Tinkering Around the Edges: 
The Supreme Court’s Death Penalty Jurisprudence

By John D. Bessler

I. INTRODUCTION

The U.S. Supreme Court has not squarely confronted the death penalty’s constitutionality since the 1970s. In that decade, the Supreme Court actually ruled both ways on the issue. In McGautha v. California, the Court first held in 1971 that a jury’s imposition of the death penalty without governing standards did not violate the Fourteenth Amendment’s Due Process Clause. But then in 1972, in the landmark case of Furman v. Georgia, the Court interpreted the

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1 402 U.S. 183 (1971).

2 Id. at 196.

3 408 U.S. 238 (1972).
Cruel and Unusual Punishments Clause to hold that death sentences—as then applied—were unconstitutional.\(^4\) In that five-to-four decision, delivered in a *per curiam* opinion with all nine Justices issuing separate opinions,\(^5\) U.S. death penalty laws were struck down as violations of the Eighth and Fourteenth Amendments.\(^6\) The death sentences of the “capriciously selected random handful” of those sentenced to die, one of the Justices wrote, are “cruel and unusual in the same way being struck by lightning is cruel and unusual.”\(^7\) Other Justices also emphasized the arbitrariness of death sentences,\(^8\) with some focusing on the inequality and racial prejudice associated with them.\(^9\)

In the year America celebrated its bicentennial, however, the Supreme Court reversed course yet again, approving once more the use of executions.\(^10\) After thirty-five states reenacted death penalty laws in the wake of *Furman*,\(^11\) the Supreme Court upheld the constitutionality of death penalty statutes in *Gregg v. Georgia*\(^12\) and two companion cases.\(^13\) The Court ruled that laws purporting to guide unbridled juror discretion—and requiring capital jurors to make special findings\(^14\) or to weigh “aggravating” versus “mitigating” circumstances\(^15\)—withstood constitutional scrutiny.\(^16\) The Court in *Gregg* emphasized that the Model Penal Code itself set standards for juries to use in death penalty cases.\(^17\) Only mandatory death sentences, the Court

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\(^4\) *Id.* at 239–40.


\(^6\) *Furman*, 408 U.S. at 240.

\(^7\) *Id.* at 309–10 (Stewart, J., concurring).

\(^8\) *Id.* at 248 n.11, 251–53 (Douglas, J., concurring); *id.* at 291–95, 305 (Brennan, J., concurring).

\(^9\) *Id.* at 256–57 (Douglas, J., concurring); *id.* at 364–66 (Marshall, J., concurring).


\(^12\) *Gregg*, 428 U.S. 153.


\(^14\) *Jurek*, 428 U.S. at 272.

\(^15\) *Gregg*, 428 U.S. at 164–66.


\(^17\) See *Gregg*, 428 U.S. at 193–95. Notably, the Model Penal Code’s death penalty provisions, cited in *Gregg*, no longer exist. In October 2009, the American Law Institute (“ALI”) withdrew the Model Penal Code’s death penalty provisions “in light of the current intractable institutional and structural obstacles to
ruled that year, were too severe and thus unconstitutional.\textsuperscript{18} In its decision in \textit{Woodson v. North Carolina},\textsuperscript{19} the Court explicitly ruled that mandatory death sentences—the norm in the Founding Fathers’ era\textsuperscript{20}—were no longer permissible and had been “rejected” by American society “as unduly harsh and unworkably rigid.”\textsuperscript{21}

This Essay examines America’s death penalty forty years after \textit{Furman}, providing a critique of the Supreme Court’s existing Eighth Amendment case law. Part II briefly summarizes how the Court, to date, has approached the constitutionality of executions, while Part III highlights the incongruous manner in which the Cruel and Unusual Punishments Clause has been read. The rarity of executions—along with the public’s unease with them—is highlighted in Part IV, whereas Part V summarizes a similar unease as regards executions that existed in the Founding Fathers’ own time. After Part VI describes the American public’s continued ambivalence toward executions—ambivalence shared by jurists—this Essay concludes that the U.S. Supreme Court should declare the death penalty unconstitutional.

II. THE QUESTION OF THE CONSTITUTIONALITY OF EXECUTIONS

Since the 1970s, the Justices of the U.S. Supreme Court have skirted the issue of whether executions are unconstitutional \textit{per se}.	extsuperscript{22} Instead of focusing on whether—as a factual and legal matter—executions are “cruel” and have become “unusual,” the Justices have preferred to leave the issue of capital punishment largely to juries, legislative bodies, and executive branch officials.\textsuperscript{23} Even when confronted with credible statistical proof showing a persistent pattern of racial bias in capital sentencing proceedings, the Court refused to strike down death sentences as ensuring a minimally adequate system for administering capital punishment.” Carol S. Steiker & Jordan M. Steiker, \textit{No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code}, 89 TEX. L. REV. 353, 354 (2010).


\textsuperscript{19} \textit{Woodson}, 428 U.S. 280.

\textsuperscript{20} \textit{Id.} at 289 (“At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses.”).

\textsuperscript{21} \textit{Id.} at 293. By the early 1960s all death penalty jurisdictions had adopted discretionary sentencing schemes, replacing their automatic death penalty statutes with statutes designed to channel juror discretion. \textit{Id.} at 291–92.

