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John Felipe Acevedo

University of La Verne College of Law

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DIGNITY TAKINGS IN THE CRIMINAL LAW OF
SEVENTEENTH-CENTURY ENGLAND AND THE
MASSACHUSETTS BAY COLONY

JOHN FELIPE ACEVEDO*

I. INTRODUCTION

Punishment of criminals in the Anglo-American criminal justice system has always involved a degree of focus on the body of a convicted person although it has decreased over time.¹ The Bloody Code of England inflicted capital punishment for all felony crimes, as well as treason, including for theft of objects worth as little as twelve shillings.² In addition to being executed, the Common Law provided that all of the defendant's property and titles would be forfeited to the king and their blood corrupted thereby cutting off their heirs.³ Despite the harshness of the English system, and unlike the continental system, torture was rarely used as an investigative or penal tool.⁴ The exception was the punishment of traitors with hanging, drawing, and quartering, which was meant as both a form of torture and a warning to future traitors.⁵

* Assistant Professor at University of La Verne, College of Law. J.D., University of Southern California Gould School of Law; M.A. and Ph.D., The University of Chicago. I would like to thank Bernadette Atuahene, Carol Rose, Eleanor Brown, Wouter Veraart, Sandy Kedar, and Craig Albert for their comments on this essay at the 2015 Law and Society Association Annual Meeting in Seattle. I would also like to thank Deepa Das Acevedo for her suggestions on how to improve the essay at multiple times during the writing process. All errors remain mine alone.

1. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 7–12 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977). Foucault asserts that, although there has been a move from punishing the body of the criminal to the soul, there still must remain some degree of emphasis on the body.

2. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK THE FOURTH 238 (1768); *see also* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 533 (Butterworths Lexis-Nexis 4th ed. 2002) (1971).

3. MAGNA CARTA (1215).

4. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 81 (2006) (noting that between 1540–1640 only eighty-one warrants for torture were issued in England).

5. *See* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON; AND OTHER PLEAS OF THE CROWN; AND CRIMINAL CAUSES 15, 210–11 (1817). Coke justifies the imposition of such harsh punishments in referencing the Old Testament of the Bible, he also notes that the punishment includes forfeiture of all lands and goods, loss of his wife's dower, corruption of blood, and loss of all goods. *See also* BLACKSTONE, *supra* note 2, at 92.



By the seventeenth century, there were calls to reform the English legal system in order to remove some of the more arbitrary and unjust elements.⁶ The Puritan colonists arriving in Massachusetts Bay to build their “city upon a hill” faced the necessity of establishing a new government and used the opportunity to reform the law.⁷ From the first criminal prosecutions conducted in the new colony, the Common Law began to be adapted to fit their religious beliefs and to implement reforms.⁸ Given the messianic nature of the colony’s existence, criminals in Massachusetts Bay were especially scorned as they were not merely breaking the King’s law, but God’s law.⁹ This led the colonists to continue to act against the bodies of defendants and impose harsh punishments.

This article examines the issue of when punishment for a crime crosses from being a legitimate punishment to a dignity taking. In her works, Bernadette Atuahene defines a dignity taking as instances when “a state directly or indirectly destroys or confiscates property rights from owners or occupiers whom it deems to be sub persons without paying just compensation and without a legitimate public purpose.”¹⁰ The definition has since been refined, “there must be involuntary property loss as well as evidence of . . . intentional or unintentional dehumanization . . . or infantilization . . . of dispossessed or displaced individuals or groups.”¹¹ The primary difference is the removal of the final element “without paying just compensation and without a legitimate public purpose.”¹² It will be shown that in criminal law, this change has the potential to greatly expand the realm of dignity takings. To remedy these extraordinary takings, something more than basic compensation is needed to restore what the

6. See generally DONALD VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM 1640–1660*, at 65–70 (1970).

7. See generally John Winthrop, *A Modell of Christian Charity (1630)*, in 2 *COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY* 33, 44–46 (1838). See also DAVID THOMAS KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629–1692*, at 3–5, 16 (1979).

8. JOHN FELIPE ACEVEDO, *HARSH MERCY: CRIMINAL LAW IN SEVENTEENTH-CENTURY MASSACHUSETTS BAY* 59–61 (2013).

9. KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 190 (Macmillan Publ’g Co. 1966).

10. BERNADETTE ATUAHENE, *WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM* 21 (2014).

11. Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 *ANN. REV. L. & SOC. SCI.* 171, 178 (2016) [hereinafter Atuahene, *Takings as a Sociolegal Concept*]; see also Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework to Understanding Involuntary Property Loss and the Remedies Required*, 41 *LAW & SOC. INQUIRY* 796, 817 (2016).

12. ATUAHENE, *supra* note 10, at 21.

person lost.¹³ In her work, Atuahene focuses on the taking of real and personal property, but in the realm of policing and criminal justice this definition would not reach many of the takings that occur.¹⁴ I have previously argued that a dignity taking occurs when the police take a person's body through physical abuse or extra-judicial murder.¹⁵ This paper seeks to expand this theory into punishments inflicted by the state and in different historical contexts.

Using approximately 6000 criminal cases from the Massachusetts Bay Colony from 1630 to 1683,¹⁶ this paper argues that criminals in Massachusetts Bay were often subjected to punishments which amounted to dignity takings, as their bodies were degraded and, at times, their property confiscated. This study incorporates criminal cases from the Essex County Quarterly Courts, the General Court, and Court of Assistants. I decided to focus on these courts in order to gather a mixture of types of cases while maintaining the ability to make comparisons without having to worry about geographical variation and more importantly to have a set of comparable cases, which occurred from 1630 to 1683

The seventeenth century was selected as it was a century of revolution that began the transformation of English society to a modern one as well as the founding of the North American colonies.¹⁷ More importantly, the modern conceptualization of dignity arose during this era; but the word has another, older meaning, "honourable or high estate, position or estimation; honour; degree of estimation, rank."¹⁸ This concept of dignity can be traced back from mediaeval England to ancient Rome.¹⁹ The modern definition is reflected in the jurisprudence of the Supreme Court, most recently in the

13. *Id.* at 57; see also Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1444–46 (2007).

14. See, e.g., Atuahene, *supra* note 13, at 1453–55; see also e.g., ATUAHENE, *supra* note 10, at 38–45.

15. John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOWARD L.J. 621, 628–29 (2016).

16. The cases used in the study were culled from the RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY (The Essex Institute 1913) [hereinafter ECCR]; RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY IN NEW ENGLAND (Nathaniel B. Shurtleef ed., 1854) [hereinafter RCMB]; RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF MASSACHUSETTS BAY: 1630–1692 (John Noble ed., 1904) [hereinafter RCA]; and JOHN WINTHROP, THE JOURNAL OF JOHN WINTHROP, 1630–1649 (Richard S. Dunn, James Savage, & Leatitia Yeandle eds., 1996). Tables containing the frequency of each standardized crime are reproduced at the end of my dissertation, ACEVEDO, *supra* note 8, at 319–44.

17. See generally STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION (2009).

18. *Dignity*, OXFORD ENGLISH DICTIONARY ONLINE EDITION, <http://www.oed.com/view/Entry/52653?redirectedFrom=Dignity> [https://perma.cc/H6CN-HA5X].

