Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROEXPLO *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

No. 05–7. Argued March 16, 2018—Decided March 20, 2018

On August 2, 2017, the Department of Justice began investigating RoExplo for multiple instances of murder and attempted murder. Soon, they decided to prosecute him and he was convicted on all charges. The District Court sentenced him to a 150-day (or five month) prison term, for the duration of which he would be subject to an arrest warrant.

Held: The 150-day sentence did not violate the Eighth Amendment, as construed in *CodyGamer100* v. *United States*, 2 U. S. 18, and was accordingly upheld by the Court. Pp. 28–29.

(a) The Court's interpretation of the Eighth Amendment "must be firmly rooted in the original public meaning it carried at the time of its adoption." Pp. 1–2.

(b) As originally understood, the Eighth Amendment's prohibition on "cruel and unusual punishment" was targeted at cruel innovations in punishment. That is, any entirely new punishment (or application of one), or one which fell out of use and was reintroduced, that—in the case of an application—is "incredibly severe" and "clearly out of proportion" such that it "shocks public sentiment and violates the judgment of reasonable people"; or—in the case of a mode of punishment—is "destitute of pity, compassion or kindness and has a separate tormenting element." Pp. 3–27.

(c) The *CodyGamer100* rule against permanent exclusion as punishment for common crime is consistent with the original public understanding of the Eighth Amendment. Pp. 27–28.

(d) A five-month sentence does not amount to "permanent exclusion" as contemplated in *CodyGamer100* and RoExplo's challenge to his sentence under that case exclusively accordingly must fail. Pp. 28–29.

Syllabus

Because RoExplo only invoked *CodyGamer100*, the Court only measured his sentence against the standard of "permanent exclusion" which it found was valid under the Eighth Amendment's original meaning. It did not apply its test directly to RoExplo's sentence.

3:18-bR0kAk1W, affirmed.

HOLMES, C. J., delivered the opinion for a unanimous Court. BORK, J., filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

No. 05–7

ROEXPLO, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

[March 20, 2018]

CHIEF JUSTICE HOLMES delivered the opinion of the Court.

Our interpretation of the Eighth Amendment must be firmly rooted in the original public understanding it carried at the time of its adoption. Failing to do so risks creation of an "ineffectual and incoherent" line of decisions. Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677, 684 (2005). In the present case, petitioner RoExplo challenges his 150 day sentence for murder and attempted murder on the grounds that it violates our finding in *CodyGamer100* v. *United States*, 2 U. S. 18 (2017), that the punishment of "permanent exclusion" cannot be imposed for common offenses (such as murder and attempted murder). *Id.*, at 23. Before turning to the question of whether his 5 month sentence qualifies as "permanent exclusion," we must first determine whether the relatively new rule of law announced in *CodyGamer100* is consistent with the original public understanding of the Eighth Amendment.[1]

I

[1] What follows is an extensive analysis of the legal and drafting history of the Amendment aimed at identifying its original public meaning. Those only interested in a summary of our findings on this question should skip to page 27.

The terms of the Eighth Amendment appear straightforward: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In practice, however, that is not the case. Legal commentators from across the spectrum and several Justices have criticized this Court's approach to the Eighth Amendment for being contradictory, see *Walton* v. *Arizona*, 497 U. S. 639, 673 (1990) (opinion of Scalia, J.) ("*Woodson* and *Locket* are rationally irreconcilable with *Furman*"), a "mess,"[2] a "train wreck,"[3] and—in many cases—downright "embarrassing."[4] The cause has largely been the Court's long-time creed that "evolving standards of decency," and not original meaning, dictate the application of the Eighth Amendment. *Atkins* v. *Virginia*, 536 U. S. 304, 311 (2002). To avoid repeating that confusion and to produce expectancy, we begin with the original understanding. Our analysis should not be taken to cast doubt on long-standing precedent.

A

The original meaning of the word "unusual" in the Cruel and Unusual Punishments Clause has been largely overlooked in this Court's jurisprudence. This is true not just of the prevailing non-originalist approach but also of the originalist approach announced in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991). Both essentially ignore the word, either by treating it as meaningless, or as in the case of the latter, assigning it a weak meaning inconsistent with the history of the Clause. See, *e.g.*, *Trop* v. *Dulles*, 356 U. S. 86, 100 n. 32 (1958); *Harmelin*, *supra*, at 976 (1991) ("Wrenched

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[2] Tom Stacy, Cleaning Up the Eighth Amendment Mess, 14 Wm. & Mary Bill Rts. J. 475, 475 (2005).

[3] Benjamin Wittes, What Is "Cruel and Unusual"?, Pol'y Rev., Dec. 2005-Jan. 2006, at 15, 16.

[4] Robert Weisberg, Cruel and Unusual Jurisprudence, N.Y. Times, Mar. 4, 2005, at A2 1.

out of its common law context, and applied to the actions of a legislature, the word 'unusual' could hardly mean 'contrary to law.' But it continued to mean (as it continues to mean today) 'such as [does not] occu[r] in ordinary practice,' '[s]uch as is [not] in common use'") (citation omitted).[5] The result of this has been the transformation of the Cruel and Unusual Punishments Clause into a Cruel Punishments Clause, with the only difference between the originalist and non-originalist approach being the time-frame from which public opinion about cruelty is derived.

The meaning of the word "unusual" is crucial here. It cannot be presumed that it was intended to have no effect; we begin our analysis there because it necessarily informs the Clause's use of the word "cruel."

1

Unusual

In the seventeenth and eighteenth centuries, the term "unusual" had many of the meanings we currently attribute to it: "rare," "uncommon," "out of the ordinary." Oxford English Dictionary 249 (2d ed. 1989) (entry for "unusual"). The word also had a more specific meaning as a legal term of art: "contrary to long usage," or "immemorial usage." An analysis of seventeenth- and eighteenth-century legal and political history reveals that this last meaning is the *only* one plausibly attributed to the Eighth Amendment's Cruel and Unusual Punishments Clause.