\textsuperscript{22} Over the years, a number of Justices have expressed reservations about executions or particular death penalty laws. Only Justices William Brennan and Thurgood Marshall, however, consistently viewed executions as \textit{per se} violations of the Eighth and Fourteenth Amendments when they were on the bench. \textit{See generally} MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL (1996).

unconstitutional. In considering the Fourteenth Amendment’s Equal Protection Clause, Justice Lewis Powell’s majority opinion ruled that the Georgia inmate, Warren McCleskey, whose fate was at stake, had failed to show discrimination “in his case.” While forthrightly conceding that the statistical evidence—presented in the Baldus study—“indicates a discrepancy that appears to correlate with race,” Justice Powell rejected McCleskey’s claim. “Apparent disparities in sentencing,” he wrote dismissively, in an opinion he would later wish he could take back, “are an inevitable part of our criminal justice system.”

The closest the U.S. Supreme Court has come to reassessing the death penalty’s constitutionality as a whole came in 2008 in Baze v. Rees. In that case, Kentucky death-row inmates challenged the state’s three-drug lethal injection protocol, questioning the legality of the country’s most prevalent method of execution. In particular, the inmates argued that Kentucky’s protocol carried a significant risk that severe pain might result during an execution if the protocol was not properly followed. Although executions around the country were temporarily put on hold pending a ruling in Baze, the Supreme Court flatly rejected the inmates’ claims. The Court made its ruling despite a Kentucky law barring veterinarians from


25 Id. at 292.


27 McCleskey, 481 U.S. at 312.


30 Every jurisdiction that uses the death penalty now authorizes lethal injection as a method of execution. Id. at 41.

31 Id. at 49; see also id. at 53 (“Their claim hinges on the improper administration of the first drug, sodium thiopental. It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.”).


33 Baze, 553 U.S. at 47 (“Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure.”).
using one of the lethal drugs, pancuronium bromide, to euthanize animals.\textsuperscript{34} The inmates, Chief Justice John Roberts wrote, “have not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment.”\textsuperscript{35} In a separate opinion, Justice John Paul Stevens lamented: “It is unseemly—to say the least—that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets.”\textsuperscript{36}

In spite of the Supreme Court’s hostility toward claims challenging the constitutionality of executions as a general matter,\textsuperscript{37} the Court has been willing to consider—and in some cases, reevaluate—the constitutionality of certain types of executions. Not only has the Court limited juror discretion\textsuperscript{38} and invalidated individual death sentences in a variety of factual contexts,\textsuperscript{39} but—utilizing its “evolving standards of decency” test—it has ruled that the U.S. Constitution forbids the execution of various categories of offenders.\textsuperscript{40} Since the mid-1970s, the Court has

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  \item \textsuperscript{34} \textit{Id.} at 58; \textit{id.} at 71 (Stevens, J., concurring); see also Robert Batey, \textit{Reflections on the Needle: Poe, Baze, Dead Man Walking}, 44 VAL. U. L. REV. 37, 47 n.58 (2009) (“Like potassium chloride, pancuronium bromide is also widely prohibited from use in animal euthanasia.”).
  \item \textsuperscript{36} Baze, 553 U.S. at 71 (Stevens, J., concurring).
  \item \textsuperscript{37} Gregg v. Georgia, 428 U.S. 153, 169 (1976) (“We now hold that the punishment of death does not invariably violate the Constitution.”); see also Baze, 553 U.S. at 47 (“We begin with the principle, settled by Gregg, that capital punishment is constitutional.”).
  \item \textsuperscript{38} Maynard v. Cartwright, 486 U.S. 356, 362 (1988) (“Since Furman, our cases have insisted that the channeling and limiting of the sentencer’s discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.”).
  \item \textsuperscript{40} 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.1(b) (3d ed. 2011) (“In addition to regulating the procedures for death sentencing, the Court has narrowed the categories of offenders and offenses subject to capital punishment under the Eighth Amendment.”).
read the Eighth and Fourteenth Amendments to prohibit the execution of the insane, juvenile offenders, the mentally retarded, non-homicidal rapists, and those who neither kill nor attempt or intend to kill. With respect to juveniles and the mentally retarded, the Court even overturned its own precedents. Just a few years earlier, the Court allowed such offenders to be executed. Conversely, the Court has upheld the constitutionality of the death penalty as a general matter and allowed death sentences for those who kill or show a “reckless indifference to the value of human life.”

III. REEVALUATING EIGHTH AMENDMENT CASE LAW

Because it has been forty years since *Furman* ushered in the death penalty’s modern era, it seems appropriate to stop and ask a few questions in light of everything that has transpired since that time. First, given what is now known about executions themselves, how “humane” is


42 Roper v. Simmons, 543 U.S. 551, 574 (2005); see also Thompson v. Oklahoma, 487 U.S. 815, 837–38 (1987) (holding that it is unconstitutional to execute juvenile offenders under the age of sixteen).


47 Baze v. Rees, 553 U.S. 35, 47 (2008) (“We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.”); *id.* at 63 (Alito, J., concurring) (“[W]e proceed on the assumption that the death penalty is constitutional.”); *id.* at 87 (Stevens, J., concurring) (“This Court has held that the death penalty is constitutional.”).


any execution or any method of execution? After all, the punishment of death is expressly calculated to take life, and executions, however carried out, lead to the same result: an inmate’s death. And, in terms of the U.S. Constitution itself, must executions—at this point in American history, especially in light of how rare executions have become—be considered “cruel and unusual punishments”? These are two questions that, to date, the U.S. Supreme Court has not satisfactorily addressed, but that must—sooner or later—be confronted head-on.

