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Introduction

A death-row prisoner spends their last twenty-four hours in a special holding cell just feet from the death chamber. The hours comprise a flurry of phone calls and legal visits, emergency stays granted and lifted, requests for clemency and extraordinary judicial intervention denied, a last meal that is hardly actually eaten, followed by the long walk (or violent drag) to the chamber where inmates are strapped down, given last words, and executed, usually by a three-drug injection cocktail known to cause paralysis and searing pain before the third drug causes death. In other words, the death penalty is a barbaric practice that seems out of place in the modern world. Internationally, it has been mostly abolished for this reason, but several countries have held out against this trend.

Proportionality is an ancient concept in the criminal law. It played a central role in Montesquieu's *Sprit of the Laws*[1] and Beccaria's *On Crimes and Punishments*.[2] In keeping with this foundational concept of proportionality, most democratic countries have similar constitutional

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1. *See* CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS (1748).
2. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764).

prohibitions against cruel treatment and disproportionate[3] punishment.[4] Nonetheless, in interpreting these prohibitions, countries' constitutional and human rights traditions have developed different definitions of "cruel" and "excessive," particularly in the application of the prohibition to specific penal practices.

Within this international context of the constitutional regulation of the excessiveness of criminal punishments, the ongoing robustness of the death penalty in the United States stands out in stark contrast to the trend throughout most of the rest of the world, in which the imposition of capital punishment is largely viewed as inconsistent with international human-rights norms.[5] This Article attempts to contribute to the ongoing effort by human rights scholars to wrestle with the mystery of the survival of this gruesome practice in the United States by analyzing it through a comparative lens. Specifically, this Article explores the commonalities and differences between the prohibition against cruel and unusual punishment contained in

3. This Article uses "excessive" and "disproportionate" interchangeably, and "constitutional" in its broadest and most generic sense.

4. The Universal Declaration of Human Rights and the European Convention on Human Rights also prohibit torture and inhuman or degrading treatment. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), art. 3, Nov. 4, 1950, 213 U.N.T.S. 222, CETS No. 5 (1953); Universal Declaration of Human Rights, Art. 5 (1948); *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810, art. 5 (1948). The Canadian Charter of Rights prohibits cruel and unusual treatment or punishment. *See* Canadian Charter of Rights, § 12 (1982) *Canadian Charter of Rights and Freedoms*, Part I of Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 12.

5. *See* Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Report of the Secretary-General, U.N. Doc. E/2000/3 (2000) (documenting the international trend toward abolition of the death penalty); *see, e.g.*, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, ETS No. 114, (Mar. 30, 1985); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, OASTS No. 73, 29 ILM 1447 (1990) (entered into force Oct. 6, 1993); Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, art. 19(2) (Dec. 18, 2000) (prohibiting the extradition of suspects to countries where there is a serious risk of facing the death penalty); The Question of the Death Penalty, Human Rights Comm'n Rights Res. 1999/61 (Apr. 28, 1999), U.N. Doc. E/CN.4/ RES/1999/61; Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (holding that the extradition of Soering from the United Kingdom to the United States for a capital offense, without assurances that the United States would not impose the death penalty, violated Article 3 of the ECHR because "death row phenomenon"—the psychological torture of prolonged detention while awaiting execution—constituted inhuman and degrading treatment); Pratt v. Attorney General for Jamaica, [1994] 2 A.C. 1 (P.C. 1993), reprinted in 33 I.L.M. 364 (1994) (holding that the imposition of the death penalty more than five years after pronouncement of the sentence categorically constituted inhuman and degrading punishment); United States v. Burns, [2001] 1 S.C.R. 283 (Canada) (holding that the extradition of two defendants to the United States to stand trial for capital murder, in the absence of assurances that the death penalty would not be inflicted, violated the right to life guaranteed by the Canadian Charter of Rights and Freedoms); Venezia v. Italy, App. No. 29966/96, 87-A Eur. Comm'n H.R. Dec. & Rep. 140 (1996) (holding that prolonged detention prior to execution violated fundamental human rights).

the Eighth Amendment to the United States Constitution and the prohibition against cruel, degrading, and inhumane treatment and excessive punishment contained in Section 9 of the New Zealand Bill of Rights Act 1990 ("BoRA").[6] The Article focuses on the United States and New Zealand because the text and historical English common law context of the Eighth

6. New Zealand, like the United Kingdom, lacks a unitary, express, written constitution. *See generally* Philip A. Joseph, *The Constitutional State, in* LAW, LIBERTY, LEGISLATION: ESSAYS IN HONOUR OF JOHN BURROWS Q.C. 249 (Jeremy Finn et al. eds., 2008); Beverley McLachlin, *Unwritten Constitutional Principles: What is Going On?*, 4 N.Z. J. PUB. INTL. L. 147 (2006); Matthew S.R. Palmer, *What is New Zealand's Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-Holders*, 17 PUB. L. REV. 133 (2006). The rights of a constitutional character are instead protected in New Zealand by a collection of statutes. *See, e.g.*, Constitution Act 1986 (N.Z.) (establishing the authority of the Queen and the three branches of the New Zealand Government, the executive, the legislative, and the judiciary); Electoral Act 1993 (N.Z.) (establishing the basis of voting); Human Rights Act 1993 (N.Z.) (prohibiting discrimination); Imperial Laws Application Act 1988 (N.Z.) (providing for the continued enforcement the parts of the English common law already incorporated in New Zealand and certain imperial enactments, including the Magna Carta and the Petition of Right); Privacy Act 1993 (N.Z.); Supreme Court Act 2003 (N.Z.); *see also* Treaty of Waitangi Between Maori Chiefs of New Zealand and the British Crown [1840] N.Z.T.S. (establishing the founding principles for the Government, citizenship, and property rights during the annexation of New Zealand by Great Britain); New Zealand Maori Council v. Attorney-General, [2013] NZSC 6; ("the Water Rights Case"); Huakina Dvpt. Trust v. Waikato Valley Auth., [1987] 2 NZLR 188 (HC); Catherine Callaghan, *"Constitutionalisation" of Treaties by the Courts - The Treaty of Waitangi and The Treaty of Rome Compared*, 18 N.Z.U. L. REV. 334 (1999); Bruce V. Harris, *The Treaty of Waitangi and the Constitutional Future of New Zealand*, [2005] N.Z. L. REV. 189, most notably by BoRA, which codifies protected individual rights and freedoms in New Zealand—and customary conventions, which together form a model of entrenched constitutionalism. *See* PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND 34 (4th ed. 2014) (describing New Zealand's constitutional conventions as "the pre-eminent non-legal source of the Constitution"); Mark Elliott, *Interpretive Bills of Rights and the Mystery of the Unwritten Constitution*, 2011 NZLR 591; *see generally* GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY (1984). New Zealand is also a signatory to several international treaties, which guarantee rights that are constitutional in nature. *See, e.g.*, the International Covenant on Civil and Political Rights ("ICCPR"), 99 U.N.T.S. 171 (1976). Because BoRA is a statute and not a formal, supreme constitution, it does not supersede other legislation that may conflict with it. *See* BoRA § 4 (requiring New Zealand courts to give effect to legislation that cannot be interpreted to conform with BoRA); *see generally* PAUL RISHWORTH ET AL., THE NEW ZEALAND BILL OF RIGHTS ACT (2003); Elliott, *supra*, at 593-94. Although the courts in New Zealand will engage in a saving construction of any legislation alleged to infringe on a protected right in order to avoid a conflict with BoRA, *see* BoRA § 6 (obligating courts to interpret other statutes consistent with the rights and freedoms contained in BoRA whenever possible), they can (but, rarely do) provide advisory opinions for the benefit of Parliament if they believe that a statute unjustifiably infringes on a right protected by BoRA. *See, e.g.*, Hanson v. R., [2007] NZSC 7 at 253-54 (McGrath, J.) (explaining that "a New Zealand court must never shirk its responsibility to indicate, in any case where it concludes that the measure being considered is inconsistent with protected rights, that . . . there is a measure on the statute book which infringes protected rights and freedoms"). *But see* Manawatu v. R., [2007] NZSC 13 at 6 (finding that the Court had no jurisdiction to hear a BoRA claim "to interpret the legislation in a way that would be more consistent with rights protected by the Bill of Rights").