19. Aurel Kolnai, *Dignity*, 51 PHILOSOPHY 251, 251–52 (1976) (tracing the meaning of the word dignity from English through European languages).

area of gay rights.²⁰ However, what is meant by Justices when they invoke the concept of dignity has never been completely articulated.²¹ This has led some scholars to declare that the term has no meaning, but this pushes the problem too far.²² However, these concerns can be addressed by looking to the older meaning of dignity.²³ Waldron has asserted, I think correctly, that this meaning of dignity is commensurate with our modern legal notions of dignity and therefore it should be viewed as a status.²⁴ Modern legal systems therefore equate dignity with equality of worth.²⁵ The notion of dignity being tied to equality arose with the revolutions of the seventeenth through early nineteenth centuries, which did not seek to form a new order, but rather, to raise all persons to the same degree of respect; “every man a Brahmin.”²⁶

This brief history of dignity is also included as a response to a critique of this paper that the concept of dignity cannot be applied retroactively as from the seventeenth century forward modern notions of dignity were circulating.²⁷ This proposition has the further advantage of highlighting how law is tied to the society that formed it; law is contextual to the society that formed it.²⁸ This is not to propose a Whigish view of history; there is no certainty that everyday things are becoming better or leading toward a certain goal nor that the increase in dignity that has occurred in the last 350 years shall continue indefinitely.²⁹ Nevertheless, there is change over time,

20. See Kenji Yoshino, *The Anti-Humiliation Principle and Same Sex Marriage*, 123 YALE L.J. 3076, 3076 (2014) (arguing that the anti-humiliation principle can be traced through the use of the term dignity in Supreme Court cases and that civil rights violation trials could be a place to argue for humiliation principle violations); see, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

21. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172–76 (2011) (noting that the term has been used when discussing the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments as well as being invoked by both conservative and liberal Justices).

22. See Ruth Macklin, *Dignity is a Useless Concept*, 327 BMJ 1419, 1420 (2003) (writing in the context of medical ethics Macklin asserts that “[a]ppeals to dignity are either vague restatements . . . or mere slogans,” and is especially critical of the concept death with dignity).

23. See JEREMY WALDRON, *DIGNITY, RANK, & RIGHTS* 30–33 (Meir Dan-Cohen ed., 2012) (asserting that this older definition is what we mean by the concept of dignity).

24. *Id.* at 33 (noting that in modern societies, and particularly Western European ones, persons are equated the respect formally reserved for the nobility).

25. *Id.* at 55–56 (providing the examples of peers having the ability to be tried in the House of Lords).

26. *Id.* at 34 (citing to the work of Gregory Vlastos on the topic).

27. This criticism was raised by participants of the Annual Meeting of the Law and Society Association held in Seattle, Washington in May 2015.

28. WALDRON, *supra* note 23, at 34–36; see also LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* 3–5 (2008) (Rosen points to the concept that law as culture and culture as law to tackle notion that law is derived from universal norms).

29. HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 9–12 (1931) (describing the error of the Whig interpretation of history as assuming that the actions of the past have are driven by

which enables us to recognize that the interplay between law and society, for better or worse, and that the way we change one necessarily affects the other.³⁰ This can be exemplified by the rapid change of policing in the last 300 years, as thief takers transformed into the Bow Street Runners, which evolved into the modern Anglo-American police force.³¹ The origin of these transformations in the concept of dignity—combined with the rise of the modern state in the seventeenth century and the theorization of the body as property—makes the seventeenth century an ideal location to examine the boundaries of Atuahene’s concept of dignity takings.

The theorization of dignity thus far proposed solves the historian’s dilemma of contextualization, but simultaneously opens up a new danger; if dignity is tied to society and society is constantly changing, then we can imagine societies that do not respect the concept of dignity or even our society denigrating dignity.³² My hope is that, by following the older definition of dignity, the debate, at least in the Anglo-American context, can focus on instances where the state has taken the dignity of the people, since all persons have the same equality of respect (roughly that of petite noblemen) rather than worrying about tying dignity to certain rights. Indeed, the Black Lives Matter movement’s call for dignity is reflected in this definition, a call for equality before the law and equal treatment by law enforcement.³³ If dignity is tied to society, then it is incumbent on every member of that society to make the law more just and more equal; this was something understood by the colonists who landed in what would become the Massachusetts Bay Colony.

Section II of the paper will examine the concept of a person’s body as their property, which is subject to dignity takings. Section III will discuss the line between legitimate punishment and a punishment as a dignity taking. Section IV will examine Massachusetts Bay as a case study for dignity takings occurring in the context of criminal law. Section V will

our present concerns and the corollary of reading the past through the lens of present problems. The culmination of this way of doing history is the false assumption that all of the past was inevitably leading to improve society toward our present).

30. ROSEN, *supra* note 28, at 170–71 (discussing the anthropologic notion of cosmos, or cultural system, as representing an interplay between society’s constructs in law and other conceptual areas).

31. See J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 55–56, 65 (Princeton Univ. Press 1986); see also THOMAS REPPETTO, *AMERICAN POLICE: THE BLUE PARADE 1845–1945, A HISTORY* 18–22 (2010).

32. See ROSEN, *supra* note 28, at 198–99 (citing to Michael Walzer, Rosen notes that although it may not be possible to determine if something is absolutely right it is possible, using law as society theorization, to determine if something is right for our society).

33. Acevedo, *supra* note 15, at 623.

examine four cases in depth to see instances of when dignity restoration was attempted in the colonial context.

II. THE BODY AS PROPERTY UNDER DIGNITY TAKINGS

During periods of upheaval (such as colonization, decolonization, civil war, and war), states engage in extraordinary takings—the forcible dispossession of land from those it deems to be enemies.³⁴ In her studies, Atuahene has focused on the taking of lands during apartheid in South Africa.³⁵ She has also demonstrated the applicability of the theory to a wide range of instances in which groups were dehumanized or infantilized and dispossessed of their property.³⁶ The concept is clearly applicable to situations of internal displacement, genocide, apartheid and other repressions.³⁷ However, the focus on real and personal property has left un-included instances when, through enslavement, corporal punishment, banishment, and death, the state works to take a person’s body from their control.

I have previously asserted that the body is the property of an individual; therefore, this section will seek to briefly restate that argument as well as add to it.³⁸ The idea that you have a property interest in your own body can be traced to the new formulations on the basis of government articulated in the seventeenth century and the political theories of John Locke in particular.³⁹ Locke asserts that every person “has a *property* in his own *person*: this no body has any right to but himself.”⁴⁰ This proposition became the basis of Locke’s theory of government presented in the *Second Treatise of Government*.⁴¹ The theoretical concept of a person’s right in their body was still forming in the seventeenth century, spurred on by an

34. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 6 (2000).

35. See generally ATUAHENE *supra* note 10, at 3–5. See also Atuahene, *supra* note 13 at 1423–25.

36. Bernadette Atuahene, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829, 834–38 (2009).

37. *Id.*

38. Acevedo, *supra* note 15, at 626.

39. See generally JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

40. *Id.* at 19. As there was no standardized spelling in the seventeenth century in all quotations the spelling and grammar will be left as in the original document without the use of sic; Sic erat scriptum.

41. See generally *id.*

increased interest in the relation of property and political theory brought on by the instability of the English Revolutions.⁴²

The practice that a person's body was property was widely practiced during the seventeenth century; unfree labor was common in the British Atlantic world with an active slave trade and the practice of indentured servitude as a means for the lower sort of persons to reach North America.⁴³ As troubling as unfree labor was in the seventeenth century, it led to the direct valuation of persons' bodies.⁴⁴ Indeed, Carol Rose describes the freeing of slaves following the American Civil War as an example of an extraordinary expropriation of property, although one that was intended to correct the previous expropriation "of the slaves' bodies from themselves."⁴⁵ Slaves themselves understood that their bodies had value, a fact forced upon them as their only hope for freedom was to buy themselves from their captors.⁴⁶ Also, the merchants who grew wealthy from the unseemly trade certainly understood bodies were property.⁴⁷

Although never directly mentioning slavery, the Constitution of the United States contains rights which imply a property interest in the body: the Fourth Amendment (prohibiting unreasonable searches and seizures of a person), Fifth Amendment (requiring due process before deprivation of life), Eighth Amendment (prohibiting cruel and unusual punishments), Thirteenth Amendment (prohibiting slavery and involuntary servitude), and Fourteenth Amendment (requiring due process before deprivation of life by the states).⁴⁸ From these enumerated rights, the Supreme Court has recognized a variety of implied interest related to bodily integrity and control.⁴⁹ However, it appears that the courts have been reluctant to extend

42. See generally CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN* (Penguin Books 1991); CHRISTOPHER HILL, *THE CENTURY OF REVOLUTION 1603–1714* (W.W. Norton & Co. 1980).

