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New Originalism: Arizona's Founding Progressives on Extreme Punishment

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NEW ORIGINALISM: ARIZONA'S FOUNDING PROGRESSIVES ON EXTREME PUNISHMENT

John Mills & Aliya Sternstein**

Originalism, together with textualism, has been of growing interest to legal scholars and jurists alike. Discerning and putting forth the views of “the founders” has become part and parcel of effective advocacy, particularly regarding constitutional questions. Arizona is no exception, with its courts explicitly giving originalism primacy over all other interpretive doctrines for discerning the meaning of an ambiguous provision of its Constitution.

Yet, the Arizona state courts have not engaged with the views of the state’s founders on key issues concerning the purposes of punishment, as demonstrated by the founders’ words and deeds. Arizona was founded in 1912 as a progressive project, and the founding generation—from the convenors of the 1910 Constitutional Convention and the courts to the people themselves—held and acted on progressive views of punishment. They rejected the idea that any person was beyond reform and insisted that the state had an obligation to bring about reform of persons convicted of crime. Progressive ideals were a core aspect of the founding of Arizona, and those ideals provide a compelling reason to give independent meaning to Arizona’s bar on cruel and unusual punishment in ways that call for judicial skepticism of any punishment that does not serve the progressive ideals of rehabilitation and reformation.

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INTRODUCTION

Arizona’s Cruel and Unusual Punishment Clause must be understood against the landscape from which it emerged, including its early judicial and political history, as well as the words and deeds of the public at the time of its 1912 enactment. Across judicial philosophies, American jurists recognize the importance of the original public meaning for understanding and applying constitutional texts.¹ This holds for state and federal constitutions alike.

Arizona is no different, and the Arizona Supreme Court is explicitly originalist in its approach to constitutional adjudication.² In assessing the state

1. See Thomas Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 729 (2011) (describing “old originalism” as an “attempt to follow the original public meaning of the constitutional provision . . . On this view, when original expectations can be ascertained, the original meaning of a constitutional provision is determined and constrained by the expectations of the framing generation as to how that provision would be applied to particular problems.”).

2. See Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 ARIZ. ST. L. J. 355, 359–60 (2017) (“The Arizona Supreme Court has long held that some form of originalism is the proper method to employ when interpreting the Arizona Constitution. Less than five months after statehood, the court noted the ‘salutary rule of construction’ is to give ‘each and every clause in a written constitution’ meaning ‘so that intent of the framers may be ascertained and carried out.’”) (quoting *State ex rel. Davis v. Osborne*, 125 P. 884, 892 (Ariz. 1912)); see also Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL’Y 341, 368–69 (2017) (citing *Rumery v. Baier*, 294 P.3d 113, 116 (Ariz. 2013) (“The [Arizona] Constitution should be construed so as to ascertain and give effect to the intent and purpose of the framers and the people who adopted it.”) (internal quotation marks omitted); *Brewer v. Burns*, 213 P.3d 671, 676 (Ariz. 2009) (same); *Cain v. Horne*, 202 P.3d 1178, 1181 (Ariz. 2009) (“In interpreting a[n Arizona] constitutional provision, our primary purpose is to effectuate the intent of those who framed the provision.”) (internal

Constitution, Arizona courts insist that “each provision must be construed so that it shall harmonize with all others without distorting the meaning” as demonstrated by the “objective meaning” at the founding.³ The Court’s originalist orientation⁴ extends to its assessment of the protections provided by Arizona’s prohibition on “cruel and unusual punishment.”⁵ Yet—forsaking the context of that prohibition—the Arizona Supreme Court has recently and repeatedly declined to recognize its independent meaning to the state’s prohibition on cruel and unusual punishment.⁶ Instead, while acknowledging that it will “not follow federal precedent blindly,”⁷ the Court has held that the state prohibition is coextensive with the Eighth Amendment. It has done so because, in its view, there is no “compelling reason to interpret Arizona’s cruel and unusual punishment provision differently from the related provision in the federal constitution.”⁸

quotation marks omitted); *Jett v. City of Tucson*, 882 P.2d 426, 430 (Ariz. 1994) (“When interpreting the scope and meaning of a constitutional provision, we are guided by fundamental principles of constitutional construction. Our primary purpose is to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it.”); *McElhanev Cattle Co. v. Smith*, 645 P.2d 801, 804 (Ariz. 1982) (“The governing principle of constitutional construction is to ascertain and give effect to the intent and purpose of the framers of the constitutional provision and of the people who adopted it.”); *City of Apache v. Sw. Lumber Mills, Inc.*, 376 P.2d 854, 856 (Ariz. 1962) (en banc) (“The governing principle of constitutional construction is to give effect to the intent and purpose of the framers of the constitutional provision and of the people who adopted it.”); *State ex rel. Morrison v. Nabours*, 286 P.2d 752, 755 (Ariz. 1955) (“It is generally conceded that a [state] Constitution should be construed so as to ascertain and give effect to the intent and purpose of the framers and the people who adopted it.”); *Miller v. Wilson*, 129 P.2d 668, 671 (Ariz. 1942) (concluding that a state constitutional provision was self-executing because “it would have been impossible for the framers of the constitution to indicate more clearly their intent” that it be self-executing); *Crawford v. Hunt*, 17 P.2d 802, 806 (Ariz. 1932) (“[I]n the construction of [a state constitution] the whole paper ought to be considered, that the will of its framers may be truly and accurately ascertained.”) (internal quotation marks omitted).

3. *State ex rel. Davis v. Osborne*, 125 P. 884, 892 (Ariz. 1912); ANTONIN SCALIA & BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 30 (2012) (“Subjective intent is beside the point. Speculation about it—even in the oddly anthropomorphic phrase *intent of the document*—invites fuzzy-mindedness. Objective *meaning* is what we are after, and it enhances clarity to speak that way.”).

4. Although the Arizona Supreme Court occasionally speaks of original “intent,” its mode of inquiry is more broadly originalist and avoids the “fuzzy-mindedness” Justice Scalia has derided about such a subjective sounding inquiry. *See, e.g., State v. Soto-Fong*, 474 P.3d 34, 44 (Ariz. 2020) (relying on scholarship concerning labor movements at the time of the founding and statements of delegates to interpret the scope of the protection provided by a provision regarding child labor).

5. ARIZ. CONST. art. 2, § 15; *see Soto-Fong*, 474 P.3d at 44. The Arizona Supreme Court has described the state and federal proscriptions as “identical,” and, indeed, the only difference between the text of the provisions is that the state prohibition references “punishment” whereas the federal protection references “punishments.” U.S. CONST. amend. VIII; ARIZ. CONST. art. 2, § 15; *Soto-Fong*, 474 P.3d at 44.

6. *Soto-Fong*, 474 P.3d at 44; *State v. Bush*, 423 P.3d 370, 393 (Ariz. 2018).

7. *State v. Davis*, 79 P.3d 64, 67 (Ariz. 2003); *see Bush*, 423 P.3d at 393.

8. *Davis*, 79 P.3d at 68.

Yet the contemporary Arizona state courts have not accounted for the original understanding of the Cruel and Unusual Punishment Clause.⁹ The state courts have not grappled with Arizona originalism: specifically, the words, actions, and understanding of those who adopted its Constitution in 1912, the punishment practices during the formative Progressive Era, and how protections against excessive punishment fit into the state's larger progressive project.¹⁰ This is a significant gap both because Arizona's Constitution is a prime example of early twentieth century progressivism¹¹ and because of the importance of state constitutionalism for the development and understanding of individual rights.¹² With regards to the former, railroad and mining interests opposed many aspects of the Constitution and used their influence in the press and elsewhere to resist progressive reforms; progressives overpowered their counterparts (which consisted largely of railroad and mining interests) at party conventions in the territory and were, therefore, able to outmaneuver their opponents,¹³ and at the convention, they "deftly used the convention process to select slates of delegates pledged to [progressive] goals."¹⁴ That history is essential to understanding the Constitution they adopted.

Likewise, modern state courts have failed to adequately consider how the original understanding of other state constitutional provisions affects the scope of protection from excessive punishment, though the Arizona Supreme Court has

9. Other scholars have recently drawn on the historical landscape upon which the Eighth Amendment was drafted to better understand the scope of its protections. *See, e.g.*, John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 998 (2019).

10. A recent article has highlighted a similar gap in the historical analysis of the non-delegation doctrine. *See generally* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

11. *See* JOHN D. LESHY, *THE ARIZONA STATE CONSTITUTION 6–10* (2d ed. 2013) (describing dominance of progressives at the Arizona Constitutional Convention).

12. Jefferey S. Sutton, *Response to the University of Illinois Law Review Symposium on 51 Imperfect Solutions*, 2020 U. ILL. L. REV. 1393, 1399–1400 (2020) ("State constitutions, like federalism itself, ultimately amount to neutral safeguards of freedom—sometimes leaning against the government, sometimes leaning for it. Just ask Justice Brennan and Justice Scalia. The former wrote a landmark article in support of independent state constitutional rights in 1977 and the latter acknowledged their role in his last opinion for the Court in 2016."); Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312 (2017) ("[R]edundancy in interpretive authority—whereby state courts and federal courts independently construe guarantees that their respective constitutions have in common—is one important way that our system of government channels disagreement in our diverse democracy."); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.");

13. LESHY, *supra* note 11, at 6–7.

14. *Id.*; *see also* KIM ENGEL-PEARSON, *WRITING ARIZONA 1912-2012: A CULTURAL AND ENVIRONMENTAL CHRONICLE* 60 (2017) ("[T]he convention delegates approved a constitution that was decidedly Progressive.");

recognized the importance of doing so.¹⁵ Indeed, Justice Antonin Scalia, the person perhaps most singularly responsible for the rise of originalism, has made the same point, as have both “sides”¹⁶ of the current Court: The original meaning is the understanding of a text that an informed, reasonable member of the public, living at the time of the text’s adoption, would have had.¹⁷ And, as discussed below, the founding era is rich with information relevant to understanding the constitutionality of extreme punishments in Arizona.

To date, little has been written about the original public meaning of the Arizona Constitution or the dedication of the first Administration, early courts, and residents to this original meaning,¹⁸ and virtually nothing has been written concerning the early meaning of the state’s prohibition on cruel and unusual

15. *State v. Soto-Fong*, 474 P.3d 34, 44 (Ariz. 2020) (“Express protections for children were limited to children in the workforce. The delegates’ desire to protect children manifests in article 18, section 2 of the Arizona Constitution, which prohibits ‘any child under sixteen years of age [to] be employed in underground mines, or in any occupation injurious to health or morals or hazardous to life or limb’ and disallows children under fourteen from employment during school hours.”).

16. See SCALIA, *supra* note 3, at 339; Thomas A. Schweitzer, *Justice Scalia, Originalism, and Textualism*, 33 *TOURO L. REV.* 749, 750 (2017) (“The most important mark Justice Scalia left on the Supreme Court may have been his advocacy of the jurisprudential doctrines of textualism and originalism, which won wide acceptance on the Court, even among his ideological rivals.”); Nina Totenberg, *Trump’s Supreme Court Pick Is a Disciple of Scalia’s “Originalist” Crusade*, *NAT’L PUB. RADIO* (Feb. 2, 2017), <https://www.npr.org/2017/02/02/512891485/trumps-supreme-court-pick-is-a-disciple-of-scalias-originalist-crusade> [<https://perma.cc/CQE5-Q7ZF>]; Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, *HARV. L. TODAY* (Nov. 17, 2015), <https://hls.harvard.edu/event/the-scalia-lecture-a-dialogue-with-justice-kagan-on-the-reading-of-statutes/> [<https://perma.cc/AE2N-FJ52>] (“[W]e’re all textualists now.”); Statement of Ketanji B. Jackson, *The Nomination of Ketanji Brown Jackson to Be an Associate Justice of the Supreme Court of the United States*, *Jud. Comm. H’ring*, 117 Cong. (2022) (“The Supreme Court now, very clearly, has determined that in order to interpret provisions of the Constitution, we look to the time of the founding, and we ascertain, based on what the original public meaning of the words the Constitution were at the time.”). Some proponents of originalism have bemoaned its newfound prominence across judicial philosophies, claiming that its dominance reduces it to a veneer to cover a judge’s other “commitments of political morality.” Conor Casey & Adrian Vermeule, *If Every Judge is an Originalist, Originalism is Meaningless*, *WASH. POST* (Mar. 25, 2022), <https://www.washingtonpost.com/outlook/2022/03/25/if-every-judge-is-an-originalist-originalism-is-meaningless/> [<https://perma.cc/8HT8-L47E>]. But a strength of original public meaning is that the meaning is fixed, regardless of the priors of those seeking out that meaning.