Amendment and BoRA Section 9 are very similar.[7] However, the two countries' judicial interpretations of the provisions are quite divergent, particularly when applied to cases in which prisoners have challenged their criminal punishments. These differences are most notable when courts in the two countries apply the cruelty prohibitions to long sentences of imprisonment and the practice of capital punishment.

In contrast to much of the normative American scholarly literature on comparative constitutionalism,[8] this Article is a descriptive one. It offers a comparative analysis of the judicial interpretations of the meanings of "cruel" and "excessive" in the United States and New Zealand. It treats New Zealand as a lens through which to view Eighth Amendment jurisprudence and American constitutional values,[9] but it does not make a normative argument about which interpretive culture is superior. The purpose of this comparison is to demonstrate the way that similar constitutional prohibitions can operate radically differently in different philosophical and legal cultures.

This Article uses New Zealand as a comparator for the United States for several reasons. First, the United States and New Zealand have similar legal traditions with a shared historical constitutional pedigree.[10] Second, the United States and New Zealand both have dualist systems when it comes to their obligations under the international treaties to which they are signatories—i.e., international treaty obligations only become binding and legally enforceable in each country when their national legislatures have codified them by statute.[11] Third, the United States and New Zealand, both culturally and legally, are at opposite ends of the international spectrum when it comes to their cultural and constitutional views about the death penalty. Most importantly, the United States remains the only democracy and signatory to the International Covenant on Civil and Political Rights

7. *See* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 559-60 (2001) (explaining why constitutional comparison is most desirable when the two countries whose constitutions are being compared share the greatest contextual similarities in terms of legal systems, legal history, and social situation); *see also* Knight v. Florida, *cert. denied*, 529 U.S. 990, 997 (1999) (Breyer, J., dissenting) (explaining the usefulness of comparing the Eighth Amendment to analogous provisions of the constitutions of other "former Commonwealth nations" because they reflected the same underlying "legal tradition").

8. *See, e.g.*, Fontana, *supra* note 7.

9. *See generally* MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES 16-25 (1970) (explaining how comparative legal methodology can give rise to a recognition of universal principles).

10. *Cf.* Poe v. Ullman, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (attempting to understand the scope of the right to privacy in relation to Connecticut's criminal prohibition against the use of contraceptives by looking to "common understanding throughout the English-speaking world").

11. *See infra* Section II (A) (3).

("ICCPR") with a robust practice of capital punishment.[12] Distinguishably, New Zealand categorically abolished its death penalty in 1989 and was the first country in the world to sign the Optional Second Protocol to the ICCPR ("Death Penalty Protocol"), which commits to the abolition of the death penalty worldwide.[13]

Section II of this Article explores the shared historical underpinnings of the two countries' respective prohibitions against cruelty and excessiveness. Section III describes the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment, and Section 9 of BoRA, which prohibits torture, cruelty, degradation, and excessive punishment. It then engages in a comparison of the texts, interpretations, and judicial applications of the two analogous provisions. It demonstrates that the texts of the two provisions have been interpreted to encompass similar prohibitions in theory, but, in practice, judicial application of the provisions to specific situations—most notably challenges to the excessiveness of criminal punishments—has been vastly different in the two countries.

Section IV specifically explores the application of the prohibitions against cruelty to the practice of the death penalty, which has been abolished in New Zealand but continues to thrive in the United States: the Eighth Amendment prohibition against cruel and unusual punishment notwithstanding. This section posits that the different judicial applications of the Eighth Amendment and Section 9 of BoRA stem from philosophically different understandings of the values that guide proportionality balancing. It concludes that the difference between the American courts' constitutional tolerance of the death penalty and the New Zealand courts' rejection of it, stem from retributive versus utilitarian understandings of the purposes of capital punishment as balanced against the means by which those purposes are accomplished.

Section V addresses an obvious methodological limitation to this comparative analysis. Because New Zealand has legislatively abolished the death penalty, its courts' contemporary discussions of the relationship between capital punishment and domestic and international prohibitions

12. While many countries still retain a de jure death penalty on the books of their criminal codes, few still actually impose the punishment in practice. *See* Amrita Mukherjee, *The ICCPR as a Living Instrument: The Death Penalty as Cruel, Inhuman, and Degrading Treatment*, 68 J. CRIM. L. 507 (2004). While death sentences and executions have decreased in the United States in recent years, they are still far from rare.

13. Greg Newbold, *Capital Punishment in New Zealand: An Experiment That Failed*, 11 DEVIANT BEHAV. 155, 156 (1990); *see generally* Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty, U.N. G.A. Res. No. 44/128 (Dec. 15, 1989) (entered into force July 11, 1991) [hereinafter "Second Protocol"], art. 1 ("1. No one within the jurisdiction of a State Party to the present Protocol shall be executed. 2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.").

against excessive punishment are necessarily sparse. Section VI concludes that the divergence in interpretations between the Eighth Amendment and Section 9 stem from judicial philosophy and culture, rather than text, history, or doctrine.

I. Geneological Comparison[14]

A. The Commonalities

1. Shared English Legal History

The Eighth Amendment to the United States Constitution and Section 9 of BoRA share a common cultural and legal heritage. The Magna Carta included a prohibition against excessive fines, which British courts interpreted very early on as a broad proportionality principle that invalidated disproportionate punishments.[15] In 1688, the British Parliament enacted the first statutory right to be free from cruel punishments in the English Bill of Rights Act.[16] This statute was the basis for the Eighth Amendment to the United States Constitution, which imports it nearly *verbatim*.[17]

When New Zealand was annexed by Great Britain in 1840, it inherited most of its common and statutory law.[18] In 1988, the New Zealand Parliament specifically incorporated the prohibition against cruelty into New Zealand statutory law, through the Imperial Laws Application Act.[19]

2. The ICCPR

Both New Zealand and the United States are State Parties to the ICCPR.[20] The ICCPR is part of the International Bill of Human Rights.[21] Article 6 of the ICCPR establishes a general right to life, but contains an

14. Fontana, *supra* note 7, at 550.

15. *See* Solem v. Helm, 463 U.S. 277, 284 (1983); *see, e.g.*, Hodges v. Humkin, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("[I]mprisonment ought always to be according to the quality of the offence[.]").

16. Bill of Rights Act 1688 (U.K.), art. 10 ("[E]xcessive bail ought not to be required, nor excessive fines imposed[;] nor cruel and unusual Punishments inflicted.").

17. *See Helm*, 463 U.S. at 285; Gregg v. Georgia, 428 U.S. 153, 169 (1976); in re: Kemmler, 136 U.S. 436, 446 (1890) ("The provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688, entitled 'An act for declaring the rights and liberties of the subject, and settling the succession of the crown[.]'"); United States v. Moore, 486 F.2d 1139, 1235 n.160 (D.C. Cir. 1973) (Wright, C.J., dissenting); *see generally* JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 162-80 (2012); Amy L. Riederer, *Working 9 to 5: Embracing the Eighth Amendment through an Integrated Model of Prison Labor*, 43 VALPARAISO L. REV. 1425, 1429 (2009).

18. *See* Newbold, *supra* note 12, at 156-57.

19. Imperial Laws Application Act 1988, s 3 (N.Z.), § 3 ("Excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.").

20. ICCPR, *supra* note 6.

21. Mukherjee, *supra* note 11, at 510.

exception for capital punishment as a lawful sanction for serious crimes if it is administered in a manner that minimizes the pain and suffering of the condemned person.[22] Article 7 of the ICCPR prohibits "torture" or "cruel, inhuman or degrading treatment or punishment."[23] Section 9 of BoRA is derived from Article 7 of the ICCPR.