The Supreme Court’s Eighth Amendment jurisprudence has already aptly been characterized as an “enigma” and a “mess.” Such terms are fitting because—if for no other reason—corporal punishments are no longer used in America’s penal system while capital punishment remains. In other words, bodily punishments less than death—such as the historically familiar penal sanctions of whipping and ear cropping—are no longer tolerated in American law while the death penalty continues to be employed, albeit sporadically, by the U.S. legal system. The disarray of Eighth Amendment case law has also been emphasized over the past few decades in particular because Supreme Court cases are so often overruled, often in the span of just a few years. Such sudden shifts by the Court, prompted by changes in membership, evolving public attitudes, or otherwise, make Eighth Amendment decision-making seem ad hoc at best.

Even a cursory examination of the country’s Eighth Amendment case law reveals its unprincipled character. For decades, the Eighth Amendment has been interpreted to protect

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50 See Richard C. Dieter, Methods of Execution and Their Effect on the Use of the Death Penalty in the United States, 35 FORDHAM URB. L.J. 789, 815 (2008) (“[L]ethal injections are viewed by many as a process replete with error, state mismanagement, and as a potential violation of human rights.”).

51 Since 1976, there have been 1289 executions in the United States. See Facts about the Death Penalty (Death Penalty Info. Ctr., Washington D.C.), March 29, 2012, at 1, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf. Of those, 1060 have been in just one region—the South—and 590 of them have been in just two states, Texas or Virginia. Texas alone accounts for 480 of the executions that have taken place since the Supreme Court permitted the resumption of executions in 1976. Id. at 3.


54 The construction of prisons—as one commentator put it—“made possible the cessation of corporal punishment” and “now make[s] possible the cessation of capital punishment.” Howard Bromberg, Pope John Paul II, Vatican II, and Capital Punishment, 6 AVE MARIA L. REV. 109, 145 (2007). In prior times, “[c]ommon non-lethal punishments included whipping, caning, branding, pilloring, ducking stools, public shaming, amputation, stockading,” and exile. Id.

prisoners from harm. Applying the Cruel and Unusual Punishments Clause, the Court has barred prison officials from using excessive force and subjecting inmates to inhumane conditions of confinement. The Eighth Amendment has also been read to bar corporal punishments or bodily harm short of death. In Hope v. Pelzer, the Supreme Court characterized the gratuitous handcuffing of a shirtless inmate to a hitching post for hours at a time—resulting in an inmate’s dehydration in the hot Alabama sun—as an “obvious” Eighth Amendment violation. Yet, executions—the intentional taking of human life, and a fate far worse—incongruously continue to be tolerated by the Supreme Court’s case law. The Court

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56 Farmer v. Brennan, 511 U.S. 825, 828 (1994) (“A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”). In a 1993 case, the Supreme Court further emphasized: “That the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners.” (citing Hudson v. McMillian, 503 U.S. 1 (1992)).

57 Farmer, 511 U.S. at 833 (“[T]he Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners.” (citing Hudson v. McMillian, 503 U.S. 1 (1992))).

58 Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) (“A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”); Farmer, 511 U.S. at 833 (“The [Eighth] Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’” (citations omitted)).

59 Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (Blackmun, J.) (“[W]e have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment.”); see also Furman v. Georgia, 408 U.S. 238, 283–84 (1972) (Brennan, J., concurring) (“[I]t does not advance analysis to insist that the Framers did not believe that adoption of the Bill of Rights would immediately prevent the infliction of the punishment of death; neither did they believe that it would immediately prevent the infliction of other corporal punishments that, although common at the time, are now acknowledged to be impermissible.” (citation omitted)).

60 536 U.S. 730 (2002).

61 Id. at 733–35, 737–38.

62 The Supreme Court has denied stays of execution even in situations where a member of the Court has asserted that it is cruel to execute inmates after they have spent more than three decades on death row. Valle v. Florida, 132 S. Ct. 1 (2011) (Breyer, J., dissenting from denial of stay) (“I have little doubt about the cruelty of so long a period of incarceration under sentence of death. . . . So long a confinement followed by execution would also seem unusual. The average period of time that an individual sentenced to death spends on death row is almost 15 years. Thirty three years is more than twice as long.”).
has never adequately explained how the Eighth Amendment can protect prisoners from harm and intolerable conditions yet simultaneously permit their execution. Nor could it, frankly.

The Supreme Court’s decisions upholding the death penalty’s constitutionality have made Eighth Amendment case law internally inconsistent and irreconcilable. Instead of focusing on the meaning of the terms “cruel” and “unusual” in the Eighth Amendment itself, the Court has applied its “evolving standards of decency” test,63 assessing whether a “national consensus” exists64 or even attempting to gauge a “trend”65 or the “consistency of the direction of change”66 in state laws. Yet, as regards executions, the fundamental questions to be asked are whether it is “cruel” to intentionally inject an inmate with lethal chemicals67 and whether executions—in a factual sense—have become too “unusual” to be allowed any longer? In Kennedy v. Louisiana,68 the Supreme Court itself—in a moment of candor—stated that the “evolving standards of decency” principle “requires that use of the death penalty be restrained.”69 While the Court ruled there that “[i]n most cases justice is not better served by terminating the life of the perpetrator,”70 it did not establish a per se bar on executions.71 Instead, it took the position that “resort” to the


66 Atkins v. Virginia, 536 U.S. 304, 315 (2002) (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”); see also Roper, 543 U.S. at 566 (“[W]e think the same consistency of direction of change has been demonstrated.”).