43. MARGARET R. HUNT, *THE MIDLING SORT: COMMERCE, GENDER AND THE FAMILY IN ENGLAND, 1680–1780*, at 4–8 (1996); see also PETER N. CARROLL & DAVID W. NOBLE, *THE FREE AND THE UNFREE: A NEW HISTORY OF THE UNITED STATES 83–84* (2d ed. 1988) (discussing the transition of southern colonies from relying on the unfree labor of indentured servants to that of slaves).

44. CARROLL & NOBLE, *supra* note 43, at 36–39.

45. Rose, *supra* note 34, at 24–25.

46. See, e.g., OLAUDAH EQUIANO, *THE INTERESTING NARRATIVE OF THE LIFE OF OLAUDAH EQUIANO*, 132–34 (Robert J. Allison ed., Bedford/St. Martin's 2d ed. 2007) (1789).

47. See, e.g., DAVID HANCOCK, *CITIZENS OF THE WORLD: LONDON MERCHANTS AND THE INTEGRATION OF THE BRITISH ATLANTIC COMMUNITY 1735–1785*, at 172–75 (1995).

48. U.S. CONST. amends. IV, V, VII, XIII, XIV.

49. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (striking down Texas sodomy law as interfering with right to privacy between consenting adults); see also, e.g., *Stafford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 375 (2009) (upholding the bodily integrity of students against unreasonable strip searches by officials); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking down Connecticut law prohibiting distribution of contraceptives under the theory a right to privacy implied by penumbras and emanation of the Constitution); *Skinner v. Oklahoma ex rel. Williamson*,

property interests in parts of the body removed as part of a medical procedure for fear of the chilling effect on medical research.⁵⁰

In *Moore v. Regents of University of California*, the Court held that no conversion occurred when doctors used cells, extracted from the plaintiff's spleen, to create a new cell line for which they obtained a patent; even though they subsequently sold it to a pharmaceutical company.⁵¹ However, the Court stated that, "Moore clearly did not expect to retain possession of his cells following their removal," implying that he had possession while in his body and could have contracted to retain it.⁵² The discarded cells were therefore akin to discarded garbage, free for the taking, although it is not clear where the curb of the body is.⁵³ Indeed, the Court noted that it is established law that a person has a property right in their likeness, which cannot be appropriated for commercial use without payment.⁵⁴ An implication of the Thirteenth Amendment's prohibition on slavery is that the body of a person cannot be sold, thereby placing a category of property beyond the marketplace.⁵⁵ The Thirteenth Amendment is of course just part of the long history on legal restrictions on what a person may do with their body.⁵⁶

There are certain legal scholars that would push the concept of a property interest in the body to the extreme: that all labor or fruits of labor cannot be taxed.⁵⁷ As J.W. Harris has noted, this strain of thought is not dangerous unless it is taken too seriously, but more importantly, it is not

316 U.S. 535, 541 (1942) (striking down an Oklahoma eugenic based sterilization act as violating right to procreation).

50. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 487–88 (Cal. 1990).

51. *Id.* at 493.

52. *Id.* at 488–89.

53. See *California v. Greenwood*, 486 U.S. 35, 45 (1988) (holding that garbage placed at the curb has no reasonable expectation of privacy and has been discarded by the owner).

54. *Moore*, 793 P.2d at 490 (citing *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 819 (1979) and *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825–826 (9th Cir. 1974)).

55. U.S. CONST. amend. XIII, § 2 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.")

56. See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 488 (2d ed. 1898) (noting that since the era of Bracton a person who committed suicide would forfeit his goods to the Crown just as a felon would as punishment for his actions); see also *COLONIAL LAWS OF MASSACHUSETTS: REPRINTED FROM THE EDITION OF 1660, WITH THE SUPPLEMENTS TO 1672: CONTAINING ALSO, THE BODY OF LIBERTIES OF 1641* (William H. Whitmore ed., 1889) [hereinafter *BODY OF LIBERTIES*]. The *Body of Liberties* are the oldest written legal code of colonial English North America. The code proscribed death for anyone who "shall lye with any beaste or brute creature by Carnall Copulation . . . lyeth with mankind as he lyeth with a woeman . . . if any person committeth Adultery." However, the only persons who were put to death under these laws were for bestiality and in one case for adultery therefore the laws were more symbolic rather than literally used.

57. See generally, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 272–75 (1974).

necessary to make the argument for a dignity taking in this paper.⁵⁸ This paper does not reach these larger claims, and focuses instead on the physical body of the individual as the property.

III. CRIMINAL PUNISHMENT AS DIGNITY TAKINGS

To qualify as a dignity taking, a taking must meet two elements: (1) an involuntary loss of property; and (2) intentional or unintentional dehumanization or infantilization of the dispossessed individuals.⁵⁹ As mentioned in the Introduction, the original definition also required that the taking occurred without paying just compensation or without a legitimate public purpose.⁶⁰ In most instances, it makes sense to exclude the final requirement, because it is illogical that there can be a legitimate reason to remove a person's dignity.⁶¹ However, in the area of criminal punishment, this element is essential, as all punishment conducts some form of dignity harm on the punished individual.⁶² Before a detailed discussion of the actions of the laws of England through the early eighteenth century and Massachusetts Bay in the seventeenth century, a more general discussion of when criminal sanctions can ever qualify as a dignity taking is needed.

The involvement of the state in the punishment of a criminal offender is unquestioned, thereby meeting the first element. But in most instances of punishment, the state does not fully deprive a person of their body; instead, the state uses it for its own ends for a limited period. However, it has been recognized that the government owes some compensation for even temporary takings when they are repeated or severe;⁶³ therefore a dignity taking can even occur if the taking is temporary. The intimacy of bodily property has led to heightened protection before the state can intrude into it.⁶⁴ Nevertheless, punishments inflicted on the defendant's body, other than capital punishment, do not destroy the body, but nevertheless there is a temporary taking. As set out in section two of this paper, a person's body can be considered their property, and, as a person certainly occupies their own body—thus even under a *de jure* slave regime a dignity taking occurs—the third part of the test is met. This leaves the fourth and fifth elements to be satisfied.

58. J.W. Harris, *Who Owns My Body*, 16 OXFORD J. LEGAL STUD. 55, 55 (1996).

59. Atuahene, *Takings as a Sociolegal Concept*, *supra* note 11, at 178.

60. ATUAHENE *supra* note 10, at 21, 26–34.

61. *See, e.g.*, Acevedo *supra* note 15, at 629 (discussing the lack of legitimate reason in the context of police misconduct).

62. MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012).

63. *See, e.g.*, Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 522 (2012).

64. *See, e.g.*, Stafford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009).

