HERODOTUS

Herodotus is a student-run publication founded in 1990 by the Stanford University Department of History. It bears the name of Herodotus of Halicarnassus, the 5th century BCE historian of the Greco-Persian Wars. His Histories, which preserve the memory of the battles of Marathon and Thermopylae, were written so that “human achievements may not become forgotten in time, and great and marvelous deeds . . . may not be without their glory.” Likewise, this journal is dedicated to preserving and showcasing the best undergraduate work of Stanford University’s Department of History. Our published pieces are selected through a process of peer review. For additional information, please visit us online at herodotus.stanford.edu.

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When landscape architect Frederick Law Olmsted produced his earliest sketches of the Stanford University Main Quad in 1888, the History Corner figured prominently into the plan. Rounding the Oval by carriage, the first students to arrive at the university would have met with a monumental Memorial Arch that was itself the keystone of the rhythmic array of sandstone buildings. At the Quad’s smoothed northeast corner stood the Department of History. Today students continue to pass through the wooden double doors and ascend the grand staircase to attend a broad offering of more than two hundred history courses.

The Herodotus Board of Editors is pleased to celebrate the work of these students through this 2017 edition of our journal. The papers included - six in total - point to the breadth of topics studied in Stanford's history department. The papers' subjects range from Medieval Europe to the modern Middle East, and they focus on such themes as legal history and the history of science. Yet, despite the wide variance of topics, all of these papers share the core traits of good historical scholarship: a deep engagement with primary sources, excellent prose, and a willingness to consider and challenge existing research. For twenty-seven years, Herodotus has served as an intellectual gathering point for this community of diverse interests, fostering a conversation among history students that spans the many contexts of our individual research. We hope our readers will enjoy the product of that work.

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PALESTINIAN RESISTANCE TO IRAQ’S OCCUPATION OF KUWAIT: A RECONSIDERATION OF PALESTINIAN COLLABORATION WITH THE BA‘TH PARTY

Introduction by Keith M. Baker & Ian P. Beacock

In March 1991, shortly after Iraqi forces were successfully routed by Operation Desert Storm, the Palestinian diaspora living in Kuwait was accused of widespread collaboration with Saddam Hussein’s Ba‘athist regime. Upon their return to power, Kuwaiti authorities used these claims to justify the harassment and expulsion of Palestinian–Kuwaitis. In this exciting work of revisionist history, however, Nathan Hausman argues that Palestinians living in Kuwait were specifically targeted by Iraqi forces and were therefore much more likely to join the resistance. He goes on to contend that the “collaboration narrative” was little more than a cynical pretense invented by the Kuwaiti government for the purposes of transforming the country’s social and demographic landscape.

The Ba‘ath Party Archives, held at the Hoover Institution and only recently made available for scholarly research, form the evidentiary spine of Nathan’s outstanding essay. The discovery of untapped sources is an exciting prospect for any historian. But Nathan’s research is so compelling because he has brought to bear upon his challenging material a curious mind and a sensitive historical imagination. The result is a lucid, persuasive, and urgent work of social and political history that effectively resurrects the lived experience of Palestinian–Kuwaitis and demands our attention as scholars and citizens.
Palestinian Resistance to Iraq’s Occupation of Kuwait:  
A Reconsideration of Palestinian Collaboration with the Ba‘th Party

Nathan Hausman

"On the other side of this river, just the other side, were all the things he had been deprived of. Over there was Kuwait. What only lived in his mind as a dream and a fantasy existed there. It was certainly something real, of stones, earth, water, and sky, not as it slumbered in his troubled mind. Saad, his friend who had emigrated there, worked as a driver and came back with sacks of money"

—Abu Qais, from Ghassan Kanafani’s “Men in the Sun” (1962)

For Palestinian refugees living in overflowing camps across Egypt and Jordan, the allure of gainful employment and familial security envisioned in Kuwait drew thousands to undertake the treacherous voyage following Israel’s military victory in 1948. Set in the late 1950s, Ghassan Kanafani’s short story “Men in the Sun” presents a fictionalized account of three Palestinian refugees who follow the same smuggling routes that transported many of the 77,000 Palestinians living in Kuwait by 1965. For those who arrived safely, Kuwait’s burgeoning oil industry provided Palestinian men (a vast majority of migrants in the early years) varied economic opportunities and a base to reconstitute their diasporic identity in exchange for physical labor and separation from their homeland. In time, men established a semblance of economic permanence and secured temporary worker status for their families and extended kinship groups, with each wave of refugees starting this process anew. Some of the educated intelligentsia even obtained Kanafani’s fabled “sacks of money,” using their wealth to send remittances to relatives who remained in Jordan, the Egyptian administered Gaza Strip, and the Palestinian territories occupied by Israel after 1967. Despite the implementation of restrictive residency policies following the 1967 Arab-Israeli War, the collective social and economic achievements of the 400,000 Palestinians residing in Kuwait by 1990 represented one of the few success stories for the Palestinian diaspora.

Yet “Men in the Sun” also warned Palestinians against envisioning any country outside Palestine as a permanent home. Saddam Hussein’s invasion and subsequent occupation of Kuwait on August 2, 1990 destroyed the country’s economy, fracturing the foundation of the society that Palestinian refugees had built over the past 40 years as guest workers. Additionally, Yasser Arafat’s support of the Kuwait invasion, aligning the Palestine Liberation Organization (PLO) with Saddam Hussein’s Ba‘th Party, enabled Kuwait’s ambassador to the U.S. to label the Palestinians as collaborators who “helped destroy”

the country. In the weeks surrounding Emir Shaykh Jaber al-Sabah’s return from exile on March 15, 1991, Kuwaiti security forces tortured and imprisoned more than 1,000 Palestinian-Kuwaitis as a form of collective punishment for the PLO-Hussein alliance. Facing death threats and eviction orders, an estimated 100,000 Palestinians fled Kuwait during the last two weeks of March alone. Following the same desert routes that killed Kanafani’s protagonists and the thousands of Palestinians who died trying to enter Kuwait 40 years before, the now double refugee Palestinians fled north towards Jordan, manifesting the fragility of all Palestinian communities in exile.

The few existing first-hand accounts from journalists and academics in Kuwait indicate that collaboration is too crude a term to describe the nuanced dynamic between Palestinian-Kuwaitis and the occupying Ba’th army. These personal histories facilitate a larger counter-narrative that diverges sharply from the Emir’s broad castigation of Palestinians and instead highlights the role of Palestinians as part of Kuwait’s civil and military resistance. However, until the recent opening of the Ba’th party archives at Stanford’s Hoover Institution, and in particular the Kuwait Dataset that covers the occupation period, documentary evidence to corroborate either the collaboration or resistance narratives was sealed in vaults in Baghdad. Although the initial evidence from the Kuwait Dataset almost exclusively supports the resistance narrative, merely challenging the Kuwaiti government’s claims of widespread collaboration fails to explain why al-Sabah saw fit to expel 30 percent of his country’s population. This essay analyzes new archival evidence alongside existing Palestinian narratives and Kuwaiti planning documents to understand how the goals and methods of the Iraqi occupation precipitated the March 1991 expulsion. As we shall see, the first two months of the occupation created the conditions necessary for Kuwaiti citizens to positively receive al-Sabah’s call for an expansive demographic transformation of the country.

This essay offers three new insights into the destruction of Palestinian society instigated by Saddam Hussein’s invasion of Kuwait. First, even before returning to power, the Kuwaiti government-in-exile crafted a plan to create a “new” Kuwaiti identity by significantly reducing the country’s guest worker population. Although new economic strategies were needed to cope with post-war market realities, Kuwait’s collaboration narrative was grounded upon removing the large, politically conscious Palestinian population. Second, Hussein never intended to govern Kuwait as a protectorate but instead sought to extract as much wealth from Kuwait as possible in a limited time. The anarchy fomented during the first days of occupation destroyed any hope of a peaceful transition of power, encouraging Kuwaiti citizens and Palestinian residents to develop civil and military resistance networks. Third, the language used by Iraqi officials to describe Kuwait, the expropriation of Kuwaiti property, and the targeting of Kuwaiti civil society make it clear that Iraq aimed to destroy Kuwaiti identity and the country’s means of production.


5 For a complete description of more than 100 documented attacks against Palestinians, see *A Victory Turned Sour: Human Rights in Kuwait Since Liberation* (Human Rights Watch, 1991).
These policies were formulated and implemented during the first two months of the occupation, further dislocating Palestinians from Kuwaiti society. The occupation strategies of Hussein’s regime, including the use of foreign Palestinian troops, provided necessary support for the al-Sabah government as it sketched the collaboration narrative and expelled the now unemployed Palestinians.

II. The Collaboration Narrative

The historical treatments of Palestinians in Kuwait during the Iraqi invasion can be grouped into three camps. The first line of argumentation, depicting Palestinians as “collaborators,” was propagated by Sheikh Jaber al-Ahmad al-Sabah’s cabinet to justify both the expulsion orders and the ban on return leveled against the Palestinians. Although this rhetoric is best understood as propaganda expressing a larger collective identity crisis, the spread of certain myths from the collaboration narrative into the other two conceptualizations displays the power of these initial claims. The second historiographical school, which I call the “American” narrative, consists of western-focused military and strategic histories written to condemn Saddam Hussein’s Ba’th regime and validate the U.S. intervention in the Gulf War. In emphasizing the PLO–Hussein pact, these authors adopt al-Sabah’s argumentation while downplaying the violence against Palestinians. The third school, advocating a “resistance” narrative, challenges previous interpretations by emphasizing the split loyalty of Palestinians in Kuwait, drawing attention to Palestinian leaders who disagreed with Arafat, and sharing stories of Palestinians who joined the resistance. My conclusions substantiate many of the claims proposed by the resistance narrative. In addition, I use Kuwaiti planning documents to understand how the first school took advantage of the Iraqi occupation to facilitate a larger goal of demographic transformation.

Beginning in February 1991, as Coalition Forces assured their victory over Iraq, Kuwait’s government-in-exile began publicly articulating its plans for reconstruction. The plans were most coherently and fully addressed in an interview with Kuwait’s Planning Minister, Sulayman al-Mutawwa’, published by the Al-Sabah-owned paper Sawt al-Kuwayt on February 28. The interview reveals three underlying motives for the monarchy’s anti-Palestinian stance. First, despite being driven by economic and demographic fears about the country’s non-citizen population, Kuwait presented the Palestinian population as a security concern. Second, the policy of Palestinian expulsion aligned with the Gulf Arab countries’ broader goal of replacing Arab workers with South Asian labor. Finally, violence enacted against Palestinian-Kuwaitis operated as a form of collective punishment against the PLO and Yasser Arafat, reestablishing al-Sabah’s power in the war-weary country.

Championing supposed security concerns, al-Mutawwa’ claimed that Palestinians in Kuwait had “conspired with the occupier” and that many retained loyalties to the expelled Iraqis. However, as he explained the government’s rationale, al-Mutawwa’ revealed that economic and demographic fears served as the main justification for creating a “new Kuwait.” Historically, Kuwait’s workforce had been predominantly comprised of foreign labor; relatively high-paying jobs were offered in exchange for the forfeiture of citizenship claims. While this transactional policy allowed the country to rapidly expand oil exports, beginning in the 1980’s, policy intellectuals warned Kuwait about the strategy’s destabilizing effects on its culture, society, and foreign policy. Speaking for the al-Sabah government, the inter-

6 FBIS-NES-91-044, 15–17.
view acknowledged the opportunity presented by post-war demographic reconstruction, euphemistically called “changing Kuwaiti citizens’ position overall.” To start, al-Mutawwa’ stated that Kuwait would reduce its population from “the 2.2 million that existed before.” As the largest non-citizen population, the 400,000 person Palestinian community became the first target. Economically, al-Mutawwa’ envisioned the benefits of reducing the number of social services “provided free or substantially subsidized.”9 Beyond the initial collaboration claim, al-Mutawwa’ made no further mention of security benefits.

Cutting costs was not a simple, or recent, task for the Kuwaiti government. Expelling Palestinians accomplished a larger Kuwaiti endeavor, initiated in the 1980s, to replace Arab labor with workers from India and Pakistan. Exploiting, South Asians’ willingness and need to accept less favorable jobs at lower wages, Gulf Countries began issuing more visas to them.10 As a component of the neoliberal economic policies seen across the Gulf today, Kuwait also passed new laws restricting workers from bringing their families.11 The visa and immigration policies were a direct attack on Palestinian laborers who, as Arabic speakers, had brought their families en masse. During their forty-year tenure, the Palestinian migrants became socially rooted and transcended the typical guest worker archetype by building and expanding new industries. While some Palestinians would inevitably be invited to rebuild the country, Kuwait saw Asian labor as an expedient replacement.

Implementing the third motive of the al-Sabah government, the punishment of the PLO, al-Mutawwa’ directed Kuwaiti’s to see the resident Palestinians as culpable for the PLO-Hussein alliance. At the end of the interview, he all but condoned violence against Palestinians by lamenting that “it is impossible to suppress the feelings of Kuwaiti citizens.”12 Though he hinted superficially at Palestinian collaboration, the Minister conceded his government’s real disdain was directed towards the PLO, “The Palestinian leadership[PLO] has inflicted great damage.”13 Yet, al-Mutawwa’ continued, readily admitting his hope that Arafat would be unseated by a “new leadership formula.”14 For the elements of Kuwait’s population seeking an outlet for revenge, al-Mutawwa’s half-promise of protection served as ample justification for violent action. Sawt al-Kuwayt went further, claiming that even though a “majority” of Palestinians did not collaborate, they were still guilty of a “collective crime,” necessitating expulsion.15

As key ministers returned to Kuwait to reestablish their power, each refused to denounce the violence that was clearly occurring. During March alone, an estimated 200 to 1,000 Palestinians were executed by government and non-government forces. Kuwait

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9 FBIS-NES-91-044, 15–17.
12 FBIS-NES-91-044, 16.
13 Ibid., 15. Interestingly, new evidence reveals that within the first week of the war, the Kuwaiti branch of the PLO publically repudiated their national leadership, see Section IV.
14 Ibid.
15 FBIS-NES-91-096, 11.
officially detained 5,800 Palestinians, with 3,000 remaining in shadow jails for more than one year.\textsuperscript{16} Confirming that the anti-PLO rhetoric reached ground troops, one Palestinian prisoner was beaten and then forced to “bark like a dog and lick his captor’s shoes” while the soldiers screamed that Arafat was himself a dog.\textsuperscript{17} As kidnappings, executions, and summary expulsions persisted, Palestinians who attempted to remain experienced unimaginable legal and extra-legal pressures to flee Kuwait. Al-Sabah’s claims satisfied the portion of Kuwait’s population who held a desire for revenge. Appearing to take an aggressive stance on security, he simultaneously accomplished his underlying demographic goals. Violence, expulsion, and death were the cynical intentions of the first historiographical representation of Palestinians in Kuwait.

III. The American and Resistance Expulsion Narratives

The overwhelming victory achieved by the U.S.-led Coalition Forces against Saddam Hussein inspired a spate of “American” histories that detail the tactics, strategies, and implications of the Persian Gulf War of 1991.\textsuperscript{18} These works inevitably cast Hussein and his allies in varying dictatorial shades. Palestinians, through the exaggerated power of the PLO, are remembered for Yasser Arafat’s support for Hussein at the May 28, 1990 Baghdad Arab League summit and at the emergency post-invasion Cairo summit on August 9. The American narrative’s selective focus on the PLO–Hussein alliance and its downplaying of Kuwait’s violent retribution reduces the history of Palestinians in Kuwait to a single dimension and normalizes its acceptance of the underlying demographic motive.

\textit{Saddam’s War}, published in 1991, epitomizes the American narrative in its boisterous condemnation of Iraq and its allies, and the authors’ conflation of Palestinians in Kuwait with other foreign national groups. Bulloch and Morris begin their discussion of Palestinians with May’s Baghdad conference, two months before the invasion, treating the meeting as prelude for war. “The Baghdad summit defined the split which was to divide the Arab world,” the authors argue, “and confirmed the emergence of a radical axis encompassing Iraq, Jordan and the PLO.”\textsuperscript{19} More aggressively, \textit{Arab Storm}, written by the sympathetic British ambassador Alan Munro, refers to these states as “Iraq’s claque.”\textsuperscript{20} Both works desperately seek to present Hussein’s allies as sycophantic and radical. The American narrative correctly finds that the states who supported Hussein had little to offer the Ba’thists, but it fails to interrogate the political forces that connected the “radical axis.”

\textit{Arab Storm} and \textit{Saddam’s War} continue their analyses by conflating the 400,000 resident Palestinians with other foreign national groups, making it possible for the American narrative to discuss war refugees without addressing the forces preventing Palestinians from returning home. Bulloch and Morris state that non-citizens quickly fled Kuwait, but they overgeneralize the refugees as either Arabs or “Far Eastern Nationals.”\textsuperscript{21} While the authors make the exodus of foreigners sound complete, other sources

\begin{itemize}
  \item \textsuperscript{16} A \textit{Victory Turned Sour: Human Rights in Kuwait Since Liberation}, 3,5,11.
  \item \textsuperscript{17} Bob Drogin, “Executions Still Occurring in Kuwait,” \textit{The Los Angeles Times}, March 22, 1991.
  \item \textsuperscript{18} Three popular examples, Bulloch and Morris’ \textit{Saddam’s War}, Munro’s \textit{Arab Storm: Politics and Diplomacy Behind the Gulf War} and Rick Atkinson’s \textit{Crusade: The Untold Story of the Persian Gulf War} will be examined.
  \item \textsuperscript{19} John Bulloch and Harvey Morris, \textit{Saddam’s War: The Origins of the Kuwait Conflict and the International Response} (London: Faber and Faber, 1991), 98.
  \item \textsuperscript{20} Alan Munro, \textit{Arab Storm: Politics and Diplomacy Behind the Gulf War} (New York: I.B.Tauris, 1996), 62.
  \item \textsuperscript{21} Bulloch and Morris, \textit{Saddam’s War}, 113. With Kuwait’s estimated total pre-war population of two million, a reader can assume the authors are also including foreign nationals in Iraq, but the narrative obfuscates the identities of the refugees,
\end{itemize}
indicate that only half of the Palestinian population, roughly 200,000 individuals, left Kuwait. Arab Storm comes closer to addressing the refugee Palestinians, while retaining the discriminatory language that precludes political analysis, “the Kuwaiti crisis reinforced the paramount need… to deal with the cancer of Palestine.” Unlike the Indians, Pakistanis and “Far Easterners,” Palestinians had no clear home to return to, and their commitment to remain prompted Kuwait’s expulsion planning.

This historiographical trend completes its discussion of Palestinian-Kuwaitis by either downplaying or denying the scope of the violence of March 1991. Aligning themselves with the Kuwaiti government restored to power by Coalition forces, these authors also adopt the al-Sabah government’s rhetoric that reprisals were justified because of potential Palestinian collaboration. Rick Atkinson’s 1993 account, Crusade, provides the most thorough examination of March 1991. Crusade documents a limited number of Kuwaiti reprisals, “dozens of Palestinians were beaten severely enough to require hospitalization…some were summarily executed,” while acknowledging that even with the U.S. army’s intervention, “by early March six thousand Palestinians had been placed in detention.” Yet, without discussing the collaboration narrative, Atkinson links Palestinians to Iraq’s war crimes, “However iniquitous [the reprisals], the Kuwaiti thirst for revenge was not without provocation…victims [of Iraq] were tortured with electric drills, electric prods, and acid baths.” The ability for this argument to gain traction without furnishing evidence for Palestinian collaboration with Iraq displays the extent to which the collaboration narrative has shaped other approaches.

Arab Storm acknowledges the collaboration link, using it to explain potential reprisals, while nearly denying that any violence occurred. Munro offers that Americans worked to convince Kuwait’s Prince Sa’ad to “see a stop put to the summary reprisals” against Palestinians who were “being accused of collaboration with the Iraqis.” Like Crusade, Arab Storm argues that reprisals stemmed from “reports of vicious Iraqi interrogation of Kuwaitis with resort to torture [that] were now being confirmed.” In a final attempt to distance the Kuwaiti army and Coalition Forces from violence, Atkinson concludes by blaming the press who “harp[ed] on [the] expectation of brutal reprisals” and praises the Kuwaiti government for not letting “matters get out of hand…despite understandable rancor.” The American narrative simultaneously complicates the origins of the especially the double refugee Palestinians.

22 Lesch, “Palestinians in Kuwait,” 46.
23 Munro, Arab Storm, 209.
24 Given that Coalition Forces were present in Kuwait during this period, acknowledging the crimes against Palestinians would require the authors to concede that the Coalition either did not stop Kuwait’s Army and police forces or did not have the power to intercede.
26 Ibid.
27 Munro, Arab Storm, 323.
28 Ibid., 334.
29 Atkinson, Crusade, 364.
400,000 Palestinians living in pre-war Kuwait, suggests the Palestinians were complicit collaborators through the PLO’s alliances, and downplays the violence that occurred in March 1991. Since the Coalition’s victory, the American narrative has dominated discussions of Palestinians in occupied Kuwait, endorsing the plans made by al-Sabah’s government in February of 1991.

Jerry Long’s *Saddam’s War of Words*, published in 2004, bridges the American narrative and the resistance camp with its revisionist, critical review of the Gulf War. His two-page discussion of the invasion’s negative effects on Palestinians introduced the resistance narrative to academic discourse, but it retains many of the unfortunate stereotypes, such as portraying Palestinians as “almost hapless.”

Citing a journal article by Ann Lesch, Long bluntly concludes “although some Palestinians collaborated… A number of Palestinians joined the Kuwait resistance.”

Despite his missteps, Long’s work was the first book to acknowledge Palestinian resistance and the March exodus that destroyed the successful diaspora community.

Long’s citation of Ann Lesch’s journal article is significant because it resurrected the resistance narrative in the *Journal of Palestine Studies*. Both of the journal’s two articles advancing the resistance narrative were published in 1991; then the topic seemed set to fade away. The most surprising feature of these articles, the other written by the Palestinian-Kuwaiti scholar Shafeeq Ghabra, is that they are the first to ask if Palestinians’ actions during the war influenced the collaboration rhetoric.

Ghabra concludes that while the shock of invasion pushed some Palestinians to seek appeasement, “most Palestinians remained loyal to Kuwait” because Kuwait had provided them “prosperity… as well as support for the Palestinian cause.”

Although both authors face difficulties with furnishing percentages, Lesch argues that among the resident Palestinians, “few…were willing to assist the Iraqi occupation” and Ghabra states that Palestinians “as a whole were neither collaborators nor accepting the new situation.”

Despite not having access to archival evidence, Lesch and Ghabra champion the role of Palestinians in the resistance, particularly in their role in “hiding weapons and explosives and transporting them to the resistance.”

Ghabra and Lesch’s work did not fit neatly into the popular discourse championed in the other narratives and had limited supporting evidence. However, their intention to highlight the diversity of the Palestinian response to occupation and confidence that the resident Palestinians did not provide broad support to the Iraqis established a base for future scholarship.

The capture of the Ba’th Regime’s archives after Hussein’s overthrow in 2003 and its digitization by the U.S. Department of Defense allows scholars to test the claims made by each narrative.

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31 Ibid., 32.
33 Ibid., 123.
36 Neither author had access to the reports and plans published by the Kuwaiti government. Thus, they could not consider the different roles of Iraq and Kuwait in the Palestinian expulsion.
IV. August 2-10: Post-Invasion Resistance Formation

Driving lightly armored tanks and armored personal carriers, the Iraqi army began its invasion of Kuwait at 2 A.M. on August 2, 1990. Speeding down the modern Kuwaiti highway at more than 50 miles per hour, the Iraqis faced little resistance until they reached Kuwait City, 120 kilometers from the Iraq-Kuwait border. By 6:30 AM, the army had captured and fortified Kuwait University, the Emir and most of his family had safely escaped, and Iraq began its 208-day occupation of the small, oil-rich nation.37

Although Iraq’s overwhelming victory might indicate thorough planning, the unscripted nature of Iraq’s first week of civilian occupation, which triggered a state of anarchy in Kuwait, suggests an improvised campaign. The chaos of this week in August harmed Kuwaitis and resident Palestinians equally, bringing violence and theft to the Gulf’s most peaceful country. Kuwaiti civilians responded rapidly, creating resistance networks and planning counter-attacks within 48 hours. Palestinians responded similarly, forging two distinct methods of resistance. Some Palestinians joined Kuwaiti resistance cells, printing and distributing pro-Emir flyers or hiding weapons and harboring foreigners in exchange for money. Others reconstituted their extended family networks by seeking shelter and sharing rations in family safe houses. While Palestinians quickly initiated familial resistance, the first week concluded with the Ba’ath government just beginning to consider how to interact with the resident Palestinians.

Perhaps expecting a more protracted military campaign, or hoping that the chaos might quell resistance, the Iraqi regime did not pursue a smooth transition to power. Looting was rampant across Kuwait and Palestinians were both the perpetrators and victims of theft.38 High-value items like luxury watches and cars were particularly attractive to Iraqi army soldiers looking to enhance their wages through the spoils of war. The army’s public participation in looting and encouragement of anarchy angered Kuwaitis and tipped them off to Hussein’s exploitative approach to administering the country. Besides destroying many roads with their tanks, the army allowed wrecked and dismantled cars to sit on roads, their owners either in custody or too scared to collect the remnants of their property. Stores set aflame by looters, the army, or both, burned for days, as did the first Iraqi vehicle bombed by the budding resistance network.39 Kuwait’s residents and foreigners were similarly injured by Iraq’s destruction, with upper and middle-class residents and citizens bearing the brunt of the looting.

Underground citizen-led resistance networks began to emerge from this turmoil. On August 4, only 48 hours after the invasion, the Iraqi Intelligence Service (IIS) received an emergency message from a field officer regarding the distribution of pro-Emir flyers. Although the text was not included, the officer wrote that the flyers encouraged various means of resistance. He postulated that the propaganda indicated the “existence

38 For examples of looting reports see KDS Box 00169, 4; KDS Box 00252, 3, 7; KDS Box 00362, 21.
of a fifth column” working inside Iraq for the benefit of “the enemy (al-‘adu).” The military leaders, who had little experience governing a foreign population, initially imagined their tenure in Kuwait as an extension of their battle against Iraq’s traditional enemies. The fifth column the officer feared was not an externally-sponsored force planted by a foreign military but rather Kuwaitis who chose to fight back. The authorship of some flyers was more easily ascertained. Immediately after the PLO’s pro-Iraq vote on August 10, its branch office in Kuwait rejected the decision and began printing and spreading “four independent Palestinian anti-occupation leaflets” that “strongly criticiz[ed] the occupation and its policies.”

The euphemistic enemy continued to cause problems for the Iraqis throughout the first week. Palestinians, characterized as sympathizers by those who follow the collaboration narrative, in fact participated in the resistance during the period of anarchy, as several documents from the Kuwait Data-set show. In an intelligence report compiled during the first week of occupation, IIS officials warned the Baghdad central office that certain “Palestinians are potentially working for al-‘adu in exchange for wages.” While the IIS did not document specific offenses in this report, other Iraqi documents indicate that Palestinians often guarded weapon caches, harbored foreigners, and protected wanted resistance members in exchange for various rewards.