68 554 U.S. 407.

69 Id. at 446.

70 Id. at 447.

71 The Court in Kennedy held as follows: “Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.” Id.
death penalty “must be reserved for the worst of crimes and limited in its instances of application.”

IV. THE RARITY OF EXECUTIONS AND THE GROWING UNEASE WITH THEM

The death penalty is now meted out, when at all, more on the basis of geography and race than with respect to the nature of the crime. And state officials, due to their lack of use of capital punishment and the concerns about the way in which it is being administered, are increasingly reevaluating the need for death penalty laws in the first place. In one of his last acts as Pennsylvania’s chief executive, Governor Edward Rendell—a long-time death penalty supporter—wrote a letter to the state’s General Assembly recounting that while he had signed 119 death warrants since taking office in January 2003, not one execution had taken place in the state in the prior eight years. “[I]t seems to me,” Rendell wrote, “that the time has come to re-examine the efficacy of the death penalty under these circumstances.” If “no avenue” could be found to “significantly shorten the time between offense and carrying out the sentence” without jeopardizing the “thorough and exhaustive” judicial review required, Rendell explained, he wanted legislators “to examine the merits of continuing to have the death penalty on the books—as opposed to the certainty of a life sentence without any chance of parole, pardon or commutation.”

And Governor Rendell’s sentiments are far from isolated. In California, which has the country’s largest death row, voters themselves are being asked to replace the state’s largely

72 Id. at 446–47.
73 KENNETH WILLIAMS, MOST DESERVING OF DEATH?: AN ANALYSIS OF THE SUPREME COURT’S DEATH PENALTY JURISPRUDENCE (2012); see also Eric Berger, On Saving the Death Penalty: A Comment on Adam Gershowitz’s Statewide Capital Punishment, 64 VAND. L. REV. EN BANC 1 (2011) (“Since 2006, Texas has carried out nearly half of all executions nationwide.”); id. at 2 (“[O]nly a few of Texas’s 254 counties seek capital punishment with any regularity.”); id. (“Other states, such as Pennsylvania and California, also have wide variations among counties’ imposition of the death penalty, even among demographically similar counties.”).
74 Illinois, New Mexico, and New Jersey recently abolished capital punishment. Peggy M. Tobolowsky, A Different Path Taken: Texas Capital Offenders’ Post-Atkins Claims of Mental Retardation, 39 HASTINGS CONST. L.Q. 1, 138 n.738 (2011).
76 Id.
77 Id.
78 As of April 1, 2011, California had 719 death row inmates. Since 1976, California has executed thirteen people. Facts about the Death Penalty, supra note 51, at 2–3.
dormant death penalty with life-without-parole sentences.\textsuperscript{79} As a result of a ballot initiative that gathered nearly 800,000 signatures,\textsuperscript{80} California voters will have the opportunity in November 2012 to replace the death penalty with life-without-parole sentences and to use the financial savings to be achieved from abolition on concrete law enforcement efforts to solve murder and rape cases.\textsuperscript{81} Already, California’s death penalty has ground to a halt while the state’s governor, Jerry Brown, awaits the results of a legal skirmish over the state’s lethal injection procedures.\textsuperscript{82} Recent national polls show, in fact, that a majority of citizens prefer life-without-parole sentences to the death penalty.\textsuperscript{83} California itself has not executed an inmate in six years, and the state’s anti-death penalty initiative—known as the SAFE California Campaign—is being led by Jeanne Woodford, a former San Quentin warden who once oversaw executions. She now favors life-without-parole sentences, as does Donald Heller, a former prosecutor who wrote and once championed California’s death penalty law.\textsuperscript{84}

\textsuperscript{79} The SAFE California Campaign is supported by a coalition of law enforcement officials, murder victims’ family members, and people who have been wrongfully convicted. About the Coalition, SAFE CALIFORNIA, http://www.safecalifornia.org/about/coalition (last visited Mar. 19, 2012).


\textsuperscript{81} The initiative seeks to repeal the death penalty for persons found guilty of murder and replace death sentences with life imprisonment without possibility of parole. The initiative, which seeks to create a $100 million fund to help law enforcement agencies solve more homicide and rape cases, would apply retroactively to persons already sentenced to death and require persons found guilty of murder to work in prison and to pay victims restitution. See Attorney General of California, Initiative Statute 11-0035 for Death Penalty Repeal (Oct. 21, 2011), http://www.safecalifornia.org/downloads/2.1.A_titleandsummary.pdf.


\textsuperscript{83} A poll conducted in 2010 by Lake Research Partners found that 61% of respondents would choose a punishment other than death for murderers. Facts about the Death Penalty, supra note 51, at 4. The most popular alternative was “Life without parole plus restitution.” Id.

