

The Unnecessary Punishment of Death – Part Two

Jon Yorke*

Editors' Note

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The Drafting and Early Interpretation of the Bill of Rights

In 1791, the Bill of Rights became part of the US Constitution, and the Grand Jury Clause of the Fifth Amendment expressly allowed for the application of the death penalty, stating that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” At the same time, the Due Process Clause states, “[n]o person shall . . . be deprived of life, liberty or property, without due process of law.” This is repeated in the Fourteenth Amendment with the addition of the Equal Protection Clause that states, “nor deny any person within its jurisdiction the equal protection of the laws.” The Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits the infliction of “cruel and unusual punishments.” These Amendments demonstrate that the death penalty is preserved only on a contingent basis. Before a constitutionally permissible sentence of death, there must be a “presentment or indictment of a Grand Jury,” “due process of law,” “equal protection of the laws,” and along with these determinations, the capital judicial system must not violate the prohibition of “cruel and unusual punishments.” Without this legal scrutiny, the punishment cannot be imposed.

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The Annals of Congress reveal very little of any debates on the Cruel and Unusual Punishments Clause. Justice Douglas affirmed that the published records “throw little light on its intended meaning,”¹ and Meghan Ryan has reviewed the Annals and the documentations of the state ratifying conventions, and has observed that they only reveal “unclear origins of the Eighth Amendment.”² There are two recorded observations on the Eighth Amendment in the Annals. William Smith of South Carolina objected to the words “nor cruel and unusual punishments,” because he thought them “too indefinite.”³ Smith was not satisfied with the concise textual *enumeration*, and it appears that he would have favoured a more encompassing *definition* for establishing specific examples that were thought to be cruel and unusual. Samuel Livermore of New Hampshire stated “[t]he Clause seems to express a great deal of humanity, on which account I have no

objection to it; but as it seems to have no meaning in it, I do not think it necessary.”⁴ But Livermore developed the issue further when he argued:

[n]o cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often

deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.⁵

Livermore’s statement reveals that the Eighth Amendment should be interpreted as a guiding standard not to be viewed as static, but reflexive (because it can look “in the future”), to encompass new penological techniques and technologies as

* Jon Yorke is a Reader in law in the School of Law, and is an Associate Director of the Centre for American Legal Studies at Birmingham City University.

they are “invented.” Furthermore, these techniques in the future were not to become more severe, or even allow state sanctioned violence imposed by corporal and capital punishment to remain at a constant level of severity; instead, governments should identify “a more lenient mode of correcting vice.” During the Revolutionary era, there were those advocating humanitarian sentiments and more humane methods of punishment, and

concerning the question of the death penalty, Louis Mazur noted that “a diverse group of Americans considered the death penalty morally and politically repugnant.”⁶ One of the founders of the American abolitionist movement was Benjamin Rush, who lectured against public executions in 1787⁷ and published a pamphlet against the death penalty in 1797, entitled *Considerations on the Injustice and Impolicy of Punishing Murderers by Death*, in which he argued that the death penalty “is contrary to reason.”⁸

Livermore’s statements in Congress called for an application of “reason” in the quest for legitimate penology. He placed together the death penalty, whipping, and cutting off ears, which in 1791 were perceived as necessary punishments in certain circumstances, but he then acknowledged the possibility that each punishment may be repealed in the future. When American experts in penal law invent new “lenient,” more humane methods, then “it would be very prudent” for the legislature to adopt these measures. Livermore concluded by focussing on “making necessary laws.” Livermore’s contemporary, Thomas Paine, made a similar argument in *Rights of Man* that was dedicated to George Washington and President Andrew Jackson, and in his arguments, he called for France to spare the life of Louis Capet, when he stated: “[I]t is our duty as legislators not to spill a drop of blood when our purpose may be effectually accomplished without it.”⁹

It is clear that Livermore (along with Rush and Paine) wanted American opinions on penology to advance within the framework of humanism and utilitarianism. The Eighth Amendment’s Cruel and