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[5] The problem with *Harmelin*'s hypothesized original meaning of "unusual" is that it relies purely on abstract logic. After extensively analyzing the understanding of the term "unusual" during the drafting of the English Bill of Rights, the *Harmelin* Court—moving from seventeenth century England to eighteenth century America—abandons that meaning without attempting to discern whether the founding generation shared it. It then asserts a new meaning out of almost thin air and does not attempt to justify it, quickly moving on. We are not convinced by the *Harmelin* Court's proposed original meaning of "unusual."

Throughout the seventeenth and eighteenth centuries, in England and later America, the common law served as the primary (and most important) source of law. Blackstone explained it as the "first ground and corner stone of the laws of England." 4 William Blackstone, Commentaries (hereinafter Commentaries) at *73. Many today see the common law as a body of judge-made law where judges, acting in accordance with a voluminous framework of precedent, devise legal principles that apply to the changing circumstances of time. Common law judges, under that view, exercised a "legislative function," formulating legal rules, doctrine, and principles based on their views of "what is expedient for the community concerned." O.W. Holmes, Jr., The Common Law 35–36 (Boston, Little, Brown, & Co. 1881).

Practitioners of common law in the seventeenth and eighteenth centuries had a different perspective. Common law to them was not judge-made law, but rather the law of "long use" and "custom." Edward Coke, The Compleat Copyholder (1630) (hereinafter Copyholder) § 33, at 563, 563 ("Customes are defined to be a Law, or Right not written, which being established by long use, and the consent of our Ancestors, hath been, and is daily practised").[6] Judges at the time did not see themselves as arbiters of public policy or makers of law; rather, they saw it as their job to identify long-standing customary rules and apply them to new cases. See, *e.g.*, Grant Gilmore, The Ages of American Law

[6] Writings from as early as the fourteenth century express the belief that the common law is primarily a law of custom and long usage. See Thomas Usk, Testament of Love, bk. III, ch. 1, 11. 78–83 (R. Allen Shoaf ed., Medieval Inst. Pub. 1998) (c. 1380) ("But custome is a thyng that is accepted for right or for lawe, there as lawe and right faylen .... [C]ustome is of commen usage by length of tyme used, and custome nat writte is usage; and if it be writte, constitutyon it is ywritten and ycleped."); see also Oxford English Dictionary 167–68 (2d ed. 1989) (defining "custom" as "[a] habitual or usual practice; common way of acting; usage, fashion, habit (either of an individual or of a community)").

5–7 (1977). The common law depended on "long use and custom" as a source of normative and actual authority. 1 The Works of James Wilson 186 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) (hereinafter Wilson).

Both English and American legal thought regarded the terms "custom" and "long use" as being closely tied together as a matter of logic and grammar. Today we say that we "follow" a custom; in the seventeenth and eighteenth centuries they would "use" a custom. For example, Edward Coke wrote: "And note that no custome is to bee allowed, but such custome as hath bin used by title of prescription, that is to say, from time out of minde." 1 Edward Coke, Institutes of the Lawes of England (1608) (hereinafter Institutes) § 170, at 701. More than a century later, Blackstone wrote that "in our law the goodness of a custom depends upon [its] having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary." 1 Commentaries at *67. James Wilson, an American and among the drafters of the Constitution, wrote: "[L]ong customs, approved by the consent of those who use them, acquire the qualities of a law." Wilson 435–36.

Long usage's binding authority was applied to private parties as well as the government. For private parties, long usage identified rights and duties.[7] For the government, on the other hand, long usage was the basis and justification for state action, such as the imposition of a given punishment for a given crime.[8] Actions that comported with long usage, for example the customary rules of royal succession,

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[7] For example, where the tenant of a farm had continuously crossed another's land by "immemorial usage," that tenant developed a right of way across the land. See 2 Commentaries at *36.

[8] Blackstone explained that it was "ancient usage among the Goths" to punish murder by imposing a large fine (amercement) on the entire community where the murder occurred. 4 Commentaries at *195.

or the "usual course of descent," were said to be "usual." 1 Commentaries at *215. Following the same principle, actions that were contrary to long usage were described as "unusual." The Magna Carta disallowed the king from demanding an "unusual" fee for the issuance of a royal writ and a sheriff could be punished for holding a Torn in an "unusual" place. 3 Commentaries at *273; also 2 William Hawkins, A Treatise of the Pleas of the Crown 91 (John Curwood ed., London, S. Sweet 1824).

Americans in the late eighteenth and early nineteenth centuries similarly used the term "unusual" to refer to actions that were contrary to "long usage." In 1769, the Virginia House of Burgesses condemned Parliament's attempt to reinstate a long-defunct statute permitting trial of American protesters in England as "new, unusual, … unconstitutional and illegal." Journals of the House of Burgesses, 1766-1769, at 215 (John Pendleton Kennedy ed., 1906). The Declaration of Independence protested the recent English practice of convening colonial legislatures at "places unusual." The Declaration of Independence ¶ 6 (U.S. 1776). In 1788, George Mason worried that the lack of common law constraints in the new Constitution would enable Congress to create "new crimes, inflict unusual and severe punishments, and extend their powers." 2 The Records of the Federal Convention of 1787, at 637 (M. Farrand ed., 1911) (hereinafter Farrand). Patrick Henry similarly argued that absent common law constraint, the federal government would be a series of "new and unusual experiments." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, at 172 (Jonathan Elliott ed., Philadelphia, J. B. Lippincott & Co. 2d ed. 1881) (hereinafter Elliott's Debates).