17. See SCALIA & GARNER, *supra* note 3, at 435; Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 *GEO. L.J.* 1119, 1120 (2010) (“[S]tatutory interpretation must hew to textualism’s original aim to embrace ordinary, public meaning and reject academic textualists’ automatic resort to elite, legalist meaning.”).

18. See John Leshy, *The Making of the Arizona Constitution*, 20 *ARIZ. ST. L.J.* 1, 59 (1988).

punishment.¹⁹ Yet early state practices and legal doctrines limiting the use of extreme sanction, as well as views of the state's residents at the founding, demonstrate a progressive approach to punishment that animated the constitutional prohibition and should inform its meaning today. These include limitations on the use of the death penalty, pre-trial detention, and harsh conditions of confinement, all grounded in the progressive ideal that punishment must be directed towards rehabilitation and re-entry into society.

Drawing on the historical primary sources,²⁰ we conclude that there is a stark disconnect between a proper Arizona originalism—grounded in early twentieth century progressivism—and the state courts' current interpretation and administration of the Arizona Constitution's Cruel and Unusual Punishment Clause. When viewed through an originalist lens, this clause should have a markedly different meaning than its federal counterpart, one that provides substantially broader protections against excessive punishments for the people of Arizona. In particular, Arizona's constitutional framers insisted that punishment must serve the goals of reform and rehabilitation, believing that public safety was better served by helping people return to society. Any punishment that forgoes these ideals—including death, needlessly long prison sentences, and brutal conditions of confinement—is unconstitutional.

Part I of this Article discusses the ways in which early twentieth century progressivism at statehood was sharply critical of extreme sanction, employing public statements and acts of the founding generation. Part II turns to the early public meaning and interpretation of Arizona's Cruel and Unusual Punishment Clause, drawing on early court decisions. These early decisions are illuminating because they long predate the federal incorporation of the Eighth Amendment against the states in 1962, and therefore focus exclusively on the state provision and its

19. A student note has argued that the lack of broad powers of executive clemency necessitates giving independent meaning to Arizona's prohibition on cruel and unusual punishment, and litigators have pressed for broader protections under the state Constitution than the federal. *See generally* Bradley N. Mumford, *Make It Mean Something: The Case for Broader Protection from Cruel and Unusual Punishment Under the Arizona Constitution*, 41 ARIZ. ST. L. J. 453 (2009); Marlee Russell, Note, *Life 'Or' Death*, 91 Miss. L.J. (forthcoming) (making textual case for broader application Mississippi's "cruel or unusual" punishment clause than its federal counterpart based on Mississippi's use of the disjunctive "or"); *see also* State v. Soto-Fong, 474 P.3d 34, 44 (Ariz. 2020); State v. Bush, 423 P.3d 370, 393 (Ariz. 2018), State v. Davis, 79 P.3d 64, 67 (Ariz. 2003); State v. Green, 502 S.E.2d 819, 828 (N.C. 1998) (stating that the North Carolina Supreme Court "historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions"). But neither the extant scholarship nor the courts have addressed the role of progressivism at the time of Arizona's founding as a reason to provide different or broader protection under the state constitution.

20. Reliance on public sources of original meaning is particularly important in Arizona, where, despite being relatively recent, the notes of the Constitutional Convention are extremely limited. LESHY, *supra* note 11, at 11 ("Available minutes mostly merely record dry details like attendance, opening and closing times, and the results of formal votes on motions and propositions In light of the available information, it is practically impossible to obtain a detailed, precisely accurate picture of the convention's deliberations.").

meaning.²¹ Part III situates the Clause in the larger array of progressive rights in the state Constitution and discusses the interplay of subsequently enacted constitutional provisions. Finally, the Conclusion discusses the means by which proper Arizona originalism would give new life to Arizona’s Cruel and Unusual Punishment Clause, limiting state sanction—and the ultimate penalty in particular—in ways different from its federal counterpart.²²

I. PUBLIC MEANING OF EXTREME SANCTION IN ARIZONA

In 2017, the Arizona Supreme Court held that executing Joel Randu Escalante-Orozco would be constitutional even though he was diagnosed with an intellectual disability and was never able to pass second grade. The Court so held because of the notion that he failed to demonstrate that the disability arose early in life, during the developmental period.²³ Escalante-Orozco’s ability to survive in a “poor family in rural Mexico,”²⁴ keep himself clean, care for farm animals, and work at an assembly plant persuaded the Court that the condition must have started during adulthood.²⁵ Though it is well settled that “intellectual disability occurs in all races

21. See *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (applying Eighth Amendment protections to state convictions).

22. Interpretations of other state constitutions have diverged at times from the U.S. Supreme Court’s interpretation of the Eighth Amendment. See, e.g., *State v. Santiago*, 122 A.3d 1, 55 (Conn. 2015) (declaring the death penalty unconstitutional on the basis of the Connecticut Constitution); *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (deciding electrocution as a method of punishment is unconstitutional despite U.S. Supreme Court precedent *In re Kemmler*, 136 U.S. 436 (1890)).

23. *State v. Escalante-Orozco*, 386 P.3d 798, 836 (Ariz. 2017).

24. *Id.*

25. *Id.* at 835–36.

and cultures”²⁶ at early ages,²⁷ the modern Arizona Court discounted his diagnosis of intellectual disability in light of perceived cultural differences, and in so doing, entered a ruling out of step with the original meaning of Arizona’s ban on cruel and unusual punishment.

When enacted in 1912, the Arizona Constitution detailed a government of checks, balances, and continuous responsibility to enforce the rights of residents of all origins and cultures.²⁸ It did so against a backdrop of opposition to extreme punishment and, specifically, the death penalty. Progressive in design and purpose, Arizona’s Constitution provided a sharp check on extreme punishments—including limiting state power in light of a defendant’s mental health and intellectual functioning—and promoted the ideal of rehabilitation. That public meaning is reflected in the organization and wording of the whole document. The second part of the document is titled “Declaration of Rights” and enumerates individual rights,²⁹ including the prohibition on a conviction working “corruption of blood, due process of law, the right to a writ of habeas corpus, limitations on conditions of confinement, two separate provisions limiting excessive bail, and the prohibition of cruel and unusual punishment.³⁰ Other founding-era provisions also provide protections, including a limitation on “[c]onfinement of minor offenders” and a requirement, in the same provision, to fund correctional and penal institutions as well as “institutions for the benefit of persons who have mental or physical disabilities.”³¹

26. Sheri Lynn Johnson et al., *Protecting People with Intellectual Disability from Wrongful Execution: Guidelines for Competent Representation*, 46 HOFSTRA L. REV. 1107, 1127–28 (2018) (citing *Escalante-Orozco*, 386 P.3d at 835–36); see also Sheri Lynn Johnson *A Legal Obituary for Ramiro*, 50 U. MICH. J.L. REFORM 291, 324 (2017) (“According to the Fifth Circuit, despite [defendant’s] multiple valid IQ scores in the sixties (all administered in Spanish), and no valid score above seventy, the state court decided that the lack of more than one full-scale IQ score using Mexican norms meant he had not met the burden of proving substandard intellectual functioning. This reasoning, however, precludes every Mexican national from *Atkins* relief, because there is only one Mexican-normed IQ test. To permit the execution of Mexicans (and only Mexicans) because they have failed to produce results on tests that do not exist is also blatant racial discrimination.”); Robert Sanger, *IQ, Intelligence Tests, “Ethnic Adjustments” and Atkins*, 65 AM. U.L. REV. 87, 88 (2015) (concluding “ethnic adjustments are not logically or clinically appropriate when computing a person’s IQ score for *Atkins* purposes [because] . . . environmental factors—such as childhood abuse, poverty, stress, and trauma—can cause decreases in actual IQ scores and which can be passed down from generation to generation. Therefore, given that individuals who suffered these environmental factors disproportionately populate death row, ethnic adjustments make it more likely that individuals who are actually intellectually disabled will be put to death.”); see also Cal. Penal Code § 1376(g) (2020) (forbidding ethnic adjustments to tests to determine whether a defendant is ineligible for a sentence of death based on their intellectual disability).

27. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38–39 (5th ed. 2013).

28. Leshy, *supra* note 18, at 59.

29. ARIZ. CONST. art. II.

30. ARIZ. CONST. art. II, §§ 4, 14–16, 22.

31. ARIZ. CONST. art. XXII, § 16; ARIZ. CONST. art. II, §§ 15, 16. Other provisions also exemplify the progressive domination of the drafting of the founding document. For

The public meaning of Arizona's limitations on punishment is also shown in the policies and practices of the founding generation, including those of George W.P. Hunt, the president of the state's 1910 Constitutional Convention who would go on to serve as the state's first governor.³² Two years prior to statehood, *The Holbrook News*, a conservative platform at the time, advocated for the abolition of capital punishment.³³ The paper emphasized that the progressive movement—which would come to dominate the state Constitutional Convention—opposed capital punishment, even for murder, because of the movement's focus on rehabilitation.³⁴ In one early decision, the Arizona Supreme Court explained that any “deprivation [of liberty] should be conducted as humanely as possible, and with the view of eventually, if that happy result is possible of realization, restoring him as a useful citizen to society.”³⁵ It also enjoyed widespread support. Hunt and his legion of constituents outlawed the death penalty by ballot referendum in 1916 during his first of seven terms as governor.³⁶

As described below, at first, opponents of capital punishment faced antagonism in the legislature and in editorial departments of major newspapers. At the time, Arizona elites and pro-business interests harbored regressive views of punishment. But Hunt's progressive movement found support among the state's people. Signatures on ballot initiatives favoring abolition of capital punishment and voters at the polls prevailed over floor speeches and editorials. The Arizona death penalty was reinstated in 1918 only after reform opponents launched a backlash campaign of the sort that America has seen many times, inciting fear about the dangers of people released from prison early or before trial, “lynch law,” and invoking statistics that falsely linked abolition to higher rates of homicide.

A. *The First Administration*

Hunt's career in the territorial legislature provided notice of his and his many supporters' skepticism of extreme punishment. He promoted prison reform and was president of the Anti-Capital Punishment League.³⁷ Those positions did not

example, the constitution provides for recall of public officials, an initiative process for public adoption of laws, and an entire article concerning labor interests, demonstrating the “substantial presence at the Constitutional Convention of advocates for the rights of the working class, or labor.” LESHY, *supra* note 11, at 381; *see also* ARIZ. CONST. arts. VIII, XVIII, XXI.

32. LESHY, *supra* note 11, at 10.

33. Casmo Romilly, *Reformation as a Crime Cure*, HOLBROOK NEWS, Feb. 18, 1910, <https://chroniclingamerica.loc.gov/lccn/sn95060791/1910-02-18/ed-1/seq-6/> [<https://perma.cc/FMG9-EBRQ>].

34. *Id.*

35. *See* Howard v. State, 237 P. 203, 204 (Ariz. 1925).

36. LESHY, *supra* note 11, at 10; *see generally* JAMES W. BYKRIT, FORGING THE COPPER COLLAR: ARIZONA'S LABOR-MANAGEMENT WAR OF 1901-1921 (1982) (explaining early progressivism in Arizona's statehood and the extents to which East Coast business interests went to undermine the otherwise popular progressivism of the state at its founding); CLAUDE G. BOWERS, BEVERIDGE AND THE PROGRESSIVE ERA 379 (1932) (discussion of political dynamics resulting in progressive domination at Arizona's Constitutional Convention).