In the largely destroyed Kuwaiti economy, Palestinians initiated the same survival tactics that had sustained them in previous disruptions, building new economic and social bonds with fellow Kuwaitis. Shafeeq Ghabra’s 1988 analysis of the Palestinian diaspora community in Kuwait reveals that Palestinians’ economic resistance was derived from tactics that helped them to survive the dislocating experiences of 1948 and 1967. According to the author, the community was founded by “self-made men and women with exceptional will and intelligence” who envisioned a “new structure based on merit.”

Given that Palestinian refugees saw economic stability as means for protecting their society in exile, it should be no surprise that they were eager to work alongside their Kuwaiti neighbors during a crisis. After all, beyond the limited wealth that could be gained through looting, the occupying Iraqi forces offered the Palestinians few opportunities for advancement. Joining the resistance signaled a desire among Palestinians to preserve their society in Kuwait as Palestinian-Kuwaitis.

Beyond resistance networks, Palestinians also found solidarity in reconstituted familial networks. Following the invasion, Palestinians first ensured the physical safety of their families by seeking shelter.
in the largest and safest family home, often owned by the family’s pioneer. “We did what many Kuwaitis were doing,” Ghabra recalled, “seeking security by moving back in with our parents… In my case there were 32 of us in [their] house.” Pooling food rations, saving precious gas by travelling together, and promoting kinship bonds through cohabitation, the Ghabras found strength in the traditional extended family that they had created through branch settlement over 40 years. From this familial resistance a commitment to remain in Kuwait grew. Refusing to follow other foreign national populations in fleeing Kuwait, most Palestinian-Kuwaitis instead repeated the phrase “never again,” seeking to protect their diasporic jewel.

After eight days of occupation, the Iraqi regime finally began considering how they might leverage the Palestinian’s transnational identity to convince the population to accept Iraqi rule. On August 10, 1990, a high-ranking Ba’th cabinet minister wrote a memo directly to Hussein with his suggestions for “directing the public opinion” regarding “the Palestinian question.” The minister began by noting that the surrounding Arab states also hosted sizable Palestinian populations that should be “swayed” toward Iraq’s goals. To promote this, he envisioned a plan that would “direct [Palestinian] opinion in the direction of a union with Iraq.” Acknowledging Palestinian participation in the resistance, the minister admitted that Iraq had failed to win over the Palestinian community and now needed to “neutralize” their contribution to “the internal saboteur gangs” (al-mukharribun). While the minister’s solution was the deployment of PLO troops in Kuwait, the letter undermines the collaboration narrative; no pre-war collaboration plan existed. Resident Palestinians, now recognized as saboteurs, are largely vindicated as they knew nothing of this agreement and had no recourse against a PLO-Ba’th alliance. Far from joining the Iraqis, the first week of Ba’th occupation prompted various forms of Palestinian economic, military, and familial resistance.

IV. August 10–September 16: The Transfer Policy

After the chaos that characterized the first week of occupation, Iraq began to implement a more advanced strategy for ruling the “province of Kuwait.” From the language used to describe Kuwait to its efforts to seize all valuable commodities and ransack the Kuwaiti economy, Iraq aimed to destroy Kuwaiti identity and the country’s means of

48 Ibid., 116.
49 “Letter from Minister [Name Withheld],” August 10, 1990, KDS Box 06107, 1-5. The letter, written on the same day Arafat voted not to join the Arab States’ condemnation of Iraq, may have been forwarded to the Iraqi delegation in Cairo as an initial outline for PLO-Ba’th cooperation.
50 The letter is one of the first to use Al-mukharribun, meaning subversives or saboteurs, as a term to describe the civilian resistance. The term found widespread use among the IIS throughout the occupation to denigrate and euphemize the civilian resistance.
51 Ibid., 4.
52 Although Iraqi officials principally referred to Kuwait euphemistically as “the Nineteenth Province,” my use of the word province hereafter is purposeful and critical—highlighting the distance between propaganda and practice.
production. Although these policies clearly harmed Kuwait’s citizens, their implementation dealt additional damage to the Palestinian community. Iraq’s attacks on Kuwait’s education system destroyed a major element of the society’s sense of continuity while also severing Palestinian’s economic link to the teaching jobs that first brought Palestinians to Kuwait. The Ba’th regime also instituted policies aimed at separating the foreign and citizen populations in Kuwait, further dislocating the guest worker Palestinians who, as a community, joined in Kuwaiti resistance efforts throughout the war.

The pervasive and erratic looting that Iraqi soldiers and Kuwaiti citizens participated in during the first week of the invasion evolved by the third week into a deliberate and devastating attack on Kuwaiti property. Iraq’s policy of “wealth transfer,” was oriented around the removal of Kuwait’s fixed assets and the transfer of this capital to Baghdad.53 This policy was justified by Hussein’s dubious claim that Kuwait had been an integral part of Iraq throughout its history.54 This patriarchal narrative was cynical at best. “What I want for this province of Kuwait is that we should try to make it fall behind the rest of the provinces in the country,” explained ‘Ali Hassan al-Majid, the first military governor of Kuwait, in 1990, “so that the other provinces can take what is their due and catch up with it.”55 Treating Kuwait as a prodigal Iraqi province, al-Majid ferociously implemented this project of wealth redistribution during his three-month tenure from August 1990 to November 1990.56

On August 21, 1990, an entire Iraqi infantry brigade, numbering more than 300 troops, signed a pledge that any “spoils” that they acquired had been “taken revenue” at the unit level. Marking the transition from looting to transferring, the army now required a review of war spoils so that any property that might be “at the disposal” to the unit could be used towards the war effort. Nodding to the temporary nature of the invasion, the soldiers also signed that they bore “all the legal consequences in the case of appearance of future contrary evidence” for the items that they retained.57 While far from exhaustive, the diversity of the following transferred items demonstrates the breadth of Iraq’s social and economic attack. Al-Majid regularly approved the transfer of valuable non-military items—from luxury goods to critical infrastructure. On August 26, 1990, for instance, he acknowledged receipt of five Cadillacs at the Baghdad Office of Military Industry and Manufacturing.58 While cars could be replaced, the removal of Kuwaiti infrastructure would impair Kuwait for years after occupation. On August 24, al-Majid permitted his lower commanders to deconstruct, pack, and transfer vital desalination equipment housed around Kuwait City.59 The governor also allowed a unit to purge the public transportation system of 200 air conditioning units, another necessary survival item in Kuwait’s desert climate.60 So determined

53 Utilizing the Arabic verb *naqala*, literally meaning to transport or carry away, the word found favor over what an outsider might observe as stealing, pilfering or appropriating.
54 Ofra Bengio, *Saddam’s Word: Political Discourse in Iraq* (New York: Oxford University Press, 2002), 48. A complete explanation of Iraq’s historical claim to Kuwait can be found in Bengio’s chapter on the invasion.
56 In numerous instances, the stolen property was either kept by various members of the Ba’th regime, or destroyed in storage or transport.
57 “Signed Pledges from 304 Infantry Brigade” KDS Box 00116, 3-20.
58 “Transfer Request,” August 26, 1990, KDS Box 00293, 3.
60 “Transfer of Air Conditioning Units,” December 17, 1990, KDS Box 00290, 3. Signed by al-Majid, who was no longer the governor in December, the date indicates that this letter was likely backdated.
were the Iraqis to disrupt the normal operation of civic life that, after a detailed study of Kuwait’s Zoo, al-Majid approved the transfer of a camel, a llama, a kangaroo, and a U.S. cow to the Baghdad Zoo. In a combined attack on civic life and sovereign capital, on September 16, al-Majid ordered Iraqi soldiers to confiscate all the furniture and electronic equipment housed across Kuwait’s 94 schools, including kindergartens, so that it could be installed in its “rightful home,” before the start of the school year.

In addition to the economic damage, the attack on Kuwait’s national identity was no less pernicious. In the same meeting where al-Majid explained the historical precedent for transfer, he also clarified his antagonistic view towards the Kuwaiti people. “I do not want it to be like… any other of our provinces,” he said. “We are interested in its position and what is under its ground. We do not want its people.” Various superficial changes were made to remind Kuwaiti residents and citizens of their new situation. Pictures of the Al-Sabah were banned and anyone possessing Kuwaiti flags or national paraphernalia, such as old license plates, was promptly arrested. More subliminally, the shuttering of Kuwait government buildings like Kuwait University and the transfer of state capital challenged familial-social identity. Schools, zoos, and public spaces served as focal points for connecting individuals and families; denying access to them distanced Kuwaitis from each other in an attempt to undermine national identity and cohesion. An entire generation of students was set back a year and Kuwaitis, not knowing when or if Iraq would be defeated, were forced to consider sending their children or their entire families to various Arab and non-Arab countries. Iraq was successful at convincing many Kuwaitis that Kuwait was no longer their home.

The exact methods of Iraq’s assault on Kuwait’s economy and national identity caused additional collateral damage to the resident Palestinian community. Iraq’s transfer of Kuwaiti government property, especially from the educational sector, threatened the very foundation of Palestinian diasporic society, as Ghabra has shown. After all, the education system was the most popular form of Palestinian employment. Even before their expulsion from Palestine in 1948, Palestinians had been invited to Kuwait in 1936 to establish Kuwait’s public school system. As the number of Kuwaiti students increased, Palestinian teachers were imported in larger numbers and made a very positive impression on Kuwait’s Council of Education. After 1948, the Council obtained employment...
for a number of educated Palestinians in the education sector as well as other parts of Kuwait’s rapidly developing economy. An undated letter sent from the Union of Palestinian Teachers to its counterpart in Iraq noted that approximately 8,000 Palestinians were employed as teachers across the entire school system during the 1989-1990 school year.\(^{67}\) Beyond losing a source of income from the school closures, Palestinians’ legal status was also threatened by al-Majid’s September 16 transfer order. Under the guarantor (\textit{kafala}) system implemented by Kuwait in 1969, foreign workers were forbidden from remaining in Kuwait if they were terminated from their job.\(^{68}\)

Ghabra, a professor at the University of Kuwait, experienced the overnight dissolution of his legal status in Kuwait. He notes that by the end of September, at least 3,000 Palestinians had been officially fired by the Iraqi government, with countless more facing \textit{de facto} termination through school closures.\(^{69}\) As part of the same September 16 bulletin, al-Majid blustered in typical fashion that Kuwait University would not open for the 1990–91 school year because the staff had become too comfortable with “the high life and large salaries.” Its students, he suggested, of whom fewer than 200 of the original 1,200 remained, “actually desire[d] to study at Iraqi universities.”\(^{70}\) The undated letter sent from the Union of Palestinian Teachers detailed the social and economic struggles of the 8,000 Palestinian educators. The teachers saw their employment in Kuwait as a way to escape poverty and statelessness, provide for their families, and continue Palestinian society in diaspora, not as a way to live the high life. The letter concluded with the modest request that the Iraqi Teachers Union forward their concerns to the central government. Neither teachers nor other government employees would find relief in the coming months.

While education was the most popular Palestinian occupation, the teachers’ fate is representative of all Palestinians employed by the al-Sabah administration. After the termination of teachers in September, the Iraqi government proceeded in October to fire a large number of Kuwaitis and Palestinians in other parts of the government.\(^{71}\) Although Iraq did not fully enforce the \textit{kafala} system, their policies established the legal conditions necessary for the March expulsion. Through their destruction of nearly all government employment in Kuwait, Iraq incidentally completed the most difficult part of the al-Sabah goal of dislocating Palestinians from Kuwaiti society and residency. Families who relied on the salary of a teacher or government worker were among the first Palestinians to become double refugees by seeking either temporary or permanent relocation outside of the country. Ghabra’s wife and two daughters were able to flee on an American transport plane at the end of September 1991, thanks to their daughters’ American citizenships.\(^{72}\) For many Palestinians, however, especially those who originally lived in Gaza, the option of returning home was impossible or illegal.

In the first month of occupation, Iraq also instituted divisive strategies that sought to drive a wedge between foreign workers in Kuwait, a majority of the population, and Kuwaiti citizens. In an attempt to break a boycott, Iraq ordered workers in certain key sectors to return to work by September
For the foreign nationals remaining in Kuwait, mostly Palestinians, legal threats included deportation and asset forfeiture. Although Ghabra estimates that more than 70 percent of Palestinians joined the boycott regardless of the legal threats, Iraq encouraged Kuwaitis to see foreigners as a threat rather than as allies. In late August, Iraq released another decree stating that any Kuwaiti found harboring foreigners wanted by the police would be executed for treason. Whether Kuwaiti planning minister al-Mutawwa’ knew of these policies or not, they conditioned Kuwait’s population to receive his call for a new identity.

V. September 16–October 21: Resistance and Foreign Troop Involvement

As the Iraqi occupiers developed new methods for exerting authority during the second month of the occupation, methods of civilian and military resistance evolved at an even faster pace. On both of the resistance fronts, Palestinians who joined Kuwaitis in rebellion faced imprisonment and execution. Political resistance expanded from flyering efforts into a systematic boycott of Iraqi-controlled industries. Palestinians also volunteered their technical expertise to so called “Popular Committees,” labor collectives organized by Kuwait’s Islamic societies to provide social services eliminated by the military government. Saboteurs continued their interference efforts through numerous imaginative techniques that prevented the IIS from instituting complete control over the population. During this time, Iraqi officials also defined the role of the external Palestinian troops, limiting them to menial tasks that did not require weaponry.

A repudiation of the Iraqi order to return to work by September 1, Kuwait’s work boycott was a powerful symbol of civilian resistance. Since Kuwait was one of the region’s most economically-stratified countries before the war began, a strike uniting day laborers, foreign workers, and wealthy business owners was by no means an inevitable response to the occupation. Kuwaitis were particularly successful at halting Iraq’s superficial attempts to re-open Kuwait. Private enterprises refused to conduct business with the occupiers while university professors rejected calls to return to their gutted campus. In step with their colleagues, Palestinian private business owners closed their doors, Palestinian university professors voted to joined their Kuwaiti counterparts; even the PLO office in Kuwait even refused to organize with Iraqis. Although Palestinians were the only foreign national community to participate in the boycott, their role in the work stoppage
was never acknowledged by the al-Sabah government.\textsuperscript{78} Beyond boycotts, Kuwait’s Shi’a Islamic societies also formed “Popular Committees” that organized volunteer labor. The Social Reform Society, which previously controlled several Kuwaiti labor unions during the 1980’s, established makeshift supermarkets, created hospitals for wounded resistance forces, and provided numerous other services that had collapsed after the invasion.\textsuperscript{79} Palestinians joined these efforts, most commonly offering their invaluable experience as doctors and engineers.\textsuperscript{80}

Military resistance conducted by saboteurs and rebels (\textit{mutamarridun}) was seen by the IIS as a more credible threat than civil resistance. The groups’ clashes, from vandalism to full-blown battles with the Iraqi Army, were thoroughly documented in security correspondence. The creative energy that some rebels dedicated to distracting and debilitating Iraqi troops is quite astounding. For example, on August 31, IIS officials reported that a number of soldiers had become ill after eating watermelons injected with rat poison.\textsuperscript{81} In September, security officials investigated claims that Kuwaitis had rigged boxes of cigarettes with blades and explosives.\textsuperscript{82} Although security forces documented acts of rebellion almost every day, gauging the size of rebel groups, or the total number of Palestinians involved, is a nearly impossible task. Arrest records provide the only window into group size and national composition.

During the two coordinated operations against rebels conducted by Iraqi General Security in October, however, many Palestinians were arrested and executed alongside the Kuwaiti members of their network. Responding to intelligence obtained from an Iraqi citizen who had lived in Kuwait for many years, police forces conducted a raid on October 5 against a large resistance cell hiding in al-Jahra, roughly 15 miles from Kuwait City. Although many of the criminals escaped, three of the ten arrested fighters were Palestinian. During their interrogation, one of the Palestinians revealed that he had previously worked in the intelligence section of Kuwait’s Defense Ministry. Given his knowledge, the commanding officer suggested to al-Majid that he should be released under the promise of future cooperation. His compatriots, likely due to their less useful backgrounds, were murdered. In the margins of the report generated after the raid, al-Majid wrote and signed a chilling order. “Book all of their families in Basra,” he jotted, “confiscate their liquid and fixed assets, and after, carry out their death sentences in Kuwait after the end of their interrogation and confession.”\textsuperscript{83} Instead of fleeing Kuwait, these three men risked their lives and the lives of their families to join the resistance forces of a country that would not even offer them citizenship.

The second raid, conducted on October 21, provides a useful opportunity to compare the contributions of Palestinian rebels against the less successful Palestinian troops imported from Iraq. After a Kuwaiti citizen was arrested for concealing a handgun, he admitted that he obtained the gun from a Palestinian rebel leader in the southern al-Fahaheel district of Kuwait City. After an interrogation, the

\begin{itemize}
  \item\textsuperscript{78} “Interview with Defense Minister Nawwaf al-Ahmad al-Sabah,” FBIS-NES-91-049, March 13,1991.
  \item\textsuperscript{79} Ghabra, “Voluntary Associations in Kuwait,” 117.
  \item\textsuperscript{80} Ghabra, “The Iraqi Occupation of Kuwait,” 117,122. As more documentary evidence from the war is released, the methods of civil resistance and the diversity of its participants could provide social historians an enriching approach to the events of 1990 and 1991.
  \item\textsuperscript{81} “Daily Report,” August 31, 1990, KDS Box 05839, 55.
  \item\textsuperscript{82} KDS Box 00270, 3,4. For other sabotage efforts see KDS Box 00325, 255; KDS Box 00361, 123,170; KDS Box 00362, 12-13.
  \item\textsuperscript{83} “Daily Security Notes,” October 5, 1990, KDS Box 00193, 2-3. During the Iran-Iraq war Basra became a well-known prison for dissidents and their families; torture and executions were a regular occurrence.
\end{itemize}
Palestinian rebel divulged the location of his weapons cache to Iraqi authorities. The cache included a remarkable “5 rifles, 4 Kalashnikovs, 50 hand grenades, 22 bombs” and an additional 35 crates of military materials. Although the man’s sentence was not stated, given his extensive armaments, he likely did not receive an offer to cooperate.

Conversely, the PLO detachment in Kuwait, numbering some 72 Iraqi-Palestinian combatants, had to beg al-Majid for “your Excellency’s generous approval” to keep 75 guns that they had purchased themselves. Although they were initially allowed to retain their weapons, al-Majid reversed his decision in the beginning of October, confiscating the weapons under the auspices that “a number of Palestinians have participated with the rebels…interfering in some of the matters of the security services.” The order that al-Majid signed also noted the imported troops had been largely infective due to “their concern with personal affairs” and were thus forbidden from carrying or shooting any firearms. Instead of helping sway the Palestinian population in Kuwait, the imported troops proved to be an untimely nuisance that distracted the security apparatus from the Palestinian rebel threat. While this instance of disarmament did not mark the end of the PLO troop involvement in Kuwait, the Iraqi government’s internal communication consistently ridiculed the PLO troops, and Hussein and al-Majid also denied Arafat’s requests to train 1,000 more Palestinian fighters.

VI. Conclusion: Exodus and Erasure

Kuwait’s systematic persecution of Palestinians throughout 1991, reaching critical mass in March, stands as one of the worst human rights abuses of the Gulf War. Those who condemn Saddam Hussein’s invasion of Kuwait should also recognize and denounce the summary expulsions, sham martial-law trials, torture, disappearances and death sentences enacted by the government that Coalition forces returned to power. By acquiescing to rhetoric of Palestinian collaboration that was created by the al-Sabah government, historians from various political persuasions have both implicitly and explicitly sanctioned Kuwait’s post-war crimes. In light of the continuation of Palestinian statelessness, and the persistence of the narrative that Palestinians in Kuwait somehow deserved their expulsion, this study

87 Ibid.
89 For a complete account of Kuwait’s abuses see A Victory Turned Sour: Human Rights in Kuwait Since Liberation.
of the diasporic community’s initial response to the Iraqi occupation assumes an even greater importance. Standing next to their Kuwaiti counterparts, a majority of Palestinians refused to leave Kuwait despite their early recognition that Hussein’s invasion could only harm their community. Palestinians were among the first to join civic and military resistance forces, and they pioneered methods of familial resistance that helped them to remain in Kuwait as other non-citizen populations fled. Nonetheless, Iraq’s transfer policy targeted economic sectors populated by Palestinian employees, fulfilling the main requirement, unemployment, necessary for “legal” expulsion under Kuwait’s *kafala* system. Additionally, Planning Minister al-Mutawwa’s explanation of the Kuwaiti regime’s demographic motives present a plausible alternative explanation for its insistence on Palestinian collaboration.

This evidence, representing the most important developments within the Palestinian community during the first two months of Iraqi occupation, clearly combats many of the claims furthered by the collaboration and American narratives. I intend to conduct additional research on the 700,000 documents that comprise the Kuwait Dataset, with particular attention to the minority groups, namely the Palestinians and Shi’a, whose stories of resistance have been omitted from the al-Sabah government’s version of history. Since the Al-Sabah continues to govern Kuwait—legitimizing its interpretation of the events and justifying its ongoing suppression of minority voices—the need to challenge dominant notions about resistance and collaboration has more than academic importance. Ultimately, the responsibility falls to Kuwaiti citizens and government officials to simultaneously include Palestinians in the story of citizen resistance and acknowledge that the ethnic cleansing of Palestinians was a human rights violation with no basis in credible security concerns.
MAPPING PUBLIC HEALTH IN NINETEENTH-CENTURY OXFORD

Introduction by the *Herodotus* Editorial Board

Lauren Killingsworth’s paper traces the history of Oxford’s cholera epidemics through sources generally considered references: maps. Killingsworth presents and analyzes a great number of maps from nineteenth-century Oxford, some directly related to Cholera outbreaks and others connected through her deft analysis. By combing through all of these materials, Killingsworth is able to point to the way these maps represented the emergence of the public health system of Oxford. Ultimately, while the maps this paper analyzes may have achieved mixed success in fighting disease, they collectively illustrate important changes in thinking about health and related infrastructure.
Mapping Public Health in Nineteenth-Century Oxford

Lauren Killingsworth

In 1855, the physician John Snow, considered the “father of modern epidemiology,” issued “On the Mode of Communication of Cholera,” a monograph containing a map of the cholera outbreak in the Soho District of London. Snow took a novel approach to mapping disease: he marked each fatal cholera incident with a black bar at the site of the house in which it occurred, and pinpointed each public water pump with a dot. In residences with multiple cases of cholera, the bars were stacked upon each other inward from the street, creating a clear infographic of the incidence and distribution of disease (Fig. 1). Snow’s map was unprecedented in its effective presentation of epidemiological data and its departure from the miasmatic theory of disease. The miasmatic theory was perhaps best summarized by English social reformer Edwin Chadwick: “All smell is, if it be intense, immediate acute disease; and eventually we may say that, by depressing the system and rendering it susceptible to the action of other causes, all smell is disease.”¹ During the cholera epidemics of mid-nineteenth century England, doctors and laypeople alike felt threatened by “deleterious,” “tainted,” and “unwholesome” air.² They imagined disease “wafting through the globe” and insisted that the air was “oppressive from the smell of cholera.”³ The surgeon Dr. Fred Symonds recalled being struck by cholera during “one particular moment when the atmosphere was peculiarly oppressive and a sort of sirocos wind passed over.”⁴ John Snow, uniquely, did not subscribe to the miasmatic theory of disease, stating, “what is so dismal as the idea of some invisible agent pervading the atmosphere, and spreading over the world?”⁵ Snow believed in contagionism, and argued in his “On the Mode of Communication of Cholera” that cholera was a “morbid poison” contracted through the ingestion of contaminated water.⁶ Snow’s map reflected his belief that cholera was a waterborne illness: a quick glance at the map reveals that the Broad Street water pump is the epicenter of the cholera outbreak. Snow advised the local government to remove the pump handle and his advice drastically slowed the spread of disease and reduced the number of deaths.

¹ Metropolitan Sewage Committee. *Parliamentary Papers* (1846), 651.
Snow’s map of the Broad Street outbreak is often regarded as the most influential work of medical mapping and is a common reference point for historians of medical cartography. The map has been praised for its effective presentation of data supporting a scientifically accurate theory of disease transmission. Yet, there are other, less well-known disease maps (many predating Snow’s) that present public health statistics in novel ways and warrant attention for their role in the evolution of medical cartography. While these maps reached scientifically inaccurate conclusions about disease transmission, they were carried out with great scientific rigor for their time, aided the portrayal of disease as a public health issue, and prompted debate over miasma-tism and contagionism theories. It is important to compare the influence of Snow’s medically accurate map with that of scientifically inaccurate, though rigorous, portrayals of disease. This can help us to better understand why Snow’s map was so revolutionary and to trace the evolution of medical cartography during a period when the scientific basis of infectious disease was highly contentious.

Physicians in the town of Oxford produced a number of maps in response to the cholera outbreaks of the mid-nineteenth century and the growing interest in mapping social statistics, championed by Oxford’s academic societies. One of these maps can be found folded into a
pocket at the back of an unassuming pamphlet “On the Sanatory Condition of Oxford” by W. P. Ormerod, surgeon to the Radcliffe Infirmary (Fig. 2). The map, titled “Plan of Oxford Shewing the Parts Visited by Cholera and Fever,” was published in 1848, predating John Snow’s map by seven years. The map, though somewhat crudely rendered and not drawn to scale, used dots and crosses to mark disease. This approach to mapping statistics with discrete symbols was rare at the time.\footnote{Michael Friendly and Gilles Palsky, “Visualizing Nature and Society” in Maps: Finding Our Place in the World, edited by James R. Akerman and Robert W. Karrow (Chicago: University of Chicago Press, 2007), 244.}

![Figure 2. Ormerod’s “Plan of Oxford shewing the parts visited by Cholera and Fever.” (Source: University of Oxford, Bodleian Library)](image-url)

In this paper, I examine the evolution of public health cartography in Oxford during the later half of the nineteenth century. Using pamphlets, newspaper articles, and proceedings from the Ashmolean Society (Oxford’s prestigious natural history society) and Oxford’s Public Health
Board, I investigate the intended purposes and audiences of Oxford’s public health maps, and the responses to these maps. I begin with Ormerod’s above-mentioned 1848 map, then turn to Oxford physician Henry Acland’s 1856 “Map of Oxford to Illustrate the Localities in which Cholera & Choleraic Diarrhea Occurred in 1854, and Cholera in 1832 & 1849.” I argue that W. P. Ormerod’s map and John Snow’s map had a strong influence on Henry Acland’s map of Oxford. I compare the Oxford cholera maps to Snow’s Broad Street map, to ask why Snow’s map was so novel and why Snow’s map, not the Oxford maps, became one of the most influential works of early medical cartography. I show that, despite the scientific approach that Ormerod and Acland took to portraying Oxford’s cholera epidemics, their analysis of the disease and proposals for reform were grounded in a belief in the miasma theory. I then examine maps published after Oxford’s cholera epidemics that were concerned with the sewage system and waterworks. I provide evidence that these maps were commissioned to glorify the city by proposing advanced infrastructure systems that were rarely implemented. These sewage maps argue for the role of medical mapping in influencing public opinion about the state of public health, a departure from earlier maps that were used as tools to understand, and advocate for, certain “scientific” modes of disease transmission. While Oxford’s nineteenth-century public health maps varied in their intended purposes and effects, they promoted conversation on health issues and reflected the contemporary misunderstandings of disease.