These American examples are different from the cited English examples in that they utilize "unusual" to denote

government actions that were not just contrary to long usage, but also fundamentally unjust. How this connotation developed will be discussed soon.

Edward Coke is oft-cited as the most important common law jurist in English history. One scholar proclaimed that "Coke's works have been to the common law what Shakespeare has been to literature, and the King James Bible to religion." Allen D. Boyer, Introduction to Law, Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke xiii–xiv (Allen D. Boyer ed., 2004) (citing William Holdsworth). His writings on the common law, his judicial decisions, and his role in Parliament decisively shaped English thought about the nature and application of common law for centuries. Coke also heavily influenced American legal thought in the late eighteenth century.

Coke established several key principles that formed the common law basis invoked in the American Revolution as well as the drafting and adoption of the Bill of Rights. Pertinently, Coke argued the common law consisted of customary practices that enjoyed "long" or "immemorial usage," and were therefore inherently just and reasonable. Coke further argued that government actions that deviated from long usage—"unusual" actions—were dangerous and presumptively unjust. Lastly, Coke argued that acts of Parliament, and even the king, which deviated from fundamental common law principles were "void" because they contradicted "common right [and] reason." These principles helped set the terms of debate for the next 150 years, including in the American Revolution and drafting of the Bill of Rights.

In the seventeenth century, it was generally agreed that the foundation for law was an objectively real moral order that inhered in nature and was knowable by reason. See Harold J. Berman, The Origins of Historical Jurisprudence:

Coke, Selden, Hale, 103 Yale L.J. 1651, 1653 (1993) ("Natural law theory treats law essentially as the embodiment in rules and concepts of moral principles that are derived ultimately from reason and conscience"). Despite the law's unitary foundation, positive law was sourced from many places in England and sometimes conflicted: custom, statute, decisions of common law courts, civil law courts, etc. See Sir John Baker, The Common Lawyers and the Chancery: 1616, at 254–55. The question then was what should be done when there is conflict between royal will, common law, and statutory law. More generally, how was one to distinguish genuine law—law that conforms to basic principles of justice—from mere "violence?"[9]

This question would not truly be answered until nearly a century and a half after Coke's death. Nonetheless, he set forth the basic principles for solving the problem, in a manner that would be highly influential on the development of the English and American constitutions (one unwritten, one codified). His principles would have particular relevance to the meaning of the Cruel and Unusual Punishments Clause.

Coke started with the proposition that basic principles of justice were built into the natural order itself; he asserted the "law of nature is part of the law of England." 1 Coke, Selected Writings, at 166, 195. He then also agreed that the fundamental basis of law was reason as opposed to will, and that therefore laws that violate basic principles of justice may not properly be called "law" at all: "[N]othing that is contrary to reason, is consonant to Law." 1 Institutes, §

[9] Thomas Acquinas, Summa Theologica, pt. II-I, Q. 93, art. 3, reply 2 ("Human law has the nature of law in so far as it partakes of right reason; and it is clear that, in this respect, it is derived from the eternal. But in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law, but of violence.")

69, at 684. However, rather than identifying "reason" directly with universal and abstract principles of justice, Coke associated it with a specific set of historically and culturally situated legal rules, the common law of England: "[R]eason is the life of the Law, nay the common Law it selfe is nothing else but reason." *Id*. § 138, at 701.

The key to this was Coke's conception of the normative power of "long usage." If a given customary law was used over a long period of time, throughout the entire kingdom, Coke held that this process confirmed the law's goodness and eliminated from the law anything that was bad or unreasonable. He thus compared long usage to the refinement of gold: "[I]f all the reason that is dispersed into so many severall heads were united into one, yet could not make such a Law as the Law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this Realme." *Ibid*.

Coke considered long usage the most reliable means for determining the goodness of a law because it establishes both the reasonableness of the law and that it enjoys the consent of the people. Coke saw long usage as, like the previously cited quote shows, a process of legal development equivalent to the refinement of gold in a fire, reliably separating good from bad. As courts decide cases year after year, century after century, impractical and unjust practices fall away, while practical and just ones endure. Second, they must also enjoy the consent of the people, else they would fall out of usage. See, *e.g.*, Coke, Copyholder, § 33, at 563 ("Customes are defined to be a Law … which being established by long use, and the consent of our Ancestors, hath been, and is daily practiced"). This notion that

long usage establishes both the reasonableness and the consensual nature of the law[10] was highly influential with, and repeated by, scholars like William Blackstone, James Wilson, and many others.

As noted above, many sources of law coexisted in England during Coke's time. The common law was the oldest and most important. The common law, however, because it looked to long usage as opposed to sovereign will for its rules of decision, was remarkably protected from royal control. For this reason, numerous kings established special courts (the Star Chamber, the Court of High Commission, the Admiralty Court, among others) that followed continental European civil law practices instead of the common law. Coke sometimes practiced in those courts but came to see them as a means of undermining the liberty of English subjects protected by the common law. Coke said the first act of civil law proponents was to introduce a torture instrument—the "Rack"—into the Tower of London for use on prisoners:

> John Holland Earle of Huntingdon, [who] was by King [Henry VI] created Duke of Exeter … and William De la Poole Duke of Suffolk, and others, intended to have brought in the Civill Lawes. For a beginning whereof, the Duke of Exeter being Constable of the Tower first brought into the Tower the Rack or Brake allowed in many cases by the Civill Law; and thereupon the Rack is called the Duke of

[10] Coke also believed that innovations in the law are presumptively unreasonable. See 1 Institutes, § 723, at 740 ("[W]hen any innovation or new invention starts up, … trie it with the Rules of the common Law, … for these be true Touchstones to sever the pure gold from the drosse and sophistications of novelties and new inventions. And by this example you may perceive, That the rule of the old common Law being soundly … applied to such novelties, it doth utterly crush them and bring them to nothing.")