As noted above, New Zealand has also specifically ratified the ICCPR Death Penalty Protocol.[24] The United States, predictably, has not.[25]

3. The Role of Comparative Constitutionalism

Courts in New Zealand and the United States take similar approaches to interpreting domestic rights in relation to these international treaty obligations, as well as in relation to foreign constitutions. In interpreting both the provisions of the United States Constitution and BoRA for which there are analogous provisions in international human-rights treaties or foreign constitutions, courts in both countries do not consider external interpretations of those analogous provisions to be binding on them in interpreting their corresponding domestic rights guarantees, but both consider them to be persuasive;[26] although those interpretations carry significantly more persuasive weight in New Zealand.[27]

22. ICCPR, *supra* note 6, at art. 6(2); Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/l/Rev. 6, 12 May 2003, General Comments 6 & 20 (6). Challenges to the death penalty under Article 6, therefore, tend to focus on the manner of execution. *See* Mukherjee, *supra* note 11, at 510.

23. *See* ICCPR, *supra* note 6, at art. 7. A similar structure exists under the ECHR, 4 November 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5. Article 2 of the ECHR contains a general right to life with a specific exception for the death penalty when lawfully imposed. *See id.* Article 3 of the ECHR prohibits "torture or other inhuman and degrading treatment or punishment." *Id.* A specific abolitionist protocol was added subsequently. *See* ECHR Protocol No. 6, The Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty (Mar. 1, 1985).

24. *See* Second Protocol, *supra* note 13

25. *See id.*

26. *See* BoRA § 28 ("An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part."); *Knight*, *cert. denied*, 529 U.S. at 997-98 (1999) (Breyer, J., dissenting) (explaining that the United States Supreme Court has long treated "the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances" as "relevant and informative" but not "binding"); *cf.* Muller v. Oregon, 208 U.S. 412, 419 (1908) (describing foreign wage laws as not "technically speaking authorities" but rather relevant evidence of "widespread belief"); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) ("The decisions of the Courts of every country . . . will be received, not as authority, but with respect.").

27. *See, e.g.*, Television N.Z. Ltd. v. R., [1996] 3 NZLR 393, 395 (Ct. App.) (considering specific exceptions in the ICCPR in determining the scope of analogous provisions in BoRA); Simpson v. Attorney-General ("Baigent's case"), [1994] 3 NZLR 667 (Ct. App.) (holding that the Crown could be held directly liable for a breach of BoRA in part because of a similar requirement in the ICCPR § 2 (3)). *But see* R. v. Goodwin, [1993] 2 NZLR 153 (Ct. App.) (holding that, when

B. The Divergence

The Bill of Rights to the United States Constitution, which contains the Eighth Amendment, predates the ICCPR by almost two hundred years, while BoRA was enacted more than a decade after New Zealand ratified the ICCPR. As noted *infra*, the Eighth Amendment was modeled after the English Bill of Rights Act while BoRA Section 9 was modeled after the ICCPR. As a result, there are textual differences between the anti-cruelty provisions of Section 9 of BoRA and the Eight Amendment, which are explored in the following section.

III. Comparative Analysis: The Extent of, and Reasons for, the Differences Between the Two Systems

Notwithstanding their shared historical origins, the meanings of prohibited cruelty and excessiveness in the United States and New Zealand have diverged considerably. While there are textual differences between the Eighth Amendment to the United States Constitution and Section 9 of BoRA, they are insufficient to explain the divergent judicial application of the two prohibitions in the two countries. Instead, the bulk of the differences relevant to this Article arise at the level of judicial application of similar doctrines to specific penal practices.

A. The Sources of Prohibition: Text and Interpretation

The Eighth Amendment to the United States Constitution, which tracks the English Bill of Rights 1689 *verbatim,* prohibits the infliction of cruel and unusual punishment.[28] Section 9 of BoRA, which paraphrases Article 7 of the ICCPR, prohibits "torture or cruel, degrading, or disproportionately severe treatment or punishment."[29]

By its plain language, Section 9 of BoRA prohibits a broader range of conduct than the Eighth Amendment for several reasons. First, it explicitly prohibits torture, degradation, and excessiveness, in addition to mere cruelty

the language of BoRA is incompatible with parallel language in the ICCPR, the BoRA language must be followed).

28. *See* U.S. CONSTITUTION, amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

29. Section 9 reads in full: "*Right not to be subjected to torture or cruel treatment[.]* Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment." BoRA § 9 (emphasis added). *See* Taunoa v. Attorney-General, [2007] NZSC 70 at 172 (Blanchard, J.) (concluding that "the words 'disproportionately severe' must have been included to fulfil much the same role as 'inhuman' treatment or punishment plays in art 7 of the ICCPR").

(and unusualness). Second, it prohibits these types of treatment in the disjunctive ("or"), while the Eighth Amendment prohibits cruel and unusual punishments in the conjunctive ("and"). Third, Section 9 applies to all "treatment" that falls under the scope of its prohibitions, while the Eighth Amendment only prohibits "punishments" that are cruel. Each of these distinctions is discussed in the following subsections in turn.

1. The Prohibited Acts

One obvious textual difference between the Eighth Amendment and Section 9 exists in the adjectives used to define the acts prohibited. While both provisions prohibit cruelty, the United States Constitution limits its prohibition to punishments that are also "unusual,"[30] while BoRA explicitly prohibits acts that are not only "cruel" but also that constitute "torture," are "degrading," or are "disproportionately severe."[31]

In practice, however, these textual variations have been rendered nugatory by judicial interpretation, since the Supreme Court of the United States interprets the Eighth Amendment prohibition against cruelty to encompass torture, degradation, and disproportionality.[32] The Court has specifically found that, when the Framers of the United States Constitution adopted the language of the prohibition against cruelty from the English Bill of Rights, they also adopted its proportionality principle, which prohibited excessive punishments.[33] Therefore, excessive or disproportionate punishments are a subset of the cruelty prohibited, such that a punishment cannot be disproportionate without being cruel under the Eighth Amendment.

2. The Relationship Between the Prohibited Acts

Another obvious textual variation occurs in the respective uses of "and" and "or" to define the relationship between the acts prohibited by the Eighth

30. U.S. CONST., amend. VIII.

31. BoRA § 9.

32. *See Helm*, 463 U.S. 277 (explaining that the Eighth Amendment prohibition against cruel and unusual punishments "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed"); Furman v. Georgia, 408 U.S. 238, 281, 314 (1972) (holding that the arbitrary application of the death penalty violated the Eighth Amendment and delineating four principles for defining cruelty, including degradation to human dignity, excessiveness, and arbitrariness).

33. *See Helm*, 463 U.S. at 285-86. This recognition of a proportionality principle, however, has not been unanimous among Supreme Court justices and has sometimes been hotly contested. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 961-94 (1991) (Scalia, J., concurring) (arguing that *Helm* was wrongly decided and that the Eighth Amendment contained no proportionality requirement); *see generally* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS (2008).