Unlike the first element, dehumanization and the legitimacy of the state's purpose can be context-specific, especially with regard to criminals. In the South African case, and indeed in most settler colony contexts, the dehumanization is evident in the racial ideology of colonial officials.⁶⁵ However, in the area of criminal law, the narrative of who the criminals are is often far more subtle than in colonial racism.⁶⁶ A society's ideological agenda drives the way convicts are viewed, demonized, or pitied.⁶⁷ The dehumanization of criminals may not be as obvious as white colonial leaders calling Africans "savages," but it can still lead to a skewing of punishments to being overly severe, and in fact dehumanizing, especially as all offenders get associated with the most severe ones.⁶⁸

The punishment for treason is a troubling area in the laws of England as the punishment inflicted—hanging, drawing, and quartering—was clearly designed to inflict suffering and to destroy the dignity of the condemned.⁶⁹ Punishment for treason was divided by gender; men were to be hung, drawn and quartered, while women would be burnt at the stake⁷⁰:

1. That the offender be drawn to the gallows, and not be carried or walk; though usually a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement.
2. That he be hanged by the neck, then cut down alive.
3. That his entrails be taken out, and burned, while he is yet alive.
4. That his head be cut off.
5. That his body be divided into four parts.
6. That his head and quarters be at the king's disposal.⁷¹

Although it was held that the monarch could not alter the sentence of the condemned, they could simply order the beheading, if included, and omit the remainder of the punishment.⁷² By the end of the seventeenth century, this had changed; hanging, drawing, and quartering being reserved for rebel leaders, while nobles were beheaded and the rabble were simply hung. The decline should not be seen as a move away from the body, as

65. See ATUAHENE, *supra* note 10 at 30–34; see also Bernadette Atuahene, *Property Rights & the Demands of Transformation*, 31 MICH. J. INT'L L. 766, 767–79 (2010); Bernadette Atuahene, *Property & Transnational Justice*, 58 UCLA L. REV. DISCOURSE 65, 66–68 (2010) [hereinafter *Property & Transnational Justice*].

66. See JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 81–82 (1997).

67. *Id.* at 101–33.

68. See Joseph H. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, in *CRIMINAL LAW CONVERSATIONS* 253–54 (Paul H. Robinson et al. eds., 2009).

69. COKE, *supra* note 5, at 210 (pagination duplicative in the original).

70. *Id.* at 210–11 (noting that women were to be drawn and burnt, never beheaded or hanged, for petite or high treason).

71. BLACKSTONE, *supra* note 2, at 92.

72. *Id.*

Foucault asserted; the English continued to regularly implement this punishment as an expediency brought about by the number executed for treason.⁷³ As the entire goal of this gruesome punishment was the preservation of order, it necessarily targeted the dignity of the criminal and thus was intentionally a dignity taking under the current definition.

Treason is also fraught with difficulties, as it implicates the legitimacy of the regime imposing it. In the seventeenth century, it was not clear if England would be an absolute monarchy, republic, or constitutional monarchy.⁷⁴ The instability of the era made reprisals especially harsh on all sides.⁷⁵ Treason is also problematic, as it could only be tried in England and not in the colonies during the seventeenth century, and therefore it does not appear directly in the records of the colony (although the crime of disrespect of a magistrate does).⁷⁶ For these reasons, treason has been excluded from this study. More refined questions are needed in the area of criminal law and dignity takings: was the dignity taking justified in the criminal context? Did the punishment serve a larger societal good?

Massachusetts Bay was chosen as the focus of this study, as the colonists attempted to reform the harshest aspects of the Common Law, while starting to create what would become a uniquely American legal system.⁷⁷ The use of historical examples as the basis for analysis will enable a disinterested analysis of dignity takings in the criminal context, as well as demonstrate the strength of the concept of dignity takings by applying it across temporal and legal boundaries. The seventeenth century also provides a much clearer example of cruel and unusual punishment, as it involves a greater variety of punishments inflicted upon defendants' bodies, and in England moved beyond the body to direct taking of real and personal property.

73. See FOUCAULT, *supra* note 1, at 8–10 (describing the decline of the spectacle of punishment). *But see* 1 THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II* 480, 482–83 (J.M. Dent & Sons Ltd. 1962) (1848). During the Hampshire assize following Monmouth's failed rebellion, Judge Jeffreys ordered Alice Lisle burned the day of her trial after she was convicted of harboring a fleeing rebel, even though the evidence appeared to demonstrate that she had no knowledge that he had participated in the rising. *Id.* at 480, 482. In Dorsetshire, 292 persons were sentenced to death, with seventy-four hanged, and the remainder transported to the colonies. *Id.* at 483.

74. See generally HILL, *supra* note 42.

75. See, e.g., ROBERT TOMBS, *THE ENGLISH AND THEIR HISTORY* 243 (Alfred A. Knopf ed., 2015) (describing Oliver Cromwell's order to give no quarter to royalist supporters).

76. See ACEVEDO, *supra* note 8, at 282–86 (contempt of magistrate was punished as a misdemeanor although many distracted and troublesome individuals were banished from the colony).

77. See BRIAN JARVIS, *CRUEL AND UNUSUAL PUNISHMENT AND U.S. CULTURE* 17–18 (2004).

A.English Criminal Law

In Anglo-Saxon England, before the Norman Conquest, there existed the policy that the lands and chattels of convicted felons, or those outlawed for failure to appear in court, would be forfeited to the King.⁷⁸ As the feudal system was based on the theory that all land was owned by the King and then granted under a system of oaths of fidelity and loyalty, it was believed that the commission of a felony was an affront to the king, breaking all bonds.⁷⁹ The laws of property for married spouses made this particularly problematic as all personal property was vested solely in the husband.⁸⁰ Therefore, if a husband committed a felony, all of his lands, all lands acquired during marriage, and all personal property of the family were forfeited to the Crown, although the wife would in theory keep any real property that she entered the marriage with or inherited during the marriage.⁸¹ Finally, the blood of the felon was held to be corrupted so their heirs could not inherit their titles; there would be no property to inherit as it had been forfeited.⁸²

After the Conquest, as feudal land holdings became more complex, the forfeiture of land to the Crown became problematic. Rarely, if ever, was land owned in fee simple absolute; instead, it was held by tenures related to the service owed to the higher lord by the tenant.⁸³ In theory, this chain of lord and tenant duties could be indefinitely long (A holds of B who holds of C who holds of X who holds of the King) and thereby posed a problem if forfeiture occurred as a person could not demand service of the King. It should be noted that those lower down the lord-to-servant chain would be unaffected by the forfeiture of a higher up as they would in theory shift their payment to the King. To protect the rights of the nobility, the Magna Carta provided that, “[w]e will not retain beyond one year and one day, the lands those who have been convicted of felony, and the lands shall thereafter be handed over to the lords of the fiefs.”⁸⁴ This provision proved a boon for lords who would gain the escheated property of felons after the King had his way with the land, including wasting the production

78. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 442–43 (Liberty Fund 2010) (1929); see also POLLOCK & MAITLAND, *supra* note 56, at 476–77.

79. PLUCKNETT, *supra* note 78, at 442.

80. BAKER, *supra* note 2, at 484–85.

81. *Id.* at 484–86.

82. *Id.* at 501–02. But see POLLOCK & MAITLAND, *supra* note 56, at 477.

83. See POLLOCK & MAITLAND, *supra* note 56, at 232–39; see also BAKER, *supra* note 2, at 237–38.

84. MAGNA CARTA, cl. 32 (1215).

of the land for a year and a day.⁸⁵ Although the pool of nobles who benefitted from forfeiture widened, it still deprived the felon's family of their property.

