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## ***Bucklew v. Precythe's* Return to the Original Meaning of "Unusual": Prohibiting Extensive Delays on Death Row**

Jacob Leon

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**BUCKLEW V. PRECYTHE’S RETURN TO THE  
ORIGINAL MEANING OF “UNUSUAL”:  
PROHIBITING EXTENSIVE DELAYS ON DEATH  
ROW**

JACOB LEON\*

ABSTRACT

The Supreme Court, in *Bucklew v. Precythe*, provided an originalist interpretation of the term “unusual” in the Eighth Amendment of the United States Constitution. This originalist interpretation asserted that the word “unusual” proscribes punishments that have “long fallen out of use.” To support its interpretation, the Supreme Court cited John Stinneford’s well-known law review article, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*. This Article, as *Bucklew* did, accepts Stinneford’s interpretation of the word “unusual” as correct. Under Stinneford’s interpretation, the term “unusual” is a legal term of art derived from eighteenth-century common law that means “contrary to long usage.” Simply put, Stinneford defines “unusual” to proscribe punishments that are “new” against the backdrop of eighteenth-century common law.

Under Stinneford’s interpretation of “unusual,” decade-long delays on death row are “contrary to long usage” and consequently “unusual” under the Eighth Amendment. This Article proves that decade-long delays on death row are “contrary to long usage” in two steps. First, it demonstrates that our Constitution’s framers adopted the principle of immediate punishment articulated by Cesare Beccaria in the Enlightenment Era. Second, with data gathered from approximately 150 execution delays in eight states during 1770-1791, this Article shows that no sentence-to-execution delay exceeding three months enjoyed “long usage” in the eighteenth century-common law.

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## I. INTRODUCTION

Two principles have been established in the U.S. Supreme Court's Eighth Amendment jurisprudence for approximately sixty years. First, to decide whether a punishment is "cruel and unusual," the Court analyzes whether the punishment corresponds with a maturing society's "evolving standards of decency."<sup>1</sup> Second, the Court's application of the "evolving standards of decency" test has remained inconsistent for sixty years.<sup>2</sup> Surprisingly, the Supreme Court appeared to erase both principles in its 2019 capital punishment opinion, *Bucklew v. Precythe*,<sup>3</sup> by not once mentioning the evolving-standards test when deciding whether a lethal injection protocol was "cruel and unusual" under the Eighth Amendment. Instead, in *Bucklew*, the Court determined whether a lethal injection protocol violated a person's Eighth Amendment right by interpreting the phrase "cruel and unusual" with originalist methods.

*Bucklew* bifurcated "cruel and unusual" into two distinct requirements and interpreted each term by turning back the clock to the eighteenth century.<sup>4</sup> The Court defined the term "cruel" by consulting Samuel Johnson's *A Dictionary of the English Language*—the fourth edition published in 1773.<sup>5</sup> That dictionary was the "standard authority" for common folks in 1787–1791,<sup>6</sup> the period in which the Eighth Amendment's "cruel and unusual" language was proposed, debated, and ratified. Johnson's dictionary defined "cruel" as "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting."<sup>7</sup>

Next, and more interestingly, *Bucklew* interpreted the word "unusual" to proscribe punishments that "had long fallen out of use."<sup>8</sup> As support, the Court cited John Stinneford's well-known law review article, *The Original Meaning of "Unusual": The*

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<sup>1</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>2</sup> Indeed, the evolving-standards test has produced jurisprudence akin to a "train wreck." Benjamin Wittes, *What Is "Cruel and Unusual"?*, HOOVER INSTIT. (Dec. 1, 2005), <https://www.hoover.org/research/what-cruel-and-unusual>. See also Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 684 (2005) (describing the Court's Eighth Amendment jurisprudence as "ineffectual and incoherent"); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005) (describing the Court's Eighth Amendment jurisprudence as a "mess"); Jeffrey Omar Usman, *State Legislatures and Solving the Eighth Amendment Ratchet Puzzle*, 20 U. PA. J. CONST. L. 677, 679 (2018) (describing the Court's Eighth Amendment jurisprudence as a "one-way ratchet" with "no workable solution" for state governments).

<sup>3</sup> 139 S. Ct. 1112 (2019).

<sup>4</sup> *Id.* at 1122–26.

<sup>5</sup> *Id.* at 1123.

<sup>6</sup> MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT 57 n.10 (2009).

<sup>7</sup> *Bucklew*, 139 S. Ct. at 1123 (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773)).

<sup>8</sup> *Id.*

*Eighth Amendment as a Bar to Cruel Innovation.*<sup>9</sup> In that article, Stinneford contends that the term “unusual” is a legal term of art—derived from eighteenth-century common law—which means “contrary to long usage” or, stated differently, “an innovation.”<sup>10</sup> Stinneford basically defines “cruel and unusual” to proscribe punishments that are “cruel and new” against the backdrop of eighteenth-century common law.<sup>11</sup>

Legal scholars have provided notable counterarguments to Stinneford’s scholarship.<sup>12</sup> Yet, as *Bucklew* did, this Article accepts Stinneford’s interpretation of the word “unusual” as correct. If Stinneford’s interpretation of “unusual” is correct, several contemporary punishments are “unusual” under the Eighth Amendment—including mass incarceration, lethal injection, and supermax prisons—because those punishment practices did not enjoy “long usage” in eighteenth-century common law.

This Article proves that decade-long delays on death row are likewise “contrary to long usage.” First, this Article demonstrates that our Constitution’s framers, who were substantially influenced by the Enlightenment, adopted the principle of immediate punishment articulated by Cesare Beccaria, a revolutionary Enlightenment thinker.<sup>13</sup> Second, this Article proves that no sentence-to-execution delay exceeding three months<sup>14</sup> enjoyed “long usage” in the eighteenth century-common law.<sup>15</sup> Although scholars routinely suggest that death sentences were quickly implemented in the eighteenth century,<sup>16</sup> no scholar has yet provided comprehensive data that displays

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<sup>9</sup> *Id.*

<sup>10</sup> John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745, 1768–69 [hereinafter Stinneford, *The Original Meaning of “Unusual”*].

<sup>11</sup> *Bucklew* and Stinneford’s approach is far astray from the Supreme Court’s normal analysis of the term “unusual.” The Court often declines to individually interpret the term “unusual” in Eighth Amendment decisions. Instead, it often combines the two distinct requirements of “cruel and unusual” into one test—whether a punishment violates society’s “evolving standards of decency.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>12</sup> See, e.g., John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL’Y 195, 268 (2009) [hereinafter Bessler, *Revisiting Beccaria’s Vision*] (arguing that that the term “unusual” “has always had—and continues to have—a straightforward dictionary definition” and, in common parlance, it “simply means not usual, not common or rare”). See also PERRY, *supra* note 6, at 57–58 (arguing that the ordinary man on the street likely would have understood “unusual” as Samuel Johnson’s A DICTIONARY OF THE ENGLISH LANGUAGE defined the word—not as Stinneford’s legal term of art).

<sup>13</sup> See *infra* Part III.A.

<sup>14</sup> This number excludes outliers. But if outliers are included, no sentence-to-execution delay exceeding 9.4 months enjoyed “long usage.” See *infra* Part III.B.

<sup>15</sup> See *infra* Part III.B.

<sup>16</sup> See, e.g., Brent E. Newton, *The Slow Wheels of Furman’s Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 55 (2012) (“[A] wealth of historical evidence demonstrate[s] that the Framers of the Eighth Amendment considered significant delays between imposition of a death sentence and its execution to be cruel and unusual punishment.”). See also Dwight Aarons, *Can*

the average sentence-to-execution delay during that period. This Article, with data gathered from approximately 150 execution delays in eight states during 1770–1791,<sup>17</sup> provides enough data to show that no sentence-to-execution delay exceeding three months enjoyed “long usage” in the eighteenth century.

Simply put, because any delay exceeding three months did not enjoy “long usage” in Anglo-American law, such delays are “unusual” under Stinneford and *Bucklew*’s interpretation.<sup>18</sup> If the Supreme Court is returning to the original public meaning of the term “unusual,” it should make the return a principled one.<sup>19</sup> A principled return requires the Supreme Court to hold that any sentence-to-execution delay exceeding three months results in an “unusual” punishment.<sup>20</sup>

## II. BACKGROUND

### A. *The Original Public Meaning of the Term “Unusual”*

#### 1. Stinneford’s Interpretation

Stinneford asserts that the term “unusual” proscribes any punishment that is “contrary to long usage,” or, stated differently, “an innovation.”<sup>21</sup> Simply put, an “unusual” punishment is an innovative punishment that replaces traditional

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*Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 179 (1998) (“The time from the imposition of a death sentence to the execution was not long” in Colonial America); Kathleen M. Flynn, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 299–300 (1997) (“[H]istory demonstrates that early American courts and legislatures did not permit prolonged death row delay.”).

<sup>17</sup> Those eight states are Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Connecticut, New York, and New Jersey.

<sup>18</sup> See *infra* Part III.B.

<sup>19</sup> Whether the Court’s originalist methods will be principled—or selectively applied—is yet to be determined. The forecast is not bright and sunny if you are wishing for principled originalism instead of selective originalism. In *Bucklew*, Justice Gorsuch cited William Blackstone’s Commentaries to demonstrate how methods that “had fallen out of use” were “unusual.” See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019). But Justice Gorsuch cherry-picked information within Blackstone’s Commentaries. He failed to mention that Blackstone’s Commentaries—the exact version he cited—in turn cited and adopted Beccaria’s immediate-punishment principle. See *infra* text accompanying notes 66–68. That principle forbids excessive delays on death row.

<sup>20</sup> This Article concentrates only on the term “unusual” in the Eighth Amendment. Whether extensive sentence-to-execution delays are “cruel” under an original-public-meaning approach is not within the scope of this Article. But Peter Baumann persuasively argued that contemporary delays on death row are “cruel” as John Stinneford defines the term. See generally Peter Baumann, *“Waiting on Death”: Nathan Dunlap and the Cruel Effect of Uncertainty*, 106 GEO. L.J. 871 (2018).