Amendment and Section 9 of BoRA, respectively. In the text of the Eighth Amendment, cruel "and" unusual are used in the conjunctive, whereas, in the text of Section 9, cruel, degrading, and disproportionately severe are used in the disjunctive. A plain reading of these texts, therefore, might suggest that the Eighth Amendment would permit punishments that are cruel as long as they are common,[34] but this textual variance between the Eighth Amendment and Section 9 of BoRA has also been rendered moot by way of judicial interpretation. In *Furman v. Georgia*, the United States Supreme Court made clear that cruelty, excessiveness, and societal abhorrence are cumulative concepts.[35] This interpretation has a long historical pedigree. At the time of the founding of the United States, the early state constitutions employed "cruel and unusual" and "cruel or unusual" interchangeably.[36]

Unsurprisingly, given the disjunctive text of Section 9 of BoRA, in New Zealand, an act need only qualify as one of the prohibited descriptors to violate BoRA. For example, in *Taunoa v. Attorney-General*,[37] the New Zealand Supreme Court held that the use of solitary confinement on a prisoner whose mental condition made the punishment unsuitable was neither "cruel" nor "degrading," but was nonetheless "disproportionately severe," in violation of Section 9.[38] Conversely, in the United States, the Supreme Court has interpreted the term "unusual" in the Eighth Amendment as a nullity, focusing only on the question of whether a challenged punishment is cruel (which, as indicated *supra*, includes torture, degradation, and excessiveness).[39]

The result is that, under the Eighth Amendment, a punishment can be unusual (in the literal sense of novel or rare) as long as it is not cruel, but it cannot be cruel no matter how commonplace it may be.[40] Therefore, by dint of judicial interpretation, both countries' prohibitions preclude cruelty,

34. *See* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567 (2010).

35. *See Furman*, 408 U.S. at 243-44 (Douglas, J., concurring).

36. *See Harmelin*, 501 U.S. at 966; BESSLER, *supra* note 16, at 118-19; Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969) (characterizing the language "cruel and unusual" as "constitutional 'boilerplate'"); *see also* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 78 (2008). *Compare, e.g.*, MD. DECL. RTS., art. 14 (prohibiting laws inflicting "cruel and unusual pains and penalties") *with* MD. DECL. RTS., art. 22 (prohibiting courts from inflicting "cruel or unusual punishments").

37. Taunoa v. Attorney-General, [2007] NZSC 70.

38. *Id.*

39. In determining excessiveness, however, the Court does sometimes consider the regularity with which the punishment is imposed for the particular offense at issue. *See, e.g.*, *Helm*, 463 U.S. at 292 (including the consistency with which a punishment is imposed within and across jurisdictions as a primary factor in determining whether it is unconstitutionally excessive).

40. *But see Harmelin*, 501 U.S. at 994-95 (Scalia, J., concurring) (distinguishing cruelty from unconstitutional unusualness).

torture, degradation, and excessiveness, separately, without regard to the regularity (i.e., usualness) with which they may occur.

3. The Role of Punitive Intent

The clearest textual divergence between the Eighth Amendment and Section 9 of BoRA occurs at the level of the nature of the acts that the two provisions prohibit and their accompanying mens rea. The Eighth Amendment only prohibits cruel and unusual "punishment," as opposed to BoRA, which prohibits any cruel "treatment," regardless of whether it constitutes a punishment. This textual distinction has become significant at the level of judicial interpretation.

The United States Supreme Court has read the term "punishment" to imply an intent requirement in the prohibitions of the Eighth Amendment.[41] In New Zealand, by contrast, while it remains a somewhat open question whether inhumane treatment has to be inflicted for the purpose of punishment to violate Section 9 of BoRA,[42] the weight of judicial authority suggests that the prohibition is not so limited, at least regarding the prohibitions against cruelty, degradation, or excessive punishment.[43] For example, in *Wolf v. Minister of Immigration*,[44] while ultimately concluding that it was not disproportionately severe under the circumstances, the New Zealand Court of Appeal determined that deportation was a form of

41. Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("The source of the intent requirement is . . . the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.") (emphasis added); *see also* Johnson v. Glick, 481 F.2d 1028, 1032 (2d. Cir. 1973) ("The thread common to all [Eighth Amendment prison-condition cases] is that 'punishment' has been deliberately administered for a penal or disciplinary purpose. . . ."); Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) ("The infliction of punishment is a deliberate act intended to chastise or deter.").

42. *Compare Taunoa*, [2007] NZSC 70 at 69 (Elias, J.) (asserting that purpose is irrelevant to the determination of whether treatment is cruel, degrading, or disproportionately severe); *id.* at 171 (Blanchard, J.) ("All forms of conduct proscribed by s 9 are of great seriousness. . . . The worst is torture, which involves the deliberate infliction of severe physical or mental suffering for a particular purpose, such as obtaining information. Treatment or punishment that lacks such an ulterior purpose can be characterised as cruel if the suffering that results is severe or is deliberately inflicted. . . . [T]reatment or punishment is degrading if it gravely humiliates and debases the person subjected to it, whether or not that is its purpose."); *with id.* at ¶ 294 (Tipping, J.) ("It is, however, of moment to whether there has been a breach of s 9 to consider the state of mind of the party said to be in breach. . . .").

43. *See* Fraser-Jones v. Solicitor-General, [2010] NZCA 622 at 47 (noting that, unlike other provisions of BoRA whose plain language applies to individuals who are arrested or in detention, section 9's plain language applies to "everyone"); Vaihu v. Attorney-General, [2007] NZCA 574 (interpreting *Taunoa* to stand for the proposition that the "[i]ntention to cause suffering is not a prerequisite for a finding that there has been cruel, degrading, or disproportionately severe treatment or punishment").

44. [2004] 7 H.R.N.Z. 469.

"treatment" governed by the limitations of Section 9, regardless of whether it was being imposed for the purpose of punishment.[45]

B. An Overview of Judicial Application

Despite judicial interpretations that largely iron out textual variations between the Eighth Amendment and BoRA regarding criminal punishment, in application, the provisions have very different scopes, particularly when it comes to interpretations of excessiveness in the context of their respective proportionality principles. Both countries' courts treat excessiveness as a question of proportionality: a sentence is impermissibly excessive if it is disproportionately severe in relation to the offense for which it is imposed. In application, however, American and New Zealand courts have very different conceptions of disproportionality.

1. The United States

The United States is the country with the most incarcerated population on earth.[46] Between 1970 and 2010, the prison population increased tenfold, from 200,000 to more than two million, far surpassing the increase in any other industrialized democracy.[47] This surge in incarceration was driven by "tough on crime" policies, including lengthy sentences of imprisonment.[48]

45. *See id.* While this distinction between the two constitutional provisions—restricting only treatment intended as punishment versus restricting all treatment that is cruel or degrading, regardless of whether it is intended to punish—is a significant variation between the two provisions in the context of cruel treatment that is not intended as punishment (for example, preventive detention), it is not significant for the topic explored in this Article, which focuses on criminal sanctions that are by definition intended to punish. *Cf.* Kansas v. Hendricks, 521 U.S. 346 (1997) (holding that Kansas's indefinite postconviction commitment scheme for sexually violent predators did not constitute "punishment" for the purpose of the prohibitions against double jeopardy or *ex post facto* punishment because it was not established with a punitive retributive or deterrent intent); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (holding that stripping American citizens of their nationality as a sanction for draft dodging during World War II, in the absence of notice, confrontation, compulsory process for obtaining witnesses, trial by jury, and assistance of counsel, violated the Fifth and Sixth Amendments to the United States Constitution because the stripping of nationality was "penal in character" because it was intended as punishment). Criminal punishments imposed after conviction for crimes, like terms of imprisonment or the death penalty, unquestionably fit within the scope of the "punishment" and "treatment" that the Eighth Amendment and Section 9 of BoRA both prohibit, respectively.

46. STATISTITA RESEARCH DEPARTMENT (2019), COUNTRIES WITH THE MOST PRISONERS PER 100,000 INHABITANTS AS OF JULY 2019, https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/

47. *See* PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE 48 (2018); Joachim J. Savelsberg, *Punitive Turn and Justice Cascade: Mutual Inspiration from Punishment and Society and Human Rights Literatures*, 20 PUNISHMENT & SOC'Y 73, 75 (2018).

48. *See* JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 7 (2017).