In England, the majority of risings and rebellions were led by charismatic leaders or families.⁸⁶ Indeed, into the eighteenth century, the Jacobite Rebellions of 1715 and 1745 were led by James III and his son Bonnie Prince Charlie.⁸⁷ Therefore, the confiscation of title and property from noblemen convicted of treason did have a legitimate purpose, as it disabled their families from leading future rebellions. However, this does not provide a rationale for the confiscation of a simple felon's property. Indeed, the amount of the estate often did not justify the defendant's resistance to the judicial system—which will be discussed below—or the effort to force the trial.⁸⁸

Increasing the severity of the felony forfeiture was the harsh nature of the penal system with the default punishment for all felonies and treason as death, regardless of circumstances.⁸⁹ Common Law felonies included murder, burglary, larceny, and arson.⁹⁰ This would seem to be a small list of crimes, but larceny included all thefts of items valued above twelve pence⁹¹(in 1630, a gallon of strong beer cost seventeen pence, a pound of flour two pence, and a pound of mutton three pence)⁹² and burglary included any breaking into a dwelling at night with the intent to commit any felony within a dwelling regardless if it was completed.⁹³ In England, most felons were hung publicly, although those convicted of treason were subjected to the far more gruesome drawing and quartering which included being dragged naked on a sled to the place of execution, followed by brief hanging (not to unconsciousness), emasculation, and disembowelment before the body was quartered and burnt, although many were commuted to beheading.⁹⁴ Women convicted of treason, including the murder of their

85. See PLUCKNETT, *supra* note 78, at 442.

86. See, e.g., BARRY COWARD, *THE STUART AGE: ENGLAND 1603–1714*, at 377–78, 355–61, 445 (3d ed. 2003).

87. LINDA COLLEY, *BRITONS: FORGING THE NATION: 1707–1837*, at 72, 79–85 (2d ed. 2005).

88. See BAKER, *supra* note 2, at 509 n.45; see, e.g., LANGBEIN, *supra* note 4, at 74–77.

89. 6 JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: 1483–1558*, at 512 (2003).

90. See BAKER, *supra* note 2, at 529–36; see also BLACKSTONE, *supra* note 2, at 221–42.

91. There were twelve pence to the shilling and twenty shillings to the pound.

92. See Glob. Price & Income History Grp., *English Price and Wages, 1209–1914*, INT'L INST. OF SOC. HISTORY (Apr. 10, 2006), <http://www.iisg.nl/hpw/data.php#united> [<https://perma.cc/L5HR-MPMD>].

93. See BAKER, *supra* note 2, at 532; see also BLACKSTONE, *supra* note 2, at 227, 239.

94. See BAKER, *supra* note 89, at 588–89; see also LANGBEIN, *supra* note 4, at 77.

husbands, were burned.⁹⁵ The goal of all of these public deaths was to dehumanize the person as they died. Throughout the eighteenth-century, prisoners were executed in a fair-like atmosphere and at times their bodies were desecrated for macabre souvenirs by the crowd.⁹⁶

There were attempts to mitigate the severity of the system by providing benefit of clergy for certain crimes (it could only be claimed once by a person); of course, this required the defendant be male and either literate or have memorized Psalm 51:14, the default verse for asserting clergy.⁹⁷ In addition, royal pardons were often granted and juries acquitted guilty persons to spare their lives.⁹⁸ Despite these attempts at mitigation, the Common Law remained rigid in its application to the area of criminal law. In addition, such attempts to relieve defendants from death serve to illustrate that many Englishmen doubted the necessity of capital punishment in many cases, thereby calling the legitimacy of the death penalty into question.

The continued use of forfeiture through the end of the seventeenth century is evidenced by the use of *peine forte et dure* to force a defendant to accept a jury trial.⁹⁹ The use of juries to try criminal cases represents an accident of history, as juries were the only method of finding proof in criminal trials after trial by ordeal was abolished by the Fourth Lateran Council and trial by battle fell into disuse.¹⁰⁰ Therefore, a defendant had to elect to be tried by a jury, which naturally caused a problem if they stood mute.¹⁰¹ To force the defendant to enter a plea, any plea, the defendant would be slowly pressed to death using heavy stones, this was called *peine forte et dure*.¹⁰² The benefit to enduring *peine forte et dure* was that the defendant was never technically convicted of the crime and therefore their property was not forfeited.¹⁰³ The practice was finally discontinued under the reign of George III, although the imposition of death sentences for even minor thefts continued into the nineteenth century.¹⁰⁴

95. BAKER, *supra* note 2, at 528.

96. ANDREA MCKENZIE, TYBURN'S MARTYRS: EXECUTION IN ENGLAND, 1675–1775, at 21–23 (2007).

97. See BAKER, *supra* note 2, at 513–15; see, e.g., *The King v. Walter Thomas* (1614) 80 Eng. Rep. 1022, 1022; 2 Bulstrode 147, 147 (Eng.).

98. See BAKER, *supra* note 2, at 515–18; see also BAKER, *supra* note 89, at 512.

99. See POLLOCK & MAITLAND, *supra* note 56, at 598–602; see also LANGBEIN, *supra* note 4, at 74–77.

100. See LANGBEIN, *supra* note 4, at 4–6.; see also POLLOCK & MAITLAND, *supra* note 56, at 598–602; BAKER, *supra* note 2, at 72–73.

101. See BAKER, *supra* note 2, at 508–09; see also LANGBEIN, *supra* note 4, at 75.

102. See BAKER, *supra* note 2, at 508–09; see also BEATTIE, *supra* note 31, at 337–38.

103. LANGBEIN, *supra* note 4, at 75–76.

104. BAKER, *supra* note 2, at 509, 518.

The imposition of forfeiture of all of a defendant's property upon conviction of a felony meets the criteria of a dignity taking; "there must be involuntary property loss as well as evidence of the intentional or unintentional dehumanization . . . or infantilization . . . of dispossessed or displaced individuals or groups."¹⁰⁵ That the goal of the state was to dehumanize the defendants is demonstrated by the manner of their deaths. In addition, the state was directly involved in confiscating all property from convicted felons who were regarded as separate from society for breaching the bonds of loyalty and fidelity. The death of the offender would fulfill the goals of retribution, deterrence, or incapacitation, but it would also most certainly enact a dignity taking. Indeed, if the body of the defendant is his property, then there can be no more intimate taking enacted by the state and—given the Bloody Code of England—the imposition of death was often well out of proportion to the crime committed. The property confiscation from felons appears wholly gratuitous, especially as the taking served as a hardship more on the family of criminals than the defendant themselves; as an exception, in instances of treason, as it would serve to disable the traitor's heirs from engaging in future insurrection.

B. Massachusetts Bay Reforms

The colonists who traveled to Massachusetts Bay sought to create a model society based on biblical law as an example of reform for England.¹⁰⁶ As part of this mission, they instituted reforms of the Common Law, including the removing of corruption of blood, the forfeiture of property, and the death penalty for property crimes while also introducing procedural reforms, such as a requirement of two witnesses for felony conviction and allowing defendant's attorneys.¹⁰⁷ The reforms instituted by the Bay colonists were part of a larger, early, seventeenth-century movement for law reform going on within the Common Law.¹⁰⁸

The colony's charter required that they apply the Common Law, but as soon as the colonists reached the Bay Colony they began to alter the Common Law of England in the way it was applied.¹⁰⁹ For example, of the fifty-three persons convicted of property crimes between 1630 and 1642,

105. Atuahene, *Takings as a Sociolegal Concept*, *supra* note 11, at 178.

106. *See generally* WINTHROP, *supra* note 16.

107. BODY OF LIBERTIES, *supra* note 56, at 35, 43.

108. *See generally* VEALL, *supra* note 6, at 65–70.

109. *See generally* CHARTER OF MASSACHUSETTS BAY (1629).

none were sentenced to death,¹¹⁰ although some of the items taken were worth more than twelve pence.¹¹¹ The removal of forfeiture and corruption of blood in Massachusetts Bay is evidenced by the elimination of *peine forte et dure* in the colony. In December of 1634, Dorothy Talibe became the first person to stand mute in the colony when she was charged with murdering her three year old daughter, Difficult Talibe.¹¹² Governor Winthrop threatened her with pressing, which induced her to enter a plea of guilty, but it is not clear if he intended to go through with the procedure.¹¹³ The next instance of someone standing mute occurred in May 1661, when two accused Quakers, Peter Peirson and Judah Broune, refused to enter a plea before the Court of Assistants, but in these instances, pleas of not guilty were assumed to have been made so the trial could proceed.¹¹⁴ The only instance of someone being subjected to *peine forte et dure* was Giles Cory who was pressed to death when he refused to plea during the Salem Witchcraft Trials.¹¹⁵ Cory's case is an anomaly, as the Common Law of England was in use during the Salem trials as a result of the new charter granted to the colony following the Revolution of 1688.¹¹⁶ The colonists in North America were thus able to remove both the forfeiture of a felon's property and the corruption of blood following a felony conviction, which worked a dignity takings on both the condemned and their families under the Common Law of England.