Unusual Punishments Clause was established as a barometer of legal and societal sentiment, to be used to check the power to punish. An appropriate interpretation of the original drafting opinions on

the Clause is that it does not preserve the death penalty in perpetuity. It provides for the possibility, along with the abolition of whipping and cutting off ears, for the abolition of the death penalty. In support of the early thoughts of the future evolution of the interpretation of the Clause, the US Supreme Court stated in *Weems v. United States*:

[L]egislation, both statutory and constitutional, is enacted, it is true from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had therefore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth . . . [i]n the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.¹⁰

The *Weems* Court interpreted the Constitution as providing a governing standard that at its heart fights against “evil” in society. This ‘evil’ can be both derived from the actions of individuals – through the committing of crimes – and so criminal law is instituted to combat this, and following the Eighth and, Fourteenth Amendments, a check is placed against any “experience of evils” that the federal and state government may impose upon individuals and groups within the jurisdiction of the

United States. Any unjustified actions of both the federal and state governments can be counteracted with an evolved understanding of what constitutes ‘legitimate’ penological policies, and to help formulate this principle, the US Supreme Court has observed that the Eighth Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”¹¹ In *Trop v. Dulles*, Chief Justice Warren

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stated that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,”¹² and this evolutionary principle was also expressed by Justice Stewart in *Robinson v. California*, as “in the light of contemporary human knowledge.”¹³ Consequently, the meaning of the US Constitution is not merely frozen in the past to be applied in the present, but it also reveals the possibilities of the future in “what may be.”

Producing a Legal Classification of the ‘Worst of the Worst’

Following the early cases considering the constitutionality of the death penalty,¹⁴ in *Furman v. Georgia* (1972), the US Supreme Court held that state capital statutes as they were then applied did not provide the

adequate guiding standards demanded by the Eighth Amendment.¹⁵ Within a plurality decision, the Court held that the death penalty was applied in an arbitrary way and was therefore capricious. Four years later, following the modification of state capital statutes, the US Supreme Court held, in *Gregg v. Georgia*, that

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the death penalty was constitutional as long as it followed a bifurcated process of firstly establishing the guilt or innocence of an individual and then, if found guilty, a sentencing phase, which would determine the appropriate sentence, including the possibility of a death penalty.¹⁶ In the sentencing phase, the prosecution presents ‘aggravating factors’ as to why an individual should be sentenced to death (these include *inter alia*, multiple homicide, homicide committed during other felonies, and contract killings¹⁷), and the defence presents ‘mitigating factors’, to demonstrate the appropriateness of a lesser sentence (these include *inter alia*, mental and emotional disorders¹⁸). In *Gregg*, the US Supreme Court thought that a constitutionally permissible capital judicial system could be created by state legislatures. However, over the following thirty-five years, the US Supreme Court has reduced the class of persons for which the death penalty may be implemented, and the punishment should now only be “limited to those offenders who commit a ‘narrow category of the most serious crimes’ and

whose extreme culpability makes them the most deserving of execution.”¹⁹ Hence the death penalty is viewed as only being *necessary* for such criminals.

There are serious questions as to the clarity and workability of the aggravating and mitigating circumstances established since *Gregg*, and if the jury cannot adequately understand the meaning of the two circumstances in the sentencing phase, there is a real possibility of arbitrary executions being administered again. The American Bar Association, which issues reports assessing state capital judicial systems, has identified various flaws in the statutory definitions of capital murder and concluded that states “cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought and imposed.”²⁰

On 15th April 2009, the American Law Institute identified that there is real concern as to whether state capital statutes “meet or are likely ever to meet basic concerns of fairness in process and outcome,” and significantly that there was an inherent problem with regards to “the tension between clear statutory identification of which murders should command the death penalty and the constitutional

requirement of individualized determination,” and the “difficulty of limiting the list of aggravating factors so that they do not cover a large percentage of murderers.”²¹

Consequently, a relevant analogy can be drawn from First Amendment freedom of speech cases and the Equal Protection Clause of the Fourteenth Amendment.²² In *Winters v. People of State of New York*,²³ the clarity of the statutory definition for public policy considerations concerning the dissemination of published materials that were “sanguinary or salacious publications with their stimulation of juvenile delinquency”²⁴ was considered. The Court held that if statutes are drafted using imprecise language, the text may be a “denial of due process for uncertainty,”²⁵ and if a “statute uses words of no determinative meaning,” it is “void for uncertainty.”²⁶ There is now gathering a hegemonic school of thought rebutting the claim that the state capital judicial systems provide clear sentencing guidance, and thus the statutes may be viewed as “void for uncertainty.”