Oxford faced cholera epidemics in 1832, 1849, and 1854. The first epidemic lasted 19 weeks, infecting 184 and killing 95, in a population of 22,000.8 The explosive, sudden outbreaks and high mortality of the disease led to widespread panic. In a sermon titled “To a Christian Congregation on the approach of the Cholera Morbus,” Rev. W. Sewell warned, “It will come on us like a thief in the night, striking us down in a moment, not allowing time for preparation, or one milder state of suffering to nerve us for another more severe… It will come on us, blow upon blow, and death upon death.”9 In response to the first epidemic, an independent Board of Health was created, including city, university, and parish members.10 The Board of Health worked with the Commissioners of Sewers and the Market Committee to manage the proper cleaning of the city, requiring that “all the Ditches, Drains, and Reservoirs, be thoroughly cleansed, and all Stagnant Water be cleared away, and the Sewers rendered free from all obstructions… to keep the Windows, especially of Bed-rooms, in good repair, in order that no Person may be exposed during sleep to currents of Night Air.”11

After the first epidemic, conflict arose between the local Board of Health and Board of Guardians over funding and responsibilities. The Board of Guardians managed Oxford’s Poor Law Union, and oversaw sanitation and relief to the poor. The Board of Guardians included

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11 R. Sheen and J.C. Jones, “At a meeting holden in the audit room of the town hall, Oxford, on Tuesday, the 15th Day of November, 1831” (1831), n.p.
ex-officio and elected members.\textsuperscript{12} Conflict between the Board of Health and Board of Guardians eventually led to the demise of the local Board. Concern regarding public health grew across England in the 1830s and 1840s, largely due to social reformer Edwin Chadwick’s establishment of the new Poor Law and publication of the \textit{Report on the Sanitary Condition of the Labouring Population of Great Britain}.\textsuperscript{13} Despite this rising concern, development of public health initiatives in Oxford was hindered by conflict between the university, town, and various sanitary commissions over individual responsibilities. Pressured by the threat of government-run health inspections and Parliament’s approval of the Public Health Act of 1848, the Oxford City Council began discussing the possibility of implementing the 1848 act.\textsuperscript{14} W. P. Ormerod, a physician at the Radcliffe Infirmary and a Fellow of the Royal College of Surgeons of England, decided to collect information to “save time in case such information should be required by an inquiry being made into the ordinary condition of health, or the unusual prevalence of disease any particular period in Oxford.”\textsuperscript{15} Ormerod was likely referring to the possibility of Oxford adopting the 1848 Public Health Act, or a new local measure. Ormerod may also have been driven to investigate Oxford’s state of health after observing the increase in fever and diarrhea in Oxford during the summer of 1846. In 1848, Ormerod published “On the Sanatory Condition of Oxford,” in which he emphasized the need to be prepared for another potential epidemic, describing how he had arranged the information such that “the parts on which disease presses most heavily may at any time be ascertained at once, and receive the chief attention.”\textsuperscript{16} The “Plan of Oxford shewing the parts visited by Cholera and Fever” included in the pamphlet reflects Ormerod’s intention to portray the distribution of disease and provide practical information.

The plan served as a visual tool for Ormerod’s detailed account of public health in Oxford. A closer look at Ormerod’s map provides insight into its intended purpose and method of organizing public health data (Fig. 3). The key, situated below the title of the map, highlights the main locations deemed unsanitary, chiefly yards. Vivid descriptions from Ormerod’s pamphlet complement the map. The key includes Faulkner’s Yard (“unpaved, with rubbish heaps, and also with the privy uncleared, suffers much from illness”), Brazier’s Yard (“a small open drain, with heaps of ashes and filth, and one corner of the yard rendered still more unclean by a donkey kept in it”), and St. Helen’s (“a deep pit partly filled with solid matters and covered by a wooden trap door is situated close to the house, the inhabitant of which complained much of the smell arising from it”).\textsuperscript{17,18,19} Interestingly, Ormerod omits a number of the locations he discusses in his pamphlet from the key. The justification for the inclusion or exclusion of particular locations is never made clear. Each parish is represented in the key, suggesting that perhaps Ormerod wanted to highlight the sites he felt were most egregious in each parish. Yet Ormerod includes Wind-
mill Yard, which is barely mentioned in the text. It is also unclear why some of the locations are listed as letters of the alphabet while others are listed as numbers. There is no obvious distinction between the alphabetical locations and the numerical locations. Finding the locations indicated by the key is quite challenging due to the small size of the numbers and lack of emphasis. Close examination reveals a small number 4 written outside St. Helen’s passageway (Fig. 4). Other numbers and letters highlighting unsanitary locations can be spotted throughout the map. However, due to the selective nature of the key and the lack of clarity, the map does not provide an immediate visualization of the sanitary condition of Oxford. Though Ormerod was thorough in identifying different areas affected by unsanitary conditions, the lack of a systematic approach to plotting these locations makes his work appear less objective and less scientifically sound by today’s standards.
Figure 3. Inset view of Ormerod’s Plan of Oxford, centered on the St. Ebbes (middle) and St. Thomas (left) parishes.
Ormerod depicted the distribution of disease more systematically than the sanitary conditions. Ormerod plotted sites where disease occurred in 1832, 1844, 1845, and 1846, though no distinction was made between each year on the map. The key states that “The localities of fever are marked with +” and “The localities of cholera are marked with a •”. The symbols can be found throughout the city. The decision to include data on both cholera and typhoid incidence allows for a visualization of the relationship between these two diseases, and Ormerod notes that the districts affected by cholera in 1832 are the same as those affected by typhoid in the 1840s. While extensive, the map lacks the clarity and quantification methods that Snow would later contribute to the public health map. A major difference between the Ormerod map and the Snow map is the base map upon which the data is illustrated. Ormerod’s map is pictorial in nature; individual trees are illustrated and buildings and landmarks of interest are shaded in. In contrast, Snow’s base map is a bare outline of the streets of Soho. Snow provides the minimal information needed to convey the source of disease, while Ormerod provides a detailed map of the city that distracts from the main intention of demonstrating disease distribution. Additionally, Ormerod plots only the location of disease incidents, not the exact number of fatalities—which Snow would later pioneer with the use of the bar stacking method. The maps also differ in the

Ibid., 42.
data selected for display; while the Snow map plots water pumps and cholera cases, the Ormerod map plots unsanitary sites, cholera, and typhoid cases. It is important to note that, while they held different views on the origins of cholera, both Ormerod and Snow used cartography to provide evidence of a causal correlation between specific factors and disease. The Ormerod map shows that Snow was not the first to implement this technique.

While Ormerod’s map may be considered unclear and rather ineffective by modern standards, it is important to remember that the thematic map was not yet widespread in 1848. The thematic map displays the occurrence of a small number of phenomena over a simple base map, as seen in Snow’s Broad Street Pump map. Ormerod’s map is more of a hybrid map than a thematic map; hybrid maps, which predate thematic maps, portray a small number of phenomena but do not use a simple base map. It is valuable for a modern viewer to remember, however, that a viewer of Ormerod’s map would likely not have had previous exposure to statistical thematic maps. A more “clear,” quantitative map such as Snow’s Broad Street Pump map might not have been more effective in illustrating the distribution of disease in Oxford; Ormerod may have intentionally incorporated landmarks into his map to help orient the viewer. The inclusion of key buildings, such as churches, whose locations would be familiar to locals, suggests that Ormerod’s map was intended to be a useful document for raising awareness of public health issues among residents.

Perhaps the most compelling aspect of Ormerod’s map is his method of emphasizing the areas with highest incidence of disease. As the key explains, “The parts chiefly visited by disease generally, are slightly shaded.” Interestingly, the idea of shading poor or “worse off” areas in maps with dark colors was a common practice in nineteenth-century mapmaking, championed by mathematician and mapmaker Charles Dupin. The map clearly shows that disease is most prevalent in the St. Ebbes, Jericho, St. Aldates, St. Thomas, and St. Clement’s neighborhoods, which were often flooded. These were the poorest neighborhoods in Oxford, and were home to two-thirds of Oxford’s population. Referring to Jericho, Ormerod described a “bloc of new streets chiefly inhabited by the poorer class… here scarlatina and diarrhoea were very general and fatal. The locality is low, and borders on parts which are occasionally flooded… a drain of the filthiest kind runs down Jericho, quite open.” In describing St. Thomas, Ormerod stated, “the river, with its levels varying at different periods of the year, runs through the parish.” Thus the map, when presented alongside the paper, suggests that poor drainage is correlated with disease.

Newspaper articles, public health memoirs, and Ashmolean Society proceedings suggest that Ormerod’s plan was very well received. Dr. Henry Acland, Lees Reader of Anatomy and Fellow of the Royal Geographical Society, remarked in his “Memoir on the cholera at Oxford, in the year 1854: with considerations suggested by the epidemic” that “Mr. Ormerod’s Sanitary

22 Ibid., 240.
25 Ibid., 24.
Map of Oxford points out in an admirable manner the way in which the Epidemic and Contagious Diseases are collected round special centres: and, as may be seen by the Map in the Memoir, these are also the undrained parts.” From a public health perspective, Ormerod’s use of shading was effective in suggesting a remediable correlation between disease incidence and drainage. There is also evidence that Ormerod’s map was used to increase awareness of public health issues, advocate for change, and help others better understand the transmission of disease. An article by G. A. Rowell in the *Oxford Chronicle*, published in 1850, praised Ormerod’s map and used it to support the claim that the city needed a source of clean water. Rowell explained,

> With regard to what localities may be considered healthy or otherwise, there cannot be a better test than the valuable pamphlet and map “on the sanitary condition of Oxford,” by Mr. Ormerod...In Mr. Ormerod’s pamphlet the locality of every death from epidemic, or contagious disease during 1844, 5, and 6, is given, and the locality of every case of cholera in 1832 (except in the parish of St. Giles); and those parts of Oxford where these diseases prevailed in a more than ordinary degree, are distinctly shaded in the map.  

Rowell also used the map to argue that disease is associated with bad water.

> The most probable cause has been bad water; and I have ascertained, that in almost every part of Oxford which is shaded by Mr. Ormerod as a fever district, the water is decidedly bad. The whole of the district lying below the Trill Stream is marked by Mr. Ormerod as very subject to fevers...The houses on the north side of the New-road, between Pacey’s Bridge and the Hollybush, are marked as a fever district; and there the water is so bad that the inhabitants now get it from a pump on the opposite side of the road, which side is not shaded on Mr. Ormerod’s map (Fig. 5).  

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28 Ibid.
Ormerod’s map raised awareness about the unequal distribution of disease and sanitary conditions in Oxford. Rowell’s comment that inhabitants got their water from the side of the road which was not shaded on Mr. Ormerod’s map suggests that Rowell was using the map to better understand the health inequality he observed between neighborhoods. Additionally, the publication of Rowell’s article in Oxford’s local newspaper suggests that Ormerod’s map was introduced to laypeople as well as those invested in public health issues. Ormerod’s decision to include landmarks familiar to locals and a key that explains how to read the map shows that he intended for his map to be circulated among the public.

Ormerod’s map was also influential in the academic setting. Ormerod’s pamphlet and map were published by Oxford’s Ashmolean Society. The proceedings of the Ashmolean Society reported that Mr. Ormerod’s map displayed a correlation between prevalence of disease and undrained regions\(^\text{29}\). The society suggested a possible remedy for the situation involving lowering the level at which the river was kept by locks and improving the valley drainage system. Ormerod’s work demonstrably contributed to public health efforts by stimulating discussion regarding the flooding situation of Oxford and possible use of a dam to remedy the issue.

While Ormerod brought light to the issue of drainage, medical professor and public health advocate Dr. Henry Acland emphasized the relationship between altitude, “bad air,” and disease. Acland published his “Memoir on the cholera at Oxford, in the year 1854: with considerations suggested by the epidemic” in 1856, one year after John Snow published his map of the Broad Street outbreak. Acland’s memoir included a main map of Oxford showing “the localities in which Cholera and Choleraic diseases occurred,” a smaller map of the locations and order of the first thirty cases, a map of the affected districts surrounding Oxford, and a number of graphical representations and charts on epidemiological data. Acland aimed to discover and present\(^\text{29}\) Abstracts of the Proceedings of the Ashmolean Society, from 1843 to 1852 Inclusive, vol 2 (Oxford: The Ashmolean Society, 1854), 190.
“information which will bring practical good to the people,” with the aim of developing a better understanding of the cause of cholera. Here, I focus on Acland’s “Map of Oxford to illustrate Dr. Acland’s Report on Cholera in Oxford in 1854 showing the localities in which Cholera and Choleraic Diarrhoea occurred in 1854 and cholera in 1832 and 1849” (Fig. 6).

Acland expertly illustrated data on disease incidence and location over three different epidemics (1854, 1849, and 1832), expanding far beyond the range of statistics conveyed in Snow’s map. The “References” box highlights the main features of the map: cases of cholera are marked in 1854, 1849, and 1832, each with a distinguishable symbol (Fig. 7). Unlike Ormerod, Acland used a symbol for each person who contracted cholera, providing a more accurate visualization of the incidence of disease. Acland used the same method of stacking bars at the site of

the patient’s residence that Snow used, indicating his familiarity with Snow’s work. Acland was also influenced by Ormerod, evidenced by the inclusion of “parts described by Ormerod” in the map’s key and by the shading of districts. Acland plotted a red dot for each unremedied location previously described by Ormerod, and used an empty red circle to symbolize “parts wholly remedied.” This contributed to a temporal element that is absent in the maps of Ormerod and Snow. By examining the changes in unsanitary regions identified by Ormerod and illustrating data from all three years of epidemics, Acland effectively portrayed the issues of cholera and sanitation over time—creating a more comprehensive map. Additionally, by demonstrating that a number of the locations identified by Ormerod eight years prior were still in dire condition, Acland demonstrated that important public health issues had been neglected.

Color plays an important role in Acland’s map, particularly in highlighting contaminated rivers, points of contamination, and undrained districts. The red backdrop signals danger, and the murky green “undrained regions” warn the viewer of a frightening, swamp-like atmosphere. The red-dotted river, signaling pollution, can be clearly spotted winding through the St. Thomas and St. Ebbes regions, both dense with cholera cases (Fig. 8). Acland details every building in Oxford, providing an even more intricate background than seen in Ormerod’s map. Yet, unlike Ormerod’s map, the backdrop is faded, allowing for emphasis on the cholera symbols and the contour lines. Contour lines connect points of equal height, providing a visualization of the

3D landscape. Acland included contour lines to illustrate his theory that cholera was related to altitude. Starting at the Carfax, the highest point in Oxford, Acland made contour lines marking five-foot gradients (Fig. 8).\textsuperscript{32}

![Figure 8. Inset of Dr. Acland’s map showing the contour lines and color scheme.](image)

The map clearly illustrated that cases were clustered in the lower elevation areas. Observing that “The mortality on our lower level was proportionally three times as great as that of our upper level,” Acland concluded that altitude was the main explanation behind cholera. He asserted that cholera was a disease of “poisoned air” that festered in the lowlands and didn’t rise.

to higher altitudes. While Acland took a scientific approach to mapping cholera incidence, he reached an inaccurate conclusion grounded in his belief in the miasmatic theory. The map itself expertly conveyed a quantification of disease incidence over time and a relationship between altitude and incidence. This correlation was in fact accurate: higher locations received cleaner water sources, while lower locations received contaminated water from the Thames and were heavily affected by flooding. It was Acland’s miasmatic explanation of the role of altitude in disease transmission that was faulty. It was not “foul smells” but contaminated water that spread disease. In fact, Acland’s map could be interpreted as strong support for the theory of waterborne illness, had it not been accompanied by a pamphlet advocating for the miasmatic theory. Acland drew flood lines on the map, marking incidences of high water. To Acland, these flood areas were places that bred toxic smells, not places where waterborne illnesses could more easily spread.

It is thought that Acland’s map received wider attention than most pamphlets on cholera, largely due to his status as a well-known member of Oxford’s medical community and the Ashmolean Society. Acland’s study was praised in medical and lay periodicals, evidence that he was successful in raising public awareness about his theory on the cause of cholera and proper prevention strategies. One of Acland’s chief goals was to spark discussion on the topic and encourage the public to address public health issues. In one passage of his pamphlet, Acland referred directly to the reader, stating, “Another question may however be put to the influential readers in the County and City, into whose hands these pages may fall. Is there a significant acreage of land lying in the Valley of the Isis and Cherwell, which could be made far more valuable by Sewage raised to such a height by steam power?” This direct engagement with the reader emphasizes Acland’s desire to have a wide public audience engage with his work. Although Acland’s work did not cause the immediate implementation of a sewage system, it played a significant role in fostering the public demand for better drainage, sewage, and water supply that was eventually addressed in the 1870s.

It may seem surprising, given the scientific approach that Ormerod and Acland took to mapping disease, that both believed in modified theories of miasma. Both used a combination of miasma and sanitary conditions to explain the cause of disease. They also were proponents of the idea that self-indulgence, particularly over-eating and consumption of alcohol, could induce cholera. While Ormerod subtly conveyed his beliefs in miasma in his pamphlet, Acland was outspoken in his defense of miasma and directly opposed Snow’s theory of contagionism in his memoir.

Evidence for Ormerod’s miasmatic beliefs can be seen in his frequent references to smells. In his pamphlet, he stated, “The inhabitants are exposed to the most unwholesome smells, and almost destitute of fresh air.” He went on to explain, “It has also been shown that the

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33 Ibid., 120.
35 Ibid.
cleansing of drains with the emptying of cesspools during the occurrence of contagious disease is at times rather an evil than a good, by exposing a large mass of decomposing matter to the open air.”

It is important to note that “contagious disease” did not necessarily mean that Ormerod believed in the passing of disease from person-to-person, though it does imply an understanding that disease could be spread. The idea of “decomposing matter” is the hallmark of the miasmatic belief that disease originates from impure particles released to the air. While Ormerod made no reference to the idea that disease was communicated between people, he did recognize that drainage issues contributed to the spread of disease. Thus his theory on disease was informed by, but not limited to, the tenets of miasma.

Acland took a stronger stance in favor of miasma. He raised the possibility of “contagion” in a few places in his memoir, only to argue against it. Acland observed that, “Small families suffer grievously when visited by Contagious Disease.” Snow would have viewed this as the results of communication of disease between people living in close quarters. In contrast, Acland, using a diagram of a house in which many family members contracted the disease, explained that this was not an incidence of contagion but “a condition of too many people in too small space… in plain words, life in poisoned air.” Acland directly countered Snow’s theory, asking,

How does the man who, in a remote country parish (Oakley), with no traceable communication with any locality affected by Cholera, falls ill, while at work in a field… Then he goes home, and all his family are attacked. Any just hypothesis of Cholera must explain a single case like this just the same as it should explain the devastation of a city. Both of these cases are perfectly intelligible, if we assume that the atmosphere or its concomitant imponderable agents produce on the whole human organism an effect resulting in Diarrhoea.

To Acland, this isolated case of “cholera” was sufficient to disprove person-to-person spread of the disease. Acland’s miasmatic beliefs were also reflected in the inclusion of contour lines in his map that demonstrated the effect of the “bad air” at low elevations. Additionally, Acland was convinced that God and meteorology played important roles in the outbreak of epidemics. Acland explained that cholera occurred during the combination of certain meteorological events (such as “thunder unaccompanied by lightning” and “aurora borealis”). He also explained that those who “violated the sanitary laws which our Creator has imposed” were subject to punishment by God.

The Oxford cholera maps, though novel in their display of disease data, are muddied by the authors’ conflicting—and incorrect—theories on disease. Unlike Snow, Ormerod and

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38 Ibid., 48.
40 Ibid., 81.
41 Ibid., 77.
42 Ibid., 75.
43 Ibid., 105.
Acland used their maps to promote miasmatic theory, which was widely accepted at the time. Though both experimented with new statistical mapping techniques, they did not use their maps to propose groundbreaking new conjectures about the transmission of disease. The lasting influence of John Snow’s map can be attributed to the novelty— and accuracy— of his theory that cholera was spread through water. Today, Snow’s work is highly regarded as an example of the role of medical cartography in understanding the scientific basis of disease and in providing a course of action during an epidemic. While Ormerod and Acland’s Oxford maps did not lead to an immediate solution like Snow’s monumental removal of the water pump handle, they did promote important conversation on Oxford’s pressing public health issues and advanced the science of medical cartography. Acland, in particular, championed the idea of social statistics, the extensive collection of data, and analysis of social issues. Both Ormerod and Acland were rigorous and methodical in their approaches to public health, collecting data on diarrhea, fever, and cholera incidence in each parish, recording changes in weather patterns, observing possible sources of disease across town, and identifying areas of poor drainage. Both explained their methods of mapping in great detail in the pamphlets that accompanied their maps, a valuable resource for those interested in mapping other public health issues and for those seeking a more detailed explanation of the epidemics. In addition to advancing the field of statistical medical mapping, Acland and Ormerod advocated for policies effective in addressing contagious disease, though their underlying reasoning was flawed. The removal of cesspits and sanitation of houses, though intended to remove the “poisonous air,” did effectively reduce risk of contact with the water-borne cholera bacteria. Additionally, the maps helped to increase awareness of public health issues and health inequality in Oxford, as suggested by discussion of the Oxford maps in lay periodicals. Increased discussion and debate over the state of public health in Oxford would eventually lead to reform in the 1870s, after many years of conflict between Oxford’s competing committees, industries, and the university.

Following the cholera epidemics, sewage became a major focus of public health cartography in Oxford. Maps diversified from the plotting of disease to detailed plans of proposed sewage and water systems. In 1850, the Paving Commissioners, who managed Oxford’s sewage and other sanitary issues, appointed a surveyor to map the city’s drainage.\(^{44}\) Engineers Sir William Cubitt and MacDougall Smith made a detailed, exhaustive survey and identified various upstream sites as possible water sources. Cubitt provided a plan for the new waterworks and drainage system. Despite the effort and expense taken to produce the plan, little was done with Cubitt’s recommendations. Instead, the Paving Commissioners built only a few new sewers in the Jericho parish.\(^{45}\) In 1854, a new Sewerage Committee was established and another survey was commissioned. After another period of inaction, yet another survey was requested. In 1864 the Local Government Act of 1858 was adopted, leading the Oxford Local Board of Health to request a series of plans from various surveyors, who all suggested an identical approach. The surveyor John Galpin lamented, “If only the scheme so many times proposed could be proceeded with, Oxford could be second to no city in the kingdom.”\(^{46}\) It is likely that Oxford’s committees


\(^{45}\) Ibid.

\(^{46}\) Ibid., 27.
sought to publish new sewage maps due to an internal conflict between the committees, and a desire to outdo the competition. The publication of maps that illustrated an Oxford with a perfectly functioning drainage and water system aimed to portray a positive image of the highly ineffective committees. These maps portrayed an ideal that was never fully implemented. In 1873, after much conflict over the proper type of sewer system and location of sewage outfall, the committees signed the first sewage contract.

The obsessive publication of later sewage maps was fueled by the Public Health Act of 1875. The Public Health Act called for plans to be drawn of proposed infrastructure before requesting government-issued loans. An instructional pamphlet was issued, titled “Suggestions as to the Preparation of District Maps, and of Plans for the Main Sewerage, Drainage, and Water Supply,” written by the civil engineer Robert Rawlinson. It detailed each type of required map, instructing, “Such Plans or tracings may be used for showing lines of main-sewers, drains, water-pipes, and gas-mains. The lines of main-sewers and drains should have the cross-sectional dimensions of the sewers and their gradients distinctly marked.” This set a new standard for the ideal sewage system, which may explain the abundance of sewage maps produced in Oxford in the late nineteenth century. In “The Main Drainage of Oxford,” published in 1877, sanitary engineer William White provided a series of maps demonstrating Oxford’s water and sewage systems, complete with cross-sections of the sewer pipes, in line with the guidelines set forth by the Public Health Act (Fig. 9). These maps were issued after the final sewage system was approved in 1873, and appear to have been a celebration of Oxford’s new sewage system, providing additional evidence for the role of the public health sewage map in portraying the city in the best possible light.

The Oxford cholera maps and the Oxford sewage maps take a very different approach to public health cartography. While the cholera maps aim to address the sanitation issues that plague the city and to better understand cause of disease, the sewage maps are chiefly interested in improving Oxford’s public image. This highlights the diverse functions of maps as scientific tools, vehicles for social change, and propaganda.

The English public health map could be used to expose and better understand medical issues affecting the city— but also as a tool to conceal concerns over the sanitation and health of the town, providing false assurance to the public. The Oxford maps provide important insight into the multidimensional role of cartography in shaping public health in nineteenth-century England. Analysis of the Oxford maps suggests that medical cartography was used as a tool to understand disease transmission and remedy health issues, as well as an important communication medium to argue for scientific theories and to publicize city image. In a time where miasmatic theory dominated, disease maps provided viewers with a visualization of an otherwise invisible and seemingly pervasive threat. By depicting regions affected by disease and plotting possible sources, medical cartography allowed physicians and public health advocates to identify remediable causes of disease and make plans for reform.

The town of Oxford generated a number of influential public health maps in the nineteenth century, a result of the cholera epidemics and the rising interest in mapping social statistics among Oxford University academics. The maps of Ormerod and Acland were novel in their scientific approaches to mapping data on disease incidence. To be sure, both Ormerod and Acland championed the use of maps to defend their misguided views grounded in the theory of miasma.
Yet while the scientific theories behind their work may have been misguided, both Ormerod and Acland promoted discussion on important public health issues among academic communities and the public, and advocated for sanitary reform that was effective in addressing contagious disease. As the focus on cholera led to a greater interest in the development of sewage systems, Oxford’s public health maps became less investigatory and more promotional, publicizing the health of the city rather than studying it. This highlights the dual nature of the nineteenth-century English public health map: a tool to expose and better understand medical issues affecting the city— but also a tool to conceal concerns over the sanitation and health of the town, providing false assurance to the public.
SETTING CRUELTY ASIDE:
INVESTIGATING THE ORIGINAL MEANING OF “UNUSUAL” IN THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

Introduction by Jonathan Gienapp, Assistant Professor of History

Elliot Kaufman produced this truly exemplary and beautifully written paper in my colloquium on originalism and the American Constitution. The theory of constitutional originalism dictates that the Constitution must be understood today in accordance with the meaning it had when originally enacted, so the course probed the relationship between this theory and the practice of history. In addition to contemplating whether the Constitution should be interpreted in this fashion, the course also wrestled with the key historical and methodological problem at its core: how might one credibly locate original constitutional meaning in the first place? Elliot took up this challenge by considering what the single word “unusual”—found in the Eighth Amendment’s prohibition against “cruel and unusual punishment”—originally meant. By drawing upon a remarkable breadth of primary sources scattered across 17th- and 18th-century Britain and America—from treatises and pamphlets to cases and judicial writings—Elliot rigorously reconstructed the original context in which “unusual” was embedded and advanced an original and persuasive thesis: that it functioned as a term of legal art drawn from the British common law tradition. Challenging prevailing scholarly and judicial interpretations, Elliot’s essay ought to be read by constitutional historians, lawyers, and judges alike.
Setting Cruelty Aside: Investigating the Original Meaning of “Unusual” in the Cruel and Unusual Punishments Clause

Elliot Kaufman

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” – Eighth Amendment of the United States Constitution

Practical and philosophical at the same time, the Cruel and Unusual Punishments Clause of the Eighth Amendment to the U.S. Constitution has long been a benighted area of constitutional interpretation. Its text has been ignored, selectively read, and misconstrued, and its meaning has expanded, contracted and changed altogether—seemingly with each new Supreme Court that reads it. In an effort to satisfy both its moral inclinations and the text of the Constitution,¹ the Court’s wildly inconsistent rulings² have been described as “ineffectual and incoherent.”³ In his dissent in Furman v. Georgia (1972), Chief Justice Burger summarized the view of many scholars,⁴ writing, “Of all of our fundamental guarantees, the ban on ‘cruel and unusual punishments’ is one of the most difficult to translate into judicially manageable terms.”⁵ This paper will attempt to clarify the original meaning of the Clause by setting aside “cruelty”—a truly amorphous moral concept—and examining the original public meaning of “unusual.” Often forgotten or viewed as a redundant term, “unusual” should be read with attention. The historical record reveals it to be the key word on which the entire meaning of the clause hinges.