Despite the immediate changes in the application of the Common Law, many colonists wanted a written code of laws, which articulated the changes made to the law and the rights of colonists.¹¹⁷ Of particular concern was the discretionary power of the magistrates when imposing sentences on the accused.¹¹⁸ If the law of the colony was to be based on the word of God then the punishments given in the Bible should be rigidly

110. See ACEVEDO, *supra* note 8, at 12–13, 319–44 (giving an example of the abandonment of the “Bloody Code,” which imposed capital punishment for property crimes, by colonists in Massachusetts Bay; and providing a summary of all crimes from the founding of the colony through the Glorious Revolution).

111. See, e.g., 2 RCA, *supra* note 16, at 99.

112. 1 ECCR, *supra* note 16, at 6.

113. WINTHROP, *supra* note 16, at 271–72.

114. 4 RCMB, *supra* note 16, at 20, 24.

115. MARY BETH NORTON, *IN THE DEVIL'S SNARE: THE SALEM WITCHCRAFT CRISIS OF 1692*, at 277 (Vintage Books 2003).

116. See generally CHARTER OF MASSACHUSETTS BAY (1691). This is the colony's second charter granted to them following the Glorious Revolution as the first charter was revoked by James I before he was deposed.

117. GEORGE LEE HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN* 35 (Univ. Press of Am. 1968).

118. See *id.*; see also WINTHROP, *supra* note 16, at 146.

applied without concern for the circumstances of the crime or the characteristics of the defendant.¹¹⁹ In Winthrop's view, such rigidity contradicted the biblical precept of mercy, while also failing to remedy one of the major flaws of the Common Law.¹²⁰

The colony's leaders, particularly Governor John Winthrop, opposed the adoption of a legal code for fear that it would draw unwanted attention from the authorities in London, as any code based on biblical law would necessarily conflict with the Common Law.¹²¹ As will be discussed in section five, the adoption of laws inconsistent with the Common Law did in fact open the colony up to investigation by the King. Although Winthrop lost the fight and legal codes were adopted, the discretion of the magistrates never waned.¹²² Between the founding of the colony and its dissolution and collapse into the Dominion of New England in 1684, there were three different legal codes used: the Common Law of England (1630–1642), the *Body of Liberties* (1642–1649), and the *Laws and Liberties* (1649–1683).¹²³

Under the new colonial laws, the overall goal of punishment in Massachusetts Bay was transformed from retribution toward reform of the offender as the desired end.¹²⁴ But, while constructing their model society, the Puritans were faced with individuals and groups who did not conform to their exacting standards. The colony's leaders had to make a choice on who could be reformed and who had to be purged from society.

IV. DIGNITY ABUSES AND DIGNITY TAKINGS UNDER THE LAWS OF MASSACHUSETTS BAY

The criminal conduct committed by the colonists was wide ranging and of a varied nature—from failure to enclose their cattle to rape and murder. Given this wide variety of criminality, two crimes will be the focus: adultery and rape. These crimes represent a crime introduced by the colonists (adultery), and a serious crime but not a traditional felony (rape). In addition, they both have less variation than battery, theft, and drunkenness, which varied according to the severity of the attack and the amount stolen or consumed. Under Massachusetts law, rape did not include

119. See HASKINS, *supra* note 117, at 204.

120. See WINTHROP, *supra* note 16, at 314.

121. See EDMUND S. MORGAN, *THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP* 167 (Oscar Handlin ed., 1958).

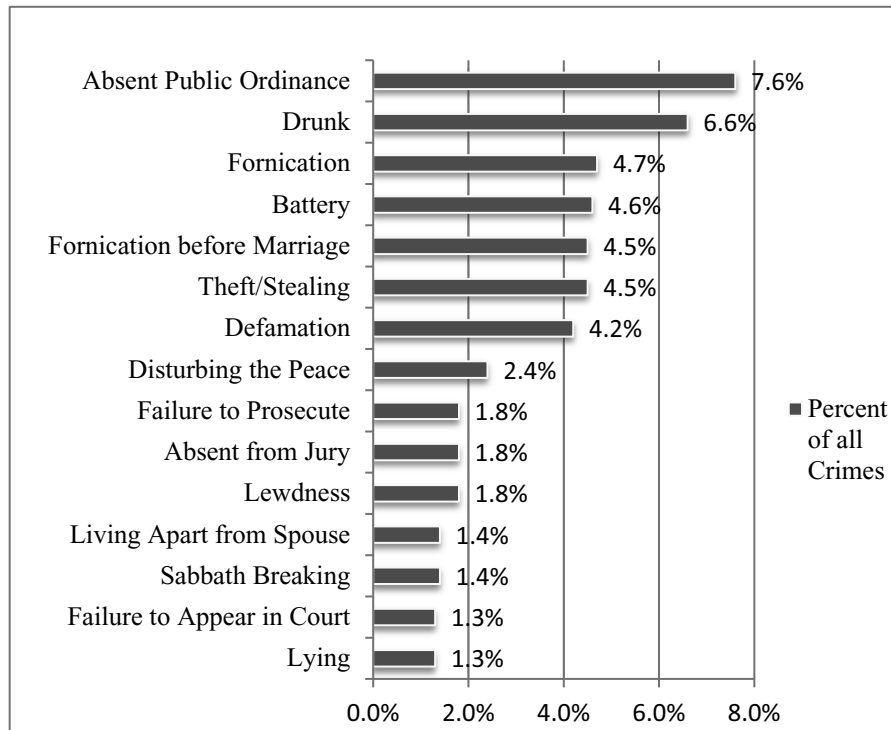
122. See generally ACEVEDO, *supra* note 8, at 108–33.

123. KONIG, *supra* note 7, at 58–59, 104.

124. HASKINS, *supra* note 117, at 204. *But see* ERIKSON, *supra* note 9, at 197.

fornication, which was treated separately.¹²⁵ Before a discussion of each of these crimes, a general overview of the punishment scheme of Massachusetts Bay will be discussed. As can be seen from the chart below, most crimes were of a petty nature, which is why it is also necessary to examine a few individual crimes in greater detail.

**Most Frequently Occurring Crimes as Percent of Total Crimes,
1630–1683**



Given that most crimes were of a petty nature, it follows that the most common punishments were fines and simple admonishments.¹²⁶ However, there still was a substantial group of punishments that were designed to dehumanize the criminal. As discussed in section three, it is possible for a dignity taking to occur in the context of criminal law. The key element will be proving that the punishment inflicted by the state had the primary purpose or effect of dehumanizing or infantilizing the criminal.¹²⁷

125. See ACEVEDO, *supra* note 8, at 319–44.

126. *Id.*

127. ATUAHENE, *supra* note 10, at 21.

A. Punishments

The change in the goal of punishment from retribution to reform is reflected in the most common punishments imposed during the era.¹²⁸ The colonists clearly sought to re-incorporate criminals within their society. As can be seen in the chart below, the most common punishments across eras were fines (2049 instances) and admonishments (328 instances). Admonishments were the least harsh penalty, as it simply meant that the person would be publicly scolded for their misbehavior.¹²⁹ Fines ranged from a few pence to several pounds depending on the infraction. For example, in 1679, Richard Nags was fined ten shillings for telling pernicious lies,¹³⁰ while in 1674, Richard Holmes was fined four pounds for striking his wife with a stick.¹³¹ In contrast only forty-one persons were executed and ninety-two banished in this fifty-three-year span.¹³²

Most Commonly Imposed Punishments Compared to Death and Acquittals¹³³

Punishment	Total	To	1642–	1649–
		1642	1649	1683
Fined	2,049	210	326	1,513
Admonished	328	51	76	201
Whipped	247	84	48	109
Restitution	175	9	11	148
Costs	144	13	8	122
Death	41	8	6	27
Acquitted	344	52	81	99

The vast majority of punishments imposed in Massachusetts Bay focused on the body of the defendant. The use of “scarlet letters” was not unheard of in the colony, although they normally took the forms of simple pieces of paper worn by the accused. For example, as punishment for burglary and lying, Susannah Buswell was sentenced to pay a fine of six shillings and ordered to sit in the meeting house with a paper pinned on her head with “for burglary and lying” in capital letters.¹³⁴ The use of stocks, pillory, and bilbowes (a metal rod with hoops through which the defendant’s wrists and ankles were fastened while they were sitting) as a method of both shaming the accused and inflicting physical pain was not unheard of, and can be seen as a steep increase in severity from simple letters. In terms of dehumanization, the imposition of “scarlet letters,” was usually designed to

128. HASKINS, *supra* note 117, at 204.

129. KONIG, *supra* note 7, at 124–25.

130. 1 RCA, *supra* note 16, at 147.