Like physicians and nurses, lawyers and jurists have begun more actively weighing in on America’s death penalty, too. In Ohio, a justice of that state’s supreme court, Paul Pfeifer, recently came to oppose the same death penalty law he helped draft as a young state senator. “I have concluded that the death sentence makes no sense to me at this point when you can have life without the possibility of parole,” he said in public comments. Gerald Kogan—a retired chief justice of the Florida Supreme Court who once prosecuted capital cases—also indicated recently that abolition should be considered. Justice Anthony Kennedy—often a pivotal vote on the Supreme Court—has also recognized the anomaly of death sentences in relation to the Court’s existing Eighth Amendment case law emphasizing the concept of human dignity. “When the law punishes by death,” Justice Kennedy wrote in 2008, “it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”

The death penalty’s history—recounted in law professor Stuart Banner’s recent book—is one of successive restrictions on its use. England’s “Bloody Code” once authorized executions for more than 200 offenses, but Great Britain no longer allows state-sanctioned killing.

85 The American Medical Association has taken the position that members of the medical profession should not participate in executions. Nadia N. Sawicki, Doctors, Discipline, and the Death Penalty: Professional Implications of Safe Harbor Policies, 27 YALE L. & POL’Y REV. 107, 121 (2008). The American Nurses Association has also called upon state licensing and disciplinary boards to treat participation in executions as grounds for disciplinary action. Id. at 124.


87 Id.

88 Id.


91 STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002). The death penalty—once administered in some of the most horrific ways imaginable—was previously used for all sorts of crimes. VICTOR STREIB, DEATH PENALTY IN A NUTSHELL 1–8 (3d ed. 2008).


Indeed, all of Europe has followed suit. In the European Union, it is now considered a flagrant violation of human rights to carry out an execution, with Canada and European countries and other nations refusing to extradite offenders to the United States until assurances are obtained that the death penalty will not be sought. Even places like Rwanda, South Africa, and Uzbekistan have done away with executions, with South Africa’s Constitutional Court issuing its decision declaring executions unconstitutional in 1995.

In early America, a whole host of crimes—from murder and rape to adultery and sodomy to witchcraft and idolatry—were death-eligible. Now, however, the only circumstances in which American courts will even consider death penalty prosecutions are those involving acts of first-degree murder or crimes against the state, such as terrorism or espionage. And such capital prosecutions are uncommon—and for some crimes non-existent. The last execution for espionage was in 1953, and capital charges today for first-degree murder are increasingly rare. Death sentences and executions are even rarer.

of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union.”).


97 State v. T. Makwanyane, 1995 (3) SA 391 (CC) ¶¶ 8, 10, 144–51.


99 In Kennedy v. Louisiana, the Supreme Court distinguished between crimes against individuals and crimes against the State and reserved judgment as to how the Court might rule as to the constitutionality of the death penalty as to the latter. 554 U.S. 407, 437 (2008) (“We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State. As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim’s life was not taken.”).

100 Sarah Frances Cable, An Unanswered Question in Kennedy v. Louisiana: How Should the Supreme Court Determine the Constitutionality of the Death Penalty for Espionage?, 70 LA. L. REV. 995, 1017–18 (2010) (noting that “the last execution for espionage was the Rosenbergs in 1953” and that “no one has been put to death for treason since John Brown in 1859”).

V. THE AMBIVALENCE TOWARD EXECUTIONS IN THE FOUNDRING ERA

The sordid history of America’s death penalty—which the Founding Fathers themselves sought to curtail—shows Americans’ now centuries-old ambivalence toward executions. In the same era in which John Hancock called for an end to the punishments of “cropping and branding, as well as that of the Public Whipping Post,” America’s leading public figures, including its founders, questioned the death penalty’s use—if not for every crime, then at least for many. In eighteenth-century Virginia, Thomas Jefferson and James Madison both sought to restrict executions to cases of murder and treason, a proposal that, in 1785, lost by just a single vote. Madison’s college classmate and close friend William Bradford—the second Attorney General of the United States—personally authored an essay in 1793 titled “An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania.” In that essay, written shortly after the ratification of the U.S. Bill of Rights, Bradford advocated for the death penalty’s abolition for all crimes except murder. And as for murder, Bradford was willing to entertain the

102 Robert J. Smith, The Geography of the Death Penalty and Its Ramifications, 92 B.U. L. Rev. 227, 233 (2012) (“[T]he number of federal capital prosecutions remains low, and the vast majority of homicide prosecutions are undertaken by state criminal justice systems.”); Carol S. Steiker & Jordan M. Steiker, Part II: Report to the ALI Concerning Capital Punishment, 89 Tex. L. Rev. 367, 416 (2010) (noting that the U.S. witnesses “between 15,000 and 20,000 homicides per year” but that in 2007 fewer than 50 people were executed and slightly more than 100 people were sentenced to death nationwide”).


105 Id. at 54.

106 Id. at 66–161.

107 Id. at 141–45. In a letter to Jefferson penned in 1776, Edmund Pendleton wrote: “Our Criminal System of Law has hitherto been too Sanguinary, punishing too many crimes with death, I confess.” Id. at 141.

108 Id. at 145, 156–57.

109 Id. at 85.
possibility that evidence might later show that the death penalty for that crime was not an appropriate punishment either.  