<sup>21</sup> Stinneford, *The Original Meaning of “Unusual”*, *supra* note 10, at 1767 (citations omitted).

punishments slowly developed over a very long period of time in eighteenth-century common law—but not the typical “judge-made” common law that legal scholars typically imagine. Instead, according to Stinneford, lawyers and judges in the eighteenth century considered common law to be “customary law,” which is the “law of long use and custom.”<sup>22</sup> Long usage helped discern “rights and duties,” and it helped justify state action, including the implementation of punishments.<sup>23</sup>

Stinneford cites Sir Edward Coke—often considered “the most important common law jurist in English history”<sup>24</sup>—to demonstrate how long usage in common law provided the “most reliable basis for determining the goodness of a law because it established both that the law was reasonable” and “enjoyed the consent of the people.”<sup>25</sup> Coke did not hide his fear and distaste of innovative punishments. He argued that common law could “utterly crush” any “drosse and sophistications of novelties and new inventions.”<sup>26</sup>

## 2. Innovative Punishments

Stinneford divides innovative punishments into three central categories. The first category proscribes “punishment practices that were either entirely new or were foreign to the common law system.”<sup>27</sup> This category likely would proscribe most twenty-first century punishments—such as lethal injections, supermax prisons, mass incarceration, and gas chambers—and, most importantly, decade-long delays on death row. By contrast, execution via firing squad would not be innovative because judges commonly approved of that practice in eighteenth-century rulings.<sup>28</sup>

Stinneford’s second category precludes punishments that are “newly married to crimes with which they had not traditionally been associated.”<sup>29</sup> This category would prohibit, for example, the government from transforming a driving-while-intoxicated (DWI) offense into a capital crime because DWI offenses always have entailed less serious punishments.<sup>30</sup> Finally, the third category prohibits traditional punishments

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<sup>22</sup> *Id.* at 1768 (citations omitted).

<sup>23</sup> *Id.* at 1770.

<sup>24</sup> *Id.* at 1771.

<sup>25</sup> *Id.* at 1774–75.

<sup>26</sup> *Id.* at 1788 (quoting EDWARD COKE, *INSTITUTES OF THE LAWES OF ENGLAND* (1608), reprinted in 2 *THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE* § 33, 563, 563 (Steve Sheppard ed., 2003)) (citations omitted).

<sup>27</sup> *Id.* at 1745. For instance, the framers feared that the federal government would replace the common law system with crimes used in civil jurisdictions.

<sup>28</sup> See John Stinneford, *Original Meaning and the Death Penalty*, 13 U. ST. THOMAS J.L. & PUB. POL’Y 44, 59 (2018).

<sup>29</sup> Stinneford, *The Original Meaning of “Unusual”*, *supra* note 10, at 1746.

<sup>30</sup> *Early History of Drunk Driving Laws*, NEWS WHEEL (June 17, 2015), <https://thenewswheel.com/early-history-of-drunk-driving-laws/>.

that fall entirely out of usage but are subsequently revived.<sup>31</sup> Brutal punishments that in fact enjoyed long usage in the eighteenth century—such as the “ducking stool”<sup>32</sup>—would be outlawed under this category because, as *Bucklew* noted, such punishments have fallen out of use.<sup>33</sup>

### III. CAPITAL PUNISHMENT IN THE EIGHTEENTH CENTURY

Stinneford’s three categories force courts to determine whether punishments enjoyed “long usage” in the eighteenth century. To discover what type of delay enjoyed “long usage” during that period, this part first shows that America’s framers viewed immediate punishment as a necessity when implementing capital punishment. The framers explicitly adopted Cesare Beccaria’s immediate-punishment principle from the Enlightenment era.<sup>34</sup> Second, this part supports that showing with research on sentence-to-execution delays and crime-to-execution delays in the New England states, as well as New York and New Jersey, from 1770 to 1791.<sup>35</sup> That sampling of states shows the death penalty practices that prevailed in that era.

#### A. The Framers’ Views on Immediate Punishment

The Constitution’s framers were significantly influenced by an array of Enlightenment thinkers.<sup>36</sup> Their perspectives on criminal law, particularly capital

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<sup>31</sup> Stinneford, *The Original Meaning of “Unusual”*, *supra* note 10, at 1746.

<sup>32</sup> A ducking stool was a “device for punishing scolds by repeatedly plunging them underwater.” *Id.* (quoting BLACK’S LAW DICTIONARY 231 (8th ed. 2004)).

<sup>33</sup> Stinneford uses *James v. Commonwealth*, 12 Serg. & Rawle 220 (Pa. 1825), to demonstrate how a Pennsylvania court determined that the “ducking stool” had fallen out of use. *See* Stinneford, *The Original Meaning of “Unusual”*, *supra* note 10, at 1813–1814. There are three ways in which a punishment could “cease to be authorized by the common law.” *Id.* at 1814. A punishment could “[1] fall completely out of usage for a long period of time; [2] it could be used in England, but not America (and thus never attain “usual” status on this side of the Atlantic); or [3] it could be disallowed by legislative reform.” *Id.* In *James*, the court noted that no one in England endured the ducking stool since the middle of the seventeenth century. *Id.* (citing *James*, 12 Serg. & Rawle at 227). Moreover, “it had never become part of the common law usage of Pennsylvania.” Stinneford, *The Original Meaning of “Unusual”*, *supra* note 10, at 1814. And, even if it had, the Pennsylvania legislature implicitly disallowed the ducking stool when it prohibited the whipping post in 1790. *Id.*

<sup>34</sup> *See infra* Part III.A.2.

<sup>35</sup> *See infra* Part III.B.

<sup>36</sup> *See, e.g.*, Immanuel V. Chioco, *Looking Beyond the Veil*, 24 IND. J. GLOBAL LEGAL STUD. 547, 553 (2017) (“Many of the Framers, such as Thomas Jefferson, Thomas Paine, and James Madison, were deeply influenced by their contemporary figures in the European Enlightenment, such as John Calvin, John Locke, and Montesquieu.”); John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria’s Forgotten Influence on American Law*, 37 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 1, 32 (2016) (demonstrating that “in the late eighteenth and early nineteenth centuries” numerous framers were influenced by Enlightenment thinker Cesare Beccaria); Samuel R. Olken, *The Refracted Constitution:*



punishment, exponentially progressed from the mid-1750s to the latter part of the eighteenth century.<sup>37</sup> That progress occurred in large part because of Cesare Beccaria's succinct treatise: *An Essay on Crimes and Punishments*.<sup>38</sup> His treatise covered many subjects but, at its core, it analyzed the theory of criminal law with a level of humanity never before realized.<sup>39</sup> America's framers were familiar with England's Bloody Code,<sup>40</sup> which permitted the government to kill citizens for several minor crimes.<sup>41</sup> The framers considered that approach to be vicious in nature due to the significant bloodshed it produced.<sup>42</sup>

By introducing humanity into the criminal law system, in light of the immoral Bloody Code, Beccaria significantly influenced the framers' views on setting and implementing punishments. Indeed, the Constitution's most prominent framers studied Beccaria in some shape or form. Among those who read and studied Beccaria's writings include George Washington, John Adams, Thomas Jefferson, James Madison, John Quincy Adams, Aaron Burr, John Witherspoon, Benjamin Franklin, Dr. Benjamin Rush, William Bradford Jr., John Hancock, Justice James Wilson, and Chief Justice John Jay.<sup>43</sup> To understand the framers' views on punishment, one must first understand Beccaria and his punishment principles.

### 1. Cesare Beccaria and His Punishment Principles

Beccaria was born in Milan in 1738.<sup>44</sup> To pursue his scholarly dreams, he left Milan to attend a Jesuit college in Parma.<sup>45</sup> He subsequently enrolled in the University of Pavia from 1754 to 1758, where he studied law.<sup>46</sup> Beccaria received his law degree

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*Classical Liberalism and the Lessons of History*, 101 IOWA L. REV. ONLINE 97, 101 (2016) (“[H]istorians agree that the Framers drew upon the ideas of John Locke, Thomas Hobbes, and Montesquieu, and were influenced in no small measure by the Enlightenment.”).

<sup>37</sup> See JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 55–65 (2012) [hereinafter BESSLER, CRUEL AND UNUSUAL].

<sup>38</sup> See, e.g., LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865 52 (1989); *id.* at 55–56.

<sup>39</sup> See BESSLER, CRUEL AND UNUSUAL, *supra* note 37, at 55–56.

<sup>40</sup> Bessler, *Revisiting Beccaria's Vision*, *supra* note 12, at 262.

<sup>41</sup> *Id.* at 268 (Blackstone recounted “approximately 160 different crimes punishable by death”).

<sup>42</sup> Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405, 439–43 (2016).

<sup>43</sup> JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 151–219 (2014) [hereinafter BESSLER, BIRTH OF AMERICAN LAW].

<sup>44</sup> *Id.* at 28.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

and afterward returned to Milan in his twenties.<sup>47</sup> As a young scholar, he studied prominent works of political philosophy written by Montesquieu, Jean-Jacques Rousseau, David Hume, and other Enlightenment thinkers.<sup>48</sup> Once he became well-read in Enlightenment texts, Beccaria joined a social group that regularly discussed foundational philosophical topics.<sup>49</sup> Those discussions and, particularly, his admiration of Montesquieu's books,<sup>50</sup> gave birth to one of the most revolutionary treatises ever written on criminal law: Beccaria's *An Essay on Crimes and Punishments*.<sup>51</sup>

Beccaria's treatise, first published in 1764, inspired leaders all over the world to reform penal systems with Beccaria's new and progressive principles of punishment.<sup>52</sup> His most well-known principle called for proportional punishments because they "make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned."<sup>53</sup> The framers wholly adopted Beccaria's proportionality principle in light of England's vicious Bloody Code,<sup>54</sup> which permitted the death penalty for more than 160 crimes.<sup>55</sup>

Yet, most importantly for purposes of this Article, the framers also adopted one of Beccaria's lesser-known principles—immediate punishment. Beccaria asserted that immediate punishments are absolutely necessary.<sup>56</sup> In his words, a punishment is "more just and useful" when conducted "immediately after the commission of a crime" because it "spares the criminal the cruel and superfluous torment of uncertainty."<sup>57</sup> This principle is especially important for capital punishment because the torment of uncertainty—while one awaits execution—increases "in proportion to the strength of

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<sup>47</sup> *Id.*

<sup>48</sup> See BESSLER, CRUEL AND UNUSUAL, *supra* note 37, at 34; MASUR, *supra* note 38, at 51.

<sup>49</sup> MASUR, *supra* note 38, at 52.

<sup>50</sup> Montesquieu *Persian Letters* and, especially, his *The Spirit of Laws*, greatly influenced Beccaria. *Id.*; see also BESSLER, CRUEL AND UNUSUAL, *supra* note 37, at 37. Montesquieu asserted that no government should violate a citizen's liberty with extreme torture. MASUR, *supra* note 38, at 51.

<sup>51</sup> MASUR, *supra* note 38, at 51.

<sup>52</sup> BESSLER, BIRTH OF AMERICAN LAW, *supra* note 43, at 3.

<sup>53</sup> BESSLER, CRUEL AND UNUSUAL, *supra* note 37, at 37.

<sup>54</sup> See BESSLER, BIRTH OF AMERICAN LAW, *supra* note 43, at 155, 163–64, 182, 189, 204, 217 (demonstrating that George Washington, Thomas Jefferson, John Quincy Adams, Justice James Wilson, Aaron Burr, and Benjamin Franklin all favored proportional punishments); see also Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 183–84 (2008).

<sup>55</sup> Bessler, *Revisiting Beccaria's Vision*, *supra* note 12, at 18 (2009) (Blackstone recounted "approximately 160 different crimes punishable by death").

<sup>56</sup> CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS WITH A COMMENTARY ATTRIBUTED TO M. DE VOLTAIRE 75 (1778).