> Exeters Daughter, because he first brought it thither.[11]

Here, we see most starkly the contrast Coke drew between the "reason" embodied in the common law's "usual" practices and the injustice and cruelty associated with efforts to introduce "unusual" or innovative practices, particularly those associated with the civil law. For the king, introduction of torture devices was a necessary first step toward adopting the machinery of civil law for the prosecution of criminal cases, thereby sidestepping many of the constraints imposed by the common law.

The Court of High Commission, for one, instituted civil law practices like trial by torture. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Cal. L. Rev. 839, 848–49 (1969). Coke believed that the inherent reasonableness of the common law—guaranteed by long use—was the sole obstacle to cruel innovations imposed by sovereign will, such as civil law torture practices.

Coke lived during a time of absolute claims to state power. The Tudors in England had bloated the powers of the monarchy over the preceding century, and when James I came to power in 1603, he explicitly claimed the power of absolute monarchy. See King James I, The True Law of Free Monarchies (1598), at 9–10. Coke never publicly disputed this claim, and agreed that the king did possess a sort of absolute power while sitting as head of the body politic represented in Parliament. See 4 Institutes, ch. 1, at 1067. When king and Parliament operated within the framework defined by the common law, with both working together towards the common good, Coke believed they possessed the same qualities of reasonableness attributed to the common law itself. Coke also acknowledged that Parliament had the

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[11] 3 Institutes, ch. 2, at 1025.

power to change common law rules: "The Common Law hath no controller in any part of it, but the high Court of Parliament, and if it be not abrogated or altered by Parliament, it remaines still." 1 Institutes, § 170, at 711.

Coke nonetheless, having identified long usage so closely with fundamental principles of justice, attributed an effectively dual status to the common law in his writings. First, as a source of positive law (which could be altered by Parliament) and second, as fundamental law (which could not, or at least should not, be altered). Coke argued that abrogating the common law (in its aspect as fundamental law) would threaten to destroy the kingdom itself: "So dangerous a thing it is, to make or alter any of the rules or fundamentall points of the Common law, which in truth are the maine pillars, and supporters of the fabrick of the Commonwealth." 2 Institutes, ch. 35, at 907.

As a source of *fundamental* law, the common law had the potential to limit the arbitrary exercise of state power. Coke asserted that the common law, reflected in the Magna Carta and elsewhere, was the font of numerous rights and liberties of citizens. Although Coke found those rights in the Magna Carta and other ancient statutes, he made clear that the written laws merely affirmed the existence of rights developed through long usage. He said the Magna Carta was "but a confirmation or restitution of the Common Law." 1 Institutes, § 108, at 697.

Coke upheld the long usage of the common law against the absolutist Stuart kings. He did so cautiously at first, but became more bold towards the end of his career. As noted earlier, Coke never expressly denied the claims of James I to absolute monarchy, but he did emphasize the following principle:

> The King is under no man, but onely God and the Law, for the Law makes the King: Therefore let the king attribute that to the Law, which from the law

> he hath received, to wit, power and dominion: for where will, and not law doth sway there is no King.[12]

Just as he had warned that Parliament could endanger the "fabrick of the Commonwealth" by changing fundamental common law rules, here Coke warned that the king endangers the very fact of kingship if he fails in subjecting himself to the laws and customs of the English people.

As a member of Parliament, Coke led the effort to pass the Petition of Right, seeking to enforce the fundamental law of England against the king. He was ultimately successful and the resulting law would serve as a model for the English Bill of Rights in 1689 and the American Declaration of Independence.

Approximately a century and a half would pass between the adoption of the Petition of Right and the Continental Congress' issuance of the Declaration of Independence. During that period, great political upheaval occurred. The English Civil War occurred in response to the claim of the Stuart kings to suspend laws by royal prerogative, followed by the Long Parliament, which abolished the monarchy and House of Lords, taking absolute power for itself, and then the Restoration brought about a milder form of Stuart absolutism, including a renewed claim of the power to suspend laws. Finally, the Glorious Revolution returned England to a system of parliamentary supremacy, setting the stage for the American Revolution.

Throughout that period, two views of the nature of government power struggled for dominance. The first view held that some institution, whether it be the monarch or Parliament, must hold absolute, arbitrary sovereign power, and therefore must be itself above the law. The second followed Coke in holding that sovereign power was limited by the rule of law, specifically the fundamental rules of the

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[12] Edward Coke, Preface, at 102.

common law embodied in long usage. See J.W. Gough, Fundamental Law in English Constitutional History 88 & n. 4 (1955) (citing Charles Herle, A Fuller Answer to a Treatise Written by Dr. Ferne 3, 8 (1642)). Conflicts between those two views of government tended to arise when the holder of sovereign power (whether the monarch or Parliament) tried to innovate in one of three ways: by changing the longstanding structure of the government itself, by taxing English citizens without proper authorization, or by trying and punishing English citizens in a manner contrary to common law. In each case, the innovation was protested on the ground that it was contrary to long usage, and therefore contrary to reason and destructive of the fabric of society. For example:

- In 1628, Parliament issued the Petition of Right which declared that King Charles I did not possess the power to impose taxes absent parliamentary approval or imprison subjects without cause, because such actions violated certain rights expressed in the Magna Carta and established through long usage.[13]
- In 1641, the Long Parliament voted to make itself perpetual; royalists and radical democrats objected on the grounds that the action was contrary to long usage. See David Jenkins, Discourses Touching the Inconvenience of a Long-Continued Parliament 123 (1647).
- When Parliament moved toward abolishing the monarchy in the 1640s, David Jenkins argued that

[13] See Edward Coke, Selected Writings, at 1288–89 ("Your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent in parliament … And … also, by the statute called, 'The Great Charter of the Liberties of England,' it is declared and enacted, that no freeman may be taken or imprisoned … but by the lawful judgment of his peers, or by the law of the land.")