To be sure, the Founding Fathers’ views were diverse and often changed with the times. While some founders, like John Adams and John Jay, had fewer moral qualms with executions, at least in some circumstances, they still struggled with the issue. Others were even more circumspect. James Wilson, a signer of both the Declaration of Independence and the U.S. Constitution, regularly referred to Cesare Beccaria’s abolitionist writings and noted with pride: “How few are the crimes—how few are the capital crimes, known to the laws of the United States, compared with those known to the laws of England!” Wilson also said that “cruelty” is the “parent of slavery” and called “cruel” punishments “dastardly and contemptible.”

Benjamin Franklin—America’s senior statesman—himself pondered in 1785: “To put a man to death for an offence which does not deserve death, is it not murder?” And even military leaders, such as George Washington and Alexander Hamilton, came to believe that executions were far too frequent.

As state penitentiaries were built following the adoption of the U.S. Constitution and the ratification of the Bill of Rights, the Founding Fathers seemed to have even less of an appetite for executions. Writing in the 1820s, Madison spoke of his attraction to “penitentiary

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110 Id. at 85–91. For anyone who thought a prison sentence too lenient, Bradford suggested that his readers look “into the narrow cells prepared for the more atrocious offenders” and consider the “hard labor” they would perform and the “coarse fare” they would subsist on during their incarceration. He also encouraged readers to consider that offenders would “languish in the solitude of a prison”—“cut off” from family—as they lived out their “tedious days” and their long nights of “feverish anxiety.” Id. at 90.

111 Id. at 56. John Jay expressed his views as follows: “As to murderers, I think it not only lawful for government, but that it is the duty of government, to put them to death.” Id. While President John Adams approved of some executions, id., he disapproved others and personally owned a copy of Beccaria’s book, On Crimes and Punishments. Id. at 50.

112 Many efforts were made in the founding era to curtail the use of executions for various crimes. See id. at 62, 76, 78–79, 86–89, 139–46, 156–67, 193, 257, 272, 274.

113 Id. at 51.

114 Id. at 52.

115 Id. at 52–53.

116 Id. at 123.

117 Id. at 126–38. In a letter to her husband John in 1797, Abigail Adams pondered what might happen “if the states go on to abolish capital punishment.” Id. at 62. John and Abigail’s son, John Quincy Adams, who studied the death penalty as a young man and who became the sixth President of the United States, would go on to support efforts to abolish capital punishment. Id. at 63–64, 273–74.

118 Id. at 269–70.

119 See id. at 85–91, 150, 296.
discipline” as a substitute for “the cruel inflictions so disgraceful to penal codes.” In 1823, Madison even wrote one Kentucky correspondent, G. F. H. Crockett: “I should not regret a fair and full trial of the entire abolition of capital punishments by any State willing to make it: tho’ I do not see the injustice of such punishments in one case at least.”

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Inspired by Beccaria’s popular 1764 essay, *On Crimes and Punishments*, Jefferson, too, emphasized in 1821 that Beccaria and others “had satisfied the reasonable world of the unrightfulness and inefficiency of the punishment of crimes by death.”

Dr. Benjamin Rush—a signer of the Declaration of Independence—specifically called death “an improper punishment for any crime” and advocated for the death penalty’s total abolition. Thomas Paine—the author of *Common Sense* and often called the “Father of the American Revolution”—also opposed executions, calling them “barbarous” and “cruel spectacles.”

VI. THE PUBLIC’S AND JURISTS’ AMBIVALENCE TOWARD EXECUTIONS

Americans have always been—and still remain—highly ambivalent about executions. Decades ago, executions came to be seen by American civic leaders as brutalizing spectacles and were, accordingly, relegated to the confines of prisons. Sometimes, state laws even went so far as to bar reporters from attending or reporting the details of executions. The abandonment of mandatory death sentences in favor of discretionary ones was due, in part, to jurors’ antipathy toward executions themselves. After Tennessee, in 1838, gave juries discretion whether to impose a death sentence for murder, other states followed suit, and by 1963 all states had done

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120 Id. at 296.
121 Id. at 158.
123 BESSLER, CRUEL AND UNUSUAL, supra note 104, at 145.
124 Id. at 70; see also id. at 66–84 (detailing Dr. Benjamin Rush’s advocacy).
125 Id. at 108.
128 Omar Malone, *Capital Punishment Statutes and the Administration of Criminal Justice: (Un) Equal Protection Under the Law!*, 15 T. MARSHALL L. REV. 87, 92 (1990) (“At least since the revolution, American jurors, have with some regularity, discarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict.”).
away with mandatory death sentences. Today, the number of death sentences and executions is down nationwide, including in the State of Texas. A recent report of the Death Penalty Information Center titled A Crisis of Confidence: Americans’ Doubts About the Death Penalty, concluded as follows: “People are deeply concerned about the risk of executing the innocent, about the fairness of the process, and about the inability of capital punishment to accomplish its basic purposes.”

The myriad ways in which executions have been carried out since the founding era indicates that Americans have never been all that comfortable with what happens at executions. Hangings in the public square at midday gradually gave way to non-public, nighttime executions behind thick prison walls. Indeed, more than eighty percent of American executions once took place between the hours of 11:00 p.m. and 7:30 a.m., with one minute after midnight becoming—for a period—one of the most popular times for executions. State laws restricting the presence of TV cameras and limiting the attendance of reporters at executions also suggests a deep sense of shame about executions. Even methods of executions—the way we choose to kill the condemned—have morphed from gibbeting and drawing and quartering, to hangings and firing squads, to electrocutions and gas chambers, to what we have today: more clinical lethal injection protocols.