<sup>57</sup> *Id.* at 73.

[the defendant's] imagination and the sense of his weakness."<sup>58</sup> Beccaria suggested that it is ruthless to force a prisoner to endure extended and "painful anxiety."<sup>59</sup>

Beccaria further justified his immediate-punishment principle because it advanced penological goals, such as deterrence of future crimes.<sup>60</sup> The "degree of the punishment, and the consequences of a crime" should produce "the greatest possible effect on others, with the least possible pain to the delinquent."<sup>61</sup> To meet this end, an "immediate punishment is more useful," Beccaria argues, "because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of Crime and Punishment."<sup>62</sup> Put another way, if criminals know that illegal acts produce prompt consequences, they will be less likely to commit crimes in the first place. In sum, Beccaria justified his immediate-punishment principle because it saved the prisoner from unnecessary torture while simultaneously deterring future crimes.

## 2. America's Framers and the Immediate-Punishment Principle

America's framers explicitly adopted Beccaria's immediate-punishment principle.<sup>63</sup> We begin with Thomas Jefferson, whose Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital in 1779 declared that "whenever sentence of death shall have been pronounced against any person . . . execution shall be done on the next day but one after sentence, unless it be Sunday, and then on the Monday following."<sup>64</sup> As support, Jefferson's Bill cited Chapter 19 of Beccaria's treatise, which argued that immediate punishments are necessary.<sup>65</sup>

Similarly, the prominent William Blackstone, who the framers repeatedly cited throughout the founding era, cited Chapter 19 of Beccaria's treatise to support immediate punishment.<sup>66</sup> Blackstone emphasized that a judge "before whom any person is found guilty of willful murder" must direct the prisoner "to be executed on the next day but one" because a quick turnaround reduces the "short but awful interval

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 74.

<sup>60</sup> *See id.* at 76.

<sup>61</sup> *Id.* at 74.

<sup>62</sup> *Id.*

<sup>63</sup> *See, e.g.,* BESSLER, BIRTH OF AMERICAN LAW, *supra* note 43, at 164–65, 168, 170, 212, 216; *see also* Braatz, *supra* note 42, at 439–43; Vikrant P. Reddy & Marc A. Levin, *Right on Crime: A Return to First Principles for American Conservatives*, 18 TEX. REV. L. & POL. 231, 249 (2014); Ursula Bentele, *Back to an International Perspective on the Death Penalty as a Cruel Punishment: The Example of South Africa*, 73 TUL. L. REV. 251, 303 (1998).

<sup>64</sup> Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments*, in MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 125 (citing Beccaria § 19; 25 G. 2 c. 37).

<sup>65</sup> *Id.*

<sup>66</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 397 (1769).

between sentence and execution.”<sup>67</sup> Blackstone noted “it is of great importance” that capital punishment “follow[s] the crime as early as possible.”<sup>68</sup>

Jefferson and Blackstone were not the only framers and legal commentators to explicitly adopt Beccaria’s immediate-punishment principle. One of President George Washington’s original Supreme Court nominees, Justice James Wilson, routinely cited Beccaria’s immediate-punishment principle with approval. Justice James Wilson—a crucial framer who often spoke at the Constitutional Convention—showed “plain admiration” for Beccaria’s immediate-punishment principle.<sup>69</sup> Justice Wilson adopted Beccaria’s immediate-punishment principle for both inferior offenses and capital punishment. He argued that “an inferiour offence should be inflicted with much expedition” after the sentence because it will “strengthen the useful association between [crime and punishment]; one appearing as the immediate and unavoidable consequence of the other.”<sup>70</sup>

Moreover, in discussing capital punishment, Justice Wilson paraphrased Beccaria’s treatise and argued that “speedy punishment should form a part of every system of criminal jurisprudence.”<sup>71</sup> Government must implement a punishment “soon after the commission of the crime,” Justice Wilson argues, because it “should never be forgotten, that imprisonment . . . in itself [is] a punishment—a punishment galling to some of the finest feelings of the heart” and may be “as undeserved as it is distressing.”<sup>72</sup> The prisoner “undergoes the corroding torment of suspense—the keenest agony, perhaps, which falls to the lot of suffering humanity.”<sup>73</sup> Justice Wilson followed Beccaria’s guidance in issuing a grand jury charge in 1791 when he stated that capital punishments “should not be aggravated by any sufferings, except those which are inseparably attached to a violent death.”<sup>74</sup>

Furthermore, another one of President George Washington’s original Supreme Court nominees, Chief Justice John Jay, followed Beccaria’s guidance concerning immediate punishment. Chief Justice Jay, in a letter to his wife, asserted that “[d]elays

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<sup>67</sup> *Id.* at 201–02.

<sup>68</sup> *Id.*

<sup>69</sup> BESSLER, BIRTH OF AMERICAN LAW, *supra* note 43, at 164–65; *see also* Michael J. Zydney Mannheim, *Not the Crime but the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula*, 86 IND. L.J. 879, 913 (2011).

<sup>70</sup> 2 THE WORKS OF JAMES WILSON 629 (Robert Green McCloskey ed., 1967) [hereinafter WILSON].

<sup>71</sup> *Id.* at 630.

<sup>72</sup> *Id.* at 629; *see also* Baumann, *supra* note 20.

<sup>73</sup> WILSON, *supra* note 70, at 629.

<sup>74</sup> BESSLER, BIRTH OF AMERICAN LAW, *supra* note 43, at 164 (emphasis added) (citations omitted).

in punishing crimes encourage commission of crime.”<sup>75</sup> Thus, the “more certain and speedy the punishment, the fewer will be the objects.”<sup>76</sup>

Finally, Beccaria’s wisdom shaped the beliefs of other founders who do not receive extensive discussions in American history books. These founders include President Washington’s second United States Attorney General, William Bradford Jr., who is described as the “Enlightenment literati” of Philadelphia.<sup>77</sup> Bradford—who befriended James Madison while studying at the College of New Jersey in 1772<sup>78</sup>—served as a State Supreme Court Justice and State Attorney General in Pennsylvania before being appointed by President Washington to serve as the nation’s top law-enforcement official.<sup>79</sup>

Bradford’s advice was requested in a letter from President George Washington’s future Secretary of State, Timothy Pickering, regarding a potential procedural right that would have enabled a “party accused before a court of oyer and terminer to remove the proceedings into the Supreme Court.”<sup>80</sup> In response, Bradford stated that it “is the opinion of Beccaria, and all enlightened philosophers on the subject, that punishment should follow the crime as quickly as possible.”<sup>81</sup> Bradford disagreed with providing a party with that procedural right because it violated Beccaria’s immediate-punishment principle. The procedural right postponed “the punishment till the remembrance and destination of the crime is weakened or lost.”<sup>82</sup>

In sum, several framers were deeply affected by Beccaria’s *An Essay on Crimes and Punishments*. The framers employed Beccaria’s immediate-punishment principle when drafting legislation and conducting judicial proceedings in the capital-punishment context. This is crucial for understanding how long a prisoner may await execution because, under Stinneford’s interpretation, a punishment must have enjoyed “long usage” in Anglo-American law. As exhibited above, America’s framers and early judges eschewed extensive delays between sentence and punishment.

### *B. Swift Implementation of Death Sentences from 1770 to 1791*

America’s framers wanted capital defendants to immediately be executed after sentencing. Yet, during the late eighteenth century, it was not “contrary to long usage”

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<sup>75</sup> *Id.* at 168 (citations omitted).

<sup>76</sup> *Id.* (citations omitted).

<sup>77</sup> *Id.* at 170 (quoting 2 OCTAVIUS PICKERING, LIFE OF TIMOTHY PICKERING 434 (Applewood Books ed. 2009)).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; *Respublica v. Lacaze*, 2 U.S. 118, 119 (1791) (listing William Bradford as Pennsylvania’s Attorney General).

<sup>80</sup> BESSLER, BIRTH OF AMERICAN LAW, *supra* note 43, at 171.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

for prisoners to await execution for weeks or months after sentencing.<sup>83</sup> To determine the specific delays that enjoyed “long usage” in the eighteenth century, as Stinneford’s interpretation demands, this section reviews how quickly death sentences were implemented from 1770 to 1791.<sup>84</sup>

There were approximately 550 to 600 death sentences implemented from 1770 to 1791 in the United States.<sup>85</sup> The data below is limited to the New England states—Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont—plus New York and New Jersey. Those eight states accounted for about 290 executions.<sup>86</sup> It was difficult to locate either the sentence date, crime date, or execution date for more than 50% of the 290 executions. Thus, to provide different sample sets, both (1) sentence-to-execution delays and (2) crime-to-execution delays are provided.<sup>87</sup>

### 1. Sentence-to-Execution Delays from 1770 to 1791

This section analyzes sentence-to-execution delays in the New England states, New Jersey, and New York from 1770 to 1791. Sources failed to provide a sentence date or an execution date for the vast majority of capital defendants during this period. The most common deficiency was the absence of a sentence date. As a result, the sample size is limited to fifty prisoners who were executed from 1770 to 1791. The results are demonstrated in Table 1 below.<sup>88</sup>

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<sup>83</sup> See *infra* Part III.B.

<sup>84</sup> The analysis ends with 1791 because the meaning of “unusual” became locked once the Eighth Amendment was ratified in that year. Put another way, the meaning of “unusual” cannot change under an original-public-meaning theory post-1791 (barring a constitutional amendment).

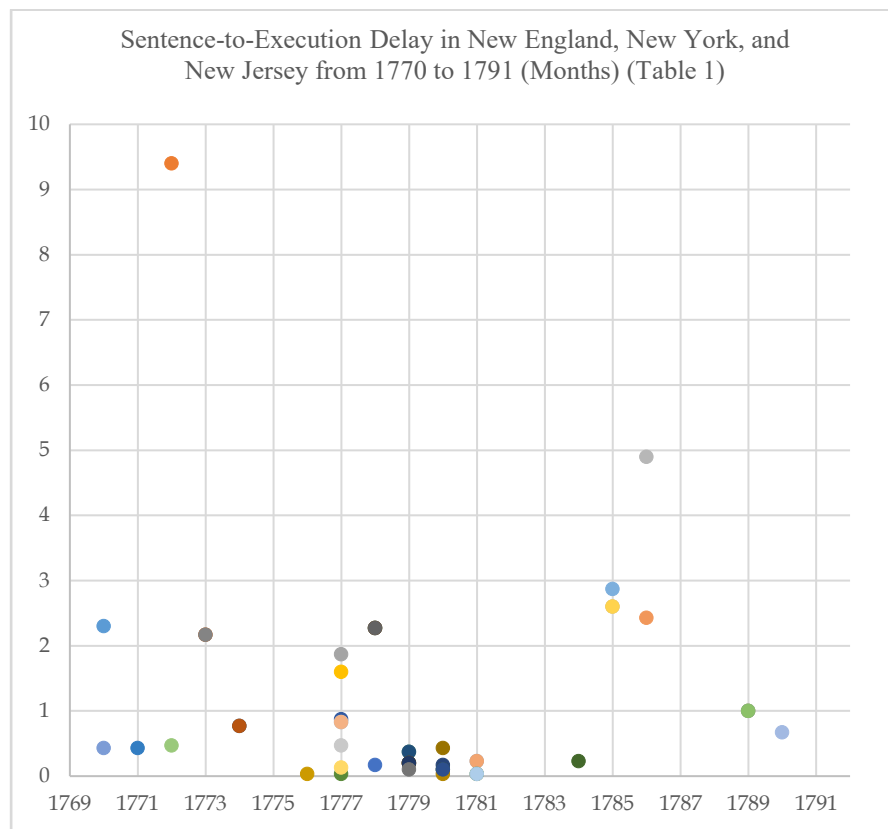
<sup>85</sup> This number was gathered with Mike Epsy’s historic legal-execution registry. See *Executions in the U.S. 1608-2002: The Epsy File*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions-us-1608-2002-espy-file> (last visited Jan. 21, 2020).