The search for original public meaning is not to be taken as an endorsement of any one method of constitutional interpretation as correct or unassailable. Rather, it is a recognition that, even to most non-originalists, this type of textual meaning—the meaning of the text as it was understood by those with authority to enact it—is relevant to interpretation. If the rule of law

¹ Meghan J Ryan, “Does the Eighth Amendment Punishments Clause Prohibit only Punishments that are both Cruel and Unusual?” 87 Washington University Law Review 3 (Jan. 2010), 568.
² The Court has switched its position on whether disproportionate punishments are prohibited twice in three years (see Rummel v. Estelle, 445 U.S. 263, 285 (1980) answering negatively, and Solem v. Helm, 463 U.S. 277, 203 (1983) answering positively, and then a third modification in Ewing v. California, 538 U.S. 11, 30-31 (2003). In the death penalty context, see infra page 2 and note 9. The Court has yet to hold that the aforementioned cases were ever wrongly decided.
⁴ See Robert A. Rutland, The Birth of the Bill of Rights 1776-1791 (Boston: Northeastern University Press, 1955), 11 (“Exactly what the prohibition of cruel and unusual punishment forbade was also a questionable point.”); Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the States of the American Union (New York: Little, Brown, and Co., 1890), 402 (“It is certainly difficult to determine precisely what is meant by cruel and unusual punishments.”)
is to be a law of rules, it is surely worthwhile to determine what the people actually ratified. Accordingly, this paper will break from Justice Warren as well as Justices Scalia and Thomas, and posit that the original meaning of “unusual” is not “contrary to what is generally done” or “such as is [not] in common use,” but rather “contrary to long usage.” If properly applied, this change should help to clarify a cruel and unusual jurisprudence. Far from prescribing Eighteenth Century standards of cruelty for the rest of time or offering the Court a blank cheque, the Eighth Amendment presents a reasonable and restrained common law benchmark.

**Surveying Eighth Amendment Jurisprudence Today**

Chief Justice Earl Warren best articulated the Court’s non-originalist reading of the Cruel and Punishments Clause in *Trop v. Dulles*, arguing that the Clause should “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” This standard allows for the Clause’s permitted punishments to change with the changing values and beliefs of American society, but it has also been criticized as overly vague, subject to judicial manipulation, and reliant upon the assumption that history is inherently progressive. In death penalty cases, the Court’s jurisprudence has seemed particularly odd, claiming in *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005) that the execution of seventeen-year-olds and the mentally handicapped was cruel and unusual punishment, but had not been cruel and unusual in 1989 when the Court reached the opposite decisions; it was “…not, mind you, that this Court’s decision 15 years ago was wrong, but that the Constitution has changed.”

The Court’s originalist contingent has taken a different approach. It employed public meaning originalism to posit that the standards of cruelty that prevailed in 1791, when the Bill of Rights was adopted, provide a benchmark for determining the constitutionality of punishments today. According to this definition, if a punishment was understood to be acceptable in 1791, it should be acceptable today. However, this view leads to some worrisome conclusions. Under this originalist understanding, a life sentence would not be an unconstitutional punishment for a parking violation. Indeed, Justices Scalia and Rehnquist argued that the Clause did not prohibit disproportionate punishments. The reintroduction of whipping would also not violate the constitution on this view, since it was not considered a cruel punishment in 1791.

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6 See infra note 21.
12 *In Penry v. Lynaugh* (492 U.S. 302, 340 (1989) the Court had ruled that it was not necessarily a cruel and unusual punishment to execute the mentally disabled, and in *Stanford v. Kentucky* (492 U.S. 361, 380 (1989) the Court had ruled that it not necessarily a cruel and unusual punishment to execute murderers aged sixteen or seventeen.
13 543 U.S. at 608 (Scalia, J., dissenting).
Justice Scalia admitted, however, that he was “faint-hearted” and wrote, “I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.” Yet this statement undermines the entire theory of originalism. As Professor Randy Barnett has noted, if the originalist can ignore textual meanings that he does not like for the Cruel and Unusual Punishments clause, why can he not do the same for the Due Process Clause, the Privileges and Immunity Clause, and every other clause?

Though bitterly divided on interpretative strategies, both mainstream originalist and non-originalist approaches read the word “unusual” out of the Clause, treating it either as nonexistent or assigning it a weak meaning. This renders the rest of the Clause a vague moral command to avoid cruelty, and prompts the court to define cruelty by discerning public opinion, either in the present or in 1791. Indeed, Chief Justice Warren argued in Trop that “unusual” either has no independent meaning or simply means “different from that which is generally done.” In his groundbreaking 1969 article, Nor Cruel and Unusual Punishments Inflicted, Professor Anthony Granucci wrote that, “the final phraseology, especially the word ‘unusual’ must be simply laid to chance and sloppy draftsmanship.”

In Harmelin v. Michigan (1991), Justice Scalia submitted that “unusual” probably meant “contrary to precedent” in the 1689 English Bill of Rights, but means “such as [does not] occur[r] in ordinary practice” or “such as is [not] in common use” in the American context. This essay will suggest that all of these views are at odds with the original meaning of the Cruel and Unusual Punishments Clause.

The Original Meaning of “Unusual” in Seventeenth and Eighteenth Century Britain

In investigating the original meaning of the Cruel and Unusual Punishments Clause, one quickly finds it rather unoriginal. James Madison copied what became the Eighth Amendment almost verbatim from George Mason’s proposed amendment at the Virginia Ratifying Convention (1788). Mason had previously copied the Cruel and Unusual Punishments Clause verbatim from Article 10 of the English Bill of Rights (1689) for the Virginia Declaration of Rights.
Accordingly, exploring the English history of the Cruel and Unusual Punishments Clause is necessary to ultimately arrive at the original meaning of “unusual”.

In the seventeenth and eighteenth centuries, the word “unusual” had many of the meanings that it still has today, including “rare,” “uncommon,” and “out of the ordinary,” according to the Oxford English Dictionary. The OED also provides some helpful examples: “A new governor, coming at an unusual time, must portent some unusual business” (Swift, Drapier’s Letter, 1724, iv); and “I returned to my Book…in a Situation quite unusual to what I had ever before experienced” (Life of Frowde, 1773, 56). However, to employ these common usages, as some scholars have, would be a mistake, “unusual” was also understood as a longstanding legal term of art, with a specific meaning. Professor John Stinneford has persuasively argued that the word meant “contrary to long usage” or contrary to “immemorial usage.” This meaning is best explained in relation to the common law.

Far from being derided as judge-made law, the common law was regarded as the law of “long use” and “custom” in the seventeenth and eighteenth centuries. Indeed, this idea was expressed in writing as early as the fourteenth century. Common law judges saw their role as identifying longstanding customary rules—Blackstone’s leges non scriptae—and applying them to individual cases. William Blackstone best expressed the connection between custom, long use, and law, writing, “In our law the goodness of a custom depends upon its having been used time out of mind…time whereof the memory of man runneth not to the contrary.” Long usage of a custom brought it binding legal authority. It could enshrine private rights and duties or create a basis for state action, such as imposing a punishment for a crime.

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26 *Ibid*.

27 Ryan, “Does the Eighth Amendment Punishments Clause Prohibit only Punishments that are both Cruel and Unusual?”, 601.

28 Stinneford, 1767-8.


30 Thomas Usk, *Testament of Love*, Book III (c. 1380), R. Allen Shoaf ed. (Kalamazoo, MI: Medieval Institute Publications, 1998), 78-83. (“But custome is a thing that is accepted for right or for lawe, there as lawe and right faylen…Custome is of commen usage by length of tyme used, and custome nat writte is usage; and if it be writte, constitution it is ywritten and ycleped.”)


33 2 Blackstone, *36. (For example, when the tenant of a farm had, for “immemorial usage,” crossed another’s land, the tenant developed a right of way.)

34 Stinneford, 1770.
Chief Justice Edward Coke, whose works have been described as “...be[ing] to common law what Shakespeare has been to literature,”35 established the principles that underpinned English common law, and perhaps the American Revolution and subsequent adoption of the Bill of Rights. Coke compared long usage of custom to the refinement of gold in a fire; just as gold was separated from the dross, habeus corpus and due process were retained, but punishment by the ducking stool and trial outside of the vicinage were abandoned over time.36 To Coke, long usage established both the reasonableness of the law (for “The common Law it selfe is nothing else but reason.”)37 and the consent of the people to the law, for it would have surely fallen out of usage over time without that consent.38 Blackstone and James Wilson both echoed this highly influential notion.39 The corollary of this view is, of course, that unusual laws, or innovations in the law, are presumptively unreasonable and dangerous.40 This distrust of innovation is perhaps unsurprising, since Coke feared the importation of continental civil law practices, which allowed the King to circumvent customary rights.41 Indeed, Coke and Blackstone claimed that the first act of those aiming to introduce civil law to England was to bring the Rack, a torture instrument, into the Tower of London.42 Coke argued that the King and Parliament lacked the sovereign power to violate the common law’s most basic principles enshrined by long usage, writing, “When an Act of Parliament is against the Common right and reason...the Common Law will control it, adjudge such Act to be void.”43

Blackstone, whose Commentaries on the Laws of England has been labeled the “handbook of the American revolutionary,”44 followed Coke in arguing that common law supported by long usage accrued “the voluntary consent of the people” and embodied “the perfection of reason.”45 Indeed, Blackstone made clear that relatively new customs, which had not “been used time out of mind,” were not part of the common law at all.46 He shared Coke’s concern about

36 Stinneford, 1817.
38 Coke, The Compleat Copyholder, supra note 28, §33, 563.
40 1 Coke, Institutes of the Lawes of England, §723, 740. (“When any innovation or new invention starts up, ...trie it with the Rules of the common Law... [the common Law] doth utterly crush them and bring them to noth
42 1 Coke, Institutes, §723, 740 and 1 Blackstone, 70.
43 Edward Coke, 8 Dr. Bonham’s Case (1610), as reprinted in 1 Selected Writings, 275. For Coke, Parliament had supreme authority, but if a statute violated fundamental principles of justice embodied in the common law, the act became void.
44 Rutland, The Birth of the Bill of Rights, 11. See also Clinton, God and Man in the Law, 92 (calling Blackstone’s Commentaries “the bible of American jurisprudence in the nineteenth century.”)
45 1 Blackstone, *74 and *70, respectively.
46 Ibid, *73.
innovation in the form of civil law, which he viewed as an enslaving “new Roman empire” endangering the “political liberties” of the continent. Accordingly, “unusual” actions were viewed as those contrary to long usage. Blackstone argued that any king who demanded an “unusual” fee for issuing a royal writ would be violating the Magna Carta, that it was illegal for a sheriff to hold a Torn in an “unusual” place, and that being in public with “unusual”—more than customary—weapons was punishable under the crime of affray.

Coke was instrumental in the drafting of the Petition of Right of 1628, the “first major public document of the modern era setting forth some of the common law rights protected under the English Constitution.” His vision of fundamental law was crucial in the seventeenth century, fighting innovations to customary liberties and practices as contrary to long usage and therefore contrary to reason. These innovations included the almost perpetual Long Parliament, the abolition of the monarchy and House of Lords, the Exclusion Bill, the Bill of Rights, and summary imprisonment. By the eighteenth century, Coke’s ideas regarding the inherent reasonableness of the common law had spread. Over Blackstone’s objections, these ideas ultimately served as the central basis for the argument that government power was limited by an unwritten constitution whose principles had been confirmed by long usage. Unfortunately, the Parliament or King usually succeeded in these conflicts, causing the normative power of common law to diverge from the actual power of government.

The first test of the phrase “cruel and unusual” was most likely Titus Oates’ petition

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50 4 Blackstone at *148.
51 Stinneford, 1781.
52 JW Gough, Fundamental Law in English Constitutional History (Oxford: Clarendon Press, 1955), 111. (Judge David Jenkins criticized making the Long Parliament perpetual, calling it “against common right or reason” and therefore “void.”)
53 Gough, Fundamental Law, 103-4. (Judge Jenkins criticized the Parliamentary effort in the 1640s to abolish the monarchy because it had existed since before written record, and “usage so practices makes therein a fundamental law.”)
54 3 Thomas Burton, Diary of Thomas Burton, John Towill Rutt ed. (London: Henry Colbourn, 1828), 357. (Nathaniel Bacon argued in 1659 that the House of Lords had a right to exist “from long continueance”)
55 Gough, 148. Opponents claimed that Parliament lacked the authority to change the customary rules of succession.
56 English Bill of Rights (1689), available at http://avalon.law.yale.edu/17th_century/england.asp (Any attempt to extend royal prerogative over the provisions of the Bill of Rights violated “the true, ancient and indubitable rights and liberties of the people of this kingdom.”)
57 Gough, 175. Daniel Defoe criticized the Commons for violating the longstanding common law right to petition parliament and be free from imprisonment contrary to law.
58 4 Blackstone, *148. (Blackstone affirmed the supremacy and “absolute authority” of Parliament)
59 Stinneford, 1785-6.
60 Stinneford, 1785-6.
from 1689, the same year the English Bill of Rights was passed.\textsuperscript{61} At a time of deep anti-Catholic suspicion, Oates claimed that two Jesuit priests had plans to shoot the King, four “Irish Ruffians” had been contracted to stab him, and the Queen’s doctor, Sir George Wakeman, stood ready to poison him. This was a complete hoax, but Oates swore its truth to a magistrate and gave his testimony.\textsuperscript{62} The magistrate was then murdered under mysterious circumstances, and an outraged Protestant England accused the Jesuits. Fifteen wrongful executions followed. Trials continued until July of 1679, when evidence of Oates’ perjury became clear. He had not been in England when the famous plotters’ meeting at the “White House Tavern in the Strand” supposedly occurred.\textsuperscript{63} After Oates was convicted of perjury, Chief Justice Jeffreys lamented that the death penalty was not a permissible punishment, and sentenced Oates to a fine of 2,000 marks, life imprisonment, whippings “from Aldgate to Newgate” and back,\textsuperscript{64} pillorying four times each year, and defrocking.\textsuperscript{65}

Oates then petitioned for mercy, and while the House of Lords rejected the petition, a minority dissented. The minority found that defrocking “belonged to the ecclesiastical courts only,” and that “there is no precedent to warrant the punishment of whipping and committing to prison for life, for the crime of perjury.” It also found that the sentence was “of ill example, and unusual,” and that “it is contrary to the declaration that excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\textsuperscript{66} The House of Commons agreed with the dissenting Lords, and Mr. Hawles labeled the punishment “cruel and illegal” in debate.\textsuperscript{67} This is only recorded contemporary usage of the terms “cruel and unusual” and “cruel and illegal.”\textsuperscript{68}

Justice Scalia sided with Professor Anthony Granucci\textsuperscript{69} to argue that “illegal” and “unusual” were “identical for practical purposes...A requirement that punishment not be “un-
usual”—that is, not contrary to “usage”…or “precedent”—was primarily a requirement that judges pronouncing sentence remain within the bounds of the common law tradition.”70 Justice Scalia was correct that “unusual” and “illegal” were used to mean the same thing in the Oates affair, because the word “unusual” required the judge to stay within the bounds of the common law. However, as has been shown, the common law tradition did not enshrine mere “usage” or “precedent,” but rather “long usage.”71

“Unusual” Comes to America

John Adams gave voice to the mainstream American position when he wrote in 1763 that “the liberty, the unalienable, indefeasible rights of men, the honor and dignity of human nature…were never so skillfully and successfully consulted as in that most excellent monument of human art, the common law of England.”72 Historian Gordon Wood has written that American devotion to English liberty, or at least a Whig reading of it, was “what made their Revolution so unusual, for they revolted not against the English constitution but on behalf of it.”73 By the end of the eighteenth century, the common law had been so universally received in America that Chief Justice Oliver Ellsworth could tell a grand jury that the common law “was the law of every part of the union at the formation of the national compact.”74

Indeed, even where the common law was not immediately viewed as an authoritative source of positive law, American colonists regularly drew upon it as a source of fundamental rights and liberties undeniable by the state. This practice began in the seventeenth century but accelerated from 1760 to 1776 as the American people protested that the British Parliament’s claim of absolute power abrogated their fundamental and immemorial common law rules.75 For example, Richard Henry Lee argued to the Continental Congress that American rights “are built upon a fourfold foundation, namely natural law, the British constitution, the charters of the several colonies, and immemorial usage.”76 The Declaration and Resolves of the Continental Congress (1774) also asserted that American rights were derived from “the immutable laws of nature, the principles of the English constitution, and the several charters,” and that the colonists possessed the “right, liberties, and immunities of free and natural born subjects, within the realm

71 This is responsible for large differences in application, e.g. the reintroduction of retired but traditional punishments.
74 Oliver Ellsworth, Oliver Ellsworth’s Charge to the Grand Jury of the Circuit Court for the District of South Carolina (May 7, 1799), in 3 The Documentary History of the Supreme Court of the United States, 1789-1800, Maeva Marcus ed. (New York: Columbia University Press, 2004), 358.
of England.”77

Americans used the Cokean common law to protest every objectionable act of Parliament, condemning them as “innovations” and “usurpations” that were “unusual,” “unconstitutional” and “void” because they were contrary to “common right or reason.”78 These included the central battles of the Revolution: taxation without representation (“an innovation, and a most dangerous innovation,” in the view of John Dickinson),79 the introduction of civil law Admiralty Courts to America under the Stamp Act (“The most grievous innovation of all…No juries have any concern there!” according to John Adams),80 and the trial of rebellious Americans in England, violating the common law right to trial by jury in the vicinage of the offense (labeled “new, unusual, unconstitutional and illegal” by the Virginia House of Burgesses).81 Even in the Declaration of Independence, the colonists adopted rhetorical stances familiar from the English Petition of Right and Bill of Rights. They listed injustices and usurpations, including the common English complaint82 of legislative bodies being called in “unusual” places, locations different from ones designated by long usage.83 In the midst of severing ties with Britain, Americans still saw the common law principle of long usage as a relevant standard for adjudicating the legality of government actions. After the Declaration of Independence, Virginia led a total of nine states in passing a constitutional prohibition on “cruel and unusual punishments” (VA, NY), “cruel or unusual punishments” (DL, MA, ML, NH, NC), or “cruel punishments” (PA, SC).

In this context of legal punishment, “cruel” and “unusual” seem to have been used synonymously. Indeed, as Tom Stacy reports, “the available evidence indicated that the Founders understood [the different formulations] to capture the same meaning.”84 Given the consensus that cruel punishments were essentially wrong and the common law essentially reasonable, “cruel” seems to have articulated the abstract moral principle while “unusual” provided a concrete reference for adjudicating whether the principle had been violated. It is thus understandable that the principle was codified alternately as “cruel”, “cruel or…”, and “cruel and…”; these were different ways of making the same point. It was understood that many American rights had been established by the common law principle of long usage, and that deviations from the common law had threatened those rights both in England and America. Consequently, the Cruel and Unusual Punishment Clauses sought to defend fundamental rights by restricting punishments to those tested by the “immemorial usage” of the common law and prohibiting the “unusual” ones.

77 Declarations and Resolves of the First Continental Congress (1774), available at www.yale.edu/lawweb/avalon/resolves.htm.
78 Stinneford, 1795.
81 Journals of the House of Burgesses of Virginia, 1766-1769 (Charleston, SC: Nabu Press, 2012), 214
82 Hawkins, 2 A Treatise of the Plead of the Crown, 91.
83 Stinneford, 1798.
“Unusual” and the Eighth Amendment

The U.S. Constitution received harsh criticism from Anti-Federalists for failing to adequately protect the rights of Americans, rights that were intimately related to the common law. George Mason worried that “There is no Declaration of Rights…nor are the people secured even in enjoyment of the benefit of the common law.”\textsuperscript{85} A Federal Farmer remarked, “I do not see a spark of freedom or a show of our own or the British common law.”\textsuperscript{86} Some common law rights were protected, such as the privilege of habeus corpus and the prohibition of ex post facto laws. But the Anti-Federalists were reasonably concerned that the unamended Constitution failed to protect the defendant’s common law right to be informed of charges against him, to confront his accuser, to have assistance of counsel, and to be free from cruel and unusual punishments.\textsuperscript{87}

The threat of civil law practices still loomed large for the Anti-Federalists. At the Massachusetts Ratifying Convention, Abraham Holmes offered an instructive account of what the lack of common law protections might portend: “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 gibbers may be amongst the most mild instruments of their discipline.”\textsuperscript{88} Patrick Henry argued at the Virginia Ratifying Convention that the treaty power allowed the government to sign a treaty subjecting citizens to “unusual punishments,”\textsuperscript{89} for the government was not bound to the common law’s principle of long usage. At his most eloquent, Henry asked “What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law.” He concluded, “We are then lost and undone.”\textsuperscript{90} The Anti-Federalists’ worries about the importation of civil law punishments and innovations on the common law should not be surprising—they were shared by Coke and Blackstone in England, as well as Richard Henry Lee, John Dickinson and John Adams before the Revolution. All of them embraced the need to guard against innovations in punishment by protecting the customary practices of “immemorial usage” that the common law so prized.

By this point, James Madison had repositioned himself politically\textsuperscript{91} and presented a Bill of Rights to the First Congress that followed the Virginia Declaration of Rights that George Ma-

\textsuperscript{87} Letters from the Federal Farmer to the Republican No. 16, 380.
\textsuperscript{88} 2 The Debates in the Several State Conventions, On the Adoption of the Federation Constitution, as Recommended by the General Convention at Philadelphia, in 1787, Jonathan Elliot ed., (Philadelphia: JB Lippincott & Co., 1881), 111
\textsuperscript{89} 3 The Debates in the Several State Conventions, 503-4.
\textsuperscript{90} Ibid, 447-8.
son had been so influential in drafting. While Professor Anthony Granucci has derided the drafting process as not “diligent or systematic,” the historical evidence reveals that its final wordings were the “fruit of much labor and research” on part of James Madison, who painstakingly examined the states’ bills of rights and endeavored to improve upon them. It is thus very likely that Madison was aware of the different constructions of the Cruel and Unusual Punishments Clause and chose to keep the word “unusual”; consequently, interpreters have a responsibility, in this case, to follow the maxim that “every word and phrase adds something to the statutory command.”

The First Congress adopted the Cruel and Unusual Punishments Clause verbatim, and only two comments focused on it in debate. Samuel Livermore opined that, “…as it seems to have no meaning in it, I do not think it necessary…it is sometimes necessary to hand a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel?” William Smith briefly objected that the clause was overly “indefinite.” Some have used these two comments to support the conclusion that the Framers did not have a clear idea of the Clause’s meaning—and so we cannot root our understanding in an original meaning either. However, this claim can be rejected for two reasons: (i) there is no evidence that the other 89 members of the First Congress shared their concern regarding vagueness. If many legislators found its meaning “indefinite,” one wonders why they passed it without raising any objections; and (ii) the historical record shows that Samuel Livermore’s views were unlikely to find company in the First Congress. As a justice on New Hampshire’s Supreme Court, he rejected the authority of precedent, holding that “every tub should stand on its own bottom.” Having rejected the very foundations of the common law, it is unsurprising that he found “cruel and unusual punishments” unacceptably vague.

The most significant evidence for the public meaning of the Cruel and Unusual Punishments Clause comes from the debates at the Virginia Ratifying Convention. The word “unusual” is utilized repeatedly with respect to legal punishments that could be imposed upon criminals or the militia, and is consistently used in expressing the Anti-Federalist concern that the federal government would not be bound by the common law, and could thus innovate from the common law principles of long use in punishments and produce greater cruelty. For example, in defending the Cruel and Unusual Punishments Clause, Patrick Henry makes the following

92 Rutland, 202.
94 Rutland, 193-4, 204.
97 Reinsch, 27-8.
98 See Granucci, 860-4 for an alternative view. Professor Grannuci argues that George Mason and other Framers misinterpreted the meaning of the Punishments Clause in the English Bill of Rights to merely proscribe torturous punishments, due to the limited legal scholarship available in America, an unclear passage from Blackstone’s Commentaries, and the anti-torture writings of Robert Beale and Nathaniel Ward. There factors may have influenced the Framers, but the record shows that they still knew “unusual” to mean “contrary to long usage” throughout this period.
remark: “But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights? — ‘that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more you depart from the genius of your country.”

This passage is telling, for it makes clear that Henry thought the Clause would severely restrict the latitude of representatives in selecting punishments, such that the society would not have to depend on the virtues of their representatives. It seems clear that a clause which was understood, as many originalists understand it today, only to prohibit punishments that were thought of as cruel at that time, would hardly restrict representatives at all. Rather, it would merely require them to think up new heinous punishments. And indeed, it was innovation that worried Henry, who went on to warn of the importation of practices from “France, Spain and Germany.” Moreover, when Henry accused the Federalists of “depart[ing] from the genius of your country,” what genius is he referring to? Three sentences later, after noting the lack of a guaranteed impartial trial in the vicinage of the offense, Henry provides an answer: the common law, “How different is this from the immemorial practice of your British ancestors, and your own! I need not tell you that, by the common law, a number of hundredors were required on a jury, and that afterwards it was sufficient if the jurors came from the same county. With less than this the people of England have never been satisfied. [The Constitution] ought to have declared the common law in force.”