When one examines the pronouncements of U.S. Supreme Court Justices—especially either nearing or after retirement—it is striking how blunt many are about the lack of necessity

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130 David McCord, What’s Messing with Texas Death Sentences?, 43 TEX. TECH L. REV. 601, 601 (2011) (“During the peak five-year period for Texas death sentences—1992–1996—an average of 42 per year were pronounced; by contrast, in the most recent five-year period—2005-2009—an average of only 14 death sentences per year were handed down. The drop from 42 to 14 per year represents a 70% decline.”).


132 DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION 271 (2010) (“A civilized aesthetic is often invoked in cases concerned with execution methods and procedures—since executions are dangerously prone to generate the sights, sounds, and smells of physical violence and gruesome images of bodily distortion and disfigurement, all of which are disturbing to refined sensibilities.”).

133 BESSLER, DEATH IN THE DARK, supra note 126, at 23–97.

134 Id. at 6, 213–20.

135 Id. at 4–5, 214–18.

136 See id. at 40–129, 163–205.

for, and the intractable problems associated with, capital punishment. Dissenting in 1994 from the denial of certiorari in *Callins v. Collins*, Justice Blackmun famously wrote: “From this day forward, I no longer shall tinker with the machinery of death.” Citing the arbitrariness and unfairness of death sentences as well as the Court’s failure to adhere to the commands of the U.S. Constitution, Justice Blackmun candidly concluded: “I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations can ever save the death penalty from its inherent constitutional deficiencies.” Blackmun issued that opinion on February 22, 1994, just months before he stepped down from the nation’s highest court.

Other Supreme Court Justices—both current and retired—have also been circumspect. At a 2001 speech, Justice Ruth Bader Ginsburg—who expressed support for a moratorium on executions in Maryland—commented, “I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.” After Justice Lewis F. Powell Jr. retired, his biographer asked him whether, given the chance, he would change any of his votes. “Yes,” Justice Powell replied, “McCleskey v. Kemp.” Powell had authored that five-to-four decision, providing the deciding vote that sealed Warren McCleskey’s fate. And Justice Sandra Day O’Connor—now retired from the Court—has also been critical of the way in which capital punishment laws are administered. At a speech in 2001 to the Minnesota Women Lawyers, O’Connor noted: “Serious questions are being raised about whether the death penalty is being fairly administered in this country.” O’Connor also emphasized that “problems” in the death penalty’s administration had “become more apparent.”

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138 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of cert.).

139 *Id.* at 1145.

140 *Id.*

141 *Id.* at 1143.

142 See Retirement of Justice Blackmun, 512 U.S. VII (June 30, 1994). Chief Justice William Rehnquist noted that it was Justice Blackmun’s last session. *Id.*


noting that “[p]erhaps most alarming among these is the fact that if statistics are any indication, the system may well be allowing some innocent defendants to be executed.”

Justice John Paul Stevens is the most recent Justice to express his disdain for executions. In *Five Chiefs*, a book published shortly after his retirement from the bench, Justice Stevens wrote that the Court’s judgment in *Baze* “had a critical impact on my views about the constitutionality of capital punishment.” Chief Justice Roberts’s draft opinion, Stevens wrote, “convinced” him that there was no longer a persuasive justification for death sentences. Between 1976 and 2008, Stevens noted, “the increasing use of life sentences without the possibility of parole” had changed the nature of the debate and “eliminated” the justifications for the death penalty. The Court’s 1976 decisions upholding capital punishment laws, Stevens wrote, were predicated on the notion “that the states had narrowed the category of death-eligible offenses and would enforce procedures that would minimize the risk of error and the risk that the race of the defendant or the race of the victim would play a role in the sentencing decision.” But Justice Stevens had come to personally “regret” his vote in 1976 to uphold the constitutionality of the Texas law that had authorized so many death sentences, with Stevens emphasizing that “the finality of the death penalty always includes the risk that the state may put an innocent person to death.”

**VII. Conclusion**

When the mounting evidence as regards the death penalty’s actual operation is reviewed in total, it seems clear that it is only a matter of time before the U.S. Supreme Court will have to address the constitutionality of executions once more. It did so in 1972, and it did so in

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149 *Id.* at 218. As Justice Stevens wrote: “John Roberts’s opinion in *Baze*, to my surprise, convinced me that the Court had already rejected the premise that the death penalty serves a meaningful retributive purpose. His review of our earlier cases effectively demonstrated that the Eighth Amendment has been construed to prohibit needless suffering and significant risks of harm to the defendant.” *Id.*

150 *Id.* at 217.

151 *Id.* at 216.

152 *Id.* at 215–16.