<sup>86</sup> See DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW ENGLAND: A COMPREHENSIVE REFERENCE, 1623-1960*, 151–80 (1999) [hereinafter HEARN, *NEW ENGLAND*]; DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW JERSEY: A COMPREHENSIVE REGISTRY, 1691-1963* 30–62 (2005) [hereinafter HEARN, *NEW JERSEY*]; DANIEL ALLEN HEARN, *LEGAL EXECUTIONS IN NEW YORK STATE: A COMPREHENSIVE REFERENCE, 1639-1963* 17–27 (1997) [hereinafter HEARN, *NEW YORK*].

<sup>87</sup> The two groups contain a significant amount of overlap. The sentence-to-execution chart below provides data on 50 capital defendants, and the crime-to-execution chart provides data on 108 capital defendants. A vast majority of the 50 capital defendants—in the sentence chart—are also represented in the crime chart.

<sup>88</sup> The execution date for each prisoner derives from Daniel Hearn’s three comprehensive registries. See *supra* note 86. Yet, because Hearn did not have the sentence date for a vast majority of the capital defendants, I used multiple sources to collect the sentence date for each capital defendant. Those sources may be found in Appendix A.

Furthermore, here are some important assumptions embedded in the sentence-to-execution chart:



At the outset, the average sentence-to-execution delay was 1.14 months from 1770 to 1791.<sup>89</sup> Yet there are different ways to review the data. If the two outliers—4.9 and 9.4 months—are excluded, the average sentence-to-execution delay decreases to 0.90 months.<sup>90</sup> Alternatively, if the American Revolution years (1775 to 1783) are excluded because a majority—but not all—of those executions were conducted very quickly for war crimes,<sup>91</sup> the average sentence-to-execution delay increases to 2.01

(1) In researching “sentence” dates, I also included “conviction” and “trial” dates. If more than one date was available, the sentence date usurped the conviction date, and the conviction date usurped the trial date. This should not cause a significant disparity because most eighteenth-century defendants were tried and convicted on the same day they were sentenced.

(2) If multiple people were convicted or sentenced on the same day for a group crime, I counted each member as one sentence-to-execution delay.

(3) I assumed each month contains 30 days.

<sup>89</sup> See *supra* Table 1.

<sup>90</sup> See *id.*

<sup>91</sup> See, e.g., HEARN, NEW JERSEY, *supra* note 86, at 35–56.

months.<sup>92</sup> But the sample size dwindles to nineteen capital defendants without the American Revolution years, which produces an unreliable result (for almost 600 executions). Either way, no non-arbitrary calculation produces an average sentence-to-execution delay exceeding 2.01 months.<sup>93</sup>

The question then becomes what type of delay enjoyed “long usage” from 1770 to 1791. Stinneford does not draw a bright line to distinguish innovative punishments from punishments that were seldom employed over a long period of time—outliers—but still utilized and agreed upon once or twice per decade in Anglo-American law. Should outliers be discarded? The answer is probably “yes” when considering why punishments must have enjoyed long usage in the first place. The common law afforded the “most reliable basis for determining the goodness [and reasonableness] of a law.” At its core, the common law demonstrated whether a law “enjoyed the consent of the people.”<sup>94</sup> An outlier punishment—abnormally occurring once or twice per decade—likely did not occur often enough to test whether it in fact enjoyed “the consent of the people” in the first place.<sup>95</sup>

Nevertheless, this Article takes the safe route and calculates the results both with and without outliers. If outliers are included, any sentence-to-execution delay exceeding 9.4 months—the most extensive delay—did not enjoy long usage in Anglo-American law.<sup>96</sup> By contrast, if outliers are discarded,<sup>97</sup> any sentence-to-execution delay exceeding three months did not enjoy long usage in Anglo-American law.<sup>98</sup> Indeed, only 3.77% of prisoners awaited execution for more than three months from 1770 to 1791.<sup>99</sup>

This three-month conclusion is further supported by Chief Justice John Marshall. While still practicing law in Virginia in 1793, Chief Justice Marshall filed a clemency petition for a prisoner who awaited execution for five months after sentencing.<sup>100</sup> He requested that the prisoner’s clemency petition be granted—and the sentence be reduced—in part because the prisoner suffered during the extensive five-month delay.<sup>101</sup> In Chief Justice Marshall’s words, “the prisoner hath languished a long time in jail, in a situation which must have added to the miseries [sic] of imprisonment, &

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<sup>92</sup> See *supra* Table 1.

<sup>93</sup> See *id.*

<sup>94</sup> Stinneford, *The Original Meaning of “Unusual”*, *supra* note 10, at 1774–75.

<sup>95</sup> That is true unless the punishment already had a long history of favoritism in Anglo-American law. No evidence shows prisoner awaiting execution before 1770 for more than three months.

<sup>96</sup> See *supra* Table 1.

<sup>97</sup> This calculation discards the two most extensive delays and the two shortest delays.

<sup>98</sup> See *supra* Table 1.

<sup>99</sup> *Id.*

<sup>100</sup> Petition to the Governor & Council of Virginia (Sept. 2, 1973), in 2 THE PAPERS OF JOHN MARSHALL 207 (Charles T. Cullen & Herbert A. Johnson eds., 1977).

<sup>101</sup> *Id.* at 208.



the horrors of an execution, which agony alone hath suspended.” Virginia’s government, in response, granted the clemency petition.<sup>102</sup>

## 2. Crime-to-Execution Delays from 1770 to 1791

This section analyzes crime-to-execution delays in the New England states, New York, and New Jersey from 1770 to 1791. The crime-to-execution data provides a more significant sample size of 108 executions—more than a 100% increase—in comparison to the sentence-to-execution sample size.<sup>103</sup> Each capital defendant’s crime date from 1770–1791 is more easily accessible than each capital defendant’s sentence date. Although crime-to-execution delays do not provide a concrete measurement of how many days each prisoner awaited execution after sentencing, it does provide the absolute maximum number of days any prisoner could have awaited execution. That is because no person is convicted and awaiting execution before the crime itself transpires.

Now, with a larger sample size, the data may be divided into two periods: 1770–1786 and 1787–1791. This permits the reader to focus on 1787–1791: the period in which the Eighth Amendment—including the term “unusual”—was written, proposed, debated, and ratified. The results are demonstrated in the chart below.<sup>104</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> See *supra* Table 1; see also *infra* Table 2. The petitioner’s clemency petition being granted likewise shows that the two outliers on the sentence-to-execution chart (9.4 months and 4.9 months) did not enjoy long usage and thus should not be considered.

<sup>104</sup> This chart’s data derives from Daniel Hearn’s three comprehensive registries. See *supra* note 86. The chart above handled Thomas Bird—the first federal death penalty case—differently than other crime-to-execution delays. Bird, a crew member, killed his ship’s captain while at sea in the summer of 1788. JERRY GENESIO, PORTLAND NECK: THE HANGING OF THOMAS BIRD 25 (2010). The ship remained at sea for one year after the murder, and Bird did not reach land (Maine) until the summer of 1789. *Id.* at 26. The chart used the ship’s landing date—July 1789—because it is well-known that Bird was not tried or convicted until the ship reached Maine. *Id.* at 42–49.

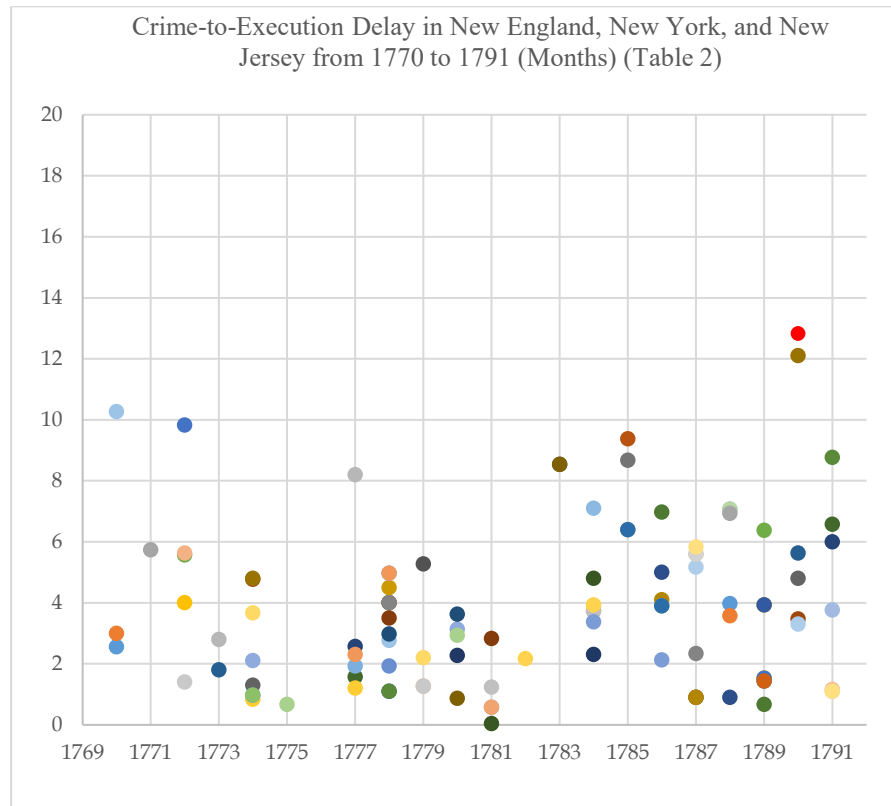
Here are other assumptions embedded in Table 2:

(1) If Hearn provided only the month in which the capital defendant committed the crime—“June” or “July,” for example—then I assumed the first day of that month: “June 1” or “July 1.” Yet I did not include any defendant if his or her *exact* execution date was unavailable.

(2) If a defendant committed multiple crimes on different dates, I chose the latest date.

(3) If a group of people committed one crime—four men killed one woman, for example—I counted that scenario as producing four distinct crimes. Thus, those four men would produce four markers on Table 2.