One factor that enabled the explosion of the prison population in the United States is the fact that the United States Supreme Court has interpreted the Eighth Amendment prohibition on cruelty and excessiveness as being largely limited in practice to the regulation of the application—but not outright abolition—of the death penalty.[49] For example, the Court has used the Eighth Amendment proportionality limitations to regulate the types of offenses and offenders to which the death penalty may apply,[50] as well as the manner in which executions may be carried out.[51]

49. *Harmelin*, 501 U.S. at 996–97 (Kennedy, J., concurring) (explaining that the Eighth Amendment imposed only a "narrow" proportionality principle in noncapital cases); Rummel v. Estelle, 445 U.S. 263, 272–74 (1980) (explaining, in the context of Eighth Amendment proportionality analysis, that "a sentence of death differs in kind from any sentence of imprisonment, no matter how long" and concluding that there was no precedent for a constitutional limitation on the length of the prison sentences that legislatures chose to impose for felony offenses); *see* Rachel A. Van Cleave, *'Death Is Different'—Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages – Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217 (2003).

50. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that the death penalty was a cruel and unusual punishment when applied for the rape of a child); Roper v. Simmons, 543 U.S. 551 (2005) (holding that the application of the death penalty to offenders who were juveniles at the time of their offenses violated the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the application of the death penalty to individuals suffering from significant intellectual disabilities violated the Eighth Amendment prohibition against cruel and unusual punishments); Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that executing children who were younger than sixteen years old at the time that they committed a crime violated the Eighth Amendment); Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the execution of an offender who was legally insane was cruel and unusual); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that death was a "grossly disproportionate and excessive punishment for the crime of rape"); Kevin M. Barry, *The Death Penalty and the Dignity Clauses*, 102 IOWA L. REV. 383, 404-11 (2017) (discussing a line of United States Supreme Court cases categorically prohibiting the imposition of death penalty for offenders who were insane, had intellectual disabilities, were juveniles, or committed offenses other than murder).

51. Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) (characterizing burning at the stake, crucifixion, breaking on the wheel, quartering, the rack, and the thumbscrew as cruel and unusual punishments); *Kemmler*, 136 U.S. at 446-47 (characterizing burning at the stake, crucifixion, and breaking on the wheel as cruel and unusual punishments); s*ee also* State v. Gainer, 3 N.C. 140 (N.C. Super. L. & Eq. 1801) (holding that execution by *peine forte et dure* (being pressed to death) violated the prohibition against cruel and unusual punishments in North Carolina's state constitution). The Eighth Amendment has also been interpreted to prohibit severe corporal punishments. Ingraham v. Wright, 430 U.S. 651, 660 (1977); *Furman*, 408 U.S. at 330 (Marshall, J., concurring) ("[T]here are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them—e.g., use of the rack, the thumbscrew, or other mont. Regardless of public sentiment with respect to imposition of one of these punishments in a particular case or at any one moment in history, the Constitution prohibits it."); Weems v. United States, 217 U.S. 349 (1910) (holding that Weems's sentence of fifteen years hard labor in shackles for the crime of falsifying official records constituted cruel and unusual punishment); Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974) (holding that a prison's practice of "handcuffing inmates to the fence and to cells for long periods of time" was a form of corporal punishment prohibited by the Eighth Amendment). Nonetheless, the Court has also rejected multiple challenges to capital punishment claiming that the manner of execution was cruel and unusual. Glossip v. Gross, 135 S. Ct. 2726 (2015) (rejecting a claim by death-row inmates that

The Eighth Amendment does not generally place any meaningful limits on the length or severity of prison sentences that legislatures can authorize or judges can impose upon competent adult offenders, although the Court has used it to limit sentences of life without the possibility of parole for juvenile offenders (i.e., offenders who were under the age of eighteen at the time of the commission of their crimes).[52] More than twenty years ago, in his landmark article "The Uneasy Relationship Between Criminal Procedure and Criminal Justice," William Stuntz decried the failure of the American constitutional law to police "the content of substantive constitutional law" and advocated for the meaningful application of a "proportionality rule" that would bar "oversentencing."[53] This complaint is exemplified by the fact that the United States Supreme Court has only on *one occasion* held a sentence of imprisonment to be unconstitutionally excessive when applied to an adult offender, despite several other compelling opportunities to do so.[54] Otherwise, it has repeatedly upheld sentences of life imprisonment for relatively minor property offenses in the face of Eighth Amendment challenges.[55]

Oklahoma's lethal-injection protocol created an unacceptable risk of severe pain during execution, in violation of the Eighth Amendment); Baze v. Rees, 553 U.S. 35 (2008) (rejecting a challenge to Kentucky's lethal-injection execution protocol on the ground that the pain and suffering that it inflicted on a condemned inmate constituted cruel and unusual punishment); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (rejecting the claim that death by electrocution was a cruel and unusual punishment); Wilkerson v. Utah, 99 U.S. 130 (1878) (upholding the constitutionality of Wilkerson's sentence of death by firing squad for murder).

52. *Compare* Miller v. Alabama, 567 U.S. 460 (2012) (holding that a mandatory sentence of life imprisonment without the possibility of parole, which precluded the consideration of mitigating circumstances, imposed upon a juvenile homicide offender violated the Eighth Amendment prohibition against excessive punishment) and Graham v. Florida, 560 U.S. 48 (2010) (holding that the Eighth Amendment prohibited the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile offender for a non-homicide offense) *with* McElvaine v. Brush, 142 U.S. 155 (1891) (rejecting McElvaine's Eighth Amendment challenge to his extended term of solitary confinement while awaiting the execution of his death sentence).

53. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997). Stuntz anchors his proportionality argument in due process, rather than cruelty under the Eighth Amendment. *Id.* at 68.

54. *Helm*, 463 U.S. 277 (finding that Helm's sentence of life imprisonment without the possibility of parole for passing a fraudulent one-hundred-dollar check violated the Eighth Amendment); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 161–62 (1995). *See generally* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 PENN. L. REV. 101 (1995).

55. Lockyer v. Andrade, 538 U.S. 63 (2003) (declining to reverse as unreasonable a lower court's rejection of Andrade's Eighth Amendment challenge to his sentence of fifty-years-to-life imprisonment for two acts of shoplifting a total of nine videotapes); Ewing v. California, 538 U.S. 11 (2003) (rejecting Ewing's Eighth Amendment challenge to his sentence of twenty-five-years-to-life imprisonment for stealing three golf clubs); *Harmelin*, 501 U.S. 957 (upholding Harmelin's mandatory-minimum sentence of life imprisonment without the possibility of parole for a first offense of possessing more than 650 grams of cocaine); Hutto v. Davis, 454 U.S. 370 (1982)

2. New Zealand

New Zealand is relatively carceral by international standards,[56] although, of course, no other democracy plays in the same league of imprisonment as the United States.[57] Nonetheless, in contrast to the United States Supreme Court's interpretation of the Eighth Amendment, New Zealand courts demonstrably understand the proportionality requirement of Section 9 of BoRA to be more robust, prohibiting even relatively short prison sentences if they are disproportionate to the circumstances of the offense or offender. For example, in *R. v. P*,[58] the High Court in Auckland declined to impose any sentence of imprisonment upon an intellectually disabled offender who forcibly raped an intellectually disabled victim in revenge for her perceived mistreatment of his brother because doing so would be disproportionate to the offense and, therefore, cruel in violation of Section 9.[59]

IV. Application of the Cruelty Provisions to the Death Penalty

A. Divergent Values and Conceptions of Cruelty

A constitution is not simply a document that structures rights and obligations. It is also an expression of national tradition and character. This duality becomes evident when comparing the way that courts in the United States and New Zealand apply their textually and historically similar bans on government cruelty and excessive punishments to the specific practice of the death penalty and the judicial factfinding that accompanies those applications.

While the United States Supreme Court has found that administration of the death penalty in specific situations or manners violates the Eighth Amendment,[60] it has consistently held that the practice of capital punishment

(rejecting Davis's Eighth Amendment challenge to his sentence of forty years imprisonment for distributing approximately nine ounces of marijuana); *Rummel*, 445 U.S. 263 (rejecting Rummel's Eighth Amendment challenge to his sentence of ten-years-to-life imprisonment for a "third strike" nonviolent property offense). This failure of the Eighth Amendment to limit terms of imprisonment has led to radical expansion of the use of sentences of life without the possibility of parole in the United States in the twenty-first century. Christopher Seeds, *Bifurcation Nation: American Penal Policy in Late Mass Incarceration*, 19 PUNISHMENT & SOC'Y 590, 598 (2017).