In failing to include the prohibition of “cruel and unusual punishments,” the Constitution was understood by Patrick Henry and others at the Virginia Ratifying Convention (which James Madison attended) to leave representatives the “latitude” to invent new punishments contrary to the long usage prescribed by the “genius” of the common law. This understanding of the original meaning of “unusual” is also confirmed by early Eighth Amendment case law. In the first fifty years after the adoption of the Bill of Rights, only a few cases involved the meaning of the Cruel and Unusual Punishments Clause, and all were decided in state court. In several cases, state courts ruled that a punishment could not be “unusual” under their state bills of rights if the punishment was permissible under the common law. In Barker v. People (1823), the Supreme Court of New York upheld a state statute that disenfranchised anyone convicted of dueling, arguing that “the 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 offences.” Similarly, in Commonwealth v. Wyatt (1828) the General Court of Virginia upheld a statute that allowed the whipping of those who ran illegal gambling operations, writing, “The punishment of offences by stripes is certainly odious, but cannot be said to be unusual,” as the discretion to impose whipping was “of the same character with the discretion always exercised

99 3 The Debates in the Several State Conventions, 447.
100 3 The Debates in the Several State Conventions, 448.
101 Ibid, 447
102 Stinneford, 1810.
103 Barker v. People, 20 Johns. 459 (New York Supreme Court, 1823).
by Common Law Courts.”104 Again, in People v. Potter (1846) the New York Supreme Court upheld the governor’s decision to offer a pardon on the condition of banishment since banishment “has been inflicted, in this form, from the foundations of our government.”105 All of these punishments were upheld because they were “usual,” or, consistent with long usage under the common law.

Alternately, early courts sometimes struck down punishments that did not inflict pain or humiliation as “cruel and unusual” because they violated common law standards. The Virginia Supreme Court of Appeals struck down a joint fine issued to four defendants in Jones v. Commonwealth (1799) as “cruel and unusual,” arguing that it violated the common law precept of not punishing one for the offense of others, since if one did not pay his part, the rest must be held in jail until they paid his part.106 In James v. Commonwealth (1825), the Pennsylvania Supreme Court rejected the punishment of a “common scold” with the ducking stool (repeatedly plunging her underwater) “as cruel and unusual punishment,” despite it being the traditional common law punishment for the crime. The Court echoed Coke107 in finding that the punishment had not been in use since the middle of the seventeenth century in England, and never in Pennsylvania, and that “The long desuetude of any law amounts to its repeal,”108 properly distinguishing between traditional punishments or precedent—unlike Justice Scalia in Harmelin109—and “long usage.”

There was only one instance during this period where a court did not treat “unusual” as “contrary to long usage,” and it is Aldridge v. Commonwealth (1824), a case deeply tainted by racism. The General Court of Virginia rejected a challenge to a state larceny law that had recently been amended to allow a convicted “free person of color” to be whipped, “sold as a slave, and transported and banished beyond the limits of the United States,” a departure from the previous punishment of a sentence lasting up to three years.110 The Court held that the Virginia Declaration of Rights only guaranteed the rights of whites, and then went on to say in dictum that even if the Declaration did apply, the Cruel and Unusual Punishments Clause would only apply to the “odious modes of punishment” used in the continental civil law systems.111 This severely cramped reading is inconsistent with the original meaning of the clause and the two other Virginia cases before and after Aldridge, and has been mockingly summarized by Professor John Stinneford as follows: “Free persons of color have no rights, and even if they do, defendants here still lose.”112 Aside from a few special, explainable circumstances, the rulings of American courts in the first half-century after the adoption of the Bill of Rights confirm that the word “unusual” was understood to mean “contrary to long usage” in the Eighth Amendment.

104 Commonwealth v. Wyatt, 27 Va. (6, Rand.) 701 (Virginia General Court, 1828).
105 People v. Potter, 1 Edm. Sel. Cas. 235, 245 (New York Supreme Court, 1846).
106 James v. Commonwealth, 5 Va. (1 Call) 558 (1799).
107 Coke, 1 Copyholder, 564. (“Custome...loses its...being if usage faile.”)
108 James v. Commonwealth, 12 Serge & Rawle 228 (Pennsylvania Supreme Court, 1825).
109 See supra note 70.
110 Aldridge v. Commonwealth, 4 Va. (2 Va. Cas.) 477-8 (Virginia General Court, 1824).
111 Ibid, 450.
112 Stinneford, 1815.
Conclusion

There is compelling evidence to suggest that, in the context of the Cruel and Unusual Punishments Clause of the Eighth Amendment, “unusual” was used as a legal term of art relating to the common law, meaning “contrary to long usage.” Emanating from the great British jurists and politicians, along with the American revolutionary heroes, “unusual” had been used as legal term of art in the context of preventing new and innovative punishments, often from the continental civil law. These “unusual” methods violated the customary liberties and practices of the people, those that, through long usage, had come to embody the reason of the common law. It was again used in that same context on the floor of the extremely influential Virginia Ratifying Convention, where Madison found it for the federal Bill of Rights in order to address Anti-Federalist concerns about innovation in punishment away from the common law—the very same concerns of those who had come before them. This original meaning was then essentially uniformly recognized and enforced by state courts in the first half of the nineteenth century.

While this paper has not sought to define other key terms like “cruel” and “punishments,” a proper understanding of the original meaning of “unusual” could significantly improve the Court’s muddled Eighth Amendment jurisprudence. The ‘evolving standards test’ compares established punishments with current public opinion, and so risks endangering groups that gain no public sympathy, like sex offenders. The implementation of statutes mandating chemical castration serve as a perfect example in this regard; in assuming that societies only progress, the ‘evolving standards test’ would have to uphold such a punishment if it is popular enough. On the other hand, the Scalia/Thomas originalist position begins to appear infirm in the face of a potential reintroduction of whipping. Would originalists have to allow that barbarism, as well as other disproportionate punishments like life imprisonment for a parking violation, or must they violate the key foundation of their interpretive theory of following the original meaning of the text?

A textually accurate reading of “unusual” would solve both problems by (i) inverting the ‘evolving standards test’ to compare new punishments with the long usage of the common law, thus protecting maligned classes of criminals from new and cruel punishments that gain the support of inflamed public opinion;\(^\text{113}\) (ii) moving both positions away from results-oriented judicial manipulation; (iii) allowing the Court’s originalists to reject new and grossly disproportionate punishments as “contrary to long usage” and consequently “unusual”; and (iv) updating the Court’s originalist position to preclude society from reintroducing the cruel, abandoned dross of the past, in punishments that have fallen out of use. Instead, it leaves America with the refined gold of long usage and the common law.

\(^{113}\) Stinneford, 1817.
JANUS GUARDS THE STYX:
THE ROLE OF STATE AND FEDERAL
DEBT, LAND, AND TAX JURY TRIALS IN
EARLY REPUBLICAN VIRGINIA AND KENTUCKY FROM 1789-1816

Introduction by Jack Rakove

This essay deals with several of the most important issues in the legal history of the early American republic. At the trial level, in the eighteenth century, juries were thought to be competent to resolve matters of law and fact alike. By the middle decades of the nineteenth century, the decision-making authority of judges was much greater. Examining the role that juries played in local legal culture during this period thus constitutes a critical question of legal history. But after 1789, issues of federalism further complicated the transition in authority from juries to judges, because the Supremacy Clause of the Federal Constitution and the appellate procedures of Article III gave federal judges enhanced authority. This essay sorts out these complications and examines the ways in which federal and provincial legal culture overlapped.
“The question whether one generation of men,” Thomas Jefferson, the U.S. minister to France, wrote to James Madison in the fall of 1789, “has a right to bind another, seems never to have been started either on this or our side of the water.”¹ Jefferson, always the strategic inquirer, answered his question by setting out the obvious truth “that the earth belongs in usufruct to the living.”² Jefferson believed that the acceptance of this maxim would have wide reaching implications. Principal among these implications was that “no man can, by natural right, oblige…the persons who succeed him in that occupation, to the payment of debts contracted by him.”³ That Jefferson used revolutionary rhetoric and theory to discredit creditors’ rights was no accident. Indeed, Jefferson and his tobacco cultivating neighbors in the Virginia Piedmont were willing participants in a transatlantic trade network that trapped them in a never ending cycle of debt.⁴ Virginia tobacco farmers were in constant need of credit because the tobacco growing season was close to ten months long. Wealthier planters sought to overcome this disadvantage by constantly expanding their tobacco plantations and purchasing more slaves to work on the extra acres.⁵ Consequently, many good Virginian families’ fortunes as well as the state’s status in the fledging union were directly correlated with the success of the tobacco crop.⁶

The price of tobacco fell precipitously from the 1780s to the 1820s – and with it the economic security of the Virginia elite.⁷ Soil depletion, a depressed post-war economy, competition

2 Ibid. Jefferson was quite the Renaissance man and wrote on subjects as diverse as land ownership, constitutional law, legal history, religion, education, public finance, and international law. See generally, Thomas Jefferson, Notes On the State of Virginia (Philadelphia: Printed and sold by Prichard and Hall, 1788). Hereafter referred to as Notes.
3 Oberg and Looney, Papers, XV, 392.
7 Frederick F. Siegel, The Roots of Southern Distinctiveness: Tobacco and Society In Danville, Virginia, 1780-
from tobacco farmers in the Carolinas, western migration out-of-state, and the steady regression of the Old Dominion’s political power in the national government only made matters worse. This stagnation prompted Virginians to turn primarily to grand and petit juries in civil and criminal cases for relief from debtors, and reassurance that their real property, personality, and way of life would remain secure. Similar trends can be observed in neighboring states such as Kentucky albeit with different causes and results. The popular appeal of grand and petit juries among debtors in these two states raises three questions. What roles did Virginia and Kentucky grand and petit juries play in debt, land, and tax cases during the early 1800s? Second, how did community norms and attitudes influence jury verdicts and the structural makeup of these institutions? Finally, in what sense did these institutions offer a means by which the local community could react to, implement, or undermine federal policies? Previous literature on the topic has argued that the bench and bar co-operated to minimize the role of juries in commercial proceedings, and to modernize the common law so that it could accommodate changing industrial practices. But, this work is largely confined to state and federal courts in New England and New York. In Virginia and Kentucky, the power dynamic among juries, judges, and litigants was different. Indeed as the records of the Virginia and Kentucky federal and state courts demonstrate, communities in these states used grand and petit juries to protect local economic interests and check the use of federal power in their municipalities.

In the 1780s, debt cases occupied seventy-eight percent of the docket in eastern Virginia state courts. But, defendants could often rely on petit juries and local judges to deny creditor claims or award small monetary judgements. Debt cases were either actions for debt or trespass on the case. The former action constituted forty-two percent of the debt cases and was used when a creditor held a bond that was signed by the debtor and served as proof of the obligation’s existence. The latter action constituted thirty-six percent of the debt cases and transpired when the creditor could only demonstrate the debtor’s obligation in the form of an account book. Many lenders failed to collect the principal and interest on their loans despite the fact that creditors did

13 Tucker supra note 12.
14 Conway Robinson, The Practice In the Courts of Law and Equity In Virginia Volume I (Richmond: S. Shepherd, 1832) 87.
15 Ibid.
not hesitate to sue debtors. Creditor suits were frustrated in two main ways. First, juries were often composed of tobacco farmers, who were also in debt, and sympathized, with the plight of cash-strapped planters.\textsuperscript{16} In fact, petit juries were so biased that a plaintiff with a good lawyer would be able to anticipate when a jury would likely return a hostile verdict. Plaintiffs, who were notified of the likely outcome, often found that it was in their interest to simply drop a debt suit because this was the only way one could initiate another action against the debtor.\textsuperscript{17} In situations such as this one, many creditors simply hoped for a more favorable jury. Second, even when petit juries did decide to award damages, which happened in a majority of debt cases in some southern Virginia counties, they usually did not include unpaid interest in the amount.\textsuperscript{18}

However, these circumstances fail to explain why Virginia petit juries were so reluctant to rubber stamp creditor claims. The answer to this question can be found in the widespread fear of centralized power and distant authorities using Virginia courts to alter the prevailing way of life created by the tobacco culture. This paranoia only worsened as the tobacco market stagnated, and Virginia declined in economic and political importance. George Mason reflected many of these fears in one of his speeches on Article III § II of the Constitution, a provision dealing with the jurisdiction of federal courts, during the Virginia Ratification Convention of 1788. Mason saw the lack of a guarantee for civil juries much as he had once viewed the Administration of Justice Act of 1774: a representation of a distant foreign power seeking to interfere with the local judicial system by removing juries. Mason declared that the “great palladium of national safety” was the jury “which is secured to us by our own government.”\textsuperscript{19} However, Mason’s argument also had a practical dimension to it because of recent international agreements with Great Britain. Two provisions are of peculiar note. First, Article IV of the Treaty of Paris 1783, which was legally binding on all parties, provided that British and American “creditors…shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted.”\textsuperscript{20} Second, Article V, which was non-obligatory, read that the U.S. shall “provide for the restitution of all estates, rights, and properties, which have been confiscated.”\textsuperscript{21} While the Confederation Congress was powerless to enforce international obligations outside of certain admiralty cases, the

\textsuperscript{16} Order Books for the District Court at Prince Edward County Volume I, (Virginia State Library and Archives) 1-274. Prince Edward County Land Tax Books, (Virginia State Library and Archives).
\textsuperscript{17} Tucker supra note 12.
\textsuperscript{18} Records at Large for the District Court at Prince Edward County 1789-1792 (Virginia State Library and Archives) 1-52.
\textsuperscript{19} The same opinion was shared by Mason’s fellow Virginian, Patrick Henry, although Henry viewed the states as the main protector of the people’s liberties. J. Thomas Wren, “The Ideology of Court and Country in the Virginia Ratifying Convention of 1788,” The Virginia Magazine of History and Biography 389-408. Jonathan Elliot and James Madison. The Debates In the Several State Conventions On the Adoption of the Federal Constitution: As Recommended by the General Convention At Philadelphia In 1787. Together with the Journal of the Federal Convention, Luther Martin’s Letter; Yates’s Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of ’98- ‘99, and Other Illustrations of the Constitution ... (Washington: Printed by and for the editor, 1836) 521-528. Hereafter referred to as Virginia Convention Debates.
\textsuperscript{21} Ibid.
new Constitution’s guarantee that “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land” would give the new Congress authority to enforce the property rights of British subjects in federal courts. Mason and many other Virginians abhorred this result since many state residents were either in debt to British creditors because they cultivated tobacco, or were residing on land that was confiscated from Tories during the Revolutionary War. But Mason and his countrymen were comforted by the prospect of having local juries control the determination of facts in these restitution cases. This was so because they were confident that Virginian juries would not be completely complicit with creditor requests. The account given above validated their predictions. Juries functioned as a barrier protecting the Virginia gentry’s way of life by controlling the determination of facts in cases and thus manipulating the law that state courts applied.

Virginia juries did not operate in a vacuum, however. The constitution’s ratification created a tripartite national judiciary that could serve as an alternative forum in a limited number of cases where federal courts had diversity or appellate jurisdiction over the matter in question. The federal judiciary, however, could only protect the interests of British creditors by asserting a right of review over state court judgments and assessing creditor rights in light of revolutionary-era confiscation legislation and treaties with Great Britain. Three Marshall Court cases were instrumental in settling the law on these points: *Ware v. Hylton* (1796), *Fairfax’s Devisee v. Hunter’s Lessee* (1812), and *Martin v. Hunter’s Lessee* (1816).

*Ware* involved an action for debt brought by John Ware, a British subject, against Daniel Hylton, a citizen of Virginia, in the Virginia federal circuit court. Hylton argued that the action could not be sustained for five reasons. First, in October of 1777, the Virginia legislature passed a statute allowing state citizens to pay debts owed to British subjects through the state loan office. Hylton presented a discharge receipt from the loan office that was signed by then Governor Thomas Jefferson and his council of advisors. Second, Hylton’s lawyer maintained that two other Virginia statutes also prohibited recovery: one permanently confiscating the real and personal property of all British subjects in the state, the other preventing the recovery of British debts until December 1783. Hylton maintained that both laws were applicable in the present case because Ware was a British subject and the debt was contracted before December 1783. Third, Hylton asserted that the restitution and creditor clauses of the Treaty of Paris were void because the British government had failed to meet its obligations under the agreement by not withdrawing troops from the interior.
of the North American continent and not returning runaway slaves to their Virginian masters. Finally, Hylton argued in the alternative that all American debts to British creditors were eliminated when the colonies declared their independence and broke off political ties with the mother country. Ware countered that Hylton’s first, second, and fourth points were irrelevant to deciding the issue in the case and that the Treaty of Paris remained in force as long as the Congress and President had not revoked it. The circuit court ruled for Ware, and Hylton requested a writ of error to the U.S. Supreme Court shortly thereafter.

The question before the Court in *Ware* was whether Article VI of the Constitution made the Treaty of Paris of 1783 federal law and thus gave it priority over Virginia law. The Court answered this inquiry affirmatively. The court reasoned that (1) the supremacy clause in Article VI, extended to all treaties contracted before and after the date of the Constitution’s ratification, (2) the Treaty of Paris of 1783 fit this classification, (3) the treaty therefore took precedence over state law, and (4) that Virginia confiscation and state loan statutes were void to the extent that they interfered with creditor rights protected by the Treaty or attempted to eliminate debts revived by the treaty’s ratification. The Court held that Ware was entitled to payment. At first glance, *Ware* appears to have been a fatal blow to the tobacco industry in Virginia for a multitude of reasons. Defendants, who had legitimately paid their debts to state loan offices, could not raise that defense in court, Virginia was rendered powerless to pass legislation that openly obstructed British property rights, and both of these results were the product of a distant federal tribunal imposing its will on the local way of life in Virginia counties.

Yet the Court’s decision in *Ware* did not have its anticipated impact because Virginia petit juries still had the power to determine the facts in debt cases. Even assuming, *arguendo*, that the law forbade defendants to plead that state law, British foreign policy, or state loan office payments foreclosed a suit, petit juries still decided how much a creditor would collect. For example, Virginia petit juries were not afraid to subtract interest claims from awards because many Virginia citizens believed that it would be unjust to fulfill British creditor obligations while runaway slaves were not returned to Virginia owners. This argument remained popular among Virginians notwithstanding the Court’s ruling in *Ware*. Virginians naturally assumed that it would be wrong for the British to demand payment on interest in arrears when they had deprived residents of the Old Dominion of one of their primary means of accumulating funds to repay that interest (i.e. slaves).

29 *Ware* at 35.
30 *Ware* at 41.
31 *Ware* at 33.
32 *Ware* at 5-6.
34 Tucker supra note 12.
36 Lewis Cecil Gray and Esther Katherine Thompson, *History of Agriculture In the Southern United States to*
As a matter of policy, this argument was tenuous because many areas of Virginia that had a high concentration of debtors were not exposed to the Revolutionary War’s ravages. Consequently, dispossessed slave owners and debtors were usually mutually exclusive classes. Virginians clung to this argument, though, because they were willing to defend their way of life. Virginia juries’ interpretation, implementation, or in some cases rejection of the Supreme Court’s reasoning in *Ware* secured the tobacco industry from large British debt awards that could have destabilized the prevailing economic order in the state.

Debt was only one of the issues plaguing Virginia tobacco planters in the early 1800s, however. British claims on Virginian land also aroused controversy among the Old Dominion’s gentry and farmers because many had purchased lands confiscated from British proprietors. The state and federal litigation surrounding Lord Fairfax’s landholdings in Virginia’s Northern Neck illustrates this phenomenon, and the role that petit juries played in land confiscation litigation. In 1736, Lord Fairfax inherited a large tract of land in northeastern Virginia. The grant stipulated that Fairfax was to hold the land in fee simple, or exercise absolute control over the land. Fairfax did so during his tenure by selling his lands through a private office, collecting annual rents from tenants, and passing on his holdings to Denny Fairfax, a British subject, in the form of a will. A substantial portion of the Fairfax estate consisted of unused or ‘waste’ land despite the Lord’s efforts to recruit paying occupants. However, there was one problem. While the Virginia assembly chose not to confiscate Fairfax’s holdings after the outbreak of the Revolutionary War, it quickly passed three statutes eliminating the annual rent on the Fairfax land, commandeering Fairfax’s private land office, and using that office to facilitate the sale of the waste lands after the British aristocrat passed away. David Hunter, a prominent northern Virginia land speculator, purchased some of the waste land from the state. Denny Fairfax brought an action of ejectment, a common law suit to recover land, against him upon learning of this news. Neither side was able to impose its will on the other in the lower court because Virginia petit juries were reluctant to sanction the state’s sale of Fairfax land that it had not formally confiscated, but they were also hesitant to allow British subjects to inherit developed Fairfax land. This suit tacked its way through the state’s judicial system until the Virginia legislature agreed to give Fairfax full title to the developed land

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37 Ibid.  
40 Ibid.  
41 *Fairfax’s Devisee v. Hunter’s Lessee* 11 U.S. 603 (1812) at 2.  
45 Order Books supra note 11.
he inherited in exchange for Fairfax relinquishing his claims over waste land and annual tenant rents. The Virginia Court of Appeals approved the compromise in *Fairfax v. Commonwealth*. In this context, petit juries did not simply operate in the strategic calculus of both parties but also, affected the legal tactics that both groups resorted to. The compromise’s result was that Virginians gained access to the waste lands and Fairfax could sell the developed land he inherited. Fairfax soon decided to cut his losses by selling the remainder of his Virginia holdings to John and James Marshall.

The Marshalls were not particularly pleased with the compromise because they wanted to turn a profit on their new holdings by collecting the annual rents that Lord Fairfax previously imposed on his tenants. The Marshalls turned to the Virginia state court system and sought to use an old case that had not been struck from the docket, *Hunter v. Fairfax’s Devisee*, to vindicate their financial interests. The Marshalls selected *Hunter* as their test case because the facts were uncontested, and the case was initiated before the Virginia compromise had been passed. The former characteristic was significant because it would allow the Marshalls to avoid a local jury trying the facts in their case – another instance that demonstrates litigant’s recognition of the potential obstructionist role petit juries could play in the Old Dominion. The suit’s initiation before the resolution of the Virginia compromise was important since inclusion of the settlement in the factual record would have weakened the Marshalls’ claims to tenant rents in the Northern Neck. Notwithstanding the ideal factual record in *Hunter*, the Virginia Court of Appeals included the legislative compromise in the record and ruled against the Marshall Brothers. The two justice appellate court reasoned that any doubt surrounding the legality of the Fairfax confiscation had been resolved by the recent compromise. Moreover, the court determined that the statute clearly forbade the collection of annual rents, and that the Marshalls could not renege on Lord Fairfax’s past promises. John and James Marshall were evidently starving for the rents because they filed a writ of error to the United States Supreme Court a few days later.

The Fairfax litigation was entered on the Supreme Court’s docket and argued during the winter of 1812. John Marshall and Bushrod Washington, the two Virginians on the bench, both recused themselves because of financial conflicts of interest. The question before the tribunal

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47 *Fairfax v. Commonwealth* (1796).


50 John Marshall to Denny Fairfax, September 6, 1797.

51 Henry Tucker to St. George Tucker, December 5, 1805.


53 *Hunter v. Fairfax’s Devisee* 1 Munford 218 (1809).

54 *Ibid*.

55 *Ibid*.

56 Judicial ethics was a relatively under-developed field in early nineteenth century America. Strictly speaking, federal judges would only recuse themselves from a case if they had financial conflicts of interest. William Van Al-
on this occasion was whether the lower court had erred as a matter of law in denying the Marshalls’ claim on the merits.\textsuperscript{57} Charles Lee, counsel for the Marshalls, disingenuously argued that the Virginia Court of Appeals had committed a legal error in its previous opinion because Lord Fairfax held his land in fee simple, Fairfax had willed his land to Denny Fairfax, the Jay Treaty of 1795 and the Treaty of Paris of 1783 had prohibited the confiscation of British lands, and that as a result, David Hunter never obtained lawful title to the land he purchased from Virginia.\textsuperscript{58} Lee purposely forgot to mention the Virginia Compromise and cited the non-confiscation provisions of the Jay Treaty even though the lower court record included the former and excluded the latter.\textsuperscript{59} This exercise in selective inclusion was not only dishonest, it also violated section twenty-five of the Judiciary Act of 1789, which stated that in cases appealed from the court of last resort in a given state “no other error shall be assigned or regarded as a ground of reversal…than such as appears on the face of the record.”\textsuperscript{60} The Court ruled in favor of its absentee Chief by a 4-1 vote. Justice Joseph Story, writing for the Court, closely tracked Lee’s oral argument in his opinion, and dismissed the section twenty-five procedural issue by arguing that “the decision of the…court must conform to the state of rights…at the time of…judgment.”\textsuperscript{61} The case was remanded to the Virginia Court of Appeals with instructions to enter a judgment that was not inconsistent with the dictates of the Court’s opinion.\textsuperscript{62} The Marshalls now had a judicial basis for their claims to all of the Fairfax lands and the rents that accompanied them since Story’s opinion did not acknowledge the Virginia Compromise.

Virginia’s petit juries and judges would have none of the Supreme Court’s imposition in local land affairs, though. Many in the Old Dominion were skeptical of the Court’s power to review state judgments and the local prejudice that George Mason’s convention speech displayed reflected this skepticism albeit in a somewhat different form.\textsuperscript{63} Centralized rule by distant and seemingly foreign appellate courts was no less objectionable than centralized rule by distant and seemingly foreign trial courts that lacked petit juries.\textsuperscript{64} Even the Court’s opinion reflected this fear, because it did not affect the land titles of Virginians who had purchased confiscated Fairfax land. The Hunter decision had this effect because the Virginia Compromise statute had not been invalidated (it was never on the record) and the Virginia Court of Appeals refused to follow the Supreme Court’s in-

\textsuperscript{57} Fairfax’s Devisee v. Hunter’s Lessee 11 U.S. 603 (1812).
\textsuperscript{58} Fairfax’s Devisee at 1-5.
\textsuperscript{60} Judiciary Act of 1789 § 25.
\textsuperscript{61} Fairfax’s Devisee at 15.
\textsuperscript{62} Fairfax’s Devisee at 16.
\textsuperscript{63} John Marshall to James Marshall, July 9, 1822.
structions on remand.\textsuperscript{65} Instead, the appellate court declared section twenty-five of the Judiciary Act of 1789 unconstitutional because it threatened states’ rights and thus individual liberty.\textsuperscript{66} The Supreme Court responded in \textit{Martin v. Hunter’s Lessee} by rebuking the lower court and reaffirming its right to decide cases under section twenty-five.\textsuperscript{67} But the Court strategically chose not to remand the case to the Virginia courts because it wanted to avoid a direct confrontation with the Old Dominion’s judicial system – one that it would likely have lost had it forced the issue.\textsuperscript{68} Of particular note in this situation, was the fact that the Marshall brothers ultimately gave up on trying to enforce their rights to annual rents in Virginia courts because of uncooperative petit juries driven by popular animus against their cause.\textsuperscript{69} This result is significant because most legal historians and constitutional law scholars portray the \textit{Ware-Hunter-Martin} litigation trilogy as a vindication of national power on a doctrinal and practical level.\textsuperscript{70} But on closer examination, it becomes clear that local petit juries held their own and guarded local economic interests on a case by case basis by subtracting interest from debt awards, not awarding interest, and not allowing Englishmen to vindicate their legal claims to land.\textsuperscript{71} Hence, Virginia petit juries played an instrumental role in protecting local agrarian economic interests from federal and foreign influence in debt and ejectment suits.