(4) I assumed each month contains 30 days.



Let us start with 1770 to 1786. The average crime-to-execution delay for that period was 3.66 months. The shortest delay, 0.03 months, transpired in 1781 and the lengthiest delay, 10.27 months, occurred in 1770.<sup>105</sup> Unlike the sentence-to-execution chart, the crime-to-execution chart does not produce any material outliers for 1770–1786 because the delays are generally distributed from one month to ten months.<sup>106</sup> Thus, despite the average crime-to-execution delay being 3.66 months, it was not “contrary to long usage” for capital defendants to endure a crime-to-execution delay of ten months from 1770 to 1786.

Yet the most essential inference derives from 1787 to 1791 because that is when the Eighth Amendment was proposed, debated, and ratified. The chart above provides crime-to-execution data on twenty-six capital defendants from 1787 to 1791.<sup>107</sup> A few observations are in order. First, an average prisoner awaited execution for 4.23 months after committing a capital crime.<sup>108</sup> Second, the shortest crime-to-execution delay was

<sup>105</sup> See *supra* Table 2.

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

0.67 months and the most extensive delay was 12.83 months.<sup>109</sup> Third, no outliers are present in the crime-to-execution chart. Therefore, no crime-to-execution delay exceeding 12.83 months enjoyed “long usage” in Anglo-American law.<sup>110</sup> Those findings do not provide a concrete average of how many months a prisoner in fact awaited execution after sentencing.<sup>111</sup> But the findings do provide the absolute maximum each prisoner could have awaited execution: 12.83 months.

In sum, the initial sentence-to-execution chart analyzed fifty of the approximate 600 U.S. executions from 1770 to 1791. That chart sufficiently demonstrated that post-sentence delays exceeding three months—or 9.4 months if outliers are included—failed to enjoy “long usage” in the eighteenth century. Further, as a corollary point, the crime-to-execution chart—with 108 prisoners—demonstrates that post-crime delays exceeding 12.83 months did not enjoy “long usage” in the eighteenth century. Whether one adopts the sentence-to-execution data (with or without outliers) or the crime-to-execution data, decade-long delays are thousands of days astray from any delay that enjoyed “long usage” in Anglo-American common law.

#### IV. MODERN DELAYS ON DEATH ROW ARE CONTRARY TO LONG USAGE

The sentence-to-execution delay did not balloon immediately after the States ratified the Eighth Amendment in the eighteenth century. The Supreme Court, almost one-hundred years later, recognized in *In re Medley* that extensive delays on death row—four weeks in that case—may unconstitutionally increase a capital defendant’s punishment.<sup>112</sup> The Court worried about the inmate’s mental health because solitary confinement “was an additional punishment of the most important and painful character.”<sup>113</sup> *In re Medley* pointed to prior penitentiary systems that had solitary confinement only and recalled that a “considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane . . . [or] committed suicide.”<sup>114</sup> Yet the Court’s concern in *In re Medley*—four weeks in solitary confinement—started dwindling when death penalty litigation became a heated topic in the 1970s.

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<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> The crime-to-execution chart also includes the time taken to catch, arrest, convict, and sentence the defendant.

<sup>112</sup> *In re Medley*, 134 U.S. 160, 172 (1890).

<sup>113</sup> *Id.* at 171.

<sup>114</sup> *Id.* at 168. Moreover, the state law at issue in *Medley* did not permit prison wardens to inform death row inmates of their execution date and, therefore, many death row inmates suffered from severe mental anxiety because they never knew which meal would be their last meal. The Court held that such uncertainty increased each death row inmate’s punishment. *Id.* at 172.

A. *Sentence-to-Execution Delay from 1930 to 2013*

Sentence-to-execution delays started to significantly increase in part because of the Supreme Court's capital-punishment jurisprudence in the 1970s. Initially, from 1930 to 1970, the average sentence-to-execution delay was approximately 37 months.<sup>115</sup> But in 1972, *Furman v. Georgia* held that capital punishment violated the Eighth and Fourteenth Amendments.<sup>116</sup> Four years later, *Gregg v. Georgia* reinstated the death penalty in part because "meaningful appellate review" would be "available to ensure that death sentences are not imposed capriciously or in a freakish manner."<sup>117</sup> This meaningful-appeal requirement sparked a lengthier and more complex appellate process. The average sentence-to-execution delay on death row increased to seventy-four months in 1984—only eight years after *Gregg v. Georgia*.<sup>118</sup> The chart below tells the rest of the story for 1984 to 2013.

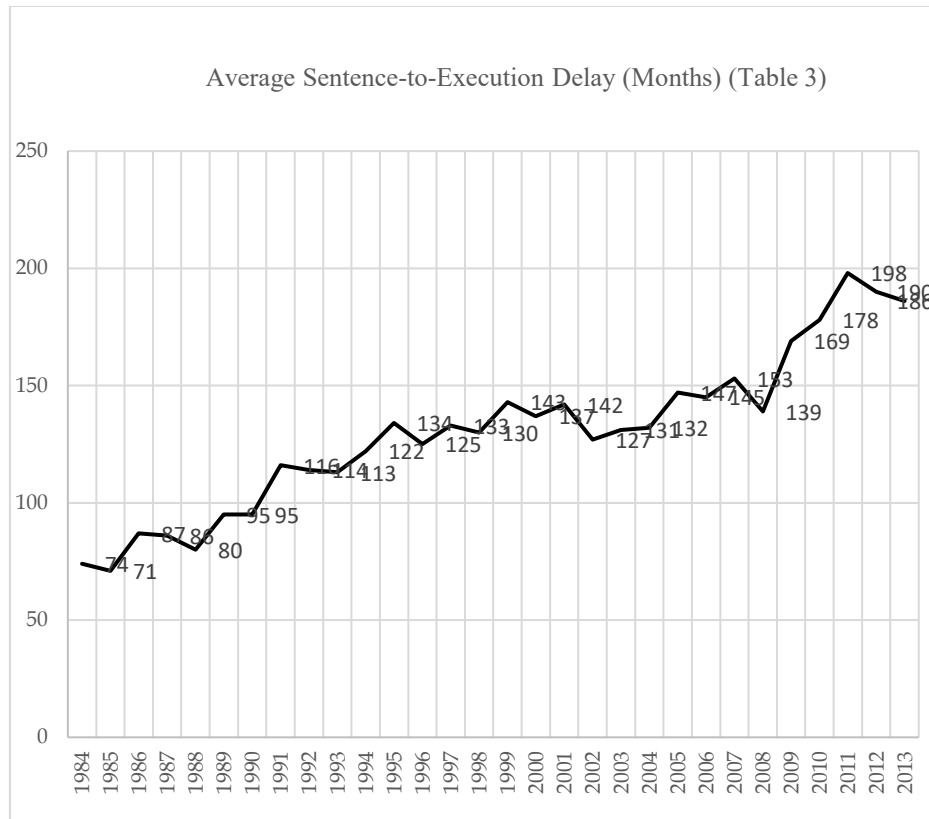
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<sup>115</sup> See U. S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 467 tbl. 6.145 (1973).

<sup>116</sup> *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam).

<sup>117</sup> *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

<sup>118</sup> Table 3's data derives from the Death Penalty Information Center. See *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> (last visited Feb. 4, 2020).



The average sentence-to-execution delay was ten years in 1994, expanded to almost twelve years in 1999, and increased to fourteen years in 2009.<sup>119</sup> At its worst moment, the average sentence-to-execution delay was 16.5 years in 2011, but recently it decreased to 15.5 years in 2013.<sup>120</sup> Those numbers are mere averages and, consequently, do not highlight death row inmates who spend thirty to forty years in solitary confinement while awaiting execution.<sup>121</sup>

A few Supreme Court Justices have already discussed extensive delays on death row. That discussion mostly transpired from 1995 to 2000 when Justices John Paul Stevens and Stephen Breyer dissented from the Court's refusal to grant certiorari to decide whether extensive delays on death row violate the Eighth Amendment.<sup>122</sup>

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See *Examples of Prisoners with Extraordinarily Long Stays on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row/examples-of-prisoners-with-extraordinarily-long-stays-on-death-row> (last visited Feb. 4, 2020).

<sup>122</sup> See *infra* text accompanying notes 123–33. Justice Breyer once again noted his concerns in 2015. See *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting). In that case, Justice Breyer argued that “unconscionably long delays . . . undermine the death penalty’s penological purpose.” *Id.* He also noted that “unless we abandon the procedural requirements

### 1. *Lackey* and Its Progeny

The Supreme Court had an opportunity to deem decade-long delays “unusual” under the Eighth Amendment in 1995 when Clarence Lackey’s certiorari petition asserted that an execution—after seventeen years of delay—entailed “cruel and unusual punishment.”<sup>123</sup> Instead, the Court simply kicked the can down the road. Justice Stevens, in a denial from dissent, argued that a seventeen-year delay “certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner’s claim.”<sup>124</sup> He also suggested, as Beccaria did, that decade-long delays do not further penological goals, such as deterrence.<sup>125</sup>

Three years later, in *Elledge v. Florida*, Justice Breyer argued that the Supreme Court should grant certiorari to decide the excessive-delay problem.<sup>126</sup> He claimed that “twenty-three years under sentence of death is unusual” when considering “the practice in this country and England at the time our Constitution was written.”<sup>127</sup> Moreover, “an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty” once the prisoner awaits punishment for decades.<sup>128</sup> As support, Justice Breyer cited late eighteenth-century documents. Specifically, he cited Chief Justice John Marshall’s clemency petition in 1793 for a capital defendant—which was granted—because the prisoner awaited execution for five months.<sup>129</sup> He also cited Thomas Jefferson’s Bill in 1779 that required execution to be conducted only two days after any death sentence.<sup>130</sup>

Justice Breyer, only one year after *Elledge v. Florida*, once again requested that the Supreme Court grant certiorari in *Knight v. Florida* to decide whether decade-long delays violate the Eighth Amendment.<sup>131</sup> The defendant in *Knight* experienced a

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that assure fairness and reliability, we are forced to confront the problem of increasingly lengthy delays in capital cases.” *Id.* at 2764.

<sup>123</sup> *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting the denial of certiorari).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 945.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari).

twenty-five-year delay on death row.<sup>132</sup> Justice Breyer emphasized that it “is difficult to deny the suffering inherent in a prolonged wait for execution.”<sup>133</sup>

Justice Breyer’s arguments in *Elledge* and *Knight*, in addition to Justice Stevens’s argument in *Lackey*, are correct. Decade-long delays on death row are a new innovation since the eighteenth century. Evidence proves that a sentence-to-execution delay enjoyed “long usage” only if it did not exceed three months (excluding outliers)<sup>134</sup> or 9.4 months (including outliers).<sup>135</sup> Yet contemporary death row inmates experienced an average of 15.5 years on death row in 2013.<sup>136</sup> That 15.5-year average delay—in comparison to the average sentence-to-execution delay in the eighteenth century—produces 6,100% more time awaiting execution on death row (186 months instead of three months). If outliers are included, on the other hand, current death row inmates are experiencing 1,878% more time awaiting execution on death row than eighteenth-century prisoners (186 months instead of 9.4 months).