56. *See* Lauren-Brooke Eisen, *The Private Prison Experiments: Is There Any Positive in For-Profit Imprisonment?*, SALON (Feb. 25, 2019), https://www.salon.com/2019/02/25/the-private-prison-experiments-is-there-any-positive-in-for-profit-imprisonment/ (explaining that Australia and New Zealand have two of the world's most rapidly expanding prison populations).

57. *See supra* Section III(B)(1).

58. (1993) 10 CRNZ 250 (HC).

59. *Id.*

60. *See supra* notes 50-52 and accompanying text.

is not categorically cruel and unusual.[61] The New Zealand Supreme Court, by contrast, considers the imposition of the death penalty to be a *per se* violation of the prohibitions against cruelty contained in Section 9 of BoRA and Article 7 of the ICCPR.[62]

While New Zealand abolished its domestic death penalty a year before the enactment of BoRA,[63] its courts have had to address the relationship between Section 9 of BoRA, ICCPR Article 7, and the death penalty in the context of other countries' requests for extradition from New Zealand of individuals charged with offenses abroad under the Extradition Act.[64] In this

61. *Gregg*, 428 U.S. 153 (holding that capital punishment did not violate the Eighth Amendment because it served the valid penological purposes of retribution and deterrence); Trop v. Dulles, 356 U.S. 86, 99 (1958) ("Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."); *Kemmler*, 136 U.S. at 447 (upholding the constitutionality of Kemmler's sentence of death by electrocution, reasoning that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution"); *see also* Roberts v. Louisiana, 428 U.S. 325 (1976) (holding Louisiana's mandatory death-penalty scheme unconstitutional, but also specifically holding that the imposition of the death penalty was not *per se* cruel and unusual punishment); Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that North Carolina's mandatory death penalty for first-degree murder violated the Eighth Amendment, but also specifically holding that the imposition of the death penalty was not *per se* cruel and unusual punishment); Jurek v. Texas, 428 U.S. 262 (1976) (upholding Texas's guided-discretion capital-sentencing scheme against the claim that the death penalty was *per se* cruel and unusual punishment); Proffitt v. Florida, 428 U.S. 242 (1976) (upholding Florida's procedures for weighing aggravating and mitigating factors in capital cases against a claim that the death penalty was *per se* unconstitutional); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

62. This is consistent with the consensus of most of the international community. Mukherjee, *supra* note 12, at 508 ("It is widely acknowledged that the imposition of the death penalty constitutes cruel, inhuman and degrading treatment.").

63. New Zealand *de facto* abolished capital punishment in 1961 and *de jure* abolished it in 1989. Newbold, *supra* note 13, at 170. Between 1961 and 1989, the death penalty was maintained only for the offense of treason, but the punishment was never imposed again. *Id.* This is consistent with the seminal work by Franklin Zimring and Gordon Hawkins, which found that a sustained period of *de facto* abolition of the death penalty generally precedes *de jure* abolition internationally. FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 21–23 (1986).

64. Under the Extradition Act, before ordering an individual's surrender for extradition to another country to stand trial for an offence against the law of that country, the Minister of Justice must consider several discretionary factors, including whether "it would be unjust or oppressive to surrender the person." Extradition Act 1999, § 8 (1). The Act specifically provides that the Minister should not surrender the person if "there are substantial grounds for believing that the person would be in danger of being subjected to an act of torture in the extradition country." § 30(2)(b). The Minister may refuse to surrender the person if the person may be sentenced to death in the extradition country. § 30(3)(a). While Section 30(3)(a) is phrased in discretionary terms, New Zealand courts have held that the Minister should not surrender an individual who is likely subject to death penalty abroad. *See* Kim v. Minister of Justice, [2017] NZHC 2109 at 113. Judge

context, New Zealand courts have determined that both Section 9 of BoRA and ICCPR Article 7 prohibit the extradition of individuals to another country to stand trial for an offence against the law of that country if there are substantial grounds for believing that these offenders would be subject to cruel, degrading, or disproportionately severe treatment or punishment.[65] Being subject to the death penalty in the country seeking extradition qualifies as such prohibited treatment.[66]

This divergence of constitutional values is consistent with the preexisting social-science literature around abolition. In their seminal work, *Capital Punishment and the American Agenda*, Franklin Zimring and Gordon Hawkins found that reconception of the death penalty as a human rights issue, rather than a criminal justice issue, tends to precede its abolition, even in the face of public support for the death penalty, in "modern democracies."[67] In *The Death Penalty, a Worldwide Perspective*, Roger Hood and Carolyn Hoyle similarly found that a hallmark of the international evolution away from capital punishment is the emergence of international human rights law and its commitment to "the protection of citizens from the power of the state and the tyranny of the opinions of the masses."[68]

v. Canada, Communication No. 829/1998,78th Session of the HRC, 20 October 2003, U.N. Doc. A/58/40 (Vol. Il), at 76 (holding that Canada had violated Judge's right to life under Article 6 of the ECHR by extraditing him to the United States without first obtaining assurances that he would not be subjected to the death penalty there). Although the ICCPR lacks a specific extradition prohibition, *cf.* U.N. Convention Against Torture, Art. 3 (1) ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."), the position of the Extradition Act is consistent with the consensus view within the international community generally and the United Nations Human Rights Committee ("H.R.C.") specifically.

65. *See* Attorney-General v. Zaoui, [2005] NZSC 38; Kim v. Minister of Justice, [2016] NZHC 1490.

66. *See Judge*, *supra* note 64, at 76–103 (ruling that States that have abolished the death penalty could not extradite individuals to States that have retained the death penalty in an absence of a credible assurance that the death penalty would not be imposed upon return). Of course, because New Zealand is a signatory to the death penalty protocol, as well as the main body of the ICCPR, it has specific obligations not to extradite defendants to countries where they may face the death penalty from that protocol. In practice, this sometimes obscures the rationale of New Zealand courts' refusal to permit extradition, since such refusal could stem either from the specific dictates of the death penalty protocol or the more general prohibitions of Article 7 of the ICCPR. Prior to the ratification of the Death Penalty Protocol, however, many other countries had already deemed the death penalty to violate Article 7.

67. ZIMRING & HAWKINS, *supra* note 63, at 21–23.

68. *See* ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY, A WORLDWIDE PERSPECTIVE 22 (5th ed. 2015).

B. The Nature of Proportionality

Retribution is generally regarded as the primary basis of punishment.[69] Contrary to mistaken conceptions of vengeance, retribution can function as a limitation on permissible punishments.[70] The prohibitions against cruelty and excessiveness in the Eighth Amendment and Section 9 of BoRA are limiting principles, in the sense that they limit the responses that legislatures and judges otherwise could give to serious criminal conduct.

The divergent views about the death penalty in constitutional jurisprudence in the United States and New Zealand reflect more than just a divergence of doctrine, but rather a divergence of values and findings of constitutional fact,[71] which are reflected in the normative nature of the excessiveness limitation. Because both countries' courts have inherited and continued to apply a proportionality principle in their interpretations of their respective prohibitions against cruel and excessive punishments, the disagreements between courts in the United States and New Zealand about which specific punishments are (or are not) cruelly excessive must ultimately reduce to a disagreement of judicial philosophy about whether and under what circumstances, if any, a particular sentence is unacceptably excessive.