> Parliament did not possess that power because the monarchy had existed since before there were written records and "usage so practiced makes therein a fundamental law." David Jenkins, Lex Terrae; or Laws of the Land (1647).

Also during that time period, several prominent English judges affirmed and applied Coke's assertion that acts of Parliament which violated fundamental common law principles were void. In *Day* v. *Savadge*, 80 Eng. Rep. 235 (1614) (K.B.), Chief Justice Hobart of the Court of King's Bench repeated Coke's assertion that "even an Act of Parliament, made against Natural Equity … is void in it self." *Id*., at 237. Similarly, in *Thomas* v. *Sorrell*, 124 Eng. Rep. 1098 (1673) (C.P.), Chief Justice John Vaughan of the Court of Common Pleas asserted that both the king and Parliament were without power to legal actions that were *malum in se*, like "murder, stealing, perjury, trespass." *Id*., at 1102. Any law that sought to legalize such actions "would be a void law in itself," for "the same thing, at the same time, would be both lawful and unlawful." *Ibid*. In *City of London* v. *Wood*, 88 Eng. Rep. 1592 (1701) (K.B.), Chief Justice John Holt of the Court of King's Bench held that a lawsuit brought by the Mayor of London in the mayor's court to enforce a fine against a defendant must be dismissed on the ground that the mayor would be—at least nominally—both judge and party in the case:

> And what my Lord Coke says in *Dr. Bonham's* case … is far from any extravagancy, for it is a very reasonable and true saying, That if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party.[14]

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[14] *Id*., at 1602.

As these cases illustrate, by the eighteenth century Coke's ideas regarding the inherent reasonableness of the common law had achieved a great deal of acceptance in the English legal and political communities. Coke's reasoning served as the primary basis for the notion that government power was limited by an unwritten constitution whose principles were embodied by long usage. Nonetheless, in the case of direct conflict between those principles and an act of a state power-holder—whether Parliament or the king—the power-holder invariably won out, at least in the short term. There was accordingly a growing divergence between the normative power of the common law and the actual power of the government.

While Coke was the most important expositor of the common law in the seventeenth century, William Blackstone assumed that mantle in the eighteenth and nineteenth centuries, particularly in America. His Commentaries on the Laws of England have been described as the "handbook of the American revolutionary," and the "bible of American jurisprudence in the 19th century." Robert Allen Rutland, The Birth of the Bill of Rights 11 (1991); Robert Lowry Clinton, God and Man in the Law: The Foundations of Anglo-American Constitutionalism 92 (1997). Blackstone's description of common law rights and liberties was among the key resources which Americans relied on in formulating their reasons for independence from England.

Blackstone exalted Coke's vision of the common law, emphasizing the inherent reasonableness and liberty assured by "long usage." Blackstone also importantly was a harsh critic of parliamentary deviation from the reason of the common law in the area of criminal punishment.

Blackstone believed in the supreme power of Parliament, but not in the supreme wisdom of all its acts. Much like Coke, he distinguished the normative power of the common law from the actual power of Parliament. Nowhere is this

distinction more clear than in his discussion of the English criminal justice system. In England, he explained, comparing its system with those of continental Europe, "crimes are more accurately defined, and penalties less uncertain and arbitrary; … all our accusations are public, and our trials in the face of the world; … torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception, nor even a personal dislike." 4 Commentaries, at *3–4. He also praised the English system of criminal punishment because "the nature, though not always the quantity or degree, of punishment is ascertained for every offense; and … it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons." *Id.*, at *377. Although English judges had discretion in sentencing, "[their] discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the second)." *Id.*, at *378. Lastly, though the law permitted horrific punishments for crimes such as treason, including burning at the stake, drawing and quartering, and disembowelment, "the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savour of torture or cruelty." *Id.*, at *376. In other words, they were falling out of usage by the middle of the eighteenth century.

While Blackstone celebrated the relative fairness of the English common law system of criminal justice, he harshly criticized the fact that over the course of the eighteenth century, Parliament had deviated from the common law and transformed a whole 160 crimes into capital offenses. *Id.*, at *18 ("It is a melancholy truth, that among the variety of

actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death"). Blackstone criticized Parliament for failing to make any distinction between greater and lesser offenses in assigning capital punishments, even insinuating that Parliament's approach to this issue revealed it to be incompetent and tyrannical:

> [S]anguinary laws are a bad symptom of the distemper in any state … It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.[15]

According to Blackstone, Parliament had departed from the rule of reason represented by the common law tradition by arbitrarily expanding the scope of capital punishment to include major and minor offenses without reference to customary notions of proportionality and desert, and had thus begun to exercise power in a tyrannical manner. He even implied that Parliament may have *exceeded* its legitimate power in designating those 160 offenses capital: "I would not be understood to *deny* the right of the legislature in any

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[15] *Id.*, at *17.

country to inforce it's own laws by the death of the transgressor, though persons of some abilities have *doubted* it." *Id*., at *11. To recap, Blackstone seems to accuse Parliament of deviating from the long usage of common law in enacting these laws contrary to basic principles of justice. The laws were thus—for lack of a better term—"cruel and unusual."

The American Revolution was unique in that those who executed it saw themselves as fighting to preserve, rather than throw off, the legal traditions of the government against which they rebelled. Gordon Wood wrote that American devotion to English legal tradition was "what made their Revolution seem so unusual, for they revolted not against the English constitution but on behalf of it." Gordon Wood, The Creation of the American Republic, 1776–1781, at 10. John Adams expressed mainstream American opinion when he wrote that "the liberty, the unalienable, indefeasible rights of men, the honor and dignity of human nature, the grandeur and glory of the public, and the universal happiness of individuals, were never so skillfully and successfully consulted as in that most excellent monument of human art, the common law of England." John Adams, On Private Revenge, Boston Gazette, Sept. 5, 1763.