America’s framers did not tolerate a punishment system that forced prisoners to suffer and agonize over death for fifteen or sixteen years in solitary confinement. The common law system in the eighteenth century envisioned a swift capital punishment process.<sup>137</sup> That is why decade-long execution delays did not enjoy “long usage” in Anglo-American law. Today’s capital offenders are not only getting sentenced to death, but they are serving long terms of imprisonment in solitary confinement before being put to death.<sup>138</sup>

## 2. Blame-the-Prisoner Argument

Justice Thomas, in *Thompson v. McNeil*, concurred in the Supreme Court’s denial of certiorari and, moreover, responded to Justice Breyer’s extensive-delay argument.<sup>139</sup> It would make “a mockery of our system of justice,” Justice Thomas argues, “for a convicted murderer, who, through his own interminable efforts of delay” postpones his or her sentence with appeals and then claims that postponement to be unconstitutional.<sup>140</sup> Justice Thomas likely would respond to this Article’s position by

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* Table 1. Ninety-six percent of prisoners from 1770 to 1791 did not experience a sentence-to-execution delay that exceeded three months.

<sup>135</sup> *Id.*

<sup>136</sup> See *supra* Table 3.

<sup>137</sup> See Part III.A.

<sup>138</sup> See generally Michael Johnson, *Fifteen Years and Death: Double Jeopardy, Multiple Punishments, and Extended Stays on Death Row*, 23 B.U. PUB. INT. L.J. 85 (2014).

<sup>139</sup> *Thompson v. McNeil*, 556 U.S. 1114 (2009) (Thomas, J., concurring in denial of certiorari).

<sup>140</sup> *Id.* at 1117 (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring)).

arguing that sentence-to-execution-delay arguments are waived once the prisoner expands his or her time on death row via appeals. Justice Thomas's argument fails for multiple reasons.

First, as Justice Breyer argued, Justice Thomas does not properly distinguish a delay caused by "constitutionally defective death-penalty procedures" from a delay that is the defendant's fault.<sup>141</sup> The complexity of the capital punishment system, combined with a lack of resources, often pushes the appeals process from a few years to a few decades. No appeals process should take thirty years to review a legal decision. So, it is not surprising that other systemic delays, not caused by the defendant, are the core problem. Some death row inmates wait eight to ten years just to get a habeas counsel appointed.<sup>142</sup> Further, Judge Arthur Alarcón recently demonstrated twenty additional systemic delays in the capital punishment process.<sup>143</sup> Not all of those delays are the defendant's fault.

Second, a death row inmate's case may involve appeals that are in fact against the inmate's wishes. Courts permit a "next friend" to litigate any inmate's appeals if that friend "appears in court on behalf" of a detained prisoner who is "unable to seek relief."<sup>144</sup> This often transpires when the next friend—which may include a public defender's office—possesses evidence that the death row inmate is not competent to waive his or her appeals. Michael Eggers's attempted waiver is illustrative.<sup>145</sup> He explicitly told his attorneys in December 2005 to "BUGG OFF! SCRAM! GET OUT OF HERE! YOU'RE FIRED! YOU ARE NO LONGER NEEDED! HIT THE BRICKS, THE HIGHWAY, THE ROAD! CATCH OUT! GO FLY A KITE ON THE FREEWAY!"<sup>146</sup> Instead, the federal public defender's office argued that Eggers was incompetent, and Eggers remained in solitary confinement for thirteen more years while the appeals process churned on—despite his sincere effort to waive all appeals.<sup>147</sup> Eggers's thirteen-year wait significantly exceeded any acceptable delay in Anglo-American law from 1770 to 1791.

Finally, let us assume that Justice Thomas is correct: a mentally competent defendant must waive all appeals before arguing that excessive delays are "unusual" under the Eighth Amendment. Justice Thomas's argument still fails because sentence-to-execution delays would exceed three months due to other systemic delays present

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<sup>141</sup> Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari).

<sup>142</sup> CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 122 (2008) [hereinafter FINAL REPORT].

<sup>143</sup> Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 707–08 (2007).

<sup>144</sup> Chinyerum N. Okpara, *Forced into Execution: Involuntarily Medicating Mentally Ill Inmates to Achieve Competency for Execution*, 43 T. MARSHALL L. REV. 1, 10 (2019) (citations omitted).

<sup>145</sup> Petition for Writ of Certiorari at ii, Eggers v. Alabama, 876 F.3d 1086 (4th Cir. 2017) (No. 16-10785).

<sup>146</sup> *Id.*

<sup>147</sup> *See generally id.*



when a death row inmate “volunteers” for death. For instance, a death row inmate may waive all appeals only after a court deems the defendant competent to “volunteer” for death.<sup>148</sup> Those competency hearings—in which psychiatrists and other professionals evaluate the inmate—cannot be waived because of twenty-first-century due process rights.<sup>149</sup>

The case of Michael Ross is illustrative.<sup>150</sup> There, Ross fought to overturn his capital sentence for almost twenty years.<sup>151</sup> Yet, on September 11, 2004, Ross’s lawyers informed the judge that he wanted to waive his appeal.<sup>152</sup> In response, the public defender’s office argued that Ross was not competent to waive his appeal.<sup>153</sup> The state prosecutor countered with a motion to determine Ross’s competency.<sup>154</sup> On December 9, 2004, the court ordered Ross to complete a competency examination and, in turn, a psychiatrist examined Ross.<sup>155</sup>

More litigation ensued—not at Ross’s request—which resulted in a competency hearing being scheduled in April 2005.<sup>156</sup> The public defender’s office eventually lost and Ross was executed on May 14, 2005, more than six months after Ross first attempted to waive his appeal.<sup>157</sup> Ross’s six-month delay did not enjoy long usage in the eighteenth-century common law because no sentence-to-execution delay exceeding three months (excluding outliers) enjoyed “long usage” from 1770 to 1791.<sup>158</sup>

But if outliers are included, Ross’s six-month delay would have enjoyed long usage in the eighteenth century. Nevertheless, other systemic delays—such as the initial appointment of habeas counsel,<sup>159</sup> moratoria by states due to drug

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<sup>148</sup> See generally Paula Shapiro, *Are We Executing Mentally Incompetent Inmates Because They Volunteer to Die?: A Look at Various States’ Implementation of Standards of Competency to Waive Post-Conviction Review*, 57 CATH. U. L. REV. 567, 568 (2008).

<sup>149</sup> *Id.*

<sup>150</sup> Stephen Blank, *Killing Time: The Process of Waiving Appeal the Michael Ross Death Penalty Cases*, 14 J.L. & POL’Y 735, 746 (2006).

<sup>151</sup> *Id.* at 777.

<sup>152</sup> *Id.* at 736.

<sup>153</sup> *Id.* at 741.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 746.

<sup>157</sup> *Id.* at 777.

<sup>158</sup> See *supra* Part III.B.

<sup>159</sup> See FINAL REPORT, *supra* note 142, at 134.

complications,<sup>160</sup> courts taking more time to “get it right,”<sup>161</sup> and automatic appeals under state law<sup>162</sup>—could easily extend the delay enough to exceed 9.4 months. That is exactly what happened to Steven Spears in Georgia, whose story is comprehensively discussed below, when a Georgia law required an automatic appeal after any death sentence. Spears requested death from the moment he was convicted at trial.<sup>163</sup> He never helped his attorneys with any appeal but, due to both Georgia’s automatic-appeal law and an alleged ex-wife litigating as a “next friend,” Spears suffered on death row for almost ten years.<sup>164</sup>

### B. *The Tale of Two Different Eras: 1789 vs. 2016*

Telling the stories of two capital defendants, who were executed 227 years apart, will display how contemporary death row inmates are suffering abundantly more than eighteenth-century capital defendants. This section will narrate the story of (1) Rachel Wall, who was executed in Massachusetts in 1789, and (2) Steven Spears, who was executed in Georgia in 2016. Wall and Spears endured dissimilar endings.

Wall, hanged one month after her sentence, spent her last moments thanking everyone involved in the process, including the prosecutor and witnesses that may have wrongly convicted her.<sup>165</sup> Wall never hinted that she was being tortured while

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<sup>160</sup> See, e.g., *Morales v. Cate*, 623 F.3d 828, 831 (9th Cir. 2010) (upholding four-year moratorium on death penalty due to lethal-injection complications).

<sup>161</sup> Courts often reject excessive delay claims because “delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone’s life.” *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998). This counter argument asserts that accuracy in capital punishment cases is so important that prisoners must tolerate lengthier delays. But courts may not delay other constitutional rights for 20 to 30 years—such as the Sixth Amendment right to a speedy trial—to simply “get it right.” Trial delays are permitted for more “serious, complex” charges, but that exception often applies to litigation with numerous criminal defendants. *Barker v. Wingo*, 407 U.S. 514, 529–31 (1972). Thus, courts must “get it right” within the time permitted under the Sixth Amendment. So too here in the Eighth Amendment context. Once a death row inmate has been psychologically and physically tortured for 3 months (excluding outliers), the Eighth Amendment’s permissible clock runs out, despite the inmate’s invocation of habeas corpus in part contributing to the delay.

<sup>162</sup> See, e.g., CAL. PENAL CODE § 1239 (West 2004).

<sup>163</sup> Rhonda Cook, *Killer Still Refuses to Appeal Sentence as Execution Date Nears*, AJC (Nov. 9, 2016), <https://www.ajc.com/news/local/killer-still-refuses-appeal-sentence-execution-date-nears/AYygN00tZoNd1O7IhBFcHN/> [hereinafter Cook, *Killer Still Refuses to Appeal*].

<sup>164</sup> David Beasley, *State of Georgia Executes Inmate for Strangulation Murder of Ex-Girlfriend*, REUTERS (Nov. 16, 2016), <https://www.reuters.com/article/us-usa-georgia-execution/state-of-georgia-executes-inmate-for-strangulation-murder-of-ex-girlfriend-idUSKBN13B1DV>.