In the context of the death penalty, this is a disagreement about whether a death sentence is impermissibly cruel and, therefore, what it means for a punishment (death) to be disproportionate in relation to a criminal offense. Because the death penalty remains in effect in the United States only for intentional homicides, this is really a disagreement more specifically about the disproportionality of a sentence of death when it is imposed as a punishment for the crime of murder—the core of the traditional, *lex talionis* "eye for an eye," justification for capital punishment. The thesis of this Article is that the competing understandings of proportionality in the United States and New Zealand, reduce to a disagreement about the primary purpose of punishment, generally, and of the proportionality principle, specifically—to wit, whether it is a principle of retribution or a principle of utility.

1. Retribution

The United States Supreme Court's continued tolerance of the death penalty under the Eighth Amendment is consistent with a criminal justice view of the death penalty and stems primarily from a sometimes unarticulated assumption that proportionality is primarily an expressive and

69. *See* Danielle S. Allen, *Democratic Disease: Of Anger and the Troubling Nature of Punishment*, in SUSAN BANDES (ed.), THE PASSIONS OF LAW (2001), at 205. *But see* THOMAS HOBBES, HOBBES'S LEVIATHAN 240 (1958) (arguing that punishment should be based on deterrence or rehabilitation rather than retribution).

70. *See* John Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3 (1651).

71. *See* Fontana, *supra* note 7, at 556 n.79 (explaining how balancing tests, value judgments like "reasonableness," and consequential reasoning are a form of constitutional factfinding).

retributive doctrine.[72] In analyzing the cruel excessiveness of punishments, while it often pays lip service to other justifications for punishment (typically, incapacitation or deterrence),[73] the Court largely determines proportionality by balancing the severity of the punishment against the gravity of the offense for which the sentence is being imposed and the extent of the offender's culpability.[74] In doing so, it defines gravity with regard primarily to "the harm caused or threatened to the victim or society."[75] In this formulation, the severity of a criminal act is a normative evaluation, based on cultural values.[76] The Court's refusal to permit capital punishment for individuals with intellectual disabilities or juvenile offenders, due to their diminished decision-making capacity, are examples of its use of a retributive understanding of proportionality, based on an offender's lessened culpability, as a limiting principle.[77] American legal scholars similarly seem to assume that proportionality is an exclusively retributive value. For example, Stuntz defines proportionality as a question of "whether the people being punished deserve the punishment they receive."[78]

The divergence between the understandings of proportionality by courts in the United States and New Zealand does not seem to occur at the level of the gravity of the offense committed or the degree of the offender's

72. *See Ewing*, 538 U.S. at 32 (Scalia, J., concurring) (arguing that the concept of proportionality was inherently tied to retributive goals); King, *supra* note 54, at 192 ("Proportionality can only be measured in relationship to the owner's culpability. . . ."). *See generally* JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY (1970); MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995); ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993). *But see* Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 PENN. L. REV. 989, 1047–48 (1978) (arguing that the Eighth Amendment establishes both retributive and utilitarian limits to punishment).

73. *See Glossip*, 135 S. Ct. at 2767 (Breyer, J., dissenting) ("[T]he death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution.").

74. *See Helm*, 463 U.S. at 292 (explaining that Eighth Amendment proportionality analysis should be guided by, *inter alia,* "the gravity of the offense"); *Coker*, 433 U.S. at 592 (explaining that the death penalty is unconstitutionally "excessive" if it "is grossly out of proportion to the severity of the crime"); *see, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (extensively examining Enmund's lack of intent to kill and his status as an accessory rather than principal in holding that his death sentence for felony murder was unconstitutionally disproportionate to his offense); *cf.* United States v. Bajakajian, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."). *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

75. *Helm*, 463 U.S. at 292.

76. *See* Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AMER. SOCIOLOGICAL REV. 224, 224 (1974).

77. *See Simmons*, 543 U.S. 551; *Atkins*, 536 U.S. at 319.

78. Stuntz, *supra* note 53, at 66.

culpability. In other words, murder, torture, and sexual violation are viewed as no less grave by courts in New Zealand and motive, intent, purpose, deliberation, capacity, a high degree of participation, and lack of remorse no less aggravating than they are by courts in the United States. Instead, it is in some other aspect of proportionality balancing over which courts in the two countries disagree.

2. Excessiveness and the Weighing of Interests

The proportionality balancing test that the United States Supreme Court employs (the severity of the offense weighed against the retributive factors that militate in favor of a lesser punishment) itself reflects another implicit balance between two underlying competing interests: On the one hand, the legitimate societal benefits and purposes to imposing punishment, in general, and a severe punishment, in particular; on the other hand, some other, external value that limits the range of that punishment is appropriate as a response to the offense committed. It is, to some extent, a cost-benefit analysis, which weighs the penological benefits of the death penalty against its societal costs.

The divergence of understandings of proportionality between courts in the United States and New Zealand does not seem to involve the first half of the value balancing, the question of whether the penological objectives that the death penalty seeks to achieve (primarily retribution and secondarily incapacitation and deterrence) are permissible *per se*.[79] Instead, it involves a disagreement around the gravity of the societal and individual costs of having a death penalty and the weighing of those costs against capital punishment's objectives (i.e., the death penalty's effectiveness in comparison to other alternatives).[80] In other words, the two countries' judicial philosophies diverge at the latter end of this balancing test (whether there is some reason, besides the insufficient seriousness of the offense or the offender's culpability, to limit the severity of the societal response to the crime) and in the balancing itself (whether the death penalty is a proportional *means* to achieve whatever its positive societal *ends* are thought to be).[81]

79. This is not to suggest that these former interests—the societal benefits of the death penalty—are not debatable, particularly deterrence and incapacitation, which are utilitarian considerations that are subject to empirical proof or disproof. Perhaps because retribution is among the frequently identified benefits of the death penalty, the New Zealand courts simply do not seem to plant their flag on this particular battlefield.

80. These two factors, the weight of the interests against the death penalty and the balance of those interests when weighed against its purposes, of course, are interrelated.

81. *But see* Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 535 (2017) (arguing that death-penalty abolition occurs when courts decide that retribution is an illegitimate goal of punishment).

Courts in New Zealand purport to take a more human-rights approach to punishment, focusing on what Hood and Hoyle characterize as "a fundamental violation of human rights: not only the right to life but the right to be free of excessive, repressive, and tortuous punishments."[82] Nonetheless, this is not a pure human-rights focus because it entails, *inter alia,* a judgment that the death penalty itself does not serve any legitimate penological purpose, a utilitarian rather than purely retributive or humanist consideration. The New Zealand courts take issue with the results of the death penalty and with its use as the means to achieve its purposes, rather than with those purposes themselves. This entails weighing the consequences of execution against the consequences of other responses to the offence, rather than weighing the seriousness of the punishment against the seriousness of the offence.

Because of this, the courts in the United States and New Zealand disagree primarily about the necessity of the death penalty to achieve its purported penological aims.[83] This second consideration—the weight that