The period from 1760 to 1776 was a time of conflict between the American colonies and the British Parliament. This conflict resembled England's seventeenth-century constitutional conflicts in at least two ways. First, as in seventeenth-century England, the holder of state power—in this case, Parliament—claimed absolute power unconstrained by fundamental common law limitations. Second, American protesters, like their seventeenth-century English counterparts, argued Parliament did not hold absolute power because it could not abrogate fundamental common law rules represented in long use.

As an example, take the Declaratory Act of 1766, wherein Parliament announced that it had "full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America … in all cases whatsoever." The Declaratory Act, 1766, 6 Geo. 3, c. 12 (Gr. Brit.), available at http://www.yale.edu/lawweb/avalon/amerrev/parliament/declaratoryact_ 766.htm.

Americans who opposed Parliament's actions during this period claimed that Parliament's power was limited by the rights held by American colonists through their status as British subjects. These rights, in turn, were based on the long usage of the common law. Richard Henry Lee argued that American rights "are built upon a fourfold foundation, namely natural law, the British constitution, the charters of the several colonies, and 'immemorial usage.'" Letters of Delegates to Congress, 1774–1789, at 46 (Paul H. Smith ed., 1976). Roger Sherman similarly asserted that American rights were based on the common law: "The Colonies adopt the common Law, not as the common Law, but as the highest Reason." *Id.*, at 47. The Continental Congress shared that view, and affirmed that American rights were based on "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts" of the various colonies. Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), available at http://www.yale.edu/lawweb/avalon/resolves.htm.

Americans invoked Coke's vision of the common law in order to protest the acts of Parliament they saw as violating their rights. Take the issue of taxation. Americans argued that the common law forbade Parliament from taxing them because they were not represented in Parliament. John Dickinson thus wrote in his infamous Letter From a Farmer in Pennsylvania that Parliament's claim of power to tax the colonies was "an innovation; a most dangerous innovation." Sources & Documents Illustrating the American Revolution

1764–1788, at 34, 40 (Samuel Eliot Morison ed., 1967).

Ultimately, the Continental Congress resolved to sever ties with England; in doing so, it relied on common law principles in justifying its decision. Most relevantly, and as briefly discussed earlier, the Declaration of Independence complained that the Crown had disrupted the legislative process by "call[ing] together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures." It is worth reiterating the point from earlier that under English common law it was prohibited for a sheriff to hold a Torn in an "unusual" location. The Continental Congress's use of the word "unusual" in the Declaration of Independence indicates that at the moment America formally separated itself from all legal ties to England, it saw long usage as a relevant source of standards for judging government actions.

There are two primary points to retain from the above historical analysis. First, that in articulating the basis for their rights, the American colonists used the terms "immemorial usage," "common law," "constitution," "reason," and "natural equity" virtually interchangeably. Second, and similarly, when complaining about Parliament's violations of their rights, the colonists used the terms "innovation," "usurpation," "unconstitutional," and "unusual" virtually interchangeably. Because American rights were based on long usage, parliamentary acts that deviated from it—"innovative" or "unusual" acts—were presumptively unconstitutional. Americans saw such innovations as a precursor to the introduction of the cruel practices of the civil law, including trial by torture.

In the summer of 1787, around eleven years after the Declaration of Independence, delegates of the thirteen former colonies (now states) were sent to Philadelphia to amend and strengthen the Articles of Confederation. Instead, they

decided to adopt a new constitution with a stronger federal government. The new government would not replace the states; rather, it would be one of limited, enumerated powers whose authority would be supreme within its proper sphere but would not exist at all outside of it. However, because the Constitution gave the federal government direct power to regulate the lives of Americans, and to prosecute violators of its laws, it vastly expanded its powers. Cf. Alexander Hamilton, The Federalist No. 21, at 130 (noting that under the Articles of Confederation, "the United States afford the extraordinary spectacle of a government, destitute even of the shadow of constitutional power to enforce the execution of its own laws").

From the instant of the Constitution's adoption, it faced heavy criticism for its failure to include a bill of rights or acknowledgement of the federal government's common law limitations. George Mason, a delegate to the Philadelphia convention, led that charge. In the convention's final week, he had proposed attaching a bill of rights. See Farrand, at 587. Ultimately, after the other delegates—weary from the long effort of the drafting the Constitution—voted down his proposal, he declined to vote to adopt the Constitution. See *id.*, at 649. He then published a series of "Objections to this Constitution of Government," where he complained that

> [t]here is no Declaration of Rights, and the laws of the general government being paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security. Nor are the people secured even in the enjoyment of the benefit of the common law which stands here upon no other foundation than its having been adopted by the respective acts forming the constitutions of the several States. *Id.*, at 637–40.

Mason also feared that without a bill of rights, and without the constraints of the common law, the federal government

would be given license to claim for itself unlimited and tyrannical powers. He worried that the Necessary and Proper Clause, for example, would allow "Congress [to] grant monopolies in trade and commerce, constitute new crimes, *inflict unusual and severe punishments*, and extend their powers as far as they think proper." *Id*., at 640 (emphasis added).