131. 5 ECCR, *supra* note 16, at 31.

132. See ACEVEDO, *supra* note 8, at 319–44.

133. This chart only contains instances when a person was subjected to a single punishment in order to illustrate the frequency of particular punishments. The majority of criminals were subjected to only one punishment so most cases are captured in this chart.

134. 6 ECCR, *supra* note 16, at 265.

humiliate—not to dehumanize—the criminal as they were of a temporary nature. More importantly, these shaming punishments were designed to replace the far harsher punishments imposed by the Common Law of England.

The use of corporal punishment in the home and society at large was common in early modern English society.¹³⁵ The use of whipping as a punishment is therefore not terribly surprising; indeed, as can be seen from the chart above, whipping was the third most commonly imposed punishment. In addition, many criminals were given the option of paying a fine or being whipped because they were persons of modest means and therefore unable to pay fines leveled by the court against them. For example, Richard Praye was given the alternative of paying fifty shillings for a series of offenses, or be whipped for beating his wife calling her a jade and calling the magistrates roundheads.¹³⁶ Although the use of whipping was common in English society, it was still designed to infantilize the criminal, as it was usually reserved for men of lesser status who could not pay a fine. The *Body of Liberties* states, “nor shall any true gentleman, nor any man equall to a gentleman be punished with whipping, unless his crime be very shamefull, and his course of life vitious and profligate.”¹³⁷

Rarer was the uses of maiming as a punishment in Massachusetts Bay, although it was common in England.¹³⁸ In most instances, this took the form of branding the convict. However, in the case of Philip Ratliffe, punishment was more severe, as he was sentenced to be whipped, have both ears cut off, and then be banished from the colony for the “moste foule scandalous invectives against our Churches and Government.”¹³⁹ The primary goal of maiming was to perpetually mark the criminal; therefore, it can be seen as dehumanizing, as there was no possibility of reintegration into society, or indeed into any other society, as they would carry the literal mark of their crime with them.

The heavy reliance on punishments that did not completely remove the offender from society requires that death and banishment, the most severe punishments possible under Massachusetts law, need to be explained as the outliers. As can be seen from the chart below, the majority of persons sentenced to death were convicted of murder and piracy, both of which were routinely punished with death.¹⁴⁰ The infliction of death for the crimes of bestiality and witchcraft are difficult to assess, as they were infrequent and punishable similarly in England.¹⁴¹ The imposition of a death sentence for adultery, rape, and returning from banishment will be discussed under each of those crimes in Part 4B.

135. BAKER, *supra* note 2, at 484.

136. 1 ECCR, *supra* note 16, at 136.

137. BODY OF LIBERTIES, *supra* note 56, at 43.

138. *See generally* BAKER, *supra* note 2.

139. WINTHROP, *supra* note 16, at 52; *see also* 1 RCMB, *supra* note 16, at 88.

140. BLACKSTONE, *supra* note 2, at 71.

141. *Id.* at 60; *see also* COKE, *supra* note 5, at 58.

Crimes for which Death was Imposed				
Crime	Total	Pre 1642	1642- 1649	1649- 1683
Murder	20	7	3	10
Piracy	5	—	—	5
Rape	3	—	—	3
Adultery	2	—	2	—
Arson	2	—	—	2
Bestiality	2	1	—	1
Returning from Banishment	2	—	—	2
Rebellion & Returning from Banishment	2	—	—	2
Witchcraft	2	—	1	1
Total	40	8	6	26

The two instances of death sentences for arson stand out, as they are the only ones that were not connected to biblical law nor related to a religious quarrel—the two persons executed for returning from banishment were Quakers.¹⁴² Arson was punishable with death by hanging under the Common Law of England.¹⁴³ However, in Massachusetts, the most common punishment for arson was banishment, followed by fine, with death as an outlier. Arson was an uncommon crime, only being prosecuted twenty-eight times; fifteen of those instances stemmed from two incidents. One distinction that can be made is between those cases in which the person was accused of burning homes versus other materials. For example, Ruben Guppy was ordered to pay restitution and was fined for setting fire to fences.¹⁴⁴ Henry Stevens was ordered to serve additional time as a servant for burning down the barn of his master John Humfrey.¹⁴⁵ This leaves the instances where the person burned a dwelling.

142. 4 RCMB, *supra* note 16, at 419; *see also* 3 RCA, *supra* note 16, at 93–111.

143. BLACKSTONE, *supra* note 2, at 222–23.

144. 1 ECCR, *supra* note 16, at 68.

145. 4 RCMB, *supra* note 16, at 311.

Punishment for Arson by Era

Punishment	Total	To 1642	1642- 1649	1649- 1683
Banished	14	—	—	14
Acquitted	4	—	—	4
Fined	3	2	1	—
Death	2	—	—	2
Restitution	2	—	—	2
Bound to Good Behavior	1	—	—	1
Put as Servant	1	1	—	—
Whipped	1	—	—	1

As mentioned before, the majority of arson cases stemmed from two instances, one of which occurred in 1679, when a group of eleven persons attempted to set fire to the town of Boston. Their motives were not recorded, but all were found guilty and banished from the colony.¹⁴⁶ The more interesting episode occurred two years later, when four African slaves were accused of intentionally setting fire to the homes of Thomas Swann of Roxbury, William Clark of North Hampton, and Doctors Wan and Lamb, both of Roxbury.¹⁴⁷ From the records, it is clear that the magistrates believed that the arsons were coordinated. If true, then this is likely the first instance of slave rebellion in continental English North America (though further research would be needed). There is some indication that the fires were coordinated, as all of them were started by getting hot coals or brands from the hearth and swinging them around to set the home alight.¹⁴⁸ The four slaves were all convicted: two, Chafaleer and an unnamed slave, were banished from the colony. A third, Jack, was ordered to be hung, then his body burnt; and the final individual, Marja, was ordered to be executed by burning at the stake.¹⁴⁹ It is not clear if this horrific punishment was actually carried out, but if it was, it would be the only instance in which this occurred. The execution of Jack and Marja seem to be designed to dehumanize the criminal, rather than simply punish them, on two grounds. First, the imposition of a death sentence was out of the ordinary for this type of crime and indicate that the state was taking more than they needed to (death rather than banishment). Second, the manner of the execution, burning at the stake or burning the body after death, was extraordinary in Massachusetts, as no other criminal was ordered to suffer a similar fate. In this instance, the execution of Jack and Marja serves no legitimate public purpose that could not have also been achieved with banishment or even death in the usual sense of simple hanging.

146. *Id.* at 250–51; *see also* 1 RCA, *supra* note 16, at 145.

147. 1 RCA, *supra* note 16, at 197–99.