82. HOOD & HOYLE, *supra* note 68, at 22.

83. *Cf. Baze*, 553 U.S. at 78–86 (Stevens, J., concurring in the judgment) (concluding that the death penalty was "patently excessive and cruel and unusual punishment violative of the Eighth Amendment" in part because it served no penological purpose); *Furman*, 408 U.S. at 288–306 (Brennan, J., concurring) (finding that the death penalty violated the Eighth Amendment in part because of its failure to deter crime or deliver retribution in light of its ineffective and arbitrary imposition); Rudolph v. Alabama, 375 U.S. 889, 890–91 (1963) (Goldberg, J., dissenting) (arguing that the death penalty violated the proportionality requirement of the Eighth Amendment because it was no more effective at achieving permissible aims of punishment than other penalties); Moore v. Parker, 425 F.3d 250, 268–70 (6th Cir. 2005) (Martin, J., dissenting) (arguing that bias and arbitrariness deprived it of its legitimate interest in retribution and general deterrence); People v. Anderson, 493 P.2d 880, 894–99 (Cal. 1972) (holding California's death penalty unconstitutional under the cruel-and-unusual-punishment clause of the California Constitution, in part because of its failure effectively to deter crime), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27 (amending the state constitution to permit the death penalty); State v. Santiago, 122 A.3d 1, 55–73 (Conn. 2015) (holding that capital punishment violated the cruel-and-unusual-punishment clause of the Connecticut Constitution in part because its unreliability, arbitrariness, and bias deprived it of any legitimate penological objective); District Attorney v. Watson, 411 N.E.2d 1274, 1282–83 (Mass. 1980) ("The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."), *superseded by constitutional amendment*; State v. Dicks, 615 S.W.2d 126, 136–41 (Tenn. 1981) (Brock, C.J., concurring in part and dissenting in part) (arguing that the death penalty violated the cruel-and-unusual-punishment clause of the Tennessee Constitution because it was unacceptable to contemporary society, served no legitimate purpose, and was "barbarous"); *Ex Parte* Panetti, 450 S.W.3d 144, 145 (Tex. Crim. App. 2014) (Price, J., dissenting) (arguing that the death penalty was unconstitutional because "the execution of individuals does not appear to measurably advance the retribution and deterrence purposes served by the death penalty; the life without parole option adequately protects society at large in the same way as the death penalty punishment option; and the risk of executing an innocent person for a capital murder is unreasonably high . . ."); Pierre v. Utah, 572 P.2d 1338, 1359 (Utah 1977) (Maughan, J., concurring in part and dissenting in part) (rejecting "vengeance" as a legitimate penological purpose); Hopkinson v. State, 632 P.2d 79, 207–16 (Wyo. 1981) (Rose, C.J., dissenting in part and concurring in part) (arguing that capital punishment lacked a legitimate penological

should be allocated to the reasons not to utilize a punishment to achieve ends that are otherwise justifiable penologically is what Richard Frase has termed "ends disproportionality."[84] The courts in New Zealand also tend to give more weight to necessity considerations—such as whether there are other available means to accomplish those penological objectives (what Frase calls "means disproportionality"[85])—in determining whether the justifications for the death penalty are outweighed by its costs.

Both of these proportionality objections to the death penalty are instrumentalist and utilitarian in nature, rather than expressive or retributive.[86] As such, they evidence a more utilitarian conception of proportionality, consistent with Beccaria's formulation:

> The purpose [of punishment] can only be to prevent the criminal from inflicting new injuries on its citizens and to deter others from similar acts. Always keeping due proportions, such punishments and such method of inflicting them ought to be chosen, therefore, which will make the strongest and most lasting impression on the minds of men, and inflict the least torment on the body of the criminal. . . . For a punishment to attain its end, the evil which it inflicts has only to exceed the advantage derivable from the crime. In this excess of evil one should include the certainty of punishment and the loss of the good which the crime might have produced.[87]

V. Methodological Limitations

One obvious methodological drawback to this comparative analysis exists because New Zealand lacks a death penalty, not because the New Zealand Supreme Court prohibited its use after determining that it violated BoRA Section 9 or ICCPR Article 7, but rather because the New Zealand

purpose because retribution was not a legitimate goal for criminal punishment); Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment*, October Term, 1963, 27 S. TEX. L. REV. 493, 502–03 (1986) (suggesting that the death penalty constituted *per se* cruel-and-unusual punishment in violation of the Eighth Amendment because it failed to further the legitimate penological objectives of deterrence, incapacitation, and rehabilitation and because "vengeance" was an illegitimate penological objective).

84. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 592–95 (2005).

85. *See* Frase, *supra* note 84 at 595–96.

86. *See id.* at 592; *see also* Grossman, *supra* note 54, at 168 n. 386 (describing the parsimony principle, which requires punishment to be no more severe than necessary to accomplish its legitimate penological objectives, as a utilitarian principle). *See generally* NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA (2017).

87. BECCARIA, *supra* note 2.

Parliament abolished it legislatively. Furthermore, because New Zealand, unlike the United States, is a signatory to the Death Penalty Protocol, the question of whether it is bound to abolish the death penalty is conclusively established by its obligations under that protocol. The result of the combination of these two factors—the political nature of the abolition of the death penalty in New Zealand and its additional, explicit treaty obligations under the death penalty protocol—confounds the comparative analysis because it renders any discussion by courts in New Zealand of the relationship between the death penalty and Section 9 of BoRA and Article 7 of the ICCPR *dicta.* In other words, the Death Penalty Protocol would obligate New Zealand not to extradite international defendants to countries where they face the death penalty regardless of whether its domestic courts believed that its imposition violated Section 9 of BoRA or Article 7 of the ICCPR. Those courts' discussions of the proportionality of the death penalty in relation to capital crimes in other countries are, therefore, necessarily sparse and sometimes insufficiently reasoned. In addition, the rationales for the abolition of the death penalty are already expressly laid out in the Death Penalty Protocol, which further detracts from the depths of New Zealand courts' consideration of the balance between the purposes of the penalty, the ends that it purports to accomplish, and the means by which it attempts to accomplish them.[88]

Nonetheless, while the New Zealand courts' discussion of the death penalty are a narrower window, made from largely *obiter dictum*, they nonetheless allow a partial view of the courts' jurisprudential traditions surrounding the death penalty. It is noteworthy that these opinions, however sparse, do not simply say "We must refuse to extradite this individual under our treaty obligations," but rather clearly demonstrate the courts' views of the penalty of death itself as a cruel and excessive one.

VI. Conclusion

A nation's constitution is an embodiment of its traditions, character, and identity.[89] The United States has a long (and arguably sordid) history of both cultural and constitutional exceptionalism,[90] and its approach to defining

88. *See* Second Protocol, *supra* note 13, Preamble (identifying "human dignity" and "the enjoyment of the right to life" as the justifications for requiring abolition of the death penalty).

89. *See* George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737 (1993).

90. *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997) ("[T]he global transformation [of constitutionalism] has not yet had the slightest impact on American constitutional thought."); Clare L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 21 (1998) (noting the refusal of American courts to consider the constitutional decisions of courts in other countries); Adrienne Stone, *Comparativism in Constitutional Interpretation*, 2009 N.Z. L. REV. 45, 57; *see, e.g.*, Printz v. United States, 521 U.S. 898, 921 n.11 (1997) ("[C]omparative analysis [is]

"cruelty" is no exception.[91] The Eighth Amendment to the United States Constitution and Section 9 of the New Zealand BoRA share historical antecedents and language, and both countries are signatories to the ICCPR. However, the constitutional cultures and judicial interpretations around the acceptable limits of the State's right to punish, particularly by death, have diverged considerably in the two countries.[92] This divergence is best explained not by reference to textual differences between the Eighth Amendment and Section 9, but rather by reference to the two countries' prevailing judicial philosophies surrounding the meaning and purpose of the proportionality constraint on excessive punishment.

This explanation matters for anyone who wishes to see the United States abolish its death penalty because it suggests that abolition will not come through doctrinal advocacy alone, at least not through advocacy that fails to account for the unique judicial philosophy of retribution employed by American courts. Only a shift in focus from the "ends" that the death penalty is perceived to bring to a focus on the "means" by which it achieves those ends, particularly in light of other penological options, will move American courts toward a more robust consideration of the acceptability of a punishment that most of the rest of the world's courts consider barbaric.

inappropriate to the task of interpreting a constitution."). *See generally* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996).

91. *See, e.g.*, *Thompson*, 487 U.S. at 869 (1988) (Scalia, J., dissenting) (dissenting from the majority opinion holding that executing children who were younger than sixteen years old at the time that they committed a crime violated the Eighth Amendment in part because of the world consensus on the issue and arguing that other countries' constitutional interpretations of their cruelty prohibitions were irrelevant to interpreting the American constitution).

92. *Cf. Rudolph*, 375 U.S. at 889, *cert. denied*, (1963) (Goldberg, J., dissenting) (arguing that the United States Supreme Court should find that the death penalty violated the Eighth Amendment in light of the trend toward abolition "throughout the world").