37. Leshy, *supra* note 18, at 37.

hurt his popular appeal; he only ever lost one general and one primary election in a four-decade-long political career.³⁸ Frank C. Lockwood, a historian focused on the southwest, described Hunt as a man of the people during territorial days:

His rude, crude strength; his defiance of money and the money interests; his detestation of snobbery and pretension, whether social or intellectual; his big-hearted humanity; and his extraordinary intellectual shrewdness and political foresight, have made him the trusted champion and advocate of the people and the scourge of the unjust, the dishonest, and the autocratic.³⁹

Although Hunt did not campaign for the position, he was nominated to represent his town at the state's 1910 Constitutional Convention.⁴⁰ Hunt's colleagues elected him president of the Convention, even though he preferred a friend for the role.⁴¹

As the first governor of the state of Arizona—and in contrast to the modern reluctance of governors to ameliorate the excesses of criminal punishment via clemency⁴²—Hunt reprieved all executions until abolition became the law.⁴³ Hunt also vetoed a bill that would take the power of pardon and reprieve from him and place it with a Board of Pardons and Paroles.⁴⁴ In 1912—the first year of

38. *Id.*

39. *Id.* at 37–38 (quoting Frank C. Lockwood, ARIZONA CHARACTERS 197 (1928)).

40. *Id.*

41. *Id.* at 38.

42. See Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 L. & SOC. REV. 183, 186 (2008) (noting that clemency in capital cases, “despite Chief Justice Rehnquist’s claim about its ‘frequency,’ has become quite rare.”). Moratoria on the death penalty, in contrast, appear to be more common. See, e.g., Gov. Gavin Newsom, Exec. Order N-09-19 (Mar. 13, 2019); Conrad Wilson, *Oregon Department of Corrections to Dissolve Death Row*, OREGON PUBLIC BROADCASTING (May 15, 2020) <https://www.opb.org/news/article/oregon-death-row-general-population/> [<https://perma.cc/RG88-2J74>]; American Bar Association, *Pennsylvania Governor Declares Moratorium on Death Penalty* (June 1, 2015) https://www.americanbar.org/groups/committees/death_penalty_representation/project_pres/2015/summer/pennsylvania-governor-declares-moratorium-on-death-penalty/ [<https://perma.cc/QQ3U-CSC7>].

43. Modern governors have undertaken actions to limit reprieves of punishment. In one extreme example, a governor vetoed the state legislature’s abolition of the death penalty. Julie Boseman, *Nebraska Bans Death Penalty, Defying a Veto*, N.Y. TIMES (May 27, 2015), <https://www.nytimes.com/2015/05/28/us/nebraska-abolishes-death-penalty.html> [<https://perma.cc/KCU2-LM3A>]. When the legislature overrode the veto, the governor used his personal wealth to mount a ballot initiative to re-instate the death penalty. Pema Levy, *A Republican Governor Is Using His Own Money to Reinstate the Death Penalty*, MOTHER JONES (Nov. 1, 2016) <https://www.motherjones.com/politics/2016/11/ricketts-nebraska-death-penalty/> [<https://perma.cc/Q9HG-MLTN>].

44. Legis. Hist., 1st Leg., 3d Spec. Sess. vol. 3 pt. 2, at 24, 31, 33 (Ariz. 1913), <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/12>. The pardon power was already quite limited as compared to the federal clemency power and the related power held by other governors. See Mumford, *supra* note 19, at 470–72.

statehood—he postponed the hangings of five people⁴⁵ and urged citizens to circulate a petition proposing the abolition of the death penalty.⁴⁶

Hunt also pushed for the legislature to follow his lead. During the state legislature’s first regular session, Governor Hunt proposed reforms reflecting the view that the goal of punishment is to rehabilitate the accused.⁴⁷ His message to the legislature advocated teaching the imprisoned employable skills that may prepare them to re-enter society after rehabilitation has made them whole. He explained his hope that inmates would

take their place in the world, and to honestly and successfully cope with its problems when their debt to society has been paid . . . How vastly better would it be to furnish some useful employment, whereby the faculties might be kept alive and alert, hope sustained, the spirit quickened, and a little money accumulated against the day when self dependence [sic] is resumed!⁴⁸

The statement also vowed adherence to “the belief held by millions, and yet increasing millions,” that capital punishment is a relic of “barbarism” and has “no place in modern civilization.”⁴⁹ He envisioned replacing capital punishment with parole ineligibility to deter crime. “[A] more fearful and effective example to others lies in the certainty of imprisonment than in the fleeting fear of death, a fear which temporarily has no place in the passion-heated or drink-crazed brain.”⁵⁰

Speaking on his view of the proper role of the state in response to crime, Hunt focused on the “humane” treatment of incarcerated people.⁵¹ On the specific question of capital punishment, he linked his campaign to abolish the practice to the state Constitution. Introducing his “Petition proposing Abolition of the Death Penalty,” he explained that abolition was required by the values “embraced in our Constitution.”⁵² While that proposal remained pending, he continued to provide reprieve⁵³ from executions until the legislature outlawed capital punishment or,

45. George W. P. Hunt, *Proclamation of Reprieve*, COPPER ERA AND MORENCI LEADER, Oct. 11, 1912, <https://chroniclingamerica.loc.gov/lccn/sn94050892/1912-10-11/ed-1/seq-2/> [<https://perma.cc/7RML-5SHG>] (postponing sentences of William Campbell, Eduardo Perez, N. B. Chavez, and Miguel Peralta).

46. *Capital Punishment*, COPPER ERA AND MORENCI LEADER, Feb. 7, 1913, at 8, <https://chroniclingamerica.loc.gov/lccn/sn94050892/1913-02-07/ed-1/seq-8/> [<https://perma.cc/F8ZS-4PUY>] (reporting on prior reprieve and Gov. Hunt’s intention to include “several thousand words of argument against capital punishment” in a forthcoming speech).

47. Legis. Hist., 1st Leg. Reg. Sess. vol. 1, at 67 (Ariz. 1912), <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/17>.

48. *Id.* at 67.

49. *Id.* at 68.

50. *Id.*

51. *Id.* at 413, 415.

52. Hunt, *supra* note 45.

53. ARIZ. CONST. art. V, § 5 (“Reprieves, commutations and pardons. The Governor shall have power to grant reprieves, commutation, and pardons, after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as may be provided by law.”).

failing that, until the people⁵⁴ voted on the question. In the same breath, he called a special session of the legislature to vote on a proposal banning capital punishment.⁵⁵

Also as governor, in 1912, Hunt issued a proclamation that drew on the progressive theory of human improvement, social science, and crime statistics to effectuate these actions. He heralded Arizona's foundation upon progressive principles of "Humanity, Utility, and Economy," and condemned the use of capital punishment as lacking any utilitarian or deterrent function. He contrasted the homicide rates of long-time abolitionist states of Michigan and Wisconsin with their retentionist neighbor Ohio:

[F]or reasons that are apparent, [capital punishment] incites the Social Consciousness to further violence and bloodshed as is shown by the fact that the States leading in the number of legal executions also lead in lynchings . . . while Michigan and Wisconsin . . . during the last ten years had only half as many murders in proportion to population as Ohio.⁵⁶

Ultimately, in 1915, Hunt successfully prodded the circulation of a voter initiative to abolish capital punishment and mandate a sentence of life imprisonment for murder.⁵⁷ He also placed an immediate moratorium on executions, which remained in place until Arizonans cast ballots and abolished the death penalty at the 1916 general election.⁵⁸

B. The Founding Legislature

During Hunt's first term as governor, anti-death penalty legislators unsuccessfully proposed similar mandates to outlaw the death penalty. For instance, in the second year of statehood, Senator John T. Hughes, a framer, introduced Hunt's "pet measure,"⁵⁹ an anti-capital punishment bill that would have submitted the matter to a vote by the people.⁶⁰ The Hughes bill died when the Judiciary Committee

54. Hunt, *supra* note 45 ("I would desire, under the salutary provisions of the Initiative embraced in our Constitution, to circulate a Petition proposing the Abolition of the Death Penalty for Capital Crimes, and to secure the submission of the question to the Electors of this State at a Special or General Election").

55. ARIZ. CONST. art. V, § 4 (empowering the governor to "convene the Legislature in extraordinary session," in which "[h]e shall communicate, by message, to the Legislature . . . the condition of the State, and recommend such matters as he shall deem expedient").

56. Hunt, *supra* note 45.

57. *Second Extra Session Is Called—Of the List of Subjects Presented, Land Legislation is Foremost—Abolition of Capital Punishment Recommended*, THE PARKER POST, June 5, 1915, <https://chroniclingamerica.loc.gov/lccn/sn95060922/1915-06-05/ed-1/seq-1/>, [<https://perma.cc/VX7Y-TAQG>].

58. *See Oh, This Miserable Fiasco!*, ARIZ. REPUBLICAN, July 31, 1915, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1915-07-31/ed-1/seq-4/> [<https://perma.cc/C5BR-TN2M>] (criticizing the reprieves of those sentenced to death and predicting that "outraged public opinion will compel their execution").

59. Legis. Hist., 1st Leg., 2d Spec. Sess. vol. 3 pt. 1, at 58 (Ariz. 1913), <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/34>.

60. *Id.*

rejected it by a 5–13 vote.⁶¹ Hughes had more success legislating other sanctioning reforms,⁶² notably a mandatory indeterminate sentencing law with parole principle. This reform was a part of the overall progressive project of rehabilitation and restoring individuals to be contributors to society. Hughes also put through a bill authorizing the purchase of a prison farm and legislation authorizing prisoners to work on public roads, highways, and bridges, rather than simply languishing in prison.⁶³ Hughes believed that Arizona’s future “bids fair to outstrip all the States of the Union . . . in the high and progressive character of its citizenship.”⁶⁴

Then, in the summer of 1915, House Representative Frank Pinkley floated a bill that would both abolish the death penalty and restrict executive pardons.⁶⁵ The provision would bar the pardon of a capital offender unless later developments demonstrated their innocence or disclosed mitigating circumstances not brought out at trial.⁶⁶ The legislation made it to the full House for a vote, but lost on the floor 12–1, with 5 members absent and 4 members excused.⁶⁷ Speculation arose that the absentees did not want to publicly commit themselves on the matter of the death penalty because the legislators were unsure of the position of their constituents, and hence evaded the roll call vote.⁶⁸

Most legislators silenced their attitudes toward capital punishment and followed the lead of vocal floor speakers to vote against anti-death-penalty legislation.⁶⁹ The floor speakers lamented Hunt’s use of execution reprieves to, as they argued, defeat the law.⁷⁰

It remained for Arizona residents to place the matter before the people at the general election in 1916.⁷¹

61. *Id.* at 61.

62. JO CONNORS, WHO’S WHO IN ARIZONA 368–69 (1913), <https://ia802803.us.archive.org/21/items/whoswhoinarizona00conn/whoswhoinarizona00conn.pdf> [<https://perma.cc/8HYB-YXL2>].

63. The founders’ push for a life sentence (with parole eligibility) replacement for the death penalty and for prison labor reflect their orientation toward rehabilitation and doing the least required to protect the public, rather than an endorsement of either practice per se. *Id.*

64. *Id.*

65. *Anti-Capital Punishment: House Debate*, ARIZ. REPUBLICAN, June 4, 1915, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1915-06-04/ed-1/seq-4/> [<https://perma.cc/ER42-SLPH>].

66. *Id.*

67. Legis. Hist., 2nd Leg., 2d Spec. Sess. vol. 4 pt. 3, at 27 (Ariz. 1915), <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/38>.

68. *Id.* at 26–27.

69. Legis. Hist., 1st Leg., 3d Spec. Sess. vol. 3 pt. 2 at 19, 25–30 (Ariz. 1913) <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/12>.

70. *Id.*

71. Legis. Hist., 2nd Leg., 2d Spec. Sess. vol. 4 pt. 3, at 28 (Ariz. 1915), <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/38>.

C. The Fourth Estate of the New State

As with many national publications⁷² between territorial days and the 1930s, newspapers in Arizona were political instruments. Political bias provided sustenance to publications headquartered in Phoenix. The town papers, in a city with more newspapers than it could support, received kickbacks in the form of government printing contracts.⁷³ Fortuitously perhaps, Phoenix happened to be the seat of three governments—city, county, and territorial.⁷⁴ Usually, the newspaper that supported the winning party could count on getting government printing contracts. These contracts provided substantial income and could mean the difference between surviving and finding other work.⁷⁵

In 1890, Arizona Territorial Governor Lewis Wolfley established *The Arizona Republican* (today's *Arizona Republic*) admittedly as an organ⁷⁶ of his new Republican Administration, serving as his political arm and catering to business interests. In the year following statehood, the structure of local government (and the intertwined Republican press) changed when Phoenix voters, intent on maintaining a progressive image, approved the adoption of the commission–city manager form of administration.⁷⁷ Considered an efficient, businesslike approach to the management of city affairs, the utilization of this structural reform was widespread in the smaller U.S. cities by the time of World War I.