To be fair, the Constitution *did* contain several common law protections in its original form: the privilege of habeas corpus, see art. I, § 9, cl. 2, the right to criminal trial by jury, see art. III, § 2, cl. 3, and the invalidity of ex post facto laws, see art. I, § 9, cl. 3, to name a few. Antifederalists, however, believed these protections could be easily circumvented in the future. Recalling the cruelty of the European civil law system, they warned against guaranteeing jury trials only in the context of criminal proceedings. They believed that such right must also be applied in civil proceedings. Moreover, they pointed out that this Court's appellate jurisdiction applies "both as to Law and Fact," so they argued jury acquittals would not necessarily be safe. During Massachusetts's ratifying convention, Abraham Holmes, a prominent Antifederalist, gave a colorful vision of the future tyranny that the Constitution's gaps in common law protection might permit:

> On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, *the Inquisition*.
>
> What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine,

> what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline. Elliott's Debates, at 111 (italics in original).

Underlying all of these Antifederalist arguments was a deep distrust of governmental power unrestrained by specific, enforceable, fundamental rights. They accordingly proposed amending the Constitution to include a bill of rights binding the federal government against the violation of common law rights, particularly in the judicial process. Among those amendments was the Eighth Amendment and its Cruel and Unusual Punishments Clause.

Ultimately, the most significant evidence we have regarding the publicly understood meaning of the word "unusual" in the Eighth Amendment comes from Virginia ratifying convention. In that debate, the term "unusual" was used primarily to signify Antifederalist concerns that the federal government would not be limited by common law constraints and would thus be able to exercise new and tyrannical powers. In the context of criminal punishment, "unusual" represented the danger that the federal government might innovate or experiment in criminal punishment—an occurrence known to lead to cruelty in the past and which might be repeated in the future. The Framers shared Coke's belief that innovation in punishment often led to torture and barbarity. See *ibid*. The word "unusual" in the Eighth Amendment was meant to be a check on the federal government's ability to innovate in punishment. That is the only plausible meaning of the word as used in the Eighth Amendment.

Early legal applications of the term "cruel and unusual

punishments" (by state courts, concerning analogous state provisions and in some cases the federal provision itself) confirm the definition of "unusual" we settle upon today. For example, the Supreme Court of New York held "[t]he disenfranchisement of a citizen is not an unusual punishment; [at common law] it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offenses." *Barker* v. *People*, 20 Johns 457, 459 (N. Y. Sup. Ct. 1823).[16] The General Court of Virginia similarly upheld the infliction of whipping as a criminal punishment against Eighth Amendment challenge because it was supported by "long usage." *Commonwealth* v. *Wyatt*, 27 Va. 694, 701 (Va. Gen. Ct. 1828). The same happened respecting the punishment of "banishment" in *People* v. *Potter*, 1 Edm. Sel. Cas. 235 (N. Y. Sup. Ct. 1846). In each case, the punishment was upheld because it was "usual"; that is, it was consistent with the long usage of common law.

It must be recognized, though, that a punishment may in fact *become* unusual if it falls out of usage. Recall Coke's observation that long usage is reliable because it is proof of both reasonableness and the people's consent as unreasonable practices and those which do not enjoy the people's consent would presumably fall out of use. He wrote explicitly: "Custome … lose[s its] … being, if usage faile." Copyholder, at 564. American courts similarly made the observation in the first half of the nineteenth century that when a traditional common law punishment falls out of use, it loses the presumption of validity that comes with being usual. See, *e.g.*, *James* v. *Commonwealth*, 12 Serg. & Rawle 220 (Pa. 1825).

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[16] A later opinion clarified that the Eighth Amendment challenge was also rejected on the grounds that it applied only to the federal government and not the states.

* * *

The original public meaning of the term "unusual" in the Cruel and Unusual Punishments Clause was "contrary to long usage." A punishment which once enjoyed the presumption of validity which accompanies long usage loses that benefit when it falls out of usage. If it is reintroduced, it is therefore immediately suspect under the Eighth Amendment; the same applies for any other new punishment.

2

Cruel

Our analysis of the original public meaning of "cruel" should be much shorter than that of "unusual" as an extensive body of precedent is already available here. We are most persuaded by certain elements of the analysis of "cruel" provided in Justice Scalia's opinion for *Harmelin* and thus refer to it, and other cases it cited, only.

In his *Harmelin* opinion, Justice Scalia cited a few early cases interpreting proscriptions on "cruel" (just cruel, not "cruel and unusual") punishment. 501 U. S., at 985 (opinion of Scalia, J.). One proposed the "power of the courts to intervene 'in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people.'" *Ibid*. (quoting *State* v. *Becker*, 3 S.D. 29, 41, 51 N.W. 1018, 1022 (1892)). Moreover, although he rejected a general proportionality concept under the Eighth Amendment, Justice Scalia referenced a footnote from *Rummel* v. *Estelle*, 445 U. S. 263, 173 n. 11 which explained that "a proportionality principle [may] come into play in the extreme example mentioned by the dissent, … if a legislature made overtime parking a felony punishable by life imprisonment."

In general, however, the Eighth Amendment applies to

modes of punishment and only to a very narrow extent, their application to certain offenses. The *application* component comes into play only when the punishment is incredibly "severe" and *clearly* "out of proportion" and thus can be definitively taken to "shock public sentiment and violate the judgment of reasonable people." With respect to modes, however, a punishment is "cruel" if it is "destitute of pity, compassion or kindness" and has a separate "tormenting" element. 1 Noah Webster, American Dictionary of the English Language (1828).

B

With a suitable conception of the Cruel and Unusual Punishments Clause's original public meaning in hand, we can now properly address the question of whether "permanent exclusion" for common crime is prohibited, as the *CodyGamer100* Court found in dicta. From the mentioned meaning, we have identified three specific guidelines to consider:

> (1) The punishment, as a mode or application, whichever relevant, is either a new innovation or one of old which fell out of use.
>
> (2) The mode of punishment is "destitute of pity, compassion or kindness and has a separate tormenting element."
>
> (3) The application of the punishment (which in itself is "incredibly severe") to a certain offense is "clearly out of proportion" and "shock[s] public sentiment and violate[s] the judgment of reasonable people."