Such uncertainty is inherent within the qualitative observations for identifying who is the ‘worst of the worst’ criminal who commits the most serious crimes. The boundaries of the worst of the worst become blurred, and different people will have different opinions because the classification of this person is inherently a value judgment. There will thus be a possibility of inconsistency within the jury deliberations. Katherine Polzer and Kimberly Kempf-Leonard, having interviewed jurors in capital cases, conclude that, on the whole, jurors do not understand the definitions of the various aggravating and mitigating circumstances, and that the “penalty phase decision making process is complex and riddled with errors, incorrect assumptions and difficult and lengthy instructions.”²⁷ Pozler and Kempf-Leonard argue that there is inconsistency in jury consideration of aggravating and mitigating circumstances, and that “there is no measure for how humans perceive and process certain information.”²⁸

There will be a possibility that the jury thinks that the aggravating and mitigating circumstances are evenly balanced. In such a case, the logical conclusion is that this individual cannot fall into the ‘worst of the worst’ category because there are substantial reasons for demonstrating a lower moral culpability for the crime. However, the US Supreme Court thought otherwise in *Kansas v. Marsh*. The jury imposed a death sentence after finding that the aggravating and mitigating circumstances were balanced, but the court allowed the decision to stand. The dissenting opinion of Justice Souter, joined by Justices Stevens, Ginsberg, and Breyer, reveals the injustice in such a case when he stated:

the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal, in a combination heinous enough to demand death. It operates, that is, when a jury has applied the state’s chosen standards of culpability and mitigation and reached nothing more than what the Supreme Court of Kansas calls a “tie.”²⁹

Justice Souter also affirmed this principle in *Atkins v. Virginia* and *Roper v. Simmons*, that “within the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst,’”³⁰ but he held that the current evidence was that the US capital judicial system continued the “kaleidoscope of life and death verdicts that made no sense in fact or morality in the random sentencing before *Furman* was decided in 1972.”³¹ The research by Jonathan Simon and Christina Spaulding supports this view as they note that the extent to which defendants are

identified as “death eligible,” both pre- and post-*Furman*, is almost indistinguishable.³² If it is only necessary to execute the ‘worst of the worst,’ it will always be an impossible quest because it signifies a search for an elusive individual. The US capital judicial system provides a heightened scrutiny of capital cases, because ‘death is different,’ yet it cannot provide a foolproof class of criminals for whom the penalty should be reserved, and so the system constantly has the shadow of arbitrary executions hanging over it. Justice Blackmun was illuminating in his famous dissent against the denial of *certiorari* in *Callins v. Collins*, when he stated:

[i]t is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants “deserve” to die? – cannot be answered in the affirmative.³³

In extending this damning observation, Justice Stevens in *Baze v. Rees* claimed:

that current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the cost and risks of administering³⁴ that penalty against its identifiable benefits.

Allowing the death penalty to remain merely because it is the product of “habit” and “inattention” is unacceptable. It does not adhere to the calls of those, from Samuel Livermore through to the present American voices of reason, who have adequately demonstrated the ineffectiveness and inhumanity of the punishment. In effect, it may be observed that the US capital judicial system has failed under the severe interpretive and adjudicative pressures that capital cases bring to bear. It is perhaps true that the United States has developed the most technical capital judicial system ever created, and even though the death penalty is one of the most litigated issues within US constitutional law, what remains, according to Justice Stevens, are “faulty assumptions” and an unacceptable “deliberative process.” Robert Cover argued that it is:

[b]ecause in capital punishment the action or deed is extreme and irrevocable, there is pressure placed on the word . . . the fact that

capital punishment constitutes the most painful, the most deliberate, and the most thoughtful manifestation of legal interpretation as violence makes the imposition of the sentence an especially powerful test of the faith and commitment of the interpreters.³⁵