The business elite that helped bring the commission–manager form of government to Phoenix wished to create the image of a “civilized city”⁷⁸ by establishing symbols of urbanism. The elite also promoted and supported schools, and churches, libraries and theaters, and other sources of “refinement.”⁷⁹ The women of Phoenix joined in the effort and sometimes led the way; the goal of the Phoenix Women’s Club during this period was the “stimulation of culture” in the

72. See William H. Lyon, “Live, Active Men, With Plenty of ‘Push’”: Arizona’s Territorial Immigration Commissioners, 37 J. ARIZ. HIST. 149, 155–56 (1996); Scot Wrighton & Earl Zarbin, *Lewis Wolfley, Territorial Politics, and the Founding of “The Arizona Republican,”* 31 J. ARIZ. HIST. 307, 307 (1990) (explaining that *The Arizona Republican* “appeared to be little more than another quarrelsome journal founded to serve narrow political ends” when “the new daily unleashed a vile exchange of personal journalism and heated up the already vigorous competition for advertising and subscription dollars in a town with more newspapers than it could reasonably support”).

73. Wrighton, *supra* note 72, at 322. (“Usually the newspaper that supported the winning party could count on getting government printing contracts. These contracts provided substantial income and could mean the difference between surviving and finding other work.”).

74. *Id.*

75. *Id.*

76. See Lyon, *supra* note 72, at 155–56 (“Following [President] Harrison’s election, the *Tucson Citizen* groomed itself to be the new [Republican] organ. It donned a new dress, spiffed up its format and type, and touted Lewis Wolfley for governor . . . Wolfley, however, had other designs. He established his own newspaper, the *Arizona Republican*, in Phoenix.”).

77. Bradford Luckingham, *Urban Development in Arizona: The Rise of Phoenix*, 22 J. ARIZ. HIST. 197, 202 (1981).

78. *Id.*

79. *Id.*

capital city.⁸⁰ As such, the desert hub played a vital role in bringing the “fruits of civilization” to Arizona. Local leaders, like Chicago transplant Dwight Heard, combining private interests with community interests, often directed local economic and cultural life with growth and development in mind. He invested in *The Arizona Republican* to exert a strong influence on politics and other aspects of life in Phoenix and Arizona.⁸¹

As a corollary, *The Arizona Republican*’s sentiments toward punishment were decidedly not progressive. Upon statehood, *The Arizona Republican* derisively characterized capital punishment opponents as “humanitarians,” “socialists,” and “anarchists.”⁸² On the opposite end of the political spectrum, in May 1913 *The Prescott Courier*, a Democratic newspaper, called Hunt “our humane, honorable and Christian governor.”⁸³

Soon, however, editorial boards at conservative and liberal newspapers were both shilling for a ballot initiative to end the debate between Hunt and legislators. *The Arizona Republican* wrote “[s]o may it be. Let the question of the abolition of the death penalty in Arizona be submitted to the people,” adding:

Let it be determined whether a majority of us regard a fiendish murder as a misfortune rather than a crime; whether the fiendish murderer is deserving of sympathy rather than censure; whether a majority of us would encourage rather than discourage murder. This matter will have to be settled in Arizona sometime, so that the earlier it is settled, the better.⁸⁴

In December 1915, as Hunt continued to delay executions and his constituents rallied petitioners, *The Arizona Republican* did an about-face and predicted that the people would vote for abolition in the 1916 election⁸⁵:

We have thought that if the law as it stands had been carried out from the time of the admission of Arizona to statehood, capital punishment would have been abolished by the people last fall if it had not been earlier abolished by a legislative act. We believe, now, that when the question is presented again, if the people shall be given opportunity to vote on a law that will as effectually remove murderers from society as to hang them does; if the power of pardon and parole shall be sufficiently restricted, and, if in the meantime the people are not further irritated by interference with the law as it stands, capital punishment will cease to be inflicted in this state. Taking human life

80. *Id.*

81. *Id.* at 202–03.

82. *Let This Thing Be Settled*, ARIZ. REPUBLICAN, Apr. 3, 1913, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1913-04-03/ed-1/seq-https://perma.cc/6N23-249H>].

83. Legis. Hist., 1st Leg., 3d Spec. Sess. Vol. 3 pt. 2, at 23 (Ariz. 1913), <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/12>.

84. *Let This Thing Be Settled*, *supra* note 82.

85. *That Event at Florence*, ARIZ. REPUBLICAN, Dec. 11, 1915, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1915-12-11/ed-1/seq-https://perma.cc/6QM2-GY5D>],

by process of law is repugnant to all right-thinking-people. It has been tolerated by them as a necessary evil.⁸⁶

And the founding people fulfilled that prediction at the ballot boxes, abolishing the death penalty.

D. The Founding People

The first generation of abolitionists may not have prevailed in the press or in the statehouse, but their actions outpowered both institutions. Anti-capital punishment advocates penned letters to the editor, tallied sentiment about abolition at town meetings, circulated petitions proposing to outlaw death sentences, signed enough of those petitions, and cast enough votes to enact the 1916 Arizona Abolition of Death Penalty Act.⁸⁷

One February 1913 letter to *The Parker Post* by Cibola resident A.D. Nelson reflects the progressive thinking that ultimately led to abolition.⁸⁸ He declared that society has “progressed in its views” on the impetus of crime—economic and social conditions—and recognized the inability of vengeance to stop it. As such, his conclusion was that capital punishment “makes sense as a deterrent only in barbaric minds.”⁸⁹ Nelson’s opinions on the respective places for retribution and rehabilitation resembled those of Hunt. He made the case that “there is good in all men, which under proper conditions can be brought to the surface,” and thus, if rehabilitation can help “a murderer to become again a useful member of society,” then what “availeth it to kill him because he killed someone else?”⁹⁰ In a note preceding Mr. Nelson’s letter, *The Parker Post* editors sympathized with some of his comments on prison reform but, in the same sentence, endorsed retaining the death penalty.⁹¹

This was but one example where the elite opinion did not reflect the voice of the people. Two years after Mr. Nelson penned his letter, a Williams County abolitionist at a parish house “Men’s Smoker” event dominated a debate over eliminating capital punishment.⁹² After an opponent presented his case, all attendees discussed the issue. At the end of the evening, the attendees voted in favor of abolishing the death penalty.⁹³

That same year, the State Federation of Labor, an influential lobbying group, particularly in the progressive circles that dominated the Constitutional

86. *Id.*

87. See John F. Galliher et al., *Abolition and Reinstatement of Capital Punishment During the Progressive Era and Early 20th Century*, 83 J. CRIM. L. & CRIMINOLOGY 538, 552 (1992).

88. *Capital Punishment*, PARKER POST, Feb. 22, 1913, at 2, <https://chroniclingamerica.loc.gov/lccn/sn95060922/1913-02-22/ed-1/seq-2/> [<https://perma.cc/7RCW-2XZ2>].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Men’s Smoker; Capital Punishment Discussed Vote, 23 For, 29 Against*, WILLIAMS NEWS, Feb. 11, 1915, <https://chroniclingamerica.loc.gov/lccn/sn82015761/1915-02-11/ed-1/seq-1/>, [<https://perma.cc/8MQW-2T7>].

93. *Id.*

Convention, backed abolition.⁹⁴ The Federation adopted a resolution to that effect, as well as a resolution that petitioned the Board of Pardons and Paroles to provide reprieve to condemned men at the State Prison until after the 1916 general election.⁹⁵

The question was finally put to the voters in the 1916 election. Over elite opposition in the legislature and the press, on November 17, 1916, Arizona voters narrowly abolished the death penalty.⁹⁶

E. The Reinstatement Period

After abolition, backlash from elite institutions was swift. The legislature, the press, and even the Arizona Supreme Court stoked fears about prisoners escaping jail or being released on parole, the threat of lynch law, and increased crime rates. As this debate was unfolding, a historic gunfight left three police officers dead.⁹⁷ Death penalty proponents exploited this opportunity to incite fear and shift the conversation on crime reduction away from progressive reforms and towards reinstatement of the death penalty.⁹⁸

The worries that instigated reinstatement in December 1918 largely mirror those that proponents of capital punishment cited before abolition. For example, immediately beneath Mr. Nelson's 1913 letter championing rehabilitation, *The Parker Post* republished an article published in *The Arizona Republican* reporting (unsubstantiated) estimates that life-termers were set free within 10 years.⁹⁹

The Arizona Supreme Court entered the political debate in its first post-abolition opinion that mentioned the referendum movement. The case before the Court involved prohibition, a different progressive project.¹⁰⁰ In resolving a narrow question about “the nature of the discretion” that a court had to grant bail pending appeal of a misdemeanor conviction, the Court suggested that abolishing capital punishment had left the courts powerless to detain murderers pending trial. The court suggested that because the “people of Arizona” had outlawed capital punishment, “all persons charged with the crime of murder,” or other offenses, may “demand admission to bail as a strict legal right, which no judge or court can properly

94. *Labor Wants Legislation*, ARIZ. REPUBLICAN, Oct. 6, 1915, at 3, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1915-10-06/ed-1/seq-3/>, [https://perma.cc/S75P-ANY4].

95. *Id.*

96. INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET, ARIZONA STATE LIBRARY 65 (1913), <https://azmemory.azlibrary.gov/digital/api/collection/statepubs/id/10522/download>. See also *Arizona Abolition of Death Penalty*, *supra* note 87.

97. WINSLOW MAIL, Feb 15, 1918, at 2, <https://chroniclingamerica.loc.gov/lccn/sn96060765/1918-02-15/ed-1/seq/> [https://perma.cc/2XUT-HW5N].

98. *Lessened Crime*, ARIZ. REPUBLICAN, Jan. 2, 1920, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1920-01-02/ed-1/seq-6/> [https://perma.cc/E93S-E2PW] (minimizing effects of prohibition on reduced homicides and calling for reinstatement).

99. *The Pardoning Power*, ARIZ. REPUBLICAN, Feb. 19, 1913, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1913-02-19/ed-1/seq-4/>, [https://perma.cc/Y2SK-WMUR].

100. *In re Welisch*, 163 P. 264, 264 (Ariz. 1917).

refuse.”¹⁰¹ The Court went further, suggesting that bail must be granted to defendants facing murder charges no matter how “diabolical or atrocious [the charge] may be, and howsoever evident may be the proof of guilt thereof.”¹⁰² The Court thus raised concerns that abolition necessarily entailed releasing known murderers before trial.

These concerns were unfounded and, in fact, contrary to the Court’s ruling in that very case. The Court was correct that in all non-capital cases a defendant had a right to demand that a judge *consider* bail. However, no defendant had an inexorable right to be released on bail. Indeed, the question in the case was resolved against the misdemeanant who had been denied bail pending appeal. The Court held that, absent “extraordinary” circumstances, it would be proper for a trial court to deny bail pending appeal.¹⁰³ That resolution is hard to square with the Court’s commentary on the consequences of eliminating capital punishment, but the Court’s commentary stands as another example of elite resistance to abolition of the death penalty that had been brought about by “[t]he people of Arizona.”¹⁰⁴

Simultaneously, press outlets exploited what they said was the first lynching in a generation to argue that abolition had unleashed this substitute means of vengeance.¹⁰⁵ Rather than let authorities hold a perpetrator of “cold-blooded murder” and “unspeakable outrage against woman” for safekeeping at the state prison, civilians disrupted his transport and hung him at a telephone pole.¹⁰⁶ *The Copper Camp* wrote that the maximum penalty under the law fell short “in the estimation of all right thinking people of what this wretch deserved.”¹⁰⁷ Instead of accurately reporting that the victim of this lynching would have, if convicted, likely faced life in prison, the paper placed blame for the lynching on what were, in its view, lenient laws: “As for the good people who deplore the fact that the mob took the law in its own hands we would say that there was no law in existence to fit the crime.”¹⁰⁸ Thus, *The Copper Camp* explicitly blamed Hunt for the lynching.¹⁰⁹ Indeed, editors across Arizona attributed the lynching to the “weakening of the state’s criminal law.”¹¹⁰

On top of concerns about released convicts and lynching, local papers strained to portray a violent crime boom, invoking misleading statistics to falsely

101. *Id.* at 265.