153 *Id.* at 217. As Justice Stevens noted: “In the last four decades, more than one hundred death-row inmates have been exonerated, a number of them on the basis of DNA evidence.” *Id.*

154 When that day will actually come, of course, is open to speculation and debate.

and when it will do so again is up to the Court itself to decide. The Justices, exercising their judicial independence, must ultimately interpret the Eighth Amendment’s text, which unequivocally prohibits “cruel and unusual punishments,” making no carve-out or exception for the punishment of death. If the “cruel and unusual punishments” language is fairly considered in light of the factual evidence surrounding the death penalty’s operation, the Court should find executions to be unconstitutional. Although the words “capital,” “life” and “limb” appear in the U.S. Constitution, as Justice Antonin Scalia is fond of pointing out, those provisions—in the Fifth and Fourteenth Amendments—were drafted as constitutional protections for individuals when mandatory death sentences were still the legal norm. It should not go unnoticed that U.S. courts no longer allow a person’s “limb” to be cut off.

Although maximum-security prisons now exist to house violent offenders, American executions still sporadically continue to be carried out. When they occur, they are the result of an arbitrary and racially discriminatory system, all of which runs counter to the basic principles of the Eighth and Fourteenth Amendments. Indeed, despite all the efforts by legislators and the

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158 Id. at 315–16.

159 Id.

160 Id. at 316.

161 Id. at 343–44. Even Justice Scalia—calling himself a “faint-hearted originalist”—has indicated that he would no longer tolerate a harsh corporal punishment such as flogging. Id. at 327 (citing Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849 (1989)).

162 The arbitrariness and racial bias in America’s death penalty system is in direct contravention of both the Eighth Amendment and the Fourteenth Amendment’s due process and equal protection guarantees. See U.S. CONST. amends. VIII, XIV; see also Jones v. United States, 527 U.S. 373, 381 (1999) (“[W]e have said that the Eighth Amendment requires that a sentence of death not be imposed arbitrarily.”). In a recent book review, newly retired Justice John Paul Stevens expressed his own concerns about arbitrariness this way: “Arbitraryness in the imposition of the death penalty is exactly the type of thing the Constitution prohibits, as Justice Lewis Powell, Justice Potter Stewart, and I explained in our joint opinion in Gregg v. Georgia (1976). We wrote that capital sentencing procedures must be constructed to avoid the random or capricious imposition of the penalty, akin to the risk of being struck by lightning.” John Paul Stevens, A Struggle with the Police & the Law, N.Y. REV. OF BOOKS (Apr. 5, 2012), http://www.nybooks.com/articles/archives/2012/apr/05/struggle-police-law. “Today,” Stevens wrote, “one of the sources of such arbitrariness is the decision of state prosecutors—which is not subject to review—to seek a sentence of death.” Id.

163 The Fourteenth Amendment, ratified in 1868, explicitly requires “equal protection of the laws.” U.S. CONST. amend. XIV.
courts since Furman, the death penalty remains as arbitrary and as problematic as ever. To borrow Justice Potter Stewart’s words from his opinion in Furman, lightning continues to strike a “capriciously selected random handful” of those sentenced to die. If Eighth Amendment case law, as a whole, is ever to be reconciled, capital punishment must be declared unconstitutional. Corporal punishments such as the pillory and the whipping post have already been rejected in our penal system, and the same impulse that leads judges to prohibit such harsh corporal punishments should lead them to declare executions unlawful.

For the time being, the gears of America’s badly broken machinery of death grind on. The facts, though, unmistakably show that the death penalty is “cruel and unusual” in both a legal and factual sense. Not only is the system riddled with error and discrimination, but executions fly in the face of what the Supreme Court itself says the Eighth Amendment is designed to do: protect prisoners. Death sentences and executions have declined in number over the years and are now restricted largely to a few states—and are mostly concentrated in

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164 Lindsey S. Vann, History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment, 45 U. RICH. L. REV. 1255, 1288 (2011) (“History has repeated itself. The capital punishment system in America is as arbitrary as it was leading up to Furman.”).


166 BESSLER, CRUEL AND UNUSUAL, supra note 104, at 258.

167 Id. at 344.


171 BESSLER, CRUEL AND UNUSUAL, supra note 104, at 219–21.

172 Death sentences have fallen from more than 300 per year in 1995 and 1996 to less than 80 in 2011. Executions, which peaked at 98 in 1999, have not exceeded 60 per year since 2003. Facts about the Death Penalty, supra note 51, at 1, 3.
just a few counties. While executions in the founding era used to be the mandatory—or usual—punishment for certain crimes, executions have become extremely unusual as life-without-parole statutes have risen in popularity. In America today, even as legislative efforts to abolish the death penalty in places such as California, Kansas, and Maryland continue, life-without-parole sentences have far eclipsed death sentences in terms of their usage for punishing first-degree murderers. The only way, in fact, in which the country’s Eighth Amendment case law can ever truly become principled—and rendered internally consistent—is by a declaration that the death penalty is unconstitutional. Until that day arrives, the Supreme Court—in deciding individual death penalty cases—will just be tinkering here and there with the state’s ultimate sanction.

173 Adam M. Gershowitz, Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty, 41 U. RICH. L. REV. 861, 862 (2007) (“Most death penalty cases are prosecuted at the county level, and there are great disparities between the counties.”).


176 LAFAYE ET AL., supra note 40, § 26.1(c) n.39 (“In 2008, more than 140,000 of those in prisons were serving life sentences and more than 41,000 of those will never be eligible for parole, up from 33,600 five years earlier.” (citing Nellis, Throwing Away the Key: The Expansion of Life without Parole Sentences in the United States, 23 FED. SENT’G REP. 27 (2010))).