Justice Blackmun and then Justice Stevens had lost faith, and there is further evidence of a growing

apostasy. The commitment of the judiciary and indeed state legislatures to the capital judicial system is waning. Currently, thirty-three states retain the death penalty as a possible criminal punishment,³⁶ and although there is a minority of seventeen states that abolished it, there is a recognisable unease with the punishment.³⁷ The Death Penalty Information Center records that both death sentences and execution rates in the United States have been diminishing over the past decade. In 2005, there were 138 death sentences across the country, and this number continued to decline in 2006 (122), 2007 (119), 2008 (111), and 2009 (106).³⁸ In 1999, there were 98 executions, with a steady decrease afterward in 2005 (60 executions), 2006 (53), 2007 (42), and 2008 (37). The year 2009, however, witnessed an increase to 52.³⁹ Most executions are confined to a select few states with Texas at the apex. Since 1976, there have been 1,212 executions in the United States, but Texas has accounted for 458 of these state-sanctioned deaths. American exceptionalism appears to have been replaced with Texas' exceptionalism, although this may be unfair to Texas as a whole, because Adam Gershowitz has demonstrated that it is only a few of the 254 counties in Texas that impose the death penalty.⁴⁰

The punishment is becoming increasingly expensive. Both the findings of state commissions on the death penalty and independent research have revealed the spiralling costs of the capital judicial system. When Governor Richardson of New Mexico signed the law to abolish the death

penalty in this state in 2009, he noted the exponential costs of the death penalty and stated that the fiscal issue was "a valid reason" for the removal of the death penalty;⁴¹ he was also

concerned about the possibility of innocent people being executed.⁴² In California, the cost of the death penalty is becoming

an increasingly contentious issue. Since the reinstating of the death penalty in California in 1976, there have been 13 executions, and this state currently houses the largest state death row population of more than 670 inmates.⁴³ *The New York Times* has reported that the California capital judicial system and death row costs \$114 million per

year more than it would cost if these 670 were imprisoned without death sentences.⁴⁴ The Death Penalty Information Center is collating information on the fiscal issues and affirms that in Kansas, "the costs of capital cases are 70% more expensive than comparable non-capital cases, including the costs of incarceration"; in North Carolina, the death penalty amounts to "\$2.16 million per execution over the costs of sentencing murderers to life imprisonment." In Florida, the death penalty is "\$51 million a year above what it would cost to punish all first-degree murders with life in prison without parole," and in Texas, "a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years."⁴⁵ It is clear that the death penalty is placing an unnecessary financial burden on state budgets.

Hugo Bedau and the 'Minimal Invasion Principle'

We may recognise a significant congruence of intellectual opinion between Samuel Livermore and Hugo Bedau – or perhaps it may be more accurate to state that Bedau has continued and improved

Livermore's opinions recorded in the Annals of Congress. At the drafting of the Eighth Amendment, Samuel Livermore recognised the role of necessity in punishment; he conceded that "it is sometimes necessary to hang a man,"⁴⁶ but then went on to indicate that the existence of the death

penalty should only be contingent on there not being the invention of "a more lenient mode of correcting vice and deterring others from the commission of it." Once such penological

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mechanisms had been created, the death penalty could be done away with because it would be “very prudent in the Legislature to adopt” these more lenient measures.

Hugo Bedau has revealed that this evolution in criminal justice and penology has now happened. Imprisonment is now an adequate punishment for the imposition of retribution, and the incarceration mechanisms are an adequate means of deterrence.