102. *Id.*

103. *Id.* at 267.

104. *Id.* at 265.

105. *Lynch Law in Arizona*, ARIZ. COPPER CAMP, May 12, 1917, at 2, <https://chroniclingamerica.loc.gov/lccn/sn95060578/1917-05-12/ed-1/seq-2/> [<https://perma.cc/K3WD-5YZH>].

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Lynching Due to Weakening of Criminal Law, Say Editors-Abolition of Capital Punishment through Efforts of Former Governor Blamed for Lynch Law*, ARIZ. COPPER CAMP, May 19, 1917, at 3, [https://chroniclingamerica.loc.gov/lccn/sn95060578/1917-05-19/ed-1/seq-/,](https://chroniclingamerica.loc.gov/lccn/sn95060578/1917-05-19/ed-1/seq-/) [<https://perma.cc/4A2K-DASP>].

connect abolition to rising crime rates. According to *The Arizona Republican*, homicides “of the most frightfully revolting character” increased within six months of the election.¹¹¹ More than twice the number of Maricopa County homicides were reported a year after abolition than reported during any other year, the *Mohave County Miner* echoed.¹¹²

The *Miner* also advocated for the death penalty as a means of preventing crime. The doubling of homicides “shows the necessity of capital punishment, not because of the likelihood of hanging a few measley [sic] criminals, but for the deterrent [sic] effect it will have on the criminal element.”¹¹³

During this time, brothers John and Tom Power, sons of a rancher in the Galiuro Mountains, recruited a paroled convict and attempted to evade the draft by killing federal officers in what became the deadliest shootout in Arizona.¹¹⁴ *The Winslow Mail* attributed the gun battle and other strife to the penal code change. “Arizona is still reaping the bitter fruits of the abolition of capital punishment. Three peace officers have been killed in cold blood . . . The crime of murder is more common than cattle stealing, and the state is being infested with thugs and outlaws to ply their criminal practices with the aid of guns.”¹¹⁵

The defendants were convicted of first-degree murder and received the most severe punishment remaining, a sentence of life in prison with the possibility of parole.¹¹⁶ Feelings ran so high over the murders that public sentiment shifted in favor of the death penalty.¹¹⁷ In the months that followed, people circulated petitions to place another initiative measure on the ballot in November 1918 that would reinstate the death penalty.¹¹⁸ The measure received wide support and repealed the 1916 Abolition of Death Penalty Act.¹¹⁹

The Arizona Republican had predicted this outcome in 1913. The editors posited that if people could be “assured that a life term would be a life term,” then

111. *Murder and Punishment*, ARIZ. REPUBLICAN, May 6, 1917, at 4, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1917-05-06/ed-1/seq-4/>, [https://perma.cc/4B57-RWFP].

112. *Murders Increasing in Arizona Since Abolition of Capital Punishment*, MOHAVE CNTY. MINER AND OUR MIN. WEALTH, Aug. 10, 1918, at 1, <https://chroniclingamerica.loc.gov/lccn/sn96060547/1918-08-10/ed-1/seq-1/> [https://perma.cc/F5CE-QXZM].

113. *Id.*

114. *See generally* Legis. Hist., 4th Leg. Reg. Sess. vol. 5 pt. 3, at 42–44 (Ariz. 1919), <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/16/>.

115. WINSLOW MAIL, Feb. 15, 1918, at 2, <https://chroniclingamerica.loc.gov/lccn/sn96060765/1918-02-15/ed-1/seq-at-2/>, [https://perma.cc/8SKU-K5XL].

116. Legis. Hist., 4th Leg. Reg. Sess. vol. 5 pt. 3, at 44 (Ariz. 1919), <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/16/>.

117. *Id.* at 45.

118. *Id.*

119. *Id.*

much of the opposition to abolition would abate.¹²⁰ And *The Arizona Republican* was correct, although it would be generations before life without parole was widely adopted as an alternative to the death penalty.

Today, public support for the death penalty plummets when survey subjects¹²¹ and juries¹²² are given an alternative option of life without the possibility of parole.¹²³ It plummets further when people learn that the typical profile of capital defendants includes severe mental illness, intellectual disabilities, post-traumatic stress disorder, traumatic brain injuries, or other significant impairments.¹²⁴ Jury instructions on parole ineligibility are obviating public safety concerns that had contributed to the reinstatement of capital punishment.¹²⁵

Further, in contrast to the elitist press's predictions about "lynch law" erupting in Arizona, sociologists have since observed that progressive-era abolition in Arizona and elsewhere at most provided a convenient rationalization for lynching and was not a cause of it.¹²⁶ Other studies published then and now show that lynching occurred regardless of whether capital punishment was in effect.¹²⁷

120. *The Pardoning Power*, ARIZ. REPUBLICAN, Feb. 19, 1913, at 4, <https://www.proquest.com/hnparizonarepublicanshell/docview/761857834/pageviewPDF/B9B300C64EF94C6APQ/1?accountid=8360> [<https://perma.cc/P6RQ-R5N7>].

121. *Ramdass v. Angelone*, 530 U.S. 156, 197 (2000) (Stevens, J., dissenting) ("General public support for the death penalty also plummets when the survey subjects are given the alternative of life without parole.").

122. *See Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring) (citing studies, and noting that "the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence"); *see also O'Dell v. Netherland*, 521 U.S. 151, 172 (1997) (Stevens, J., dissenting) ("[T]he decline in the number of death sentences has been attributed to the fact that juries in Virginia must now be informed of the life-without-parole alternative.").

123. *Ramdass*, 530 U.S. at 197.

124. Justice Research Group & Data for Progress, *The Modern American Death Penalty Is Massively Unpopular* at 2 (Feb. 17, 2022) <https://acrobat.adobe.com/link/review?uri=urn%3Aaaid%3Aascds%3AUS%3A48b7905d-a04b-39e4-92c1-508d39a63701#pageNum=1> [<https://perma.cc/S2SD-CANA>] (reporting that, e.g., 60% of voters oppose seeking death sentences for people with severe mental illness; 59% oppose for people with intellectual impairments; and 63% oppose for people with a traumatic brain injury).

125. *See generally* Galliher et al., *supra* note 87.

126. *Id.* at 575.

127. *Id.* (citing J.E. Cutler, *Capital Punishment and Lynching*, 29 ANNALS AM. ACAD. POL. & SOC. SCI. 182 (1907)); Charles David Phillips, *Exploring Relations Among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina, 1889-1918*, 21 L. & Soc. Rev. 361, 363 (1987); LOUIS P. MANSUR, RITES OF EXECUTION: CRIMINAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865 (1989)). Nineteenth century progressives opposed capital punishment generally and public executions specifically for reasons similar to their opposition to lynching. In both instances they were concerned with maintaining the rule of law without stoking public sentiment against politically unpopular groups. *Id.* The other premise of proponents of reinstatement—deterrence through execution—was questioned at the time and has been subject to contemporary criticism. John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment*,

And even the reporting on increased crime after abolition appears to be misguided. In at least some places, homicide rates fell.¹²⁸ Simultaneously, there was increased hate-based violence, including lynchings against labor activists and striking workers.¹²⁹ Thus, many bases for early support of the death penalty, pressed by opponents of the progressive goals of the founders, were built on false assumptions.

II. THE EARLY COURTS AND THE MEANING OF ARIZONA'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE

In 2008, state authorities placed minimum-security arrestee William Wright with a medium-security inmate in “Tent City,”¹³⁰ an outdoor, 100-degree jail, with questionable supervision and without air conditioning.¹³¹ Authorities denied Tent City habitans access to cigarettes or coffee and offered only “scanty and unappetizing” food.¹³² The state official who designed the policy of housing inmates in tents acknowledged that the heat made inmates irritable and tense.¹³³ The medium-security inmate, who had been convicted previously of aggravated assault, soon fractured Wright’s orbital bone.¹³⁴

Wright sued, arguing that the conditions violated his state and federal rights.¹³⁵ Instead of analyzing Wright’s claims independently and applying the original meaning of Arizona’s Constitution, an Arizona state court followed Eighth Amendment standards for “cruel and unusual punishments.”¹³⁶ Under the Eighth Amendment, incarcerated people who challenge prison or jail conditions—including inadequate food and medical care—must show that the jailer or warden acted with “deliberate indifference” to a risk of serious harm. Decades of experience have proven that this standard is nearly impossible to meet, even with compelling claims of horrific conditions.¹³⁷ In Wright’s case, the court concluded that the situation did not violate his rights because Tent City did not impose a “substantial risk of violence.”¹³⁸

America’s Death Penalty, and the Abolition Movement, 4 NW. J. L. & SOC. POL’Y 195, 311–12 (2009).

128. Clare V. McKanna Jr., *Alcohol, Handguns, and Homicide in the American West: A Tale of Three Counties, 1880-1920*, 26 W. HIST. Q. 455, 473 Fig. 5 (1995) (reporting drop in homicides in two counties and very little change in a third).

129. See Kathleen Belew, *Lynching and Power in the United States: Southern Western, and National Vigilante Violence*, 12 HIST. COMPASS 84, 96 (2014).

130. *Wright v. Maricopa Cty.*, No. 1 CA-CV 07-0493, 2008 Ariz. App. Unpub. LEXIS 781, at *10–14 (Ct. App. Apr. 29, 2008).

131. *Flanders v. Maricopa Cty.*, 54 P.3d 837, 841–42 (Ariz. Ct. App. 2002).

132. *Id.*

133. *Id.*

134. *Wright*, 2008 Ariz. App. Unpub. LEXIS at *3–4.

135. *Id.*

136. *Id.* at 10.

137. See Andrea Clare Armstrong, *No Prisoner Left Behind: Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL’Y REV. 435, 461 (2014) (describing PLRA restrictive requirements generally).

138. *Wright*, 2008 Ariz. App. Unpub. LEXIS at *10–14

In contrast, at the time of statehood, and decades before the U.S. Supreme Court held that the Eighth Amendment applies to the states, Arizona courts understood cruel and unusual punishment to mean “unreasonable and harsh treatment.”¹³⁹ This is just not a semantic difference. In 1925, for example, the Arizona Supreme Court concluded that placing convicted prisoner C.E. Howard alone in a basement with only bread and water for 30 days was “unreasonable and harsh treatment” that the Arizona Constitution did not tolerate.¹⁴⁰ This conclusion represented the aim of the state’s penal system at its founding. According to the 1925 Court, “our state at present adheres to the general policy, that while for the protection it is necessary to deprive the offender against its laws of his liberty for a greater or lesser period, yet such deprivation should be conducted as humanely as possible.”¹⁴¹ The ultimate goal of penalizing a prisoner was “restoring him as a useful citizen to society.”¹⁴² While Mr. Howard accepted his court sentence of seven to ten years in prison for perjury, he argued that, with such deleterious conditions, the warden imposed a more severe sentence than the one the judge issued. The Court agreed and held that the prison violated Howard’s right to basic human dignity, grounded in what it saw as two interwoven state rights to due process and freedom from excessive punishment:

From the Magna Carta down to our own Constitution (Article II, §§ 4 [Due Process], 15), with its reaffirmation that no person shall be deprived of life, liberty or property without due process of law, and that no cruel nor unusual punishment shall be inflicted, the rule is the same.¹⁴³

The Court held that incarceration under inhumane conditions amounts to the executive increasing the severity of the punishment, contrary to law.¹⁴⁴ By this standard, Tent City—which by design placed people in brutal, hostile conditions that would undermine rather than promote reform goals—likely ran afoul of the Arizona Constitution’s prohibition of cruel and unusual punishment. But despite this precedent that reflects the original meaning, the Court in Wright’s case never conducted this analysis.

In addition to restricting unreasonable and harsh treatment, there are other ways in which Arizona’s Cruel and Unusual Punishment Clause was originally

139. *Howard v. State*, 237 P. 203, 205 (Ariz. 1925). *Howard* was decided over three decades before the Supreme Court of the United States announced its seminal Eighth Amendment standard requiring that the meaning of the prohibition on cruel and unusual punishments “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

140. *Howard*, 237 P. at 205.

141. *Id.* at 204.

142. *Id.* (explaining that “our state at present adheres to the general policy, that . . . deprivation [of liberty] should be done as humanely as possible” and should be with the goal of “restoring [the inmate] as a useful citizen to society”).