Local petit juries played a similar role in a different economic climate to the west in Kentucky. In contrast to Virginia, internal revenue laws presented one of the primary threats to the local economic order in Kentucky communities during the early 1800s. Kentuckians were particularly disgusted with the 1791 federal excise tax on the production of distilled spirits, which included the region’s beverage of choice: whiskey. There were four reasons why Kentucky residents disliked the tax. First, the average adult in Kentucky consumed large amounts of whiskey.\textsuperscript{72} Therefore a tax on the beverages’ producers decreased supply, temporarily increased the price point, and encour-

\begin{itemize}
\item \textsuperscript{65} \textit{Hunter v. Martin, Devisee of Fairfax} 4 Munford 1 (1814).
\item \textsuperscript{67} \textit{Martin v. Hunter’s Lessee}, 14 U.S. 304 (1816).
\item \textsuperscript{68} Timothy S. Huebner, \textit{The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790-1890} (Athens, Ga.: University of Georgia Press, 1999) 3.
\item \textsuperscript{69} Kent R. Newmyer, \textit{John Marshall and the Heroic Age of the Supreme Court} (Baton Rouge: Louisiana State University Press, 2001) 239.
\item \textsuperscript{71} For a similar account of local jury proceedings in North and South Carolina, Laura F. Edwards, \textit{The People and Their Peace: Legal Culture and the Transformation of Inequality In the Post-Revolutionary South} (Chapel Hill: University of North Carolina Press, 2009).
\item \textsuperscript{72} W. J. Rorabaugh, \textit{The Alcoholic Republic, an American Tradition} (New York: Oxford University Press, 1979) 91.
\end{itemize}
-aged consumers to find substitute drinks to satisfy their demands. However, the tax only affected market participants, who were willing to comply with its provisions. Many Kentuckians simply chose to ignore the whiskey excise but resented the tax nonetheless because they believed that it discriminated against small western farmers. Second, whiskey was a major export for the state’s farmers hence a production tax prevented many yeomen from bartering with merchants to obtain manufactured goods that they needed on the homestead and could not make for themselves. Third, the tax was seen as an illegitimate attempt to reward speculators in devalued government securities. This perception prevailed among Kentuckians because the proceeds from the excise tax were used to pay the interest and principal on federal and state bonds, many of which were held by a retinue of investors, who had purchased the notes from impoverished Revolutionary War veterans for pennies on the dollar. Moreover, charges that several Treasury officials were personally profiting from the government’s redemption and assumption policies only raised suspicion. Finally, whiskey was used as a medium of exchange because gold and silver specie was in short supply. The whisky tax therefore drained the Kentucky economy of gold and silver specie when collectors demanded payment in hard currency, and led to an outflow of money from the state when federal agents were willing to accept the beverage as payment. In both cases, the decrease in the money supply prompted economic contraction and made it harder for Kentucky farmers to pay off loans in specie or whiskey because the value of both currencies had appreciated. For all these reasons, Kentuckians were not enthusiastic about the federal whiskey tax. Their distaste for the measure was reflected in grand jury decisions and petit jury trials where they were asked to indict and convict neighbors, who violated the tax.

The current historical understanding is that many Kentuckians disregarded the federal

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81 Lewis Collins, *History of Kentucky* (Louisville, 1877) 432.
82 Kentuckians would sometimes resort to outright violence when they could not rid themselves of tax collectors. In the winter of 1793, a tax collector Hubble was attacked in his sleep, and his money, saddlebag, and collection records were stolen. Later on in the same year, another collector was pulled from his horse and rolled in leaves. Thomas Marshall to Edward Carrington, March 20, 1794. Tench Coxe to William Clarke, May 11, 1797.
whiskey tax.\(^{83}\) This claim is supported by the sheer number of federal civil and criminal actions that were brought against tax dodgers in the late 1790s and early 1800s. In fact, from 1786 to 1816, the U.S. District Attorney filed 675 civil actions and 100 criminal charges related to violations of the whiskey tax.\(^{84}\) The criminal charges are of particular significance here because in Kentucky the power of grand and petit juries was at their zenith in criminal matters.\(^{85}\) Grand juries could approve criminal charges against tax dodgers in two ways. A grand jury member could issue a presentment when he believed that the excise law had been violated. Alternatively, the grand jury, as a whole, could concur with a prosecutorial indictment by returning a \textit{bilia vera}, or a true bill. Grand jury members were apparently content to let their neighbors snub the law because no presentments or indictments were approved from 1789 to 1793.\(^{86}\) The grand juries’ inactivity is most likely attributable to the fact that many members were also whiskey distillers, who were unwilling to trouble one of their own.\(^{87}\) But even when the local federal court adopted a new rule that prevented whisky distillers from sitting on grand juries in cases involving violations of the excise law, petit juries refused to convict defendants. Indeed, no Kentuckian was found to be in violation of the excise law from 1793 to 1800.\(^{88}\) In the words of federal district court judge Harold Innes, jury trials were “considered…the great bulwark that intervenes between the magistrate and the citizen” for “no offender” could be found guilty until “his trial comes before a petit jury.”\(^{89}\) That Kentucky petit juries lived up to Judge Innes’ romanticized characterization is demonstrated by two relatively short criminal cases that he presided over: \textit{United States v. Brown} (1798) and \textit{United States v. Jones} (1798).\(^{90}\)

In March 1797, John Brown, a prominent member of the Kentucky bar, was accused of violating the excise law by the district prosecutor.\(^{91}\) Brown appeared in district court seven months later after a writ of \textit{venire factas ad respondendum} and a writ of \textit{alias capias ad respondendum} were issued summoning him for trial, and ordering the court martial to deliver Brown to the bar to respond to the suit filed against him, respectively.\(^{92}\) Brown finally pled ‘not guilty’ in July 1798 and requested a jury trial.\(^{93}\) Initially, \textit{United States v. Brown} appeared to be an open and shut case for the government because it was public knowledge that Brown was the owner of a distillery that


\(^{86}\) \textit{Kentucky District Court Order Books}, 1789 to 1793.

\(^{87}\) Thomas Marshall to Edward Carrington, March 8, 1792.

\(^{88}\) \textit{Kentucky District Court Order Books}, 1793-1800.

\(^{89}\) Judge Harold Innes, Papers of Judge Harold Innes (Library of Congress) 2-123.


\(^{91}\) \textit{Kentucky District Court Order Books}, March 22, 1797.


\(^{93}\) \textit{Kentucky District Court Order Books}, July 9, 1798.
refused to comply with the excise law. However during the trial, the jury discovered that Brown had not technically refused to pay the excise tax. Rather, the former owner of the mill had run the delinquent account. This revelation caused Judge Innes to rebuke the government from the bench and he refused to enter any evidence that was not related to Brown’s own conduct. The jury apparently shared Innes’ indignation because it quickly voted to acquit Brown after both sides rested their case. In Brown, judge and jury alike combined to hand the government a defeat and preserve local economic interests against the foreign and illegitimate threat that was the federal excise tax.

If the presence of obstructive coordination was ambiguous in Brown, it certainly was not unclear in Jones. The district attorney filed a suit against Thomas Jones, a local justice of the peace, in March 1797 accusing him of violating the excise law. Jones pled ‘not guilty’ in November of that year and a jury trial was held during March of 1798. At the conclusion of the trial, Judge Innes was appalled at the weakness of the government’s case, and instructed the jury to find a ‘special verdict,’ which was an ambiguous judgment that admitted the existence of certain facts but, declined to convict the defendant of the crime in question. The special verdict in Jones found that the defendant did indeed own a mill and that he had not complied with the excise law, but nonetheless refused to declare him guilty of a crime. The jury simply muttered “if the law be for the plaintiff, we find for the plaintiff; if the law be for the defendant, we find for him.” The meaning of the jury’s pronouncement may have been ambiguous, but the message it sent to the federal government was not: Kentuckians would not allow a distant government to impose unpopular taxes on local firms so long as petit juries had a say in the matter.

Grand and petit juries functioned as a gatekeeper in debt, land, and tax suits in early republican Virginia and Kentucky. Jurymen prevented federal and foreign governments from successfully asserting their claims to property in federal and state courts by tinkering with monetary awards, denying British property claims, and hampering federal tax collection efforts. These findings are important because they add sectional nuance to the dominant historiographical theme portraying northern petit juries as an insignificant or marginalized party in early nineteenth century commercial cases. They also enrich current understandings of the Marshall Court’s nationalist jurisprudence and early federal court practice by underscoring the extent to which local juries both opposed and cooperated with state courts in their effort to undermine federal power. In truth, Virginia and Kentucky juries were Janus-like gatekeepers of the local community’s economic interests, and they were determined to protect their own from the perceived devilish exploits of distant forces.

94 Kentucky District Court Order Books, March 22, 1797.
95 Kentucky District Court Order Books, November 21, 1797.
THE MAKING OF AN AMERICAN FOUNDER:
CHARLES CARROLL OF CARROLLTON AND REVOLUTIONARY RELIGIOUS TOLERATION

Introduction by the Herodotus Editorial Board

Matthew Wigler’s engaging paper tracks the political life of Charles Carroll, an American revolutionary and devout Catholic from Maryland. As the paper shows, Carroll contended with a number of difficulties stemming from his status as a religious minority. Through analyzing Carroll’s writings and correspondences, Wigler established how these experiences as a religious minority impacted his thinking, and would ultimately lead him towards his revolutionary career. While historians often emphasize the political and economic origins of the American Revolution, Wigler reminds us that religion cannot be entirely removed from this picture.
The Making of an American Founder: Charles Carroll of Carrollton and Revolutionary Religious Toleration

Matthew Wigler

Prevailing interpretations of the motivations of the colonists who rebelled against British taxation of and sovereignty over the Thirteen North American colonies during the American Revolutionary War tend to focus on one of two broad themes: political ideology or economic self-interest. While proponents of the first model pursue the rigorous examination of the ideological imperatives that inspired American colonial resistance, those of the second, more jaded camp contend that colonial insurrection was more a matter of incentives than ideas, incited by the colonial elite to secure their personal interests. As this largely binary debate is waged amongst scholars, other alternative approaches to understanding the motivations of those who thought and fought the American Revolution are often lost. Although ideological impulses and economic interests may well have been issues of foremost importance to many American patriots, adopting such a limited vantage point risks obfuscating the myriad of individual perspectives harbored by those who constituted the Revolutionary movement, whose many reasons for participation composed a much more diverse mosaic of inspirations. Religious freedom and toleration, for example, may not appear to have been a serious impetus for the majority of colonists, but the struggle for freedom to practice one’s faith without fear of injury or oppression was the foremost consideration of at least one prominent American revolutionary.

Charles Carroll of Carrollton was a Signer of the Declaration of Independence and one of the first two United States Senators to represent the State of Maryland. He was a well-studied scholar of common law and the English Constitution, versed in the literature and tradition of liberty: a disciple of the political ideology most associated with the American Revolution. One of the richest men in North America, Carroll was a slave-holding tobacco planter who strongly identified with the interests of the Southern colonial elite. A conventional analysis of the Founding Fathers’ revolutionary motivations would fixate on these twin details of Carroll’s biography, which alone provide ample fodder for an exploration of those factors that propelled him to take up the cause of American independence.

Yet, these factors alone cannot and do not account for this Founder’s conviction to the Revolutionary cause. The case of Daniel Dulany, a prominent Maryland contemporary of Carroll’s, who shared with him a similar background as a scholar of law and pamphleteer for liberty, offers an important contrast. Despite sharing the same ideological inclinations and economic reservations about the Revolution, Carroll emerged as a champion of independence, while Du-
lany became a loyalist. This divergence highlights the critical role of a third aspect of Carroll’s identity as an American Founder: his Roman Catholicism. Carroll was the only Catholic Signer of the Declaration of Independence at a time when dissent against Protestantism was a significant social and political handicap, accompanied by the denial of equal rights and status. Carroll’s public Catholicism in the Protestant British North America of the late eighteenth century overshadowed his other complex motivations to join the American Revolution. In fact, as this paper argues, Carroll’s yearning for freedom as a religious minority was, regardless of the strength of his ideological bent or economic agenda, the single most important factor compelling him to support and eventually take a leadership role in the American Revolution.

To assess the weight that Charles Carroll placed on the various factors that ultimately led him to support the American Revolution, this paper examines in detail Carroll’s personal written correspondence, from his earliest letters to his final commitment to revolution. However, only those letters that were not published until after his death are considered so as to eliminate any public sentiments that may be more rooted in the demands of political performance than in his own sincere belief as he actively processed the Imperial Crisis to formulate his position. After analyzing the influences of both ideological inspiration and economic incentive on Carroll’s decision to participate in the Revolution, it is unclear which of the two wielded the stronger impact; while both informed Carroll’s revolutionary frame of mind, neither impulse can be deemed paramount over the other. However, with the introduction of a third consideration—Carroll’s identity as a Roman Catholic—it becomes clear that his fear of persecution and experience of exclusion from the full rights and liberties common to his neighbors were the decisive factors in his adoption of the Revolutionary cause.

Sent abroad to Europe as a youth to study law and government, Charles Carroll of Carrollton was nonetheless instructed in his appreciation for liberty and justice by his father, Charles Carroll of Doughoregan, who instilled in him a commitment to these ideals. “Would not it be of infinite advantage… if every man of property… were a sound Lawyer and well acquainted with the Constitution?” the elder Carroll asked the younger. ¹ Carroll’s father implored him to pay special attention to the constitutional qualities that undergird governments, urging him on his departure that “it is necessary to obtain a pretty good insight into ye Constitution of France” and later making similar exhortations that he should familiarize himself in depth with the English constitution. ² Beyond simply requesting that his son conduct his own inquiries into the nature of government, Charles Carroll of Doughoregan, as a follower of the English ‘country’ Commonwealth tradition of political thought, cultivated in his son that same set of principles that guided him politically, suggesting early in his son’s education that he adopt his theoretical framework. In one lesson, Charles Carroll of Doughoregan expounded to his son the basic creed, at the heart of his school of thought, that “corruption and freedom cannot long subsist together.” ³ In the strong words of yet another letter, the young Charles Carroll of Carrollton was taught that “if government cannot be carried on without corruption, there is an end of ye Constitution.” ⁴ Such lessons

¹ Charles Carroll of Doughoregan to Charles Carroll of Carrollton. December 29, 1762.
² Charles Carroll of Doughoregan to Charles Carroll of Carrollton. April 16, 1759.
³ Charles Carroll of Doughoregan to Charles Carroll of Carrollton. September 3, 1763.
⁴ Charles Carroll of Doughoregan to Charles Carroll of Carrollton. April 8, 1762.
would soon assume a grimmer undertone as the elder Carroll infused his notes on political theory with interpretations of current events. By 1762, Charles Carroll of Doughoregan had sounded the alarm bell to his son, conveying to him in despair that “virtue has abandoned us and liberty is gone with it.”

For his part, young Charles Carroll of Carrollton was soon convinced that, towards the latter part of his stay in London, virtue and liberty were beginning to decay. In a letter to his concerned father, Carroll insisted that “whoever presides in the Treasury can command in Parliament,” signaling the long-feared fall to corruption of England’s once virtuous government, while also painting a picture of a vile citizenry that “seems to be tending hastily to Anarchy.” In a letter to his friend and peer, Bradshaw, Carroll expressed his gloomy confidence in an apocalyptic vision of England’s inevitable political fate: “the English Constitution seems hastening to its final period of dissolution,” he wrote, “and the symptoms of a general decay are but too visible.”

Such beliefs reflect that Carroll’s familiarity with contemporary political theory focused on the vulnerability of liberty, an idea he came in contact with during his years of study at the Temple in England. His view regarding the inevitable decay of constitutions as virtue extinguishes amongst a population speaks to his understanding of Robert Molesworth’s central thesis in *An Account of Denmark*, which recounts the decline of liberty in that kingdom. Carroll echoed Molesworth’s fear of “a sickly Constitution” which “mortifies… Liberty and Freedom,” anxious that the experience of Denmark, where “at one instant the whole Face of Affairs was changed so… not the least remnant of Liberty remains to the Subject and the very name of Liberty is quite forgotten,” may well have been repeating itself in his own country. In addition to Molesworth, the young Charles Carroll of Carrollton counted amongst his teachers “Livy, Cicero, Horace, Virgil, and Caesar,” purchased for him by his father, who would have illustrated yet other examples of the precipitous decline and fall of liberty that accompanies the wane of virtue, as infamously occurred in ancient Rome. Carroll was also inspired by Voltaire, whom he esteemed as possessing a “sarcastic wit and humour so peculiar and original that ye easily distinguish his works,” and Jonathan Swift, whose satires he professed to love.

Upon his return to Maryland, Carroll not only continued to engage with such literature, but he also carried out a vigorous correspondence with the friends in England with whom he had studied law. In these letters, he debated points of liberty and constitutionality as they applied to

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5 Ibid.
6 Ibid.
7 Charles Carroll of Carrollton to Mr. Bradshaw. November 21, 1765.
9 Charles Carroll, Of Doughoregan to Charles Carroll of Carrollton. April 16, 1759.
10 Charles Carroll, Of Carrollton to Edmund Jennings. August 13, 1767.
12 Charles Carroll of Carrollton to Henry Graves. September 15, 1765.
current events, most notably the episodes surrounding the passage and repeal of the Stamp Act. Carroll’s arguments demonstrate his lawyerly interest in the philosophy of jurisprudence and the nature of liberty, displaying sincerity in his commitment to such moral and intellectual pursuits. “There are certain known fundamental laws essential to and interwoven with ye English constitution which even a Parliament itself cannot abrogate: such I take to be that invaluable privilege from birth Englishmen [enjoy] of being taxed with their own consent,” Carroll wrote to his friend Edmund Jennings in 1765. His private arguments remained consistent over time and across audiences. That same year, Carroll engaged another English friend, Henry Graves, on the same matter, writing, “by law, ye most favourable to liberty, we claim the invaluable privilege, that distinguishing Characteristick of ye English constitution, of being taxed by our own representatives; to say that we are virtually represented is only adding to ye oppression ye cruel mockery of our understandings.” Conjuring such eloquent private appeals to political philosophy for friends an ocean away, Carroll evinced his commitment to ideology, which must have impacted his decision to support the American Revolution. “If [American] freedom and [English] power are res dissociabiles, incompatible, I am sorry for it, but let us retain our liberty whatever becomes of honor,” Carrollton wrote to Graves. In an ‘honor society’ like that of eighteenth century British North America, willingness to sacrifice one’s own honor for anything was a statement of incredible significance; if Carroll was willing to submit his honor to what he considered to be the higher value of liberty, one can only take him at his word that the idea must have held inestimable importance to him.

Yet, Carroll’s interest in protecting his liberty cannot be fully removed from his interest in preserving his own wealth in the face of Parliamentary overreach and tyrannical taxation. In one letter to Henry Graves, Carroll wrote “Americans will never depart from the essential right of internal taxation, without which our property would be at ye mercy of every rapacious minister.” While in that same letter he went on to imply that affronts to general rights and liberties by Parliament were of paramount concern to him—writing that “the Stamp Act has taken away in part ye trial by Juries: has curtailed ye liberty of ye Press: petitions, altho’ the subject has an undoubted right to petition, were rejected with scorn on ye frivolous pretense”—it was ultimately the threat to property that was his chief concern, earning it the position of greatest emphasis.

Carroll ended his discourse on the Stamp Act by asking, in bold, as if in summary: “what security remains for our property?”

Just as Charles Carroll of Doughoregan had instilled his son with his political ideology, he also impressed upon him at a young age a sense of status and station that came as a result of their material wealth. Having grown wealthy “on the sale of ye Tobacco,” as Charles Carroll
wrote, the whole family was employed in the effort to affect the air of nobility and condescension expected of those with their fortune. When Charles Carroll of Carrollton was newly arrived in France, his father chided him from across the sea to represent the family well and impress upon locals the prestige of the family name. “Since it is the Fashion, you should wear worked Ruffles,” the elder Carroll reminded his son. Under such pressure to flaunt one’s wealth and secure one’s social superiority, modesty was no virtue. “I understand you dress plainly,” Charles Carroll of Doughoregan wrote to his son while he was studying law in England, “I commend you for it, but I think you should have Clothes suitable to occasions.” Throughout his childhood, Charles Carroll of Carrollton was made to feel that wealth bestowed on him a unique position in society, a space above it more than part of it, an exception to the rules that bound the commons.

Certainly, Carroll was aware of the superior social station his considerable wealth granted him and internalized his role as a genteel country patrician as one both social and political. He considered that acting in his economic self interest was a social service to those around him, writing “in these times of necessity and oppression it is a duty every man of fortune owes his country to set an example of frugality and industry to ye common people.” Carroll argues that, though the simple unconstitutionality of the Stamp Act was itself an injustice, its injustice was magnified because it caused him economic distress. “It would be more oppressive than ye Stamp Act itself… to pay extravagant prices for the advantage of Great Britain,” he admitted. To Carroll, the financial difficulty the Act imposed compounded its evil. An ideological purist would not care whether an illegal tax separated him from a penny or a pound: more than stealing his wealth, the tax stole his liberty. For an ideological purist of the country Commonwealth tradition, the second would have been the far more injurious—and far more important—deprivation. Carroll himself was aware of that distinction, remarking to his English friend Jennings that “an American might say, if my money is to be taken from me without my consent, it is immaterial to me in what manner this is effected.” By recognizing that this typical ‘American’ response is not his own, Carroll separated and isolated himself from his countrymen in Maryland by virtue of his economic position.

Carroll was also flexible in his opposition to legislation on the grounds of its unconstitutionality alone and was willing to accept laws that overstepped the bounds of a strict interpretation of parliamentary power if they served worthy ends. Referring to an “embargo laid on wheat,” Carroll reasoned that “if [it] was on creation of the prerogative not strictly legal, yet the measure was confessedly necessary… no stretch of ye prerogative for ye general good will ever endanger our constitution.” The economic effect of illegal legislation seemed to be of greater consequence than its illegality. Writing to Daniel Barrington, Carroll wondered with frustration: “Will ye solid advantages of a most profitable, extensive trade, be given up to an empty point of

21 Charles Carroll of Doughoregan to Charles Carroll of Carrollton. September 2, 1762.
22 Charles Carroll of Carrollton to Henry Graves. September 15, 1765.
23 Charles Carroll of Carrollton to Edmund Jennings. March 9, 1767.
24 Ibid.
25 Charles Carroll of Carrollton to Edmund Jennings. March 9, 1767.
honour?" Many of Carroll’s fellow patriots would likely have been insulted by reference to the Stamp Act, that most abominable instrument of tyranny, as little more than an impediment to the lucrative export of tobacco across the Atlantic.

But if the majority of American patriots had reason to be critical of Carroll’s self-interested economic motivations to revolution, so too did he often critique their acts of resistance, which he considered inappropriate. In at least one instance, Carroll’s privilege pitted him against the bulk of his fellow patriots, and the fracture along class lines was not lost on him: “Men of some property were too sensible to carry [the masses’ plans] into execution,” he wrote to Daniel Barrington, exempting himself from a popularly anticipated political exercise on account of his class.

In another letter to Barrington, Carroll dismissed the whole revolutionary affair as the ill-founded work of the mob: “the clamour of the People,” he alleged, “proceeds from their ignorance, prejudice, and passion.” At times, it seems, Carrollton’s interests as an elite would have compelled him to oppose the Revolution, though such instances were more the exception than the rule.

However, as the example of Daniel Dulany, who shared Carroll’s ideological leanings and economic standing, but nonetheless remained a Loyalist, highlights, neither ideology nor economic self-interest present an obvious impetus for Carroll to have supported the Revolution. As a youth in London, Carroll had studied law in the company of Lloyd Dulany, the son of Maryland Governor Daniel Dulany. Daniel Dulany, like Carroll, was deeply dedicated to both the ideological ideals of liberty and his own economic interests, both of which pitted him against the English government. When Dulany published a pamphlet assaulting the Stamp Act as both unjust and imprudent, titled Considerations on the Propriety of Imposing Taxes in the British Colonies, Carroll was enamored. The pamphlet expressed both ideological convictions and economic concerns that Carroll shared, identifying Dulany’s words as the most cogent encapsulation of his views on the Imperial Crisis. “If you are any ways serious or desirous to enter into ye merits of a cause, the most important, interesting, and of ye utmost consequence to the British Empire, I must recommend to you a Pamphlet lately published in this province entitled ‘Ye Claim of the colonies or an exemption of taxes all considered’,” he gushed to his friend Bradshaw. Just two days later, he exhorted Jennings: “if you have a mind to see the claims of the Colonies for an exemption of taxes laid by Authority of Parliament, fairly stated, fully discussed, and asserted with great solidity and strength of argument, I must refer you to a Pamphlet of Dulany’s bearing much such a title.”

Given the profound deference and admiration with which Carroll revered Dulany, it may be surprising that the former made his name in a heated newspaper war with the latter. Under the pseudonyms of “First Citizen” and “Antillon,” respectively, the two battled one another in

26 Charles Carroll of Carrollton to Daniel Barrington. March 17, 1766.
27 Charles Carroll of Carrollton to Daniel Barrington. December 22, 1765
28 Charles Carroll of Carrollton to Daniel Barrington. March 17, 1766.
30 Charles Carroll of Carrollton to Mr. Bradshaw. November 21, 1765.
31 Charles Carroll of Carrollton to Edmund Jennings. November 23, 1765
column after column, as Carroll embraced American patriotism and Dulany became a leading loyalist. If Dulany, who so closely resembled the outlook and pocketbook of Carroll, was to remain a loyalist, what accounts for the divergence between the two men? That factor, which most compelled Carroll to commit to the Revolutionary cause was his Catholicism. While philosophical sympathy and the interests of wealth could not drive Dulany – or presumably Carroll, for that matter – to revolt against British colonial rule, Carroll’s identity as an oppressed religious minority in the Protestant colony of Maryland compelled him to support the Revolution, when he saw in it the opportunity to improve his plight and that of his fellow religious minorities.

Like so much else, Carroll inherited his devotion to Catholicism from his father, who himself inherited it from his. The Carrolls traced their origins to Ireland, where they were known as the O’Carroll’s. Despite trying circumstances, they had remained proudly and publicly Catholic in the New World. Charles Carroll of Carrollton was sent to Catholic institutions at Rheims and the Temple to spend his childhood and adolescence in the company of his co-religionists. As the Carrolls remembered in their Family History, “it remained a traditional custom with the English student of the Catholic faith to frequent the foreign colleges his fathers had sought before him.” The young Carroll demonstrated a sincere commitment to serve his faith dutifully, causing his father to praise him for “entering into ye world fully instructed as to your Duty to God and with a sincere disposition to comply with it.”