148. *Id.*

149. *Id.*

B. Crimes

As mentioned in the previous section, the imposition of death in adultery cases was also unusual. Adultery was made a capital crime under the *Body of Liberties* in 1641; before then, it was severely punished with whipping. Banishment was imposed in the cases of Margaret Seale, John Hathaway, and Robert Allen, while Sara Hales was ordered to sit on the gallows before being banished.¹⁵⁰ The likely addition of the sitting on the gallows in Hales case is because she was convicted in September of 1641 when drafts of the new legal code making adultery a capital offense were circulating.¹⁵¹ It should be noted that this is an example where the state acts coercively against a person's body and indeed enacts a taking, in the sense that it intruded onto the body, but does not reach the level of a dignity taking as there was no dehumanization, simply humiliation.

The first couple caught after the passage of the new act, Mary Latham and James Britton, were convicted and hung.¹⁵² However, after this initial incident, juries were reluctant to convict persons of adultery even with overwhelming evidence; instead, they convicted individuals of the lesser crime of suspicion of adultery, which is the primary reason that no one else was executed.¹⁵³ In one sense, the execution of Latham and Britton did act as a clear indicator of the magistrate's intention to treat adultery seriously. The unwillingness of juries to convict subsequent adulterers—there would be twenty-eight persons subsequently charged—indicates that the punishment was out of sync with the severity of the crime in the minds of the jurors. Interestingly, instances of adultery occurred approximately once every eleven months before the executions (eleven cases in twelve years) and only once every eight months after the executions (twenty-eight cases in thirty-nine years); whether two lives were worth this reduction is debatable, but tends to indicate that these were arguably instances of a dignity taking, as the punishment was severely disproportionate to the crime as evidenced by its lack of subsequent implementation.

The crime of rape is particularly difficult one for which to compare punishments, as both the attributes of the victim and defendant can play a role in aggravating or mitigating the crime. For example, Jonathan Thing was severely whipped for raping a girl of eight years old because he was a boy at the time.¹⁵⁴ Of the three persons executed for rape, the triggering factor in two of the cases was that the rape involved a breach of the master-servant relationship. Basto, an African slave, was ordered executed for raping Martha Cox, the daughter of his master.¹⁵⁵ On the reverse side of the relationship, William Cheny was executed for the rape of Experience Holdbrooke, his servant.¹⁵⁶ This seems to indicate that the

150. 1 RCMB, *supra* note 16, at 225, 335.

151. *Id.* at 335; *see also* 2 RCA, *supra* note 16, at 139.

152. WINTHROP, *supra* note 16, at 500–02; *see also* 2 RCA, *supra* note 16, at 139.

153. *See, e.g.*, WINTHROP, *supra* note 16, at 609–11.

154. *Id.* at 361.

155. 1 RCA, *supra* note 16, at 74.

156. *Id.* at 199.

added instability to society caused by breaches of the social order were singled out for especially severe treatment.

The earlier cases of John Hudson, Daniel Fairfield, and Jenkin Davis for having sex with Dorcas Humphry also seem to bear this out. The court desperately wanted to execute the three men because Humphry had not reached maturity, but they were saved because Humphry admitted that she consented to fornication.¹⁵⁷ Instead, the court ordered Hudson to be whipped at Boston and Lynn and pay twenty pounds restitution to the family. Davis was ordered whipped at Boston and Lynn, to pay forty pounds restitution, confined to the town of Lynn, and ordered to wear a hemp rope around his neck. Although a humiliating punishment, it was not a dignity taking, as it was not designed to dehumanize Davis. The most severe punishment was reserved for Fairfield, who was ordered whipped at Boston and Salem, pay forty pounds restitution, confined to Boston Neck, made to wear a hemp rope around his neck and have one nostril slit and seared in Boston and Salem.¹⁵⁸ Although a severe crime, the punishments inflicted appear to go beyond what was necessary; Fairfield's maiming was designed to dehumanize him by permanently marking him as being apart from the community, and therefore served as a dignity taking. If situated in the context of similarly situated criminals—those that raped children—then the punishments become more reasonable as one was whipped,¹⁵⁹ another banished and sold as a slave,¹⁶⁰ and a final person acquitted but banished anyway.¹⁶¹ The court seems to have acknowledged that it may have gone too far in its punishment, as Davis and Fairfield were relieved of their confinement and the wearing of the ropes.¹⁶² Given the severity with which the other individuals were punished, the unusual nature of those inflicted on Davis and Hudson may have been inappropriate but likely did not rise to a dignity taking. The irreversible maiming of Fairfield, however, was a dignity taking, especially in light of the court's subsequent reversal of some of the lesser punishments.

This brief sampling of criminal acts from Massachusetts Bay shows the difficulty in identifying when a harsh punishment becomes a dignity taking. However, a line can be established based on when a punishment crosses from humiliation to dehumanization or infantilization of the criminal. Unlike England, where an entire classification of action toward criminals acted as a dignity taking because the crime involved dispossession of property, Massachusetts Bay posed the more modern dilemma of when to classify criminal punishment as a dignity taking because the property destroyed or taken was the body. In each of these three crimes (arson, rape, and adultery), there are individual incidents that seem to cross from a legitimate punishment into a dignity taking, but each is a close case. The clearest examples of dignity takings in colonial Massachusetts were the executions of Mary Latham and James Britton for adultery, Jack and Marja's executions for arson, as well as the maiming of Fairfield for his transgressions against Dorcas Humphry. In each of these instances, there were severe transgressions on the

157. 2 RCA, *supra* note 16, at 121; *see also* WINTHROP, *supra* note 16, at 370.

158. WINTHROP, *supra* note 16, at 373–74.

159. 4 RCMB, *supra* note 16, at 212.

160. 3 RCA, *supra* note 16, at 216–17.

161. 1 RCA, *supra* note 16, at 158.

162. 3 RCMB, *supra* note 16, at 67.

bodies of the defendants, especially when compared to the punishments meted out to similarly-situated defendants. Although there were numerous punishments imposed on the body of the defendants, these did not rise to the level of dignity takings; in the seventeenth century, such punishments were not only common, but represented mercy when compared to the death sentences imposed in Europe. It should of course be noted that such punishments, if used in contemporary Massachusetts, would certainly constitute a dignity taking.

V. CONCLUSION

The concept of a dignity taking can be extended to include certain criminal sanctions. In the seventeenth century, dignity takings occurred when the state took the estates of felons after they were publicly executed in a dehumanizing manner, or when the state executed for minor crimes or in a manner designed to inflict dehumanization. These takings affected both the criminal and their families. Although early American colonists removed this blatant dignity taking in their early legal codes when they ended the Bloody Code, corruption of blood, and quartering of traitors, they did not fully remove dehumanizing punishments from their criminal system. To examine modern forms of punishment, it is necessary to expand the definition of property covered in dignity takings to include the destruction of an individual's body alongside the annihilation of an individual's body.¹⁶³ In colonial Massachusetts Bay, certain punishments were designed to dehumanize the criminal (maiming) or infantilize them (whipping). Other punishments such as the imposition of "scarlet letters" and other shaming punishments (sitting on the gallows, wearing hemp ropes) were humiliating, but did not rise to the level of dignity takings. Future research needs to be conducted on contemporary criminal punishments to determine when they cross from the legitimate role into a dignity taking. In particular, the extrajudicial killing of suspects by police officers appears to be an area of essential inquiry.

This study also shows the limit of the concept of dignity takings, for it is not clear if the idea could be pushed into the sixteenth century or earlier. This is an example of the fundamental conflict between law being contextual and being universal. As the Introduction set forth, once society becomes more equal, then dignity became more universal. Although Anglo-American society is still struggling to live up to the ideals articulated more than three hundred years ago, the colonists of Massachusetts Bay advocated for greater dignity in criminal punishments when compared to their brethren in England. They were far from perfect, but they started the process of recognizing the need for mercy in criminal punishment and persons' dignities.

163. Atuahene, *supra* note 13, at 1438.