143. *Id.*

144. *Id.* *Howard* was later overturned, not on the merits, but for the remedy it applied, using the contempt power to adjudicate whether confinement was cruel. *See Ridgway v. Superior Court*, 245 P.2d 268, 273–74 (Ariz. 1952) (holding that any violation was not “redressible [sic] by contempt” related to a court’s order sentencing a person to confinement).

understood to provide more robust legal protections than what the Eighth Amendment provides today. In particular, Founding-era courts also recognized a right to an individualized sentence¹⁴⁵ and a right to bail.¹⁴⁶ For example, some 70 years ago, a bail set at \$75,000 for Charles Gusick's sodomy charge and the same sum for fellatio charges did not pass originalist muster.¹⁴⁷

Within the original meaning of Article II, § 15, "excessive" bail was that which "prevent[s] the prisoner from being admitted to bail."¹⁴⁸ In other words, the accused's ability to pay, based on his own financial circumstances and "the possession of friends able and willing to give bail for him," is one of the factors that courts must consider when fixing bail.¹⁴⁹ Further, Article II, § 15 prohibits denying bail for the purpose of "punishing a person."¹⁵⁰ As such, the Arizona Supreme Court, in 1951, ordered a \$30,000 bail reduction for each of Mr. Gusick's charges and ordered his release.

By contrast, more recently, pretrial detainees have died because of dangerous jailhouse conditions that they faced only because they could not afford to make bail. In 2019, David Ray Maxwell,¹⁵¹ held on a \$7,500 bond,¹⁵² and Francisco Ruiz,¹⁵³ denied pretrial release on unrelated charges,¹⁵⁴ became unresponsive after Pima County Jail detention guards used force against each man. Ruiz had just been booked into a minimum-security facility when staff placed him in handcuffs and

145. State v. Harold, 246 P.2d 178, 183 (Ariz. 1952) ("It has been the practice of the courts of this state from statehood based upon sound principles that the trial judge in imposing a sentence for the violation of any criminal offense may and does take into consideration whether the defendant has been previously convicted of the same or similar offense. This is the very purpose of the indeterminate sentence.").

146. Gusick v. Boies, 233 P.2d 446, 447 (Ariz. 1951).

147. *Id.*

148. *Id.* at 448 (quoting *People ex rel. Sammons v. Snow*, 173 N.E. 8, 9 (Ill. 1930)).

149. *Id.*

150. *Id.* at 448.

151. See Danyelle Khmara & Shaq Davis, *Officials ID Tucson Jail Inmate Who Died After Fight with Corrections Officer*, ARIZ. DAILY STAR (Feb. 15, 2019), https://tucson.com/news/local/crime-and-courts/officials-id-tucson-jail-inmate-who-died-after-fight-with-corrections-officer/article_b70d990e-30b9-11e9-a905-93d4f6ba042f.html [<https://perma.cc/UHQ4-J2RX>].

152. *Pretrial Detention Should Not Be a Death Sentence*, TUCSON SECOND CHANCE CMTY. BAIL FUND (Sept. 30, 2020), <https://www.tucsonbailfund.org/pretrial-detention-should-not-be-a-death-sentence/> [<https://perma.cc/CET6-G4AZ>]; see also Andrea Craig Armstrong, *Prison Medical Deaths and Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 79, 82 (2022) (explaining that "the leading cause of death in carceral spaces (including jails and prisons) is medical illness.").

153. Dylan Smith, *Inmate Dead After 'Encounter' with Pima County Jail Guards*, TUCSON SENTINEL (Nov. 19, 2019), http://www.tucsonsentinel.com/local/report/111919_jail_death/inmate-dead-after-encounter-with-pima-county-jail-guards/ [<https://perma.cc/JWB9-C3CE>].

154. *For Immediate Release: Local activists claim recent jail deaths are linked to corruption, racism and a culture of violence in the Pima County Sheriff's Department*, TUCSON SECOND CHANCE CMTY. BAIL FUND (Sept. 30, 2020), <https://tucsonbailfund.org/for-immediate-release/> [<https://perma.cc/CZK8-MN9H>].

shackles to evaluate him for “acting strangely.”¹⁵⁵ Maxwell had spent more than a year in jail awaiting trial.¹⁵⁶ Soon after, seventy-six-year-old Ricardo Sena Pascual III was detained in the same facility on a \$7,500 bond.¹⁵⁷ He was found unresponsive by guards making their rounds.

When Mr. Gusick, in 1951, was unable to afford bail and denied pretrial release, he did not die before his day in court, unlike the three recent pretrial detainees. The Court held that Mr. Gusick’s ability to pay must be considered—and robustly enforced—in setting bail in light of his individual circumstances.

This state of affairs exists in part because the current Arizona courts have too often failed to account for the original public meaning in assessing whether bail is appropriate in a given case, as affirmed in Mr. Gusick’s case. For example, the Arizona Court of Appeals held that the federal and state Due Process Clauses did not require a defendant to be competent at the time of his bail hearing,¹⁵⁸ despite the repeated emphasis the founders placed on the importance of bail.¹⁵⁹ Moreover, the modern Arizona courts have not read Arizona’s bail provisions in harmony with the other limitations on punishment that the founders imposed.¹⁶⁰

Early decisions from the Arizona Supreme Court recognized that an individualized determination at sentencing “has been the practice of the courts of this state from statehood.”¹⁶¹ The context for that particular observation was explicating “the purpose of the indeterminate sentence,” a legislative practice that has since been supplanted.¹⁶² But the historical practice at the founding was to provide a sentence that was “graduated and proportioned to” both the offender and the offense.¹⁶³

In keeping with the founders’ understanding of “cruel” and “excessive,” John C. Phillips, a founding sentencing judge (who later became a legislator and

155. Melissa Egan, *Inmate Described As ‘Combative’ Before Death at Pima County Jail*, KOLD (Nov. 27, 2019), <https://www.kold.com/2019/11/28/report-inmate-described-combative-before-death-pima-county-jail/> [https://perma.cc/CET6-G4AZ].

156. Khmara & Davis, *supra* note 151.

157. Dylan Smith, *Inmate Found Dead in Pima County Jail Cell*, TUCSON SENTINEL (Oct. 19, 2020) https://www.tucson sentinel.com/local/report/101920_inmate_death/inmate-found-dead-pima-county-jail-cell/ [https://perma.cc/AY9V-2W82].

158. Sills v. Coates, 506 P.3d 28, 30 (Ariz. Ct. App. 2022).

159. See ARIZ. CONST. art. II, §§ 15, 22. In other cases, where the courts have specifically addressed the limitations on pre-conviction detention imposed by the founders the Arizona courts have, time and again, struck down undue limitations on the availability of pre-trial release. See, e.g., Simpson v. Miller, 387 P.3d 1270, 1278–79 (Ariz. 2017) (holding unconstitutional under Article II, § 22 a statute the categorically eliminated bail for sex offenses against a minor because such offenses are not “inherently predictive of future dangerousness,” a required consideration under § 22).

160. See Khmara & Davis, *supra* note 151; see Smith, *supra* note 153; Smith, *supra* note 157.

161. State v. Harold, 246 P.2d 178, 183 (Ariz. 1952).

162. *Id.*

163. Weems v. United States, 217 U.S. 349, 367 (1910).

governor),¹⁶⁴ declared from the bench in 1913 that he opposed capital punishment.¹⁶⁵ Judge Phillips served as territorial probate judge from 1902 to 1912, and under the new statehood laws became the first Maricopa County Superior Court judge.¹⁶⁶ His 1913 protest of capital punishment followed a death sentence that, he said, the penal code forced him to impose on defendant William Faltin.¹⁶⁷ In denying Faltin's motion for a new trial,¹⁶⁸ Phillips remarked that "if he had ever felt a repugnance" to capital punishment before, "he certainly did at that moment."¹⁶⁹ And as described above, the judge's view would soon win the day with the founding generation, when voters in 1916 abolished capital punishment statewide.

But ever since the U.S. Supreme Court held in 1962 that the Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment, the Arizona Supreme Court has equated the meaning of Article II, § 15 to that of its federal counterpart¹⁷⁰ and refused to recognize the original meaning of cruel and unusual punishment.¹⁷¹ As we detail below, the Arizona Supreme Court has emphasized the importance of the views of the founders but failed to engage with what those views actually were.

III. THE CLAUSE AS PART OF THE WHOLE

Crucially, Arizona's Cruel and Unusual Punishment Clause does not exist in isolation. Rather, it must be read and understood in harmony with the entire text of the Constitution, particularly other clauses relating to criminal sanctions. The Arizona Supreme Court has tacitly endorsed this approach, and it is part and parcel

164. NATIONAL GOVERNORS ASSOCIATION, BIOGRAPHICAL DIRECTORY OF THE GOVERNORS OF THE UNITED STATES 1899-1978 (Robert Sobel & John Raimo eds., Meckler Books 1978), <https://www.nga.org/governor/john-c-phillips/> [<https://perma.cc/MU8Y-5GGF>].

165. *Faltin Dies on April 18-That Is Unless There Should Be Intervention-Sentenced Passed Upon the Murderer of Carl Peterson Yesterday Morning*, ARIZ. REPUBLICAN, Feb. 9, 1913, at 12, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1913-02-09/ed-1/seq-12/> [<https://perma.cc/AP9Q-939H>].

166. NATIONAL GOVERNORS ASSOCIATION, *supra* note 164,

167. *Faltin Dies*, *supra* note 166 ("[Judge Phillips took] occasion to say that he was opposed to capital punishment and if he had ever felt a repugnance to it before, he certainly did at that moment.").

168. *See Faltin v. State*, 151 P. 952, 955 (Ariz. 1915).

169. *See id.* (proceeding subsequent to "APPEAL from a judgment of the Superior Court of the County of Maricopa, J. C. Phillips, Judge. Affirmed.").

170. *See generally* Bradley N. Mumford, Comment, *Make It Mean Something: The Case for Broader Protection from Cruel and Unusual Punishment Under the Arizona Constitution*, 41 ARIZ. ST. L.J. 453, 460 (2009) ("Arizona courts have failed to affirmatively decide to what extent article II, section 15 of the Arizona Constitution differs, if at all, from the Eighth Amendment. Since the United States Supreme Court handed down *Solem*, the Arizona Supreme Court has been unable to improve on the complicated formula it received to evaluate claims of cruel and unusual punishment. It is easy to understand the difficulty, considering the vast amount of confusion and disagreement that existed even among the members of the United States Supreme Court.").

171. *See State v. Soto-Fong*, 474 P.3d 34, 44 (Ariz. 2020); *State v. Bush*, 423 P.3d 370, 393 (Ariz. 2018), *State v. Davis*, 79 P.3d 64, 67–68 (Ariz. 2003).

with textualism and originalism.¹⁷² Of course construing the same word used in separate provisions in similar ways is consistent with an originalist and textualist understanding of Arizona's Constitution.¹⁷³ But as Justice Scalia has noted, understanding a clause as part of the whole text requires more:¹⁷⁴ specifically, one constitutional provision can shed light on another, or the two can even be seen as "enhancing each other."¹⁷⁵ State courts regularly undertake this approach when construing topically related provisions of their respective constitutions. For example, Montana interprets its Cruel and Unusual Punishment Clause as enhanced by its provision guaranteeing human dignity, and other states have undertaken a similar approach in other contexts.¹⁷⁶

Arizona should be no exception. Consider Arizona's constitutional protections for children. The same progressive philosophy that informed Arizona's Cruel and Unusual Punishment Clause also led to a separate provision, Article XXII, § 16, that prohibited detaining youth with adult offenders and recognized the state's unique obligation to protect and rehabilitate even "so-called incorrigible" children. Simply following Eighth Amendment law in juvenile cases ignores this unique feature of Arizona's Constitution, with often brutal results.

In 1994, Angela Leeman was convicted of 13 counts of child abuse and two drug charges for conduct that occurred before she turned 18. Even though her abusive and much older adult "boyfriend" was charged as the principal, she received a much longer sentence that made her ineligible for release until she was 78 years old.¹⁷⁷ Ms. Leeman's case was but one of several in which the Arizona state courts affirmed similarly lengthy sentences for juvenile convictions.¹⁷⁸ In doing so, the courts have repeatedly declined to "extend" the protections of the Arizona Constitution beyond the minimum protections required by the Supreme Court of the

172. SCALIA, *supra* note 3, at 153 ("When construing the United States Constitution in *McCulloch v. Maryland*, Chief Justice John Marshall rightly called for 'a fair construction of the whole instrument.'").