Hence, a fair and humane prison system can be viewed as a more lenient and thus legitimate means of punishment, and the death penalty becomes merely a “gratuitous infliction of suffering.”⁴⁷ Bedau has articulated this assessment of legitimacy through a measurement of the interference in a criminal’s

life necessary to achieve the aims of penology and the governmental policies for the protection of society. He terms this measurement the “minimal invasion principle.”⁴⁸ Bedau argues that if governments are democratic, they must justify their punishment practices and that the “only justification available is that it is a necessary means to a fundamental social goal”⁴⁹ as:

[g]iven a compelling state interest in some goal or purpose, the government in a constitutional democracy built on the principle of equal freedom and human rights for all must use the least restrictive means sufficient to achieve that goal or purpose.⁵⁰

Hence a specific punishment practice is justified only if there are no alternatives that are “less invasive.” In applying this principle to the death penalty, Bedau sets it out as:

1. Punishment is justified only if it is necessary as a means to some socially valid end.
2. The death penalty is more severe – more invasive – than long-term imprisonment.
3. Long-term imprisonment is sufficient as an invasion of individual liberty, privacy, and autonomy (and other fundamental values) to achieve valid social goals.
4. Society ought to abolish any lawful practice that imposes more violation of individual liberty, privacy, or autonomy (or other fundamental value) when it is known that a less invasive practice is available and is sufficient.⁵¹

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Bedau concluded with the words: “Society ought to abolish the death penalty.” He has most effectively demonstrated that Livermore’s observation that the death penalty becomes unnecessary once more lenient (but also effective) methods of punishment are created is now fulfilled because of the availability of long term secure imprisonment. A fixed term of imprisonment that does not extend to life without parole is a sufficient and effective punishment. A humane incarceration system makes the death

penalty unnecessary and renders it a gratuitous infliction of violence on the human body. In addition, the arguments presented in this chapter have attempted to demonstrate that because the death penalty is not necessary for the preservation of the security of the state, it should be viewed as serving no “socially valid end,” as

expressed in Bedau’s point 1 presented earlier. Furthermore, if the death penalty is becoming too expensive, it may also become an illegitimate financial drain because this money could be redistributed for “socially valid ends,” such as healthcare.

Conclusion

Along with the human rights rationale for the abolition of the death penalty, it is seen that globally, a vast majority of governments do not view the death penalty as a necessary tool for the protection of its citizens from ordinary crimes; it is also ineffective as a means of state security in war and terrorist attacks. Following 9/11 and the continued terrorist attacks around the world, instead of there being a global embrace of the death penalty, there has been a clear absence of this punishment. The OSCE focuses on maintaining security within its participating states and has witnessed the rejection of the death penalty as an integral tool for its fundamental aim; thus the death penalty is not necessary for the maintenance of global security. As such, we can see that there is a growing governmental expression at the United Nations, the Council of Europe, the European Union, and the OSCE that the death penalty is no longer a legitimate manifestation of sovereign power. The United States should join the abolitionist community and take part in the global movement for the eradication of this repugnant punishment. Indeed, the United States’ membership in this most noble club would be a significant event for a world free of the death penalty, and would represent the closing of the final act in the *severing* from sovereignty the right to impose this outdated punishment.