As Roman Catholics, the Carroll family faced immense hardship that not even their great tobacco wealth could overcome. Though Maryland was originally founded as a proprietary colony to serve as a safe haven for England’s persecuted Catholics, the colony quickly was dominated by Protestants. In 1654, the Maryland Toleration Act was repealed, and following Coode’s ‘Protestant Rebellion’ of 1689, Catholic proprietors were deprived of control, their faith declared illegal in the crown colony. By the time Charles Carroll of Doughoregan was born, the O’Carrolls had dropped the telltale ‘O’, from their surname, to avoid the prejudice that accompanied the presentation of Irish heritage. Even though the family was permitted to maintain its tobacco plantation despite their open Catholicism, the Carrolls nevertheless faced punitive legislation in Maryland that subjected them and other adherents of their faith to numerous obstacles and degradations. Laws demanded they pay a church tax, as well as twice the land tax levied on Protestant Marylanders. Meanwhile, as Catholics, the Carrolls were disenfranchised and prohibited from holding any kind of public office in the colony. Thus, despite his civic-mindedness and considerable wealth, Charles Carroll of Doughoregan was forbidden from ever casting a ballot or pursuing a government position. Prior to the American Revolution, his son Charles Carroll of Carrollton was forced into this plight as well and had no reason to expect any change.

It is not surprising that the young Charles Carroll of Carrollton became frustrated as he studied law with no hope of becoming a lawyer, not only by his apparently fruitless education, but also with his position in society. Carroll’s angst earned him his father’s sympathetic chiding, as they shared ‘the talk’ via written correspondence. “It is true,” Charles Carroll of Doughoregan

33 Charles Carroll of Doughoregan to Charles Carroll of Carrollton. August 30, 1758.
admitted to his son, “as things now stand, you are shut out from ye Bar.”

While attempting to reassure his son of his self-worth, the elder Carroll was careful not to indulge him with any illusions. “I find you begin to think that neither Maryland or any of ye British Dominions are desirable Residence for a Roman Catholic; without a change in ye Scene, they certainly are not so,” he conceded. “Laws which Double tax us oppress us,” he complained in one letter, before turning his focus from economic inequities to the systematic injustices Catholics faced in the legal system, where “a Roman Catholic stands but a poor Chance for Justice, with our Ju- ries in particular.”

So precarious was the predicament of Roman Catholics, Charles Carroll of Doughoregan insisted, that “if our House of Commons could have their way, such is their Malice that they would not only deprive us of our property, but our Lives.” In final summary, he stated: “Maryland [is] no desirable residence for a Roman Catholic,” imploring him to consider settling elsewhere.

Yet, as a young adult, Charles Carroll of Carrollton must have known that his options for a ‘somewhere else’ were limited. Even in Catholic nations like France, those of his faith seemed threatened. Charles Carroll of Doughoregan obsessed over the numerous blood libels and smears leveled against Roman Catholics, especially Jesuits. In particular, he fixated on what he considered a global conspiracy to tarnish the good name of the Society of Jesus. “What has been ye real occasion of ye shocking Executions at Lisbon?” he asked his son, “ye lugging ye Jesuits into ye Plot makes me disbelieve what I see in our Papers. I know ye Envy of their superior Merit draws on them; they are not only too virtuous, but too wise to engage in Assassinations, however illy treated.”

In the Carrolls’ eyes, Jesuits were persecuted for their virtue “I say it as my Sentiment, [the Jesuits’] eminent Merit and Virtue has provoked this persecution,” the elder Carroll argued. Convinced of this, Charles Carroll of Carrollton would go on to associate closely with the Society of Jesus for the rest of his life, even when doing so in Maryland was illegal. The documentation of his marriage dispensation survives, indicating that he was married by a Jesuit, the Reverend John Lewis, in spite of the vicious claims leveled against the order by his countrymen.

Vicious claims were still deployed against Catholics in Maryland with alarming frequency: when Charles Carroll of Carrollton returned home, he was forced to accustom himself to being the subject of conspiracy, an inevitable circumstance of life as a religious minority that he learned to tackle with humor. For example, when a prominent English Protestant died at sea on Carroll’s second wedding day, rumors spread in Maryland that he had been assassinated as part of a Papist conspiracy. Writing to his friend Edmund Jennings of his marriage, Carroll joked,

34 Charles Carroll of Doughoregan to Charles Carroll of Carrollton. October 6, 1759.
35 Charles Carroll of Doughoregan to Charles Carroll of Carrollton. May 1, 1759.
36 Charles Carroll of Doughoregan to Charles Carroll of Carrollton. December 12, 1760.
37 Charles Carroll of Doughoregan to Charles Carroll of Carrollton. April 16, 1762.
39 Charles Carroll of Doughoregan to Charles Carroll of Carrollton. April 16, 1762.
40 Charles Carroll of Doughoregan to Charles Carroll of Carrollton. April 8, 1762.
41 Charles Carroll of Doughoregan to Charles Carroll of Carrollton. October 6, 1759.
42 Lewis, John, S.J. Dispensation for the Marrying of Charles Carroll of Carrollton to His Cousin, Rachael Cooke. October 14, 1766.
“No wonder that a bloody minded Papist should chuse for feasting and merriment a day which had like (if you believe ye story) to have proved so fatal to a Protestant.” Here, Carroll demonstrated that he internalized his precarious position as ‘the Other.’ Blood libel and rumors of the most egregious scandal were his lot in life as a Catholic in a formally Protestant society.

On occasion, Carroll offered glimpses into the mode by which he perceived himself as the despised ‘Papist’ in a Protestant society. “Having mentioned Protestants and Papists, I could wish… that ye unhappy differences and disputes on speculative points of Theology had been confined to divines,” he lamented: “the savage wars, ye cruel massacres, ye deliberate murders committed by law, under ye sanction of Religion, have not reformed ye morals of men.” Carroll at times found himself unable to affect the façade of humor with which he otherwise strove to address the vulnerability that accompanied his ‘Other-ness.’ One such case was in August 1767, when he could not hold back from expressing his extreme alarm by “ye Bishop of London’s shutting up some of ye Roman Catholic Chapels.”

The victim of constant religious oppression, Carroll uniquely appreciated the futility of religious conflict and the legal posturing of one faith over another; he wished to end the interplay of religion and politics. In perhaps his most candid confession, Carroll wrote to his friend Jennings, “I am of the opinion, were an unlimited toleration allowed and men of all sects were to converse freely with each other, their aversion from a difference of religious principles would soon wear away.” He must long have harbored hope that he might one day be free to put such a theory to trial by experiment.

By necessity, Carroll developed a philosophy to mitigate his futile desires to gain public office, offering an explanation into his failure to publicly discuss either his Catholic faith or political ambitions prior to the American Revolution. “If none but those who professed ye established religion were admitted to posts of profit and trusts, and ye exclusion of all others made ye punishment of their dissenting from ye established mode of faith,” he wrote, describing the conditions that he himself faced as a dissenter in Maryland, “those against whom it is employed are apt to conclude that their opinions can not be confuted by other arguments.” Regardless of his profound hopes, Carroll was convinced that those who barred him from public life were beyond persuasion. Yet, the American Revolution would offer him the opportunity to circumvent restrictive statutes.

When the Revolution began to brew and Carroll found himself emerging as one of its leaders in his native colony of Maryland, he must have hoped that religious toleration for himself and his community might indeed be possible. As the American Revolution stirred resistance against colonial authorities, its participants were often drawn from the ranks of those outside political authority. When Carroll created a name for himself in the Revolutionary movement, originally as “First Citizen” during his disputes with Daniel Dulany’s “Antillon,” he rose to prominence in a new, as-yet undefined power structure that developed free from the strictures and prejudices that had infested the structure of the colonial government. If the laws of the Royal

43 Charles Carroll of Carrollton to Edmund Jennings. October 14, 1766.
44 Charles Carroll of Carrollton to Edmund Jennings. October 14, 1766.
45 Charles Carroll of Carrollton to Edmund Jennings. August 13, 1767
46 Ibid.
47 Ibid.
Colony of Maryland had forbidden the Catholic Carroll from fulfilling his aspiration to join Maryland’s royal government, no such regulations forbade him from serving on a shadow government created to organize against it. Charles Carroll of Carrollton did exactly that. In 1774, he was elected to sit as a representative on Maryland’s revolutionary Committee of Correspondence. Thereafter, the Maryland legislature could not prevent him from taking a seat in Maryland’s actual colonial legislature. Breaking the law to rebel in the name of liberty for American independence, Carroll simultaneously broke the law to exercise his natural political rights in spite of his Roman Catholicism. When he was elected to represent Maryland as a delegate to the illegal Continental Congress, no established legal code could bar him from participating as a Catholic, and he could ensure that no such law would ever exist. As a Founding Father of a new, independent American nation, Carroll was able to finally instate and experience religious toleration, which was officially enshrined in the Constitution of the new United States of America in 1789.48

When Carroll was a child, his father assigned him a lofty task, writing “I shall leave you to dispute many things of Consequence which ye present Injustice of ye times will not permit me in prudence to contest.”49 While Carroll’s father certainly valued the ideology of liberty and the economic standing of his family, the chief injustice the Carrolls faced was their oppression as Roman Catholics. When Carroll was selected as a senator by the legislature which had once refused to grant him basic political rights, he achieved the advancement his father had only dreamed of, reconciling his family’s political status with its economic one while holding fast to his ideology of liberty. Even though Carroll would be required to continue his pursuit of genuine religious toleration as a Senator —fighting, for example, against a statute passed by the Maryland legislature that prohibited Catholic couples from adopting orphan children —his support and participation in the American Revolution had earned him unprecedented success in securing religious freedom.50 Thus, in spite of the undoubtedly significant roles that ideology and economics played in motivating the American Revolution, for at least one Founding Father, there was one exalted principle above these common causes: religious toleration. His name, Charles Carroll of Carrollton, though lacking it’s ‘O’, can be found on the bottom of that piece of parchment that became the United States Declaration of Independence.

50 Rev. Dr. Carroll to Charles Carroll of Carrollton. November 11, 1783.
TEMPERING GOD'S WRATH IN THE IDEAL CITY

Introduction by Fiona Griffiths

Focusing on the founding of so-called “health boards” in Florence in the aftermath of Bubonic plague, Popova challenges the prevailing scholarly view that these were fundamentally public health measures, arguing rather that they were social institutions, founded to counteract challenges to the renaissance concept of the “ideal city” that plague outbreaks repeatedly undermined. As Popova shows, health boards were first founded in the mid-fifteenth century (a full century after the first plague outbreak), a delay that she attributes to the need—by that point—to repair Florence’s battered conception of itself as an ideal city. Political and religious ideology—rather than health concerns—inspired the Florentine expansion of government authority, as Popova argues in this bold and persuasive paper.
Tempering God’s Wrath in the Ideal City

Lilia Popova

What are you thinking of, merciful God, thus to destroy your creation and the human race; to order and command its sudden annihilation in this way? ... What a tragic and wretched sight!

--Gabriele de’ Mussis (1280-1356), on the Black Death

The Black Death was the first and most devastating outbreak of bubonic plague; it struck Europe and Asia between 1346-1353, causing an estimated 75-200 million deaths. Europe’s largely Christian population saw the Black Death as God’s wrath on a sinful society. As a result, people responded to plague with charity, sympathy, and selflessness. Acting on their Christian duty to help the needy and on their civic duty to contribute to the peaceful and organized city, Florentine citizens “left in their deathbed wills, over 350,000 florins to be distributed to the poor.” By responding to the plague with mutual assistance, the citizens of Florence contributed to the realization of the political, economic, and social philosophy of the “ideal city,” an Early-Renaissance goal.

In the chaos and disruption of plague, however, this moral response to assist the needy was short-lived. Many people tried to take advantage of the influx of money that was intended for charity and the shortage of regulatory officers to prevent this exploitation. Recognizing the overflow of donations, “...many eagerly sought to become captains of the [almshiving] society.

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2 Although plague existed in Asia prior to the mid-fourteenth century, the Black Death was the first epidemic of bubonic plague that spread to Europe. Carmichael argues that the plague was especially devastating in Western Europe because the climate changes of the fourteenth century created conditions that favored higher populations of reservoir hosts, animals that carry the disease asymptomatically before it is passed on to humans by fleas (Carmichael, Ann. “Plague Persistence in Western Europe: A Hypothesis,” In Pandemic disease in the medieval world: rethinking the Black Death, by Monica Green. 157-191. Kalamazoo, MI: Arc Medieval Press, 2015.).
5 Discussed and defined later in “Medieval Florence: Between Ideality and Reality.”
6 These charitable donations were both by living citizens and by the dead whose assets, without any living relatives left, were redirected to strangers in need.
in order to administer this treasure.\textsuperscript{7} … the money they kept, each one taking part for himself. … And because of this improper behavior, much of the treasure was quickly dissipated …\textsuperscript{8}

Greedy citizens realized that almsgiving societies were collecting money faster than they could distribute it and so they quickly filled empty positions (left by the plague) as captains of these charitable societies and hoarded the alms for themselves. What was once a surplus of charitable emergency relief for the city of Florence quickly disappeared when panic, fear, and self-advancement corrupted society officials. Consequently, tensions between society officials and the poor benefactors of their services escalated as plague drew on, leading people to lose faith in their fellow citizens leading the charitable societies. “[F]aith in the society among citizens and countrydwellers began greatly to fall off, poisoned by the excessive treasure and by its greedy administrators…”\textsuperscript{9} It was not only the societies’ donations that suffered in the aftermath; suspicions of ill will translated to neighbors, government officials, and workers. This is one example of how plague destabilized not only the economy, but also societal relationships.

Florence was the first city to appoint health officials, and later, to institute a health board; it was also central in the Renaissance, which was important in developing conceptions of the “ideal city.” Because of these characteristics, Florence serves as a valuable case study, presenting a new perspective on the emergence and purpose of health boards.

Thankfully, the Black Death’s debilitating effects were temporary. Plague eventually passed and the Florentine society and economy stabilized. Although Florence restabilized after each bout of plague, the associated economic, social, and political threats from plague outbreaks over the next century eventually prompted the Florentine government to institute a health board.

It is easy to assume that health boards were founded in direct response to plague to improve well-being or limit the spread of disease;\textsuperscript{10} however, these explanations inappropriately ascribe an intent to improve societal health to medieval governments.\textsuperscript{11} They also do not account

\begin{itemize}
\item \textsuperscript{7} The society referred to here by Florentine historian Matteo Villani (1283-1363), is the Santa Maria of Orsanmichele, a charitable society that collected money for the poor (Villani, Matteo. “Cronica” In The towns of Italy in the later Middle [sic] Ages).
\item \textsuperscript{8} Villani, Matteo. “Cronica” In The towns of Italy in the later Middle [sic] Ages. 108.
\item \textsuperscript{9} Ibid.
\item \textsuperscript{10} This is the argument of textbooks on the history of public health. Porter’s book, Health, civilization, and the state: a history of public health from ancient to modern times, for example, argues that the dense populations that the growth of towns and cities led to focused public efforts on the diseased poor. This, she posits, was the first time the state took action to prevent the spread of disease in dense cities because of the risk the poor harbored of spreading disease (Porter, Dorothy. 1999. Health, civilization, and the state: a history of public health from ancient to modern times. London: Routledge).
\item \textsuperscript{11} Guy Geltner argues that medieval interventions in Lucca, another Italian city, such as controlling the construction of furnaces and ovens, maintenance of walls, drains, latrines, and wells, disposal of waste, slaughtering of animals, constitutes early government interventions in health. He coins the term “healthscaping,” which he defines as “a physical, social, legal, administrative and political process of providing [metropolis] environments with the means to safeguard and improve residents’ wellbeing.” to represent this process (Geltner, Guy. “Healthscaping a medieval city: Lucca’s Curia viarum and the future of public health history.” Urban History 40.03 (2013): 395-415. Web. p 396.). The application of the term healthscaping in qualifying certain medieval policies as health-related is reasonable; however, this term cannot be applied to studies of the development of medieval government interventions in health because of its presumption that such health-related policies were meant to “improve
for the century-long gap between the onset of plague and the expansion of government authority to encompass disease response (Table 1). Another argument on the origins of health boards posits that they emerged to control social disorder.\textsuperscript{12,13} This paper examines the extent to which social disorder prompted government interventions in health, and instead argues that the significant gap between the Black Death and the founding of health boards indicates that although plague temporarily challenged health and social order, it was not an exceptional tipping point in tensions between the rich and poor.

Instead, plague uniquely challenged Florence’s conception of itself as the “ideal city” and a century after the Black Death, the Florentine government expanded its authority to encompass matters of health in order to save this abrading ideology. The story of medieval Florentine health boards, then, is not one of public well-being or uncontrollable social disorder, but of city efforts to preserve a particular vision of society—that of the ideal city.

\textsuperscript{12} Most notably made by Carmichael, who argued that plague officials instituted restrictive policies because they “successfully addressed social disruptions created by plagues” (Carmichael, Ann G. 1986. \textit{Plague and the poor in Renaissance Florence}. Cambridge [Cambridgeshire]: Cambridge University Press. p 2).

\textsuperscript{13} Historians making the public health argument have tended to ignore intent, which is critical to evaluating the purpose and functioning of medieval health boards. Policies that have downstream effects that promote societal health are necessarily ‘public health’ measures. In medieval Italy, for instance, there was no known association between wages and health. While a guild’s decision to increase the salaries of its workers may have had positive effects on their health, it cannot be construed as public health policy, as it would be today, because improving worker health was not a goal that guild officials sought by raising wages (In modern times, amending minimum wage laws is public health policy. This is because research has shown that raising the minimum wage significantly impacts health. Now, policies are proposed to increase minimum wage with the intent of improving the baseline standard of living and people’s ability to afford healthy foods, prescription medications, etc. Thus, this economic and social policy is now also considered to be public health policy). Attributing such worker policies or other sanitary codes health as public health lays a foundation that makes the eventual designation of health boards appear a natural consequence. But plague policies were not interventions enacted with societal wellness in mind; they were piecemeal adaptations to government jurisdiction of civic matters such as the cleanliness of the atmosphere and the regulation of travel during disease outbreaks.

residents’ wellbeing.” In this way, the term is anachronistic and inappropriately ascribes agency in ensuring societal wellness to medieval governments. While the purpose of Geltner’s argument is to find evidence for government action related to health, his application of a modern term to medieval developments lends itself to the categorizing of legislation or policies pre-dating health boards as “public health,” which obscures the intent behind the implementation of health boards and precludes studies of the political, economic, social, religious, and ideological sources of their origins. As a result, the term healthscaping will not be used in this argument.
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<td>1527-1531</td>
<td>110 in 1527; average of 29 in later years</td>
<td>Most significant epidemic since the Black Death 1527: Florence health board decreed permanent</td>
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**Table 1. Significant plague outbreaks (Overall Mortality Rate > 15 per 1,000 Person-years) in Florence, 1347 – 1550.**

*Data from Morrison et al, 1985.

Table produced in consultation with Morrison et al. 1985; Cipolla 1976; Buonaccorso Pitti from Brucker 1967; Cohn 2010; Bartlett 2011.
Medieval Florence: Between Ideality and Reality

The ideal city is usually a term that is reserved for post-fifteenth-century Renaissance architectural planning, which was intended to create maximally functional urban living spaces to support a “rational” society. Jane Crenshaw, a historian of Renaissance public health in Venice, expanded this term beyond architectural design to include early-Renaissance city planning and governance meant to improve society’s functioning. She argued that the state’s emphasis on creating a “well-ordered cityscape as a means of promoting a well-ordered society” influenced more than just architectural theory: it also prompted intervention in the management of the natural (atmospheric) and built environment.14

By Crenshaw’s definition, the ideal city represents the goal of cities to govern in ways that maximize the order of society. This definition enables the study of how the relationship between city and society developed in the century prior to the Renaissance, when city planning emphasizing harmony between markets, governance, and social spheres developed in Italy. By focusing on the ideological values of city and social functioning rather than on rationality, we come to a new definition of the ideal city that encompasses government planning intended to create a maximally functional society. Conceptions of the ideal city by this definition not only include the built urban environment, but also include well-functioning markets, respect for government authority, and positive social relations.

The fourteenth-century government of Florence maintained a political and ideological philosophy with values in line with those of the ideal city—the state served society, tying the success of the government to the political, economic, and social functioning of the city.15

For Florence, the improvement of the urban setting in turn improved society. Towards this goal, the Florentine government enacted policies that were meant to promote the safety and cleanliness of the city, for the benefit of society as a whole, prior to plague’s onset. One manifestation of this was in the regulation of brothels, lepers, and public baths, which were not permitted within even the “surrounding territory of Florence,” for their potential to corrupt a pious, clean society.16

By regulating institutions, organizations, groups, and individual behavior, the government regulated social behavior and the civic landscape, promoting social order in the ideal city.

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15 The goal of the ideal city was not limited to Florence, but was found in other Italian city-states at the time. For instance, government is similarly portrayed in Ambrogio Lorenzetti’s 1339 Sienese fresco, The Effects of Good Government in the City and in the Country, which was intended to guide Siena’s government. The painting of the city’s peaceful landscape filled with bustling markets, churches, buildings, and people, bears the inscription: “... [Justice] always renders to everyone his due. Look how many goods derive from her and how sweet and peaceful is that life of the city where is preserved this virtue who outshines any other” (Stefani, Ruggero. “Appendix I: Inscriptions in the Sala Dei Nove.” In Randolph Starn and Loren W. Partridge, *Arts of power: three halls of state in Italy, 1300-1600.* 261-266. Berkeley: University of California Press. 1992. p 265.) Government, the hand of Justice, is personified as the plant that grows economic prosperity, the keeper of social order, the Queen of her fruitful worker bees.

Another essential component of Florence’s self-conception as an ideal city was having a well-functioning economy integrated with the state.\textsuperscript{17} Fourteenth century Dominican friar and political theorist of Florence, Remigio de’ Girolami (1235-1319), wrote on the seven gifts that God bestowed on the city: “[1] abundance of money, [2] nobility of coinage, [3] multitude of people, [4] a civilized way of life, [5] the wool industry, [6] arms manufacture, and [7] ‘prestige building’ in the \textit{contando}.”\textsuperscript{18} Five out of the seven components of the ideal city-state Girolami describes directly relate to the city’s economy (money, coinage, wool industry, arms manufacture, building), reflecting the importance placed on of a functional and efficient economy. If used properly, he wrote, these gifts illuminate man; if used poorly, man “becomes blinded” and threatens the foundation of the city as a whole. For Florence, the success of the city was directly determined by the success of the economy, making functioning markets critical for the realization of the ideal city.

Fourteenth-century Florence’s governance by merchants and guild officials enabled the success of the city-state to be tied closely with economic growth. When the \textit{popolo} took power in the mid-thirteenth century, they arranged “for gold coins to be minted in Florence” instead of the previous silver coins.\textsuperscript{19} The city’s coinage, or \textit{florins}, circulated throughout Europe, Asia, and North Africa, “demonstrating the Florentines’ power and magnificence” and earned them valuable privileges in foreign exchange, reported chronicler Giovanni Villani in 1252.\textsuperscript{20}

The strong coinage minted bolstered the growth of the Florentine economy in the thirteenth century. Government action was thus important in ensuring the success of Florence’s economy.

Social status, regulatory power, and financial success motivated merchants, guild officials, and others involved in the city’s economy, to accept positions in the city’s administration, where they had more control over the city’s economic affairs. In Florence, social status was closely tied to financial success. As a result, people were motivated to succeed financially so that they would be eligible to partake in city governance, where they had higher social rank and were more influence in city affairs. Florentine poet Pieraccio Tedaldi (1290s - 1350s) writes on money’s social and political power in fourteenth century Florence:

\begin{quote}
Alas, I feel so bewildered, / when I have no money in my pocket. / Where people meet to exchange some news, / I almost fail in my courage to speak. / And if I speak, I am pointed at, / and I hear the words ‘Look at that talker’. / … / But when I have coins in abundance / in my purse, pocket or haversack, / I am bold and
\end{quote}

\textsuperscript{17} Milan, Venice, Genoa, and Florence were the most prosperous business centers of the Commercial Revolution. All other city markets paled in economic importance (Lopez, Robert S., and Irving W. Raymond. 1967. Medieval trade in the Mediterranean world: illustrative documents. New York: W.W. Norton). Milan was a strong metropolis since the Roman Empire. Venice was the strongest maritime power in Western Europe since the tenth century. Genoa’s success came from the First Crusade. Florence was the least triumphant of the four in commercial affairs, but had the largest bourgeoisie class, which took control of the city from the nobility in the fourteenth century, helping to build up the city-state’s economy.


\textsuperscript{20} Ibid.
When the narrator of this poem does not have money, he is perceived as useless to the other people in the city; only when he has coins is his speech accepted. Money granted respect, authority, and power to the beholder by granting influence over other people of lower social rank. The assistance that the narrator’s fellow citizens hope for may be monetary, representing social expectations of charity; social, representing hopes to climb in social rank by association; or political, through lobbying fellow citizens to support their interests. In any event, all of these privileges, previously not allowed to any except the aristocracy and the magnates, motivated people to take part in government and consequently, in bringing the ideal city to fruition. Ordinary citizens thus brought the ideal city to life. Along with Florence’s mercantile economy and participatory government, society was also critical to the ideology of the ideal city because it affected how people saw Florence and their roles within the city’s functioning.

**God’s Wrath in the Ideal City**

Although Florence’s goals were idealistic, the reality was far from ideal. There were justified fears of government corruption by greedy businessmen, who managed to rob the republic at times, and there was intragroup conflict among the rich, the workers, and the poor. The tensions were not between rich and poor; instead, they were related to economic and political pursuits and religious ideals. Artisans, for instance, resented the nobility for their control of the city. Clerics, on the other hand, had separate issues; they saw the non-religious as “traitors, usurers, perjurers, adulterers, and thieves.” Reciprocally, non-religious “laymen” saw the clerics as “fornicators, gluttons, idlers, thieves, and vainglorious men.” The nature of these tensions threatened the Florentine Republic’s foundation of common welfare because without a sense of commonality, individual relationships to the community created different visions of the ideal city. Ultimately, the lack of a consistent and favorable vision of what government’s goals should
constitute and the growing distrust of political administration and authority left Florence, the
supposed “ideal” city, vulnerable to significant social disruption.

The Black Death came at an opportune time when faith in the ideal city was already
being tested by famine, intragroup conflict, and fears of corruption. Medieval Europe was no
stranger to disease or outbreaks, but bubonic plague’s transmission speed and drastically high
mortality rate, combined with medicine’s inability to treat it, were debilitating.28
A contributing factor was that doctors’ medical knowledge was ineffective in the face of the
plague—“all the power of medicine were profitless and unavailing,” wrote Boccaccio in his in-
troduction to the Decameron, a well-regarded account of the Black Death in Florence.29
Killing rich and poor, old and young, alike, the plague ravaged Florence.