173. See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999) ("In deploying [intratextualism], the interpreter tries to read a contested word or phrase that appears in the Constitution in light of another passage in the constitution featuring the same (or a very similar) word or phrase.").

174. SCALIA, *supra* note 3, at 153.

175. Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 Wisc. L. Rev. 1001, 1003 (2021).

176. See *Quigg v. Slaughter*, 154 P.3d 1217, 1223 (Mont. 2007); *State v. Keefe*, 478 P.3d 830, 843 (2021) (McGrath, C.J., concurring in part and dissenting in part) (explaining that Montana's constitutional protections for children should enhance the protections provided by its prohibition on cruel and unusual punishments); see also generally Williams, *supra* note 175, at 1002 (discussing cases of one state constitutional provision enhancing the protections provided by another).

177. Petition for Writ of Certiorari, at 3, *Leeman v. Arizona*, No. 18-1267, 2019 WL 1490167 (U.S. Mar. 29, 2019).

178. See *State v. Soto-Fong*, 474 P.3d 34, 44 (Ariz. 2020) (addressing several similarly situated defendants in a consolidated case).

United States.¹⁷⁹ But even in declining to “extend” Eighth Amendment protections in cases like *Ms. Leeman’s*, the Arizona state courts have minimized the extent of its protection. For example, even while acknowledging that juveniles cannot constitutionally be sentenced to life without parole unless they have committed murder, the Court has held that a term-of-years sentence that exceeds life expectancy for multiple offenses, even coming out of a single offense, does not violate the Eighth Amendment.¹⁸⁰

But moving in lockstep with the Eighth Amendment precedent in these cases—and holding that “cruel and unusual” in Arizona means nothing more—ignores the unique protections for children in the Arizona Constitution and why they exist. The Arizona framers presumed that any juvenile would reform in the care of the correctional system and insisted that such reform was the primary purpose of that system.¹⁸¹ Constitutional Convention delegates wrote Article XXII, § 16 (“Confinement of minor offenders”) to ensure it.¹⁸² Yuma County Delegate E.L. Short condemned the territorial system, which he felt failed to give “our boys and girls in this state” the “consideration” that their youth demanded.¹⁸³ At the time of the Convention, if a woman’s cell was not available in Yuma, juvenile defendants were placed in a corridor where they mingled with adult male prisoners.

After hearing of such “neglect,” delegates declared that legislative protections will never extend far enough to guard these children against harm. Thus, they cemented in the state Constitution protections for juvenile offenders beyond those provided in even the U.S. Constitution: “It shall be unlawful to confine any minor under the age of eighteen years, accused or convicted of crime, in the same section of any jail or prison in which adult prisoners are confined. Suitable quarters shall be prepared for the confinement of such minors.”¹⁸⁴ To applause, Maricopa County Delegate F.A. Jones said that the provision will operate as “a declaration of the rights of the children.”¹⁸⁵

Upon statehood, Hunt emphasized in his first message to the legislature the state’s constitutional obligation to care for the “so-called incorrigible” children of the state: “The constitution, among its many splendid provisions, has few better than that one which throws a protecting arm about dependent, neglected, incorrigible or delinquent children, and children accused of crime, under the age of eighteen

179. *State v. Valencia*, No. 2 CA-CR 2019-0207, 2020 Ariz. App. Unpub. LEXIS 854, at *11 n.1 (Ct. App. Aug. 14, 2020) (“Valencia alternatively argues we should extend the protections of the Arizona Constitution beyond those of the Eighth Amendment. But as we have repeatedly noted our supreme court has declined to do so.”) (internal citations omitted).

180. *Soto-Fong*, 474 P.3d at 45.

181. JOURNALS OF THE CONSTITUTIONAL CONVENTION OF ARIZONA AS PROVIDED FOR BY THE ENABLING ACT OF CONGRESS APPROVED JUNE 20, 1910, 272 (Cronin ed., State Law and Legislative Reference Library 1925).

182. *Id.* at 274.

183. *Id.*

184. ARIZ. CONST. art. XXII, §16.

185. JOURNAL, *supra* note 181.

years.”¹⁸⁶ Hunt made it explicit that, under the Constitution, the state criminal system would not treat youth in ways similar to adults. Instead, the state’s Constitution demanded that the state provide a “shield” between “the young boys and girls whose unhappy environment, parentage or misfortune” and the “heartlessness of a system containing no thought of humanity.”¹⁸⁷ That differential treatment was in service of the view that “few children are naturally criminal, even though they may have committed some criminal act, but I am convinced that many are made criminals, in legal parlance, by due process of law.”¹⁸⁸

Hunt’s and the other framers’ understanding of the juvenile detention provision is essential to understanding Article II, § 15. The state Cruel and Unusual Punishment Clause must be interpreted in harmony with the entire text of the state Constitution, the Clause as part of the whole. This is in part because the same philosophy of criminal punishment that animated the clause to protect children supported the prohibition of cruel and unusual punishment.¹⁸⁹ Indeed, early Arizona Supreme Court decisions applied this principle to construe the meanings of “cruel and unusual,” “punishment,” and “bail,” and the founding-era views on other provisions of the Constitution clarify the scope of Article II, § 15’s limitations on extreme sanction.

A. Article XXII, § 22, *Judgments of Death*

In the summer of 2021, the Arizona Department of Corrections was deliberating whether to use a lethal injection or the gas chamber to execute Frank Atwood and Clarence Dixon.¹⁹⁰ As the state prepared to kill Atwood and Dixon, it became public that the Department of Corrections had obtained the same lethal gas used by the German government to exterminate Jews in gas chambers.¹⁹¹ After World War II, the International Military Tribunal convicted the gas chamber

186. George W. P. Hunt, Governor, *Message of Governor Geo. W. P. Hunt to the First Legislature of Arizona*, ARIZ. REPUBLICAN, Mar. 19, 1912, at 2, <https://chroniclingamerica.loc.gov/lccn/sn84020558/1912-03-19/ed-1/seq-10.pdf>; see also Legis. Hist., 1st Leg., 1st Reg. Sess. Vol. 1 at 68 (Ariz. 1912), <https://azmemory.azlibrary.gov/digital/collection/p17220coll18/id/17>.

187. Hunt, *supra* note 186. See also Legis. Hist., 1st Leg., *supra* note 186.

188. Hunt, *supra* note 45; see also Legis. Hist., 1st Leg., *supra* note 186.

189. SCALIA, *supra* note 3, at 153 (“When construing the United States Constitution in *McCulloch v. Maryland*, Chief Justice John Marshall rightly called for “a fair construction of the whole instrument.”).

190. Robert Anglen, *Lawyers: State Botched Purchase of Gas Chamber Chemical in Effort to Resume Executions*, ARIZ. REPUBLIC (June 4, 2021), <https://www.azcentral.com/story/news/local/arizona-investigations/2021/06/04/arizona-supplies-death-penalty-gas-drug-called-into-question/7535904002/> [<https://perma.cc/3EX4-WQW3>] (“Nearly 30 years after Arizona voters abolished the gas chamber, the Department of Corrections is buying supplies to make poison gas and preparing to execute death row inmates.”).

191. Christine Hauser, *Outrage Greets Report of Arizona Plan to Use “Holocaust Gas” in Executions*, N.Y. TIMES (June 2, 2021), <https://www.nytimes.com/2021/06/02/us/arizona-zyklon-b-gas-chamber.html> [<https://perma.cc/R5GE-TLDD>].

architects of war crimes.¹⁹² Other concerns have focused on long and gruesome executions and the state's admitted purchase of spoiled chemicals. Arizona officials maintained that they were fulfilling "constitutional obligations" by preparing to execute these men in this fashion.¹⁹³

The officials may have misspoken. Nowhere does the Arizona Constitution obligate the state to carry out any form of execution. Perhaps they were referencing a *legislative* obligation, imposed via state statute. If they really did mean "constitutional," perhaps they meant to invoke Article XXII, § 22, which contains the phrases "lethal injection" and "lethal gas," under the subtitle "Judgments of Death." But a closer look at the history and construction of that *constitutional* clause belies a conclusion that it or any constitutional provision requires capital punishment.

First, the original Arizona Constitution did not contain those phrases, nor did it explicitly mention capital punishment,¹⁹⁴ or include any similar wording. Second, the people of Arizona added the "Judgments of Death" Clause (Article XXII § 22) through a 1933 referendum to minimize any anguish after the state made mistakes identical to those of the 2021 Department of Corrections.¹⁹⁵ The amendment and a subsequent 1992 revision aimed to mitigate the harshness of the death penalty statute, as reflected by the historical record and contemporaneous case law.

Upon reinstatement of capital punishment in 1918, the method of execution was hanging. In 1930, Eva Dugan was decapitated under her own weight when the Department of Corrections caused her long drop from the gallows.¹⁹⁶ This execution generated revulsion so widespread that Hunt—still a death penalty opponent—asked

192. Matthew Lippman, *Genocide: The Trial of Adolf Eichmann and the Quest for Global Justice*, 8 BUFF. HUM. RTS. L. REV. 45, 105 (2002).

193. Anglen, *supra* note 190. The State of Arizona executed Clarence Dixon on May 11, 2022, and Frank Atwood on June 8, 2022. DEATH PENALTY INFORMATION CENTER, *Executions Database*, <https://deathpenaltyinfo.org/executions/execution-database?sort=dateString/asc&page=31> [https://perma.cc/5E6S-2GCF; https://perma.cc/9A6R-GLF4].

194. To be sure, the constitution as originally drafted made reference to rights that must be honored before the state deprive its citizen of life. ARIZ. CONST. art. II, § 4. But, as others have explained, "there is no reason to suppose that [conferring these rights] somehow nullifies other constitutional prohibitions—most importantly, the ban on cruel and unusual punishment." Joseph Blocher, *The Death Penalty and the Fifth Amendment*, 111 NW. U. L. REV. 275, 278 (2016).

195. ARIZONA OFFICE OF SECRETARY OF STATE, STATE OF ARIZONA INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 4 (1933), <https://azmemory.azlibrary.gov/digital/collection/statepubs/id/10758> (proposing amendment to the constitution to provide for lethal gas as the method of carrying out judgments of death).

196. *Campaign Against Capital Punishment*, COOLIDGE EXAM'R., Apr. 18, 1930, at 3, <https://chroniclingamerica.loc.gov/lccn/sn94050542/1930-04-18/ed-1/seq-3/> [https://perma.cc/8W9B-V6ZR] ("More interest in the abolition of the death penalty has been created since the execution of Eva Dugan, the only woman to be legally hanged in the state.").

the legislature to enact a means of capital punishment less barbarous and revolting than hanging.¹⁹⁷

Through the 1933 ballot initiative, the people replaced the gallows with lethal gas. In preparing to perform the first execution by lethal gas, the warden of the state penitentiary said that the gas chamber is “quicker and more humane” than Arizona’s old gallows.¹⁹⁸

The courts made similar observations. In *Hernandez v. State*, the first judicial interpretation of the lethal gas provision, the 1934 Court observed that gas had been “used for years by dental surgeons for the purpose of extracting teeth painlessly.”¹⁹⁹ As such, the Court reasoned that the use of gas is “more humane and less barbarous than hanging” as well as “less painful and more humane than hangings.”²⁰⁰

The public realized this was not so in 1992, during the first gas chamber execution since the end of World War II.²⁰¹ The death of condemned man Donald Eugene Harding²⁰² lasted eleven painful, convulsion-wracked minutes and shocked many Arizonans.²⁰³ The people quickly sought to codify an alternative mechanism for carrying out the death penalty statute. In response, the editorial board of the *Arizona Daily Star* endorsed a 1992 ballot amendment under the headline, “Bring a bit of mercy to brutal death penalty.”²⁰⁴ At the time, science persuaded the people and courts²⁰⁵ that lethal injection was “the most merciful method”²⁰⁶ of execution possible. The amendment passed overwhelmingly, by a vote of 1,040,535 to

197. Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 440 n.776 (1997) (“In 1930, Eva Dugan was decapitated when she was hanged because of her 250-pound weight and the length of the drop. As a result, revulsion was so widespread and great that Governor George W. P. Hunt asked the legislature to find a means to enact the death penalty less barbarous and revolting than the one used at present. Accordingly, Arizona’s switch to lethal gas in 1933 was on the ground that lethal gas was more humane.”) (cleaned up quotation).