- ¹ Per Justice Douglas, in *Furman v. Georgia*, 408 U.S. 238, 244 (1972). In *Furman*, Justice Brennan considered the drafting debates and stated, “Livermore, Holmes and Henry agreed that the Cruel and Unusual Punishments Clause imposed a limitation upon the legislative power to prescribe punishments,” and that “we cannot now know exactly what the Framers thought ‘cruel and unusual punishments’ were . . . nor did they intend simply to forbid punishments considered ‘cruel and unusual’ at the time. The ‘import’ of the Clause is, indeed, ‘indefinite’ and for good reasons.” Justice Scalia outlined the influence of the English Bill of Rights on the Clause when he stated, in *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991), “the entire text of the Eighth Amendment is taken from the English Declaration of Rights, which provided, ‘that excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishment inflicted.’” See also Robert J. McWhirter, *Baby, Don’t Be Cruel: What’s So “Cruel and Unusual” about the Eighth Amendment?*, 46 *Arizona Attorney* 12 (December 2009).
- ² Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 *Wash. U. L. Rev.* 567, 573 (2010).
- ³ *Annals of Congress*, 1, 754 (1789), cited in *Furman supra*, p. 244.
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ Louis P. Masur, *rites of Execution: Capital Punishment and the Transformation of American Culture, 1776–1865* 61 (New York: Oxford University Press, 1989). See also Austin Sarat, *When the State Kills* 17.
- ⁷ Hugo Bedau notes that, “as early as 1787 Dr. Benjamin Rush . . . lectured and wrote against public executions,” in Hugo Adam Bedau, *The Death Penalty in America: Current Controversies* 5 (New York: Oxford University Press, 1997).
- ⁸ Cited in Hugo Adam Bedau, “An Abolitionist’s Survey of the Death Penalty in America Today,” in Hugo Bedau and Paul Cassell (eds), *Debating the Death Penalty: Should America Have Capital Punishment?* 16 (New York: Oxford University Press, 2004).
- ⁹ In 1791–1792, Thomas Paine published *Rights of Man*, and Part One was dedicated to George Washington. President Andrew Jackson was greatly influenced by the text. Regarding the death penalty, Paine stated (at page 213): “[L]ay the axe at the root, and teach governments humanity. It is their sanguinary punishments which corrupt mankind.” In 1793, Paine made a similar argument in France for the preservation of the life of Louis Capet in, “Reasons for preserving the life of Louis Capet” (1793). Both texts are found in Michael Foot and Isaac Kramnick (eds), *Thomas Paine Reader* (London: Penguin Books, 1987).
- ¹⁰ *Weems v. United States*, 217 U.S. 349, 373 (1910); applied in *Furman v. Georgia, supra* at 420, *Robinson v. California, supra* at 666. See also, Pressly Millen, *Interpretation of the Eighth Amendment: Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 *Duke L. J.* 784 (1984); William C. Hefferman, *Constitutional Historicism: An Examination of the Eighth Amendment Standards of Decency Test*, 54 *Am. U. L. Rev.* 1355 (2005); Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 *Pepp. L. Rev.* 661 (2004).
- ¹¹ *Weems, supra* at 378.
- ¹² *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
- ¹³ *Robinson v. California*, 370 U.S. 660, 666 (1962).
- ¹⁴ See *Wilkerson v. Utah*, 99 U.S. 130 (1878), where death by firing squad was held to not violate the Eighth Amendment; *In re Kemmler* 136 U.S. 436 (1890), electrocution as a method of execution did not violate the Eighth Amendment; *McElvaine v. Brush*, 142 U.S. 155 (1891) and *Trezza v. Brush*, 142 U.S. 160 (1891), holding it was not a violation of the Eighth Amendment to isolate an inmate while awaiting execution.
- ¹⁵ *Furman v. Georgia*, 408 U.S. 238 (1972).
- ¹⁶ *Gregg v. Georgia*, 428 U.S. 153, 164 (1976).
- ¹⁷ See Franklin Zimring, *The Contradictions of American Capital Punishment* 9 (New York: Oxford University Press, 2003).
- ¹⁸ *Id.*
- ¹⁹ *Atkins v. Virginia*, 536 U.S. 304 (2002), affirmed in *Roper v. Simmons*, 543 U.S. 551, 568 (2005), and *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2650 (2008).
- ²⁰ American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: the Georgia Death Penalty Assessment Report, 2006, Executive Summary*, p. v. See the American Bar Association website for the reports at www.aba.net, and the evaluation of the reports in Hood and Hoyle, *The Death Penalty* 121–22.
- ²¹ The American Law Institute, *Report of the Council to the Membership of The American Law Institute on the Matter of the Death Penalty* 5 (April 15, 2009).
- ²² For example, see the cases concerned with the freedom of the press; *Stromberg v. People of State of California*, 283 U.S. 359 (1931); *Herndon v. Lowry*, 301 U.S. 242 (1937).
- ²³ *Winters v. People of State of New York*, 333 U.S. 507 (1948).
- ²⁴ *Id.* at 510.
- ²⁵ *Id.* at 512.
- ²⁶ *Id.* at 516–17, citing *State v. Diamond*, 27 *N. Mex.* 477 (1921).
- ²⁷ Katherine Polzer and Kimberly Kempf-Leonard, *Social Construction of Aggravating and Mitigating Factors: How Capital Jurors Attribute Blame*, 45 *No. 6 Crim. L. Bull. Art.* 4.
- ²⁸ *Id.*
- ²⁹ *Kansas v. Marsh*, 548 U.S. 163, 206 (2006).
- ³⁰ *Id.* at 206, citing *Roper v. Simmons, supra* at 568, affirming Justice Stevens in *Atkins v. Virginia, supra* at 319: “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”
- ³¹ Per Justice Souter, in *Kansas v. Marsh, supra* at 207.
- ³² See Jonathan Simon and Christina Spaulding, “Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties,” in Austin Sarat (ed), *The Killing State: Capital Punishment in Law, Politics, and Culture* 87 (New York: Oxford University Press, 1999).
- ³³ *Callins v. Collins*, 510 U.S. 1141 (1994).
- ³⁴ *Baze v. Rees*, 128 S.Ct. 1520, 1546 (2008). Justice Stevens then cited *Gregg* and stated, “we explained that unless a criminal sanction serves a legitimate penological function, it constitutes ‘gratuitous infliction of suffering’ in violation of the Eighth Amendment,” *id.* at 1547, and Justice Stevens affirmed this principle in *Thompson v. McNeil*, 129 S.Ct. 1299, 1300–1301 (2009).
- ³⁵ Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1622 (1986). See also Austin Sarat (ed), *Pain, Death and the Law* (Ann Arbor: The University of Michigan Press, 2001). See also *Gregg v. Georgia, supra* at 226: “Imposition of the death penalty is

surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." This cannot be satisfactory.

- ³⁶ The thirty-three retentionist states are: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. The death penalty is also included within the US government's federal jurisdiction, and under military law.
- ³⁷ The seventeen abolitionist states are: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and also the District of Columbia.
- ³⁸ Source – Death Penalty Information Center, Facts about the Death Penalty, May 28, 2010.
- ³⁹ *Id.*
- ⁴⁰ See Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 Vand. L. Rev. 307, 308-09 (2010).
- ⁴¹ See Ian Urbina, "Citing Costs, States Consider the End of the Death Penalty," *The New York Times*, February 24, 2009, at A1.
- ⁴² Scherzer, "The Abolition of the Death Penalty," p. 254. For a detailed analysis of actual innocence claims, and the complex judicial hurdles needed surmounting in order to bring an innocence claim, see Jonathan

Aminoff, *Something Very Wrong Is Taking Place Tonight: The Diminishing Impact of the Actual Innocence Exception for the Death Penalty*, 46 No. 1 Crim. L. Bull. Art. 4 (2010).

- ⁴³ Death Penalty Information Center, Facts about the Death Penalty, May 28, 2010.
- ⁴⁴ See Editorial, "High Cost of Death Row," *The New York Times*, September 27, 2009, at A22.
- ⁴⁵ These figures are found in Death Penalty Information Center, Facts about the Death Penalty, May 28, 2010.
- ⁴⁶ *Annals of Congress*, 1, 754, (1789), cited in *Furman v. Georgia*, *supra* at 244.
- ⁴⁷ In *Gregg v. Georgia*, *supra* at 183, it was held that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Justice Stevens affirmed this principle in *Thomson v. McNeil*, when he held, "[i]t would therefore be appropriate to conclude that a punishment of death after significant delay is "so totally without penological justification that it results in the gratuitous infliction of suffering." 129 S.Ct. 1299, 1300 (2009). See also *Johnson v. Bredensen*, 130 S.Ct. 541 (2009).
- ⁴⁸ See Hugo Adam Bedau, *The Minimal Invasion Argument Against the Death Penalty*, Criminal Justice Ethics, June 22, 2002; Hugo A. Bedau, "An Abolitionist's Survey of the Death Penalty in America Today," in Hugo Bedau and Paul Cassell (eds), *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT?* 32 (New York: Oxford University Press, 2004). See also Hugo A. Bedau, *KILLING AS PUNISHMENT: REFLECTIONS ON THE DEATH PENALTY IN AMERICA* 142-58 (Boston: Northeastern University Press, 2004).
- ⁴⁹ Bedau, *AN ABOLITIONIST'S SURVEY OF THE DEATH PENALTY IN AMERICA TODAY* 35.
- ⁵