In April of 1348, the Florentine government appointed eight citizens to a temporary com-
mittee that would take care of the general problems that plague brought, but their advisements
were mainly reiterations of previous sanitary protocols.30,31 For instance, the government forbade
citizens from taking sick people and anyone from infected cities into their homes since it was un-
derstood that plague was contagious.32 In his dissertation on plague control in Venice and North-
ern Italy, Richard Palmer explains this policy vividly: “Sick persons were dangerous in precisely
the same way as bad salt pork, in that they added to the general atmospheric corruption.”33
Because disease was thought to be caused by miasmata, or ‘bad airs,’ cleansing the atmosphere
was a natural goal of early-Florentine plague legislation. Further policies put into place were
essentially restatements of previous sanitary codes. For example, “streets were to be kept free
of filth, sewers cleaned, animals kept out of the city’s boundaries and all occupations banned
which were productive of foul smells.”34 These sanitary ordinances were not novel innovations;

28 Also, Bubonic plague was a horrific infection. It spread rapidly with high virulence and mortality and was
terrifyingly gruesome. Just three to seven days after being infected, the ill were stricken with high fevers, head-
aches, and vomiting. Then, their lymph nodes swelled into large buboes the size of golf balls. Florentine chronicler
Marchionne di Coppo Stefani (1336-1385) recorded the symptoms: “a bubo in the groin, where the thigh meets
the trunk; or a small swelling under the armpit; sudden fever; spitting blood and saliva (and no one who spit blood
survived it)” (Di Coppo Stefani, Marchione. "Marchione di Coppo Stefani, The Florentine Chronicle."). Sometimes,
fingers, toes, lips, and nose, developed gangrene--the tissue died and turned black--as the bacteria laid claim to their
victims’ bodies. Within days, most people infected died.
30 Cipolla, Carlo M. Public health and the medical profession in the Renaissance. Cambridge: Cambridge U
Press, 1976. Print. p. 13; Palmer, Richard J. The Control of Plague in Venice and Northern Italy 1348-1600. Univer-
31 These ‘Eight Custodians,’ as they are called in archival records, were not made into a permanent magistracy
until 1448. Until 1448, Florence did not have a “specific magistracy for health affairs” (Cipolla, Carlo M. Public
health and the medical profession in the Renaissance, p 13). Cipolla writes that this Health Board was administrate-
in nature from the start. Doctors were not consulted in drafting legislation and protocols; the power was entirely
centered in the administration and did not require consultation of medical authorities (Pub Health and Med Prof in
Renaissance 21).
32 Palmer, Richard J. The Control of Plague in Venice and Northern Italy 1348-1600. p. 18.
33 Ibid. p. 20.
34 Ibid. p. 18.
they were first proclaimed in the sanitary ordinance of 1324, and their institution prior to the Black Death disconnects them from plague. Thus, even though they were intended to prevent atmospheric contamination and, consequently, the spread of disease, these policies are evidence against the argument that plague sparked innovations in public health. Florentine health officials’ ordinances were thus not public health policies in the contemporary sense because they did not have the intent of preserving health.

This failure of medicine and city sanitation combined with the plague’s perception as “God’s wrath” to affect people’s perceptions of authority and social order. Gabriele de Mussis (1280-1356) of nearby Piacenza, Lombardy in Northern Italy, characterizes the plague as God’s judgement on humanity’s sins:

Almighty God… looked down from on high upon the entire human race and saw it sinking and sliding into all kinds of wickedness, embracing out of sheer persistence numberless crimes and transgressions, and immersing itself… in every type of vice…

Boccaccio corroborates this belief, saying that the plague was punishment for an “iniquitous way of life.” Medieval thought rationalized that, as a consequence of society’s decrepit behavior, God sent “the quivering spear of the Almighty, in the form of the plague… to infect the whole human race.” Such forceful rhetoric of the plague as God’s vengeance on a backwards society carried apocalyptic tones. When “all the wisdom and ingenuity of man were unavailing” in the face of God’s wrath, there was a sense that judgement day was coming—there was nothing mere mortals could do to escape “the horrible onslaught of death, running its course throughout the world and threatening ruin.” As people turned to religion for salvation, they abandoned their faith in the city (Figure 1).

Europeans responded to this belief in assured doom in different ways. Some withdrew in isolation, where they lived peacefully in a “sober and abstemious mode of living” and avoided any news of plague, and perhaps even preemptively punished themselves for society’s decrepit behavior. These people avidly prayed for salvation (Figure 1). Others drank heavily and “shrug[ged] the whole thing off as one enormous joke.” Finally, many (mainly the rich) fled the city because they either thought that the plague would strike only the deteriorating city or that the whole city’s population would be exterminated by plague because of how quickly it was trans-

35 Ibid.
37 Boccaccio, G. The decameron. p. 5.
39 Boccaccio, G. The decameron. p. 5.
41 Boccaccio, G. The decameron. p. 7.
42 Ibid.
mitted and how virulent it was. Consequently, cities were left with far fewer wealthy authority figures who usually functioned to preserve social order. As a result, “all respect for the laws of God and man had virtually broken down” because most government officials were either dead or ill, or had fled the city out of fear of disease, so “everyone was free to behave as he pleased.” This lack of authority combined with the plague’s reception as a devastating punishment from God made people question civic order.

Plague’s unforgiving and unrelenting virulence caught Florence by surprise during the Black Death epidemic, leading to market closures and labor shortages. As the wealthy fled the city, there were fewer workers willing to risk infection for meager salaries so the cost of labor and living rose. Marchionne di Coppo Stefani chronicled how the Black Death affected Florence’s economy: “Servants, or those who took care of the ill, charged from one to three florins per day and the cost of things grew. The things that the sick ate, sweetmeats and sugar, seemed priceless.” While the rich had resources enough to leave, the poor had no choice but to stay. The poor who remained took advantage of the short supply of workers by demanding increased monetary compensation mainly out of necessity.

The wealthy citizens who fled Florence in the wake of the plague perceived the poor’s opportunistic laboring and wage demands as inappropriate exploitation. In the Decameron, Boccaccio describes resentments towards the gravediggers, people from “the lower orders of society” who “demanded a fat fee for their services” and accorded “no more respect...to dead people than would nowadays be shown towards dead goats.” He describes the gravediggers as insensitive plutomanics seeking to take advantage of a precarious situation. Marchionne di Coppo Stefani’s chronicle reports that the gravediggers of Venice carelessly threw dead bodies into ditches and that “if there were many [bodies] in the trench, they covered them over with dirt… just like one puts layers of cheese in a lasagna.” Contempt for the gravediggers is evident in his tone, as is his will to distinctly separate himself from the gravediggers he paints as self-serving indigents. These perceptions of workers reflect the ways plague exacerbated social relations.

Judgments passed by the rich were predicated on the social disorder caused by plague. Accusations against the poor ranged from extorting society through wage demands to robbing and sexually molesting corpses, although it is speculative how extensive this behavior was or whether it occurred beyond one or two isolated cases. The poor, while they may have taken advantage of the demand for gravediggers, were also risking their lives to earn meager salaries to

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44 Boccaccio, G. The decameron. p. 7-8.
47 Boccaccio, G. The decameron. p. 10-11.
49 Boccaccio, G. The decameron. p. 17, 29.
support themselves and their families. True or not, these claims are pervasive in accounts of the period. They contributed to the growing negative rhetoric of the poor as sources of degenerate behavior that brought God’s wrath to the city, reflecting the sentiments of those better off. In a matter of months, the Black Death exacerbated contempt for the poor.

Dispelling the Myth of Resentments Between the Rich and Poor

Some historians argue that contempt for the poor during plague, due to this economic exploitation, led to social tensions between the rich and the poor. Many arguments for escalating social tensions in Florence during the late-fourteenth and early-fifteenth centuries are founded on primary sources depicting resentments of the rich towards the poor for their exploitation of labor shortages (as seen in the earlier section). This argument posits that the poor’s laboring during plague led to an accumulation of wealth by those in the lowest economic strata (and thus social rank), leading to tensions between the rich and poor.

At first glance, the data appears to support this conclusion. The percent change in total household assets between the 1427 catasto and the 1480 decime seem to indicate a higher rate of increase in the assets of the lower six deciles of the population (the lower 60%) and a lower rate of increase in the assets of the top four deciles of the population (the upper 40%) (Figure 2A). But analyzing the data over this time period obscures a critical pattern in the proportionate shares of assets that each decile of the Florentine population held at different points in the fifteenth century.

By splitting this time period using the 1458 catasto, we see that between 1427 and 1458, the rate of increase of assets was inversely proportional to the population decile group, suggesting that the poor gained assets faster than the wealthy during this period. Between 1458 and 1480, on the other hand, the entire population lost financial assets at approximately the same rate (Figure 2B). Further, by analyzing the lower decile cutoffs in each of these three census studies, it is seen that although the lower deciles disproportionately gained assets between 1427 and 1480, there is no marked increase in their wealth relative to the assets of those in higher deciles (Figure 4). This new analysis strongly suggests against the conclusion that the poor accumulated wealth over the course of the fifteenth century.

Instead, the sharp decrease in the lower boundary of the tenth decile (the richest 10%) suggests that the greater economic equality in Florence in 1458 and 1480 was not due to economic gains by the poor, but to the economic equalizing of the top decile (Figures 3, 4). The decline of the relative wealth shared by the top decile in Florence between 1427-1480 is consis-

50 With the scarcity of food already problematic due to the early-fourteenth century food shortages, the poor could hardly nourish themselves on pre-plague prices, let alone after the inflation.
51 Herlihy, David. 1967. and others; elaborated on later.
53 Florence tax survey of 1480 that sampled 10% of the population and only included real property assessment (ibid.). Despite only sampling 10% of the population, historians have used these samples for analysis in the past, arguing that their large sample sizes are generally representative of the population (see Lindholm 2017, Chapter 3, appendix 3A for a full explanation).
tent with other studies of cities in northeast Italy in the fourteenth century, which show the same pattern of a sharp decline in the share of wealth owned by the top 10% of the rich between 1350 and 1450, followed by a steady rise through the sixteenth century and then a sharp rise beginning in the seventeenth century.\textsuperscript{54}

The argument that mass mortality induced by plague affected the distribution of wealth is not new.\textsuperscript{55} However, the time period of its effects is debated. David Herlihy, who has written extensively on these fifteenth century Florentine tax studies, argued that the Black Death’s mass fragmentation of patrilineal families, whose inheritance was divided fairly among sons (with daughters also receiving a portion of the share), redistributed wealth, temporarily improving economic equality. Soon after, he argued, hoarding quickly led to an unprecedented rise in economic, and thus social inequality.\textsuperscript{56}

The data analysis presented in this paper instead supports the quantitative arguments by Alfani and Ammanti 2014 and Padgett 2010 that income inequality decreased, not soon after, but over the century-long period after the Black Death (1350-1450) and did not begin to increase again until the Florentine population restabilized and began growing in the mid-fifteenth century.\textsuperscript{57} This undermines Herlihy’s argument that plague led to drastically higher levels of inequality in medieval Italy in its aftermath. Instead, demographic stagnation was likely tied to low economic growth between the mid-fourteenth and mid-fifteenth centuries,\textsuperscript{58} leading to lower societal economic inequality in part a result of decreasing shares of total wealth of the richest ten percent of Florentines.

Therefore, while plague caused some economic disruption, it was hardly enough to singularly change social relations significantly. Though social tensions contributed to the eventual expansion of government authority into health boards, this response was not a desperate reactionary attempt to maintain social order during outbreaks. This is not to say that tensions did not


\textsuperscript{55} This was first argued by Herlihy, David. 1967. Medieval and Renaissance Pistoia; the social history of an Italian town, 1200-1430. New Haven: Yale University Press.


\textsuperscript{58} Prior to the demographic growth of the latter half of the fifteenth century, the economy did not grow significantly because of labor shortages and significant fiscal challenges during this period, including the Florentine war with Milan in the 1420s and the fiscal crisis of 1431-33 (Alfani, Guido. “Economic Inequality in Northwestern Italy.” 2015; Lindholm, Richard T. Quantitative Studies of the Renaissance Florentine Economy and Society.
accumulate over the late fourteenth and early fifteenth century. During this time, plague’s recurrence challenged social dynamics, acceptance of political authority, and economic functioning, gradually eroding the image of the ideal city.

**The Calm After the Storm: Where was the Health Board?**

The worst outbreak of plague, the Black Death, came and went (1348-1353, in Florence) without significant government intervention aside from the appointment of the temporary plague-time officials who mainly expanded earlier sanitary codes. Over the next century, leading up to the institution of a permanent health board in Florence in 1448, the city appointed officials temporarily during severe plague outbreaks. Many policies related to quarantine and plague hospitals originated during this period.

Some historians have argued that these policies are evidence for social disorder between rich and poor and that they indicate that government response to plague was reactionary and sought to isolate the poor from the rich. 59 Paul Slack argued that plague laws were instruments of social control meant to manage the poor during outbreaks. 60 Similarly, Tatjana Buklijas argued that plague hospitals were built to prevent the disruption of trade by isolating society from the sick and poor and hence, from sickness. 61 However, the policies that Slack and Buklijas claim intentionally limited individual freedoms in order to separate the poor from the rich and to abate social tensions can also be interpreted as expansions of earlier sanitary codes. Quarantine of ships from infected cities and of the sick in pest houses, for example, was not intended to be a method of social policing to separate the rich and the poor, 62 but an expansion of prior sanitary codes. Crenshaw argues that the introduction of charitable hospitals in the fifteenth century was not only intended to care for the sick and limit disease transmission, but also to fulfill religious duties of charity. 63 Palmer extensively analyzes these policies and argues that ultimately, at this stage, the goal of all Florentine plague-time legislation was to prevent the atmosphere from being polluted, not to isolate the poor or sentence the sick to a quick, isolated death. Similarly, he argues that authorities came to claim the linen and wool clothes and bedding of the sick in order to prevent diseased stench from permeating to other houses. 64 These policies were not popular, nor were their enforcers; however, even though they were perceived as inappropriate exertions of government authority, they were rooted in sanitary theories and not in social control. As a result, their intent may not have been to separate the rich and poor, but to cleanse the atmosphere of the city.

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59 Carmichael argues that plague controls originated directly from the threats poverty and plague posed to the state (1986). Porter argues that dense populations festered disease among the poor, causing social disruption that forced the intervention of political authority into social and economic matters (1999).


62 Florentine neighborhoods were not separated by social status or relative wealth at the time.

63 Crenshaw, JS. *The Renaissance Invention of Quarantine.*

64 Palmer, Richard J. *The Control of Plague in Venice and Northern Italy 1348-1600.*
Gradual Erosion of the Ideal City and Government Intervention in Public Health

The picture of Florence between the mid-fourteenth and mid-fifteenth centuries now appears less grim: the rich and poor were not threatening civic order enough to necessitate urgent government authority over personal liberties during plague outbreaks (seen later in the sixteenth and seventeenth centuries). An alternate explanation for the gap between the Black Death and the institution of health boards is that threats to the realization of the Florentine government’s ideal economic, social, and political order accumulated gradually in the century following the Black Death, and eventually prompted the government to expand its authority and form a permanent health board.

Between 1348, when the Black Death peaked, and 1448, when the Florentine government created a permanent health magistracy, recurrent plague outbreaks gradually soured the reputation of the ideal city. While threats to social disorder may not have been great enough to spur interventional policies, plague nevertheless contributed unique threats to social order. One of the largest issues was the mass abandonment of Florence during plague by anyone with the resources to flee. Although these were quickly handled, the possibility of social disorder during outbreaks did not reflect well on the city’s ability to keep Florence in working order during plague. In addition, because many of those who left were merchants, economic activity suffered during plague, often halting trade and market exchanges. When merchants fled, they not only took their immediate families with them, but their household employees, servants, and slaves, preparing for an indefinite absence from which they would only return when it was clear that plague had subsided. This affected all city-states in Italy given the widespread reach of plague, individually debilitating each city when the monetary influx paused each time the disease returned.

In addition to rising social tensions, the gap between political philosophy and the realities of government administration also grew, further challenging Florentines’ acceptance of city authority. In the first half of the fifteenth-century, there was a growing divide between the civic humanist ideology of the ideal city and the social and political realities of Renaissance Florence.

Leonardo Bruni (1370-1444), one of the main philosophers who wrote about how gov-

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65 As shown previously, since people who had enough assets to relocate were citizens of wealth and high social rank, and consequently often were authorities in government, plague left the city vulnerable to revolts.


67 Civic humanism is a form of republicanism with active, participatory government by all citizens and an accompanied humanistic ideal. The term civic humanism was first coined by Hans Baron in 1925 and was used to describe two concurrent ideals that guided early-Renaissance Florentinian thought: apolitical humanism, which emphasized individual agency in guiding one’s life, and a resistance to imperious rule by the aristocracy or magnates, which originated with the Guelf tradition and the popolo rise to power in the early fourteenth century (Moulakis, Athanasios, “Civic Humanism.”) The philosophy of the ideal city represents the goal of civic humanism—to build a city-state with participatory governance that will strive for the common good. The appearance of the philosophy of the ideal city in the fourteenth century then, even before the Black Death, suggests that civic humanism predates the mid-fourteenth century. While both civic humanism and the philosophy of the ideal city engage government action, they differ in that the former is focused on personal fulfillment, while the latter (the ideal city) emphasizes the ultimate success of society as a unit. Despite civic humanism’s emphasis on the individual, its writers still discuss how...
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government could best serve the public, emphasized that the state’s power should be divided among its citizens. Magistracies should not have exclusive power; instead, “their decisions should be approved by the council of the people and the council of the community.” He implied that since citizens were to some extent involved in the governance and administration of Florence, policies were well accepted: “through these offices this city is extremely well-governed. Not even a private home ever enjoyed better regulations. Nobody can suffer injustice.” Ideally, government regulations over public and private life should have been welcomed because they were approved by multiple offices, in consultation with the public, before being enacted. Yet time and again, Florentines evaded both government administrators and policies. Buonaccorso Pitti diaries his aunt’s response to the death of his cousin, Niccolo: “When the epidemic was over, we returned to Florence where we found that Niccolo’s mother, Monna Margherita, had stripped the house they lived in and moved all their goods and valuables to the house of her sister.” Monna Margherita stripped her house of their belongings to keep their clothes and possessions from being taken and burned by officials due to their potential to corrupt the neighboring atmosphere. She would not have had an incentive to relocate her valuables from the house if she condoned their potential removal, as per common plague-victim procedure. Despite Bruni’s lauding of government litigation and acceptance, citizens did not blindly accept the laws and policies or have complete reverence for the state’s authority, as suggested by Bruni, marking a significant gap between the intended and actual reception of city officials’ jurisdiction.

Plague led citizens to question official city policy. Part of Bruni’s praise for Florence was related to the city’s cleanliness. “For just as there can be no happiness in a misshaped (diseased) body even if for the rest it enjoys all good things,” analogizes Bruni, “there can be no beauty in dirty cities, even if they have all the rest.” Neither architecture nor urban planning nor efficient, effective, or representative governance could secure Florence’s success in the face of disease contamination. Plague, which incited frequent and significant bouts of disease, separated fami-

69 Bruni, Leonardo, In praise of Florence. p. 118
71 Palmer, Richard J. The Control of Plague in Venice and Northern Italy 1348-1600.
72 Sources from this period are limited and are mainly from upper class merchants and their families. If they evaded these policies, people of lower social rank likely did as well.
73 Though there are no sources that speak to the experience of the poor during this period, later sources suggest that the procedures that sent those of lower social rank to pest houses, or lazarttos, was not received well; this contempt was likely present during this period as well (Cipolla, Palmer).
lies, disillusioned citizens, and eliminated incentives to work and thrive; in doing so, it fissioned
the relationship between Florentines and their state.

Tensions between ideality and reality led to a greater need to expand government authori-
ity in, what Moulakis calls, “patriotic self-defense.” Of course, plague was not the only problem
in fifteenth-century Florence. But while unfavorable attitudes towards war could be controlled
by propagandizing civic humanism and those regarding labor, placated through the existing guild
structure and market systems, the city had no way to respond to concerns brought by plague.

The social, political, and economic consequences of plague posed unique challenges
to the ideal city. The Florentine government’s failure to respond to the more subtle social and
economic issues that grew worse with repeated plague outbreaks during this period abraded so-
ciety’s vision of Florence as a prosperous, superior city. This eventually prompted the expansion
government authority to encompass disease control. In September 1448, on the heels of yet
another plague epidemic, the ‘Eight Custodians,’ originally designated as temporary health offi-
cials in Florence, were granted “full authority… to make provisions and issue ordinances, pre-
serve public health, keep off the plague, and avoid an epidemic.” These officials were granted
an extended period of three months to make amendments to existing policies and procedures. In
addition, the assignment of health-control tasks to their particular magistracy, a bureau of polit-
cical police, was the first decisive allocation of power on health matters. Almost another century
later, again under significant duress from plague, this magistracy was eventually granted perma-
nency in 1527.

From the start, this health board was administrative and political in basis. Over time, as
the health board gained authority and prestige, its responsibilities expanded because of the seem-
ing success of its policies and procedures and likely at least in part because of the board’s ability
to handle plague’s threats to the ideal city. For instance, the board’s creation of plague hospitals
not only provisioned care for the sick and helped control the spread of disease, but also engaged
the city with charity. Religious leaders and pious citizens viewed this favorably because it ad-
dressed the religious roots of plague. Hospitals were one form of quarantine, but under the new
policies implemented by the health board over the next century, people were also quarantined in
incoming ships or in their homes. This containment restricted the movement of the diseased, but
allowed the healthy to move freely through the city environment, encouraging people to stay in
the city longer while plague was present, reinforcing respect for government authority. Health
passes certifying travelers as plague-free were issued to allow citizens and foreigners to pass
freely through the city, allowing markets to function even during outbreaks by excluding the ill.

75 Moulakis, Athanasios, “Civic Humanism.”
76 Corsini. “La moria del 1464 in Toscana.” In Carlo Cipola, Public health and the medical profession in the
77 Cipolla, Carlo M. Public health and the medical profession in the Renaissance.
78 Crenshaw, JS. The Renaissance Invention of Quarantine.
79 This is one of the theories for why plague deaths slowed over the three centuries following the Black Death
and eventually tapering off. People became more experienced with when it was appropriate to leave the city and did
not flee at the first instance, but were ready to leave when it was most appropriate.
80 Cipolla, Carlo M. Public health and the medical profession in the Renaissance.
Entire cities were ‘banned’ if they were home to an exceptionally volatile plague outbreak, allowing cities to reassure their citizens of safe exchanges (of people and of merchandise) between populations. These actions of health boards helped quell the spread of plague and other diseases and concurrently shaped perceptions of the city’s ability to handle outbreaks, prevent plague-related fluctuations in the economy, and promote social order.\footnote{81}

\textbf{Conclusion}

Many factors contributed to the institution of Florence’s health board in the mid-fifteenth century, the most critical of which was not medical knowledge, social disorder, or a desire to reduce a particular social group’s susceptibility to disease. Instead, over the fourteenth and fifteenth centuries, threats to the Florentine government’s conception of the ideal city accumulated, endangering a romanticized vision of society. Plague contributed by significantly endangering the acceptance of political authority, efficient functioning of the economy, and relative stability of social relations.

This paper suggests that health boards originally emerged as gradual expansions of government authority over civic matters and not as dramatic innovations in disease control or methods of controlling social disorder. Though medieval Italian health boards gained authority and prestige over time, allowing them to infringe on personal liberties for the sake of minimizing disease’s impact on the city, this case study of Florence argues that they did not originate as efforts to mitigate social tensions. Government involvement in public health, though an important component of modern states, did not result naturally from urban population density or threats of disease alone; it required a particular philosophy of the state’s relationship to its citizens and of the role of government in ensuring the well-order of society. The ideal city, though it did not call for public health explicitly, was foundational in its conception of the relationship between the state and society as mutually beneficial. This conception is what ultimately led to the expansion of government authority to matters of health and disease.

\footnote{81} Then, as health boards gained more power in the seventeenth and eighteenth centuries, they became significantly more restrictive, leading to public contempt for health officers for their interference with personal liberties (Cipolla, Carlo M. Public health and the medical profession in the Renaissance.). At that point, it becomes the health board \emph{did intended} to control and prevent social disorder.
Appendix: Figures

Figure 1. Giovanni del Biondo painting depicting Sebastian of Rome interceding during plague, 1370s. This image, the lowest of three sections of the left wing portion of a triptych by Giovanni del Biondo, depicts the mass mortality and religious significance of plague. To the left, it shows an angel banishing the demon of plague above Saint Sebastian of Rome, before which a group of people pray to. On the right side, a corpse is being lifted into a sarcophagus and diseased victims are in the buildings, the church, and on the street. Above, one victim is placed outside from a window (Painting in Florence: Museum, Museo dell’Opera del Duomo; from The Index of Christian Art, record number 000159514).
Figure 2. Overall and Split Percentage Change in Assets Over Time by Decile. A) Comparing the percent change in total assets of each decile of the Florentine population between census samples from 1427 and 1480 suggests that the bottom 50% of the population in each census gained assets, while the top 50% of the population in each census lost assets. Note: Deciles determined independently for each data set; data is not continual over time, but represents two distinct time points. B) This conclusion is refuted by splitting these changes into the two periods defined by the available census records (1427-1458 and 1458-1480). Between 1427 and 1458, the poor gained assets at a significantly higher rate than the rich. Between 1458 and 1480, the entire population experienced a loss of assets. Compiling the data between 1427 and 1480 (as in A) thus obscures this pattern. It is not that the rich lost assets that the poor proportionately gained; rather, those in lower deciles gained assets at a faster rate than those in higher deciles between 1427 and 1458, and all deciles lost assets at similar rates between 1458 and 1480. (Note: Percent changes for the assets of those in the second decile do not appear because the assets held by this decile hold constant at zero). This figure was created in consultation with the methods of Herlihy and Klapisch-Zuber 1985; Marsh and Elliot 2008; Stone et al. 2016.
Figure 3. Distribution of Wealth in Florence (1427, 1458, 1480). Cumulative shares of total assets were plotted against cumulative percentage of the population to show wealth inequality in Florence. The line of complete equality is plotted for reference. Further deviation from this line indicates greater wealth inequality. The significant difference between the curves for this wealth inequality plot suggests that wealth inequality decreased between 1427 and 1458. This conclusion is supported by the work of other historians (Padgett 2010; Alfani and Ammannati 2014). This figure was created in consultation with the methods of Herlihy and Klapisch-Zuber 1985; Marsh and Elliot 2008; Stone et al. 2016.

Notes for figures 2 through 4: Wealth is measured by total assets recorded by the 1427 Catasto, 1458 Catasti, and 1480 Decime. The samples from 1458 and 1480 are 10% samples of the population, but historians have used these samples for analysis in the past, arguing that their large sample sizes are generally representative of the population (see Lindholm 2017 Chapter 3, appendix 3A for a full explanation). Data analysis done in SPSS; graphs in Excel.

Figure 4. Relative Wealth in Florence (1427, 1458, 1480). This graph plots the lower boundary of the corresponding asset decile (2nd through 10th decile, since the lower boundary for the 1st decile is 0 florins) for each year that census data was taken in Florence (1427, 1458, and 1480). The data suggests that the poor did not gain significant wealth compared to the total assets of the rich, even though they had the largest percent increases in their total assets (Figure 2). It also shows a decrease in the total assets of the richest decile between 1427 and 1480, given the sharp decline of the lower boundary of the 10th decile during this period. This conclusion is also supported by the work of other historians (Chapter 6 of Lindholm 2017). This figure was created in consultation with the methods of Herlihy and Klapisch-Zuber 1985; Marsh and Elliot 2008; Stone et al. 2016.