198. *Shaughnessy And 2 Others to Die By Gas Next Month*, NOGALES INT’L., June 23, 1994, at 1, <https://chroniclingamerica.loc.gov/lccn/sn96060774/1934-06-23/ed-1/seq-1/>, [<https://perma.cc/HR84-49F5>] (“The new squat, white, two-seated death house has never been used save in experiments on animals The gas chamber, Warden Walker says, is far superior to Arizona’s old gallows. Death, he claims, is quicker and more humane.”).

199. *Hernandez v. State*, 32 P.2d 18, 25 (Ariz. 1934).

200. *Id.* at 24.

201. Editorial Board, *Proposition 103 — Bring A Bit of Mercy to Brutal Death Penalty*, ARIZ. DAILY STAR at 12 (Oct. 13, 1992).

202. Chris Limberis, *1st Execution in State Since Nears — As Lawyers Appeal, Debate Is Renewed*, ARIZ DAILY STAR, Feb. 24, 1992, at 13 (describing first lethal gas execution having “renewed debate over capital punishment” and reporting on proposed legislation to move from lethal gas to lethal injection).

203. *A Bit of Mercy*, *supra* note 201.

204. *Id.*

205. *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602, 610 (1995) (“[M]edical experts urge that death by lethal injection is the most humane of any method of execution.”).

206. *A Bit of Mercy*, *supra* note 201.

314,919.²⁰⁷ The revision²⁰⁸ required the use of lethal injection for any future execution and provided an option of gas or injection for any future execution of an inmate sentenced before 1992.²⁰⁹

As the original meaning of the “Judgments of Death” section reflects, it is directed at making punishment in the state less cruel. And nothing about that provision necessitates a conclusion that the state Cruel and Unusual Punishment Clause would not bar execution.²¹⁰ Far from reinforcing the constitutionality of capital punishment, this Clause is an effort to bring some mercy into the Constitution after vested elite interests reinstated the death penalty. It is far more a step toward abolition than a rejection of it. At a minimum, therefore, it cannot be used to argue that capital punishment is not itself “cruel,” and it should also infuse the “Cruel and Unusual” Clause with some idea of mercy.

B. Article II, the Declaration of Rights

Against Larry Wayne’s will, Maricopa County corrections staff regularly administered a paralyzing drug with tormenting side effects to manage his behavior.²¹¹ No court authorized the medication. No emergency required sedation. The Arizona Supreme Court, in the 1986 decision *Large v. Superior Court*, likened these chemical restraints to the “shackles of old.”²¹² The Court read the state Constitution’s due process protections in Article II, § 4 of the Declaration together with the Declaration’s Article II, § 16 prohibition on a conviction “work[ing] corruption of blood” to hold that such punishment is unconstitutional.²¹³ Although Arizona’s “corruption of blood” provision bears “some resemblance to” its federal counterpart in Article III, § 3 of the U.S. Constitution, it is “more expansive” than that provision. Like the federal prohibition, it rejects the “idea that children must atone for the sins of their parents.”²¹⁴ But Arizona’s provision goes further, preventing as a general matter, a person from forfeiting property to the state by virtue of having committed a crime.²¹⁵ As described below, the Arizona courts have

207. ARIZONA OFFICE OF SECRETARY OF STATE, STATE OF ARIZONA INITIATIVE AND REFERENDUM PUBLICITY PAMPHLET 16 (1992) (describing change from lethal gas to lethal injection for carrying out judgments of death).

208. LESHY, *supra* note 11, at 432 (noting that, in 1992, this section was amended to its current form, substituting lethal injection for lethal gas and adding the second sentence and the caption; the third sentence was the second sentence in the 1933 version).

209. *State v. Hinchey*, 890 P.2d 602, 610 (1995) (“In all events,” a prisoner has “the option of choosing death by lethal gas.”).

210. This is further demonstrated by other states having held the death penalty to be unconstitutional even though their respective constitutions similarly refer to the existence of capital punishment. Blocher, *supra* note 194, at 278 (citing state constitutional doctrine in other jurisdictions).

211. *Large v. Superior Court*, 714 P.2d 399, 406 (Ariz. 1986).

212. *Id.*

213. *Id.*; see also ARIZ. CONST. art. II, § 4 (“No person shall be deprived of life, liberty, or property without due process of law.”); ARIZ. CONST. art. II, § 16 (“No conviction shall work corruption of blood, or forfeiture of estate.”).

214. LESHY, *supra* note 11, at 80.

215. *Id.*

explained that this provision limits the state's power to impose harsh conditions of confinement.

In *Large*, the Court explained that although the legislature has the power to punish and incarcerate those convicted of crimes, it lacks the power to “immobilize and warehouse prisoners by using chemicals with known adverse consequences, only to release them—possibly severely impaired—at the end of their sentence.”²¹⁶ The Court concluded that “[s]uch an Orwellian result is not permitted by our state constitution.”²¹⁷ This decision relied in part on *Howard*, the 1925 decision holding that the state's Cruel and Unusual Clause prohibits corrections officials from increasing the severity of sentences through needlessly harsh conditions. The Court explained that the person's status as a prisoner did not diminish his right to be free from arbitrary chemical restraint.²¹⁸

Howard's treatment of the interaction of the ban on “corruption of blood” and the Cruel and Unusual Punishment Clause provides additional insights into the Clause's original meaning. There, the Court addressed whether it was constitutional to be confined to “a dark cell or dungeon and for thirty days fed on bread and water.”²¹⁹

To answer that question, the Court turned to the “history of penal legislation of the last hundred years in the United States, and particularly the last generation in Arizona.”²²⁰ Interpreting the state's Constitution, the Court concluded that “our state at present adheres to the general policy, that while for the protection it is necessary to deprive the offender against its laws of his liberty for a greater or lesser period, yet such deprivation should be conducted as humanely as possible.”²²¹ The ultimate goal of that deprivation is “restoring him as a useful citizen to society.”²²²

Founding-era views of the right to bail under Article II, § 22, “Bailable offenses” also illuminate the scope of protections provided by the ban on cruel and unusual punishment. This provision of the Declaration contains more details than the Article II, § 15 prohibition on “excessive bail.”²²³ The founding generation's inclusion of not one but two provisions prohibiting the use of bail as a punishment signifies an emphasis on freedom from undue confinement.²²⁴

In a 1913 case, the Arizona Supreme Court considered whether it was constitutional to hold Roy Haigler without bail on a first-degree murder charge.²²⁵ In an opinion written by a delegate to the Constitutional Convention in the first year of statehood, the Court explained that granting bail is “the rule and the refusal of it

216. *Large*, 714 P.2d at 409.

217. *Id.*

218. *Id.* at 406 (citing *Howard v. State*, 237 P. 203, 204 (Ariz. 1925)).

219. *Howard*, 237 P. at 203.

220. *Id.* at 204.

221. *Id.*

222. *Id.*

223. LESHY, *supra* note 11, at 88.

224. *Id.*

225. *In re Haigler*, 137 P. 423, 424 (Ariz. 1913).

is the exception.”²²⁶ The Court explained that the bail right existed to prevent a person accused of a crime from being “punished by imprisonment previous to his conviction.”²²⁷ The Court required trial courts to presume innocence and remember that “to grant bail is the rule and the refusal of it is the exception [because] the law in its mercy so commands.”²²⁸

In *Haigler*, as in other early decisions, the Court checked the power of the executive branch to “punish” by seeking out the meaning of the word in restrictions on state conduct related to the Cruel and Unusual Punishment Clause.²²⁹

Thus, the founders were clear that the clauses of the constitution should be read in conjunction with one another to give each clause meaning. What process may be due and what punishments prohibited should be informed by the repeated protection of minors in other parts of the document. What pretrial confinement conditions run afoul of the Cruel and Unusual Punishment Clause should be informed by the limitations on refusing bail. These textual signals—all contained within the same document—are powerful tools for understanding the scope of Arizona’s constitutional limitations on punishment.

CONCLUSION

The founding-era views on cruel and unusual punishment and related constitutional protections provide fertile ground for developing state constitutional doctrines limiting extreme sanction and the administration of Arizona’s criminal law. Such a vision would draw on the widely held founding view that the purpose of punishment is reform and returning to society for those convicted of crimes. And although it would mark a departure from the state’s current understanding of the Cruel and Unusual Punishment Clause, this reorientation would be explicitly originalist in its approach. Twentieth century progressives dominated the Arizona Constitutional Convention and infused Arizona’s founding document with progressive ideals, including about limitations on punishments and the purposes of them. The founding generation—through the people themselves, through their seven-term progressive governor, and through the decisions of the judiciary—gave those limitations meaning in ways that remain salient today.

Indeed, as the state resumed executions in May 2022—and will perhaps soon undertake very many of them²³⁰—the original public meaning may have

226. *Id.*

227. *Id.*

228. *Id.*

229. Although beyond the scope of this paper, more recent reforms to the Constitution vest additional power to the courts to ensure the procedural fairness in the administration of the law, including in criminal cases. *See, e.g.*, *State v. Reed*, 456 P.3d 453, 458 (Ariz. 2020) (The “constitution defines who is entitled to appeal—’the accused’—and the legislature lacks authority to redefine who may exercise this right.”). At least in the context of these amendments, modern courts should feel *more* empowered to act than their founding-era counterparts.

230. Editorial, *Arizona’s Attorney General Wants to Finish His Term with a Rush of Executions*, L.A. TIMES (Apr. 12, 2021), <https://www.latimes.com/opinion/story/2021-04->

bearing on a wide range of issues including a person's competency to be executed,²³¹ whether leaving a person under a sentence of death for decades is cruel and unusual,²³² and the constitutionality of the death penalty in and of itself.²³³ As described above, the Arizona courts have declined to chart a course different from their federal counterparts on each of these issues.

The Arizona courts have also declined to develop independent state constitutional doctrines related to other severe sentences. This is so with regards to proportionality determinations of lengthy sentences for adult conduct,²³⁴ sentences for criminal conduct by juveniles,²³⁵ and whether a fine is excessive.²³⁶ And although Arizona applies a separate bail provision and related test, the resulting pre-trial detentions do not differ from what would obtain under federal law.²³⁷

An Arizona originalism, grounded in the meaning of the state Constitution at the time of its enactment and elucidated by related text in the founding document, might produce substantially different outcomes on each of these scores. Bail would be only for the purpose of securing a person's presence and ensuring community safety, would be available to the rich and indigent alike, and would not in purpose or effect impose punishment prior to a conviction absent compelling evidence of guilt. Punishments would be scrutinized for whether they promote the rehabilitative ideals embodied in twentieth century progressivism. Sentences that wholly forego hope of rehabilitation—death in prison, whether by length of sentence or execution—would be closely scrutinized and only permitted in the narrowest of cases, if at all. Prison conditions that inflict needless suffering would be required to give way to conditions that enable growth and reform.

But whatever the outcomes, Arizona's constitutional history calls out for the development of an independent state constitutional doctrine limiting extreme sanction.

12/arizona-death-penalty-brnovich-barr-trump [https://perma.cc/NM7K-P4EM] (describing the Attorney General's intention to execute 21 people before leaving office in January 2023); see Jimmy Jenkins et al., *Arizona Executes Frank Atwood for Murder of Vicki Lynne Hoskinson*, ARIZ. REPUBLIC (June 8, 2022), <https://www.azcentral.com/story/news/local/arizona/2022/06/08/frank-atwood-execution-arizona-vicki-lynne-hoskinson-murder/7547656001/> [https://perma.cc/8GH3-LYLV] (reporting execution of Frank Atwood and noting recent execution of Clarence Dixon).

231. See *Panetti v. Quarterman*, 551 U.S. 930, 957 (2007).

232. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., dissenting).

233. *State v. Bush*, 423 P.3d 370, 392–93 (Ariz. 2018).

234. See *State v. DePiano*, 926 P.2d 494, 496–97 (Ariz. 1996).

235. See *State v. Soto-Fong*, 474 P.3d 34, 44 (Ariz. 2020).

236. See *State v. Russo*, 196 P.3d 826, 831 (Ariz. 2008).

237. See *supra* notes 140–153 and accompanying text.