<sup>165</sup> RACHELL WALL, LIFE, LAST WORDS AND DYING CONFESSION, OF RACHEL WALL, WHO, WITH WHOM WILLIAM SMITH AND WILLIAM DUNOGAN, WERE EXECUTED AT BOSTON, ON THURSDAY OCTOBER 8, 1789, FOR HIGH-WAY ROBBERY (1789) [hereinafter RACHEL WALL DYING CONFESSION].

awaiting execution in prison.<sup>166</sup> And she never begged for her life to end.<sup>167</sup> Steven Spears, on the other hand, begged for his lethal injection after spending almost ten years in solitary confinement in Georgia.<sup>168</sup> He analogized each day awaiting execution to “a cancer eating [him] up every day.”<sup>169</sup>

### 1. Rachel Wall

Rachel Wall was born in Carlisle, Pennsylvania in 1760.<sup>170</sup> Wall, a devout Christian who grew up on a farm, eventually abandoned the farm life and began traveling in colonial America.<sup>171</sup> On this trip, she met and married George Wall.<sup>172</sup> The newlyweds traveled to Philadelphia, New York, and Boston.<sup>173</sup> The couple struggled to financially survive and, upset with that unfortunate circumstance, George deserted Rachel while the couple was in Boston.<sup>174</sup> She remained in Boston without any income or hope and was forced into prostitution to survive.<sup>175</sup>

The prostitution proceeds did not fully support Wall, and she thus decided to become a career thief. Wall was eventually convicted of grand larceny in Boston in 1785.<sup>176</sup> That crime involved stealing goods from one of Boston’s most well-known lawyers, Perez Morton.<sup>177</sup> Wall then transformed her specialty from thievery to piracy.<sup>178</sup> She secretly tiptoed on docked ships in Boston at night. Wall pocketed “upwards of thirty pounds, in gold, crowns, and small change” from a ship at Long-

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<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> Rhonda Cook, *Georgia Executes Steven Spears for 2001 Murder*, AJC (Nov. 16, 2016), <https://www.ajc.com/news/local/georgia-executes-steven-spears-for-2001-murder/75Cr3QHMsKGHT7POypFeNJ/> [hereinafter Cook, *Steven Spears*].

<sup>169</sup> *Id.*

<sup>170</sup> RACHEL WALL DYING CONFESSION, *supra* note 165.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> HEARN, NEW ENGLAND, *supra* note 86, at 176.

<sup>175</sup> *See id.*

<sup>176</sup> *Id.*

<sup>177</sup> ALAN ROGERS, MURDER AND THE DEATH PENALTY IN MASSACHUSETTS 50 (2008). The Boston Court of Law sentenced Wall to 15 lashes and three years of indentured servitude. HEARN, NEW ENGLAND, *supra* note 86, at 179.

<sup>178</sup> RACHEL WALL DYING CONFESSION, *supra* note 165.

Wharf in 1787.<sup>179</sup> She also lifted a silver watch, silver buckles, and pocket-money from another ship docked at Doane's Wharf in 1788.<sup>180</sup>

Wall finally went too far. She attacked a female pedestrian, Margaret Bender, along one of Boston's most active streets.<sup>181</sup> Wall clobbered Bender, placed a handkerchief in her mouth, and lifted her bonnet and shoes.<sup>182</sup> Pedestrians detained Wall and, in turn, Boston charged her with highway robbery—a capital offense.<sup>183</sup> Attorney General Robert T. Paine aggressively prosecuted Wall's highway-robbery case.<sup>184</sup> Wall's appointed attorneys, James Hugh and Christopher Gore, claimed that no bonnet or shoes were found on Wall's person upon detention and, therefore, the pedestrians had detained the incorrect person.<sup>185</sup> The jury did not take the bait.

The jury found Wall guilty of highway robbery despite Massachusetts never having previously executed a woman for that crime.<sup>186</sup> On September 8, 1789, Wall received her sentence of death.<sup>187</sup> Wall petitioned Massachusetts's Governor, John Hancock, for clemency, but Governor Hancock rejected her petition.<sup>188</sup> He reasoned that it was time to show women in Massachusetts that they would be held liable for crimes like male citizens were in 1789.<sup>189</sup> On October 7, 1789, while providing her dying confession, Wall confessed to several petty crimes but insisted that she did not commit the highway-robbery offense.<sup>190</sup>

Most importantly, in her dying confession, Wall did not critique her prison conditions or the people who participated in her trial.<sup>191</sup> Instead, she stated, "I return my sincere thanks to the [Honorable] gentlemen who were my Judges, for assigning me counsel, and to them for their kindness in pleading my cause."<sup>192</sup> Wall did not stop there. "I likewise return my hearty thanks to the several Ministers of the town, who have attended me since I have been under sentence" and "other kind friends, for the

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> ROGERS, *supra* note 177, at 51.

<sup>182</sup> *Id.*

<sup>183</sup> HEARN, NEW ENGLAND, *supra* note 86, at 176.

<sup>184</sup> ROGERS, *supra* note 177, at 51.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> BILL BOWERS, GREAT AMERICAN CRIME STORIES: LYONS PRESS CLASSICS 145–46 (2017).

<sup>188</sup> HEARN, NEW ENGLAND, *supra* note 86, at 176.

<sup>189</sup> *Id.*

<sup>190</sup> RACHEL WALL DYING CONFESSION, *supra* note 165.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

care they have shewn to me, both for soul and body, which gratitude obliges me to acknowledge.”<sup>193</sup>

Those words—conveyed only one day before her death on October 8, 1789—displayed no outward signs of torture, disgust, or delay from imprisonment or any other treatment while awaiting execution. Wall did not want her life to end but, on October 8, 1789, she became the first woman to be executed in Massachusetts for highway robbery.<sup>194</sup>

## 2. Steven Spears

Steven Spears’s journey to death row began once he started dating Sherri Holland.<sup>195</sup> Spears and Holland dated for roughly three years in Georgia, but the couple eventually separated in 2001.<sup>196</sup> Spears believed that Holland was cheating on him and, in turn, promised that he would “choke her ass to death” if Holland ever was romantic with another man.<sup>197</sup> He kept that promise several months after he and Holland terminated their relationship.<sup>198</sup> Spears contemplated four distinct methods to murder Holland: electrocution, strangulation, physical abuse, and with a firearm.<sup>199</sup> He chose strangulation.<sup>200</sup>

On August 25, 2001, Spears secretly entered Holland’s home and remained in her young son’s closet.<sup>201</sup> After Holland arrived home, Spears loomed in the background until Holland fell asleep in her bedroom.<sup>202</sup> He subsequently entered the bedroom and strangled Holland until her body went limp.<sup>203</sup> Spears placed a garbage bag over Holland’s head, secured it with duct tape, locked the bedroom door, and departed in Holland’s vehicle.<sup>204</sup> He eventually abandoned that vehicle and disappeared in the

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<sup>193</sup> *Id.*

<sup>194</sup> ROGERS, *supra* note 177, at 51.

<sup>195</sup> Spears v. State, 769 S.E.2d 337, 341 (Ga. 2015).

<sup>196</sup> Brief of Appellee-Respondent at 8, Spears v. State, 769 S.E.2d 337 (Ga. 2015) (No. S14P1344).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 9.

<sup>200</sup> *Id.*

<sup>201</sup> Spears v. State, 769 S.E.2d 337, 341 (Ga. 2015).

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* at 600.

<sup>204</sup> *Id.*

woods for days until located by a Georgia police officer.<sup>205</sup> He voluntarily admitted to murdering Holland once arrested by that officer.<sup>206</sup>

Spears was charged and convicted of numerous counts on March 21, 2007.<sup>207</sup> He heatedly forbade his lawyers from presenting any mitigation evidence during the sentencing phase of the trial.<sup>208</sup> He even threatened to murder his lawyers if they argued for a life sentence.<sup>209</sup> Spears also refused to permit his lawyers to pursue any post-conviction appeal.<sup>210</sup> Yet his alleged ex-wife,<sup>211</sup> Gwen Thompson, filed a petition as his “next friend” to appeal Spears’s death sentence. In response, Spears told the judge that his lawyers and Thompson were “trying to force their beliefs on me.”<sup>212</sup> The judge eventually ordered a competency hearing and, when the selected psychiatrist asked Spears if he wanted to be executed, he stated, “[n]ot really, but would you want to live in a six by nine cell. That’s not living.”<sup>213</sup>

Spears conceded that he did not desire to pursue post-conviction relief because it entailed “about another ten to fifteen years” in solitary confinement.<sup>214</sup> He emphasized that the “process takes so long” and explained that extensive delays are “what’s wrong with the death penalty.”<sup>215</sup> By awaiting execution in solitary confinement for almost ten years, each day became “a cancer eating [him] up.”<sup>216</sup> Spears finally stopped suffering from that “cancer” on November 16, 2016, when he was executed via lethal injection.<sup>217</sup> Spears—unlike Rachel Wall who did not complain about prison conditions and did not yearn for her execution date—was ready for his lethal injection. Spears did not provide any last words.

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 601.

<sup>207</sup> The counts included malice murder, felony murder while in commission of aggravated assault, felony murder while in commission of kidnapping, aggravated assault, kidnapping with bodily injury, burglary with intent to commit theft, and burglary with intent to commit murder. *Id.* at 598 n.1.

<sup>208</sup> Cook, *Killer Still Refuses to Appeal*, *supra* note 163.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Spears denied that he and Thompson were ever married. *Georgia Executes 8th Person This Year*, CBS NEWS (Nov. 16, 2016), <https://www.cbsnews.com/news/steven-frederick-spears-georgia-executes-8th-person-this-year/>.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See Cook, *Steven Spears*, *supra* note 168.

<sup>217</sup> *Id.*

## V. CONCLUSION

The Constitution's framers understood that capital punishment would be permissible in the United States. But the framers did not envision government permitting a version of the death penalty in which prisoners endure fifteen years of agonizing and tormenting delays. Instead, swift and immediate punishment reigned as supreme and necessary. The framers imagined execution delays akin to what Rachel Wall experienced: a month or so. That is why no sentence-to-execution delay exceeding three months (excluding outliers) enjoyed "long usage" in the eighteenth-century common law. Thus, contemporary delays—under *Bucklew v. Precythe*'s apparent adoption of Stinneford's interpretation—are "unusual" under the Eighth Amendment because such delays did not enjoy long usage in the eighteenth-century common law.