These guidelines are helpful but do not always provide us with bright-line distinctions. In order for an Eighth Amendment challenge to be successful under its original public meaning, however, the first guideline must always

be met. The second or third guideline must also be substantially met, of course dependent on whichever one relates to the claim.

Permanent exclusion, both as a mode of punishment and in its application to common crimes, is not supported by long usage. Never has it been *commonly* applied in our group and it eventually fell out of use entirely. The *CodyGamer100* instance was the punishment's first use in a long time, and likely its first application at all to common crime in the group's history. It was thus an attempt to reintroduce a punishment which fell out of use and an attempt to introduce it for the first time as punishment for common crime. The first guideline is clearly met in all respects for permanent exclusion.

We do not address the application of the second factor to permanent exclusion at this time because our petitioner has referenced a constitutional bar on permanent exclusion *for common crime* only. Similarly, *CodyGamer100* only had to do with common crime. We therefore look to the third guideline, which we conclude is clearly met by the application of permanent exclusion to common crime. Permanent exclusion is undoubtedly an "incredibly severe" punishment (the most severe at a court's disposal). Common crime is often seen by the public as so trivial that the application of such a severe punishment to it would "shock public sentiment and violate the judgment of reasonable people." Moreover, the punishment would be "clearly out of proportion."

* * *

We approve of the *CodyGamer100* Court's dicta finding that the use of permanent exclusion as punishment for common crime is cruel and unusual under the Eighth Amendment and affirm it as a holding of this Court.

II

With the fact in mind that permanent exclusion for common crime is cruel and unusual, we now consider whether the petitioner's five-month sentence for murder and attempted murder fits that definition. Obviously, a five-month sentence is not equal to permanent exclusion. Petitioner, however, argues that the gravity of such a sentence, and its practical effect, has the purpose and effect of permanent exclusion. We reject this argument for a few reasons.

First, we recognize that such a line of thinking is an inherently slippery slope which extends a reviewing court's power to determine the acceptability of a sentence far beyond that which was originally conceived by the Framers. Second, as we emphasized earlier: holding the *application* of a specific sentence unconstitutional requires the meeting of a very high bar, which we are not convinced can be met with a five-month sentence. And finally, if we were to invalidate petitioner's sentence on the asserted grounds, there would be no logical endpoint. Where would we draw a line in the application of a "purpose and effect" test for permanent exclusion?

* * *

For the foregoing reasons, the sentence imposed by the District Court is accordingly

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 05–7

ROEXPLO, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

[March 20, 2018]

JUSTICE BORK, concurring.

I join the Court's opinion because I agree with its decision on the merits that *CodyGamer100* v. *United States*, 2 U. S. 18 (2017) does not apply to the 150-day sentence received by petitioner. *Ante*, at 1–29. I write separately to explain that I conclude res judicata generally precludes petitioner's Eighth Amendment claim.

I

Some time after petitioner first commenced his appeal, the President—aware for the first time of petitioner's plight (neither petitioner or his counsel made any effort, which I am aware of, to obtain clemency)—granted him an unconditional pardon. The Court may take notice of that pardon because it was "brought regularly into the cause" through the Government's motion to dismiss. *United States* v. *Wilson*, 32 U. S. 150, 161 (1833); see also Motion to Dismiss. While the Court denied the motion because there is "no power in a court to force" a pardon recipient to avail himself of the pardon's benefit,[1] *Wilson*, *supra*, it is still relevant to the case and constitutes part of the record.

Petitioner, after receiving the Presidential pardon, could

[1] I disagree with this reasoning but for the purposes of this opinion, will accept it as valid because it is not relevant to the claim preclusion.

have at any time eliminated his sentence—the one he believed was unconstitutional. In that way, he "carr[ied] the keys of [his] prison in [his] own pockets." *Hicks* v. *Feiock*, 485 U. S. 624, 633 (1988). Nevertheless, he *chose* not to use that option and instead continued his appeal.

Even just thinking about this situation logically, it appears nonsensical. Petitioner is alleging that he's being inflicted cruel and unusual punishment prohibited by the Constitution; however, because of his pardon, he may end that punishment at any time. What is the need for the appeal then? Is any punishment being "inflicted" which he does not himself allow (or invite)?

II

Res judicata—or "claim preclusion," as it is more commonly known—is a "bedrock principle of our legal system." *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ___, ___ (2016) (Alito, J., dissenting) (slip op., at 3). Primarily, it serves the "public policy" purpose of ensuring there is "an end to litigation … once [matters have been] settled." *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U. S. 522, 525 (1931). Courts exist to ensure the "conclusive resolution of disputes." *Montana* v. *United States*, 440 U. S. 147, 153 (1979). If that has been accomplished already, a court has no business continuing to insert itself into the affairs of parties. Other objectives are also fulfilled by adherence to the rules of res judicata: doing so "protects … adversaries from the … vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.*, at 154. These are "vital public interests" that should be "'cordially regarded and enforced.'" *Federated Department Stores, Inc.* v. *Moitie*, 452 U. S. 394, 401 (1981).

An unconditional pardon is considered an irrevocable

grant of clemency. Once the President issues an unconditional pardon, "it is presumed to be in [the recipient's] custody, and the property of it belongs to him." *Wilson*, *supra*, at 162 (internal quotation marks omitted) (citing Hawkins, b. 2, ch. 37, § 65). Because the issuance of an unconditional pardon inasmuch effects a definitive grant of power to a convict to end their punishment, the dispute which once may have existed between Government and convict over the Eighth Amendment validity of punishment ceases to and the convict is precluded from raising any such dispute before a court. The matter is "settled." *Baldwin*, *supra*.

* * *

For the reasons stated in this opinion and the Court's, I concur with the affirmance of the sentence imposed by the District Court.