## APPENDIX: CAPITAL PUNISHMENT CASES IN NEW ENGLAND, NEW YORK, AND NEW JERSEY

## New England

Prisoner	Trial/Conviction/ Sentence Date	Execution Date	Trial/Conviction/Sentence Source
William Shaw	Convicted 10/03/1770	12/13/1770	BENJAMIN LYNDE, JR., THE DIARIES OF BENJAMIN LYNDE AND OF BENJAMIN LYNDE, JR. 199 (photo. reprint) (1880).
Moses Paul	Convicted 12/20/1772	9/02/1772	SAMSON OCCOM, THE COLLECTED WRITINGS OF SAMSON OCCOM, MOHEGAN: LEADERSHIP AND LITERATURE IN EIGHTEENTH-CENTURY NATIVE AMERICA 195 (Joanna Brooks ed., 2006).
Moses Dunbar	Tried 01/23/1777	03/19/1777	BRISTOL, CONNECTICUT, IN THE OLDEN TIME "NEW CAMBRIDGE" WHICH INCLUDES FORESTVILLE 148-49 (1907).
Robert Thompson	Convicted 04/21/1777	06/09/1777	EDMUND R. THOMPSON, SECRET NEW ENGLAND: SPIES OF THE AMERICAN REVOLUTION 157 (1991).
David Redding	Tried 06/06/1778	06/11/1778	JOHN J. DUFFY ET AL., THE VERMONT ENCYCLOPEDIA 245 (2003).
James Buchanan	Convicted 04/24/1778	07/02/1778	2 PELEG W. CHANDLER, AMERICAN CRIMINAL TRIALS 43 (1844).
William Brooks	Convicted 04/24/1778	07/02/1778	2 PELEG W. CHANDLER, AMERICAN CRIMINAL TRIALS 43 (1844).
Ezra Ross	Convicted 04/24/1778	07/02/1778	2 PELEG W. CHANDLER, AMERICAN CRIMINAL TRIALS 43 (1844).
Batsheba Spooner	Convicted 04/24/1778	07/02/1778	2 PELEG W. CHANDLER, AMERICAN CRIMINAL TRIALS 43 (1844).
Barnett Davenport	Convicted 04/25/1780	05/08/1780	PETER C. VERMILYEA, WICKED LITCHFIELD COUNTY 57 (2016).
Jeremiah Braun	Tried 08/23/1780 or 08/24/1780	08/24/1780 or 08/25/1780	CYRUS EATON, HISTORY OF THOMASTON, ROCKLAND, AND SOUTH THOMASTON,



			MAINE: FROM THEIR FIRST EXPLORATION, A. D. 1605; WITH FAMILY GENEALOGIES 139–40 (2001).
John Dixon	Tried 11/04/1784	11/11/1784	BOSTON'S HISTORIES: ESSAYS IN HONOR OF THOMAS H. O'CONNOR 20 (James M. O'Toole & David Quigley eds., 2004).
Thomas Goss	Sentenced 08/11/1785	11/07/1785	Litchfield, HARTFORD COURANT, Aug. 29, 1786, at 2.
Hanna Occuish	Sentenced 10/06/1786	12/20/1786	New London, HARTFORD COURANT, Oct. 9, 1786, at 3.
Issac Combs	Sentenced 07/04/1786	12/21/1786	MARTHA J. MCNAMARA, FROM TAVERN TO COURTHOUSE: ARCHITECTURE AND RITUAL IN AMERICAN LAW, 1658–1860 55–56 (Gregory Conniff et al. eds., 2004) (quoting WILLIAM PYNCHON, DIARY OF WILLIAM PYNCHON OF SALEM 261 (Fitch Edward Oliver ed., 1890)).
William Smith	Sentenced 09/08/1789	10/08/1789	INDEPENDENT CHRONICLE (Boston), September 10, 1789.
William Denoffee	Sentenced 09/08/1789	10/08/1789	INDEPENDENT CHRONICLE (Boston), September 10, 1789.
Rachel Wall	Sentenced 09/08/1789	10/08/1789	INDEPENDENT CHRONICLE (Boston), September 10, 1789.
Thomas Bird	Convicted 06/05/1790	06/25/1790	JERRY GENESIO, PORTLAND NECK: THE HANGING OF THOMAS BIRD 48–49, 52 (2010).

## New York

Prisoner	Trial/Conviction/Sentence Date	Execution Date	Trial/Conviction/Sentence Source
Mary Daily	Convicted 04/27/1771	05/10/1771	DANIEL A. HEARN, LEGAL EXECUTIONS IN NEW YORK STATE: A COMPREHENSIVE REFERENCE 1639-1963 17

Gilbert Belcher	Convicted 01/27/73	04/02/1773	2 NEW YORK STATE LIBRARY, 85TH ANNUAL REPORT 494 (1902).
John Lovey	Convicted 01/27/73	04/02/1773	2 NEW YORK STATE LIBRARY, 85TH ANNUAL REPORT 494 (1902).
Thomas Hickey	Sentenced 06/28/1776	06/28/1776	HENRY P. JOHNSTON, THE CAMPAIGN OF 1776 AROUND NEW YORK AND BROOKLYN
Nathan Hale	Sentenced 09/21/1776	09/22/1776	DANIEL A. HEARN, LEGAL EXECUTIONS IN NEW YORK STATE: A COMPREHENSIVE REFERENCE 1639-1963 19
John Williams	Tried 04/13/1777	05/09/1777	ALEXANDER ROSE, WASHINGTON'S SPIES: THE STORY OF AMERICA'S FIRST SPY RING 51-52 (2006)
Jacob Middagh	Convicted 05/03/1777	05/28/1777	MARIUS SCHOONMAKER, THE HISTORY OF KINGSTON, NEW YORK 254 (1888).
Jacob Roosa	Convicted 05/03/1777	05/28/1777	MARIUS SCHOONMAKER, THE HISTORY OF KINGSTON, NEW YORK 254 (1888).
Edmund Palmer	Sentenced 07/24/1777	08/08/1777	ROBERT E. HUBBARD, MAJOR GENERAL ISRAEL PUTNAM: HERO OF THE AMERICAN REVOLUTION 141-42 (2017).
Daniel Taylor	Tried 10/14/1777	10/18/1777	ALEXANDER ROSE, WASHINGTON'S SPIES: THE STORY OF AMERICA'S FIRST SPY RING 58 (2006).
Claudius Smith	Sentenced 01/11/1779	01/22/1779	EDWARD M. RUTTENBER, CATALOGUE OF MANUSCRIPTS AND RELICS IN WASHINGTON'S HEAD-QUARTERS, NEWBURGH, N.Y: WITH HISTORICAL SKETCH, AND DESCRIPTIVE SKETCHES OF REVOLUTIONARY LOCALITIES IN VICINITY 34 (1890).
Thomas Delamar	Sentenced 01/11/1779	01/22/1779	EDWARD M. RUTTENBER, CATALOGUE OF MANUSCRIPTS AND RELICS IN WASHINGTON'S HEAD-QUARTERS, NEWBURGH, N.Y:

			WITH HISTORICAL SKETCH, AND DESCRIPTIVE SKETCHES OF REVOLUTIONARY LOCALITIES IN VICINITY 34 (1890).
James Gordon	Sentenced 01/11/1779	01/22/1779	EDWARD M. RUTTENBER, CATALOGUE OF MANUSCRIPTS AND RELICS IN WASHINGTON'S HEAD-QUARTERS, NEWBURGH, N.Y: WITH HISTORICAL SKETCH, AND DESCRIPTIVE SKETCHES OF REVOLUTIONARY LOCALITIES IN VICINITY 34 (1890).
James Fluelling	Sentenced 06/02/1779	06/08/1779	EDWARD M. RUTTENBER, CATALOGUE OF MANUSCRIPTS AND RELICS IN WASHINGTON'S HEAD-QUARTERS, NEWBURGH, N.Y: WITH HISTORICAL SKETCH, AND DESCRIPTIVE SKETCHES OF REVOLUTIONARY LOCALITIES IN VICINITY 34 (1890).
Daniel Keith	Sentenced 06/02/1779	06/08/1779	EDWARD M. RUTTENBER, CATALOGUE OF MANUSCRIPTS AND RELICS IN WASHINGTON'S HEAD-QUARTERS, NEWBURGH, N.Y: WITH HISTORICAL SKETCH, AND DESCRIPTIVE SKETCHES OF REVOLUTIONARY LOCALITIES IN VICINITY 34 (1890).
James McCormick	Sentenced 06/02/1779	06/08/1779	EDWARD M. RUTTENBER, CATALOGUE OF MANUSCRIPTS AND RELICS IN WASHINGTON'S HEAD-QUARTERS, NEWBURGH, N.Y: WITH HISTORICAL SKETCH, AND DESCRIPTIVE SKETCHES OF REVOLUTIONARY LOCALITIES IN VICINITY 34 (1890).
James Smith	Sentenced 06/02/1779	06/08/1779	EDWARD M. RUTTENBER, CATALOGUE OF MANUSCRIPTS AND RELICS IN WASHINGTON'S HEAD-

			QUARTERS, NEWBURGH, N.Y: WITH HISTORICAL SKETCH, AND DESCRIPTIVE SKETCHES OF REVOLUTIONARY LOCALITIES IN VICINITY 34 (1890).
John Andre	Convicted 09/29/1780	10/02/1780	SPENCER C. TUCKER, AMERICAN REVOLUTION: THE DEFINITIVE ENCYCLOPEDIA AND DOCUMENT COLLECTION 29 (2018).
Wheeler	Sentenced 12/15/1781	12/22/1781	KENNETH SCOTT, GENEALOGICAL DATA FROM COLONIAL NEW YORK NEWSPAPERS: A CONSOLIDATION OF ARTICLES FROM THE NEW YORK GENEALOGICAL AND BIOGRAPHICAL RECORD 235 (2004).
Wood	Sentenced 12/15/1781	12/22/1781	KENNETH SCOTT, GENEALOGICAL DATA FROM COLONIAL NEW YORK NEWSPAPERS: A CONSOLIDATION OF ARTICLES FROM THE NEW YORK GENEALOGICAL AND BIOGRAPHICAL RECORD 235 (2004).
Christopher Cooper	Convicted 04/26/1785	06/18/1785	2 JOEL MUNSELL, THE ANNALS OF ALBANY 293 (2d ed. 1870).
Petrus Cooper	Convicted 04/26/1785	06/18/1785	2 JOEL MUNSELL, THE ANNALS OF ALBANY 293 (2d ed. 1870).

## New Jersey

Prisoner	Trial/Conviction/Sentence Date	Execution Date	Trial/Conviction/Sentence Source
Cadry Lacy	Sentenced 04/13/1770	04/26/1770	Arrivals, PENNSYLVANIA GAZETTE, Apr. 19, 1770.
William Reed	Sentenced 05/16/1772	05/30/1772	Philadelphia, PENNSYLVANIA PACKET, June 1, 1772, at 3.

Peter Galwin	Sentenced 11/12/1774	12/05/1774	Rivington's New-York Gazetter, November 24, 1774.
John Taylor	Sentenced 11/12/1774	12/05/1774	Rivington's New-York Gazetter, November 24, 1774.
Thomas Long	Tried 11/01/1779	11/04/1779	DANIEL A. HEARN, LEGAL EXECUTIONS IN NEW JERSEY: A COMPREHENSIVE REGISTRY, 1691-1963 42 (2005).
James Hammel	Tried 02/18/1780	02/19/1780	ANTHONY M. SHERMAN, HISTORIC MORRISTOWN, NEW JERSEY: THE STORY OF ITS FIRST CENTURY 306 (1905).
Tobey	Tried 06/21/1780	06/24/1780	DANIEL A. HEARN, LEGAL EXECUTIONS IN NEW JERSEY: A COMPREHENSIVE REGISTRY, 1691-1963 46 (2005).
David Gilmore	Tried 01/26/1781	01/27/1781	DANIEL A. HEARN, LEGAL EXECUTIONS IN NEW JERSEY: A COMPREHENSIVE REGISTRY, 1691-1963 50-51 (2005).
John Tuttle	Tried 01/26/1781	01/27/1781	DANIEL A. HEARN, LEGAL EXECUTIONS IN NEW JERSEY: A COMPREHENSIVE REGISTRY, 1691-1963 50-51 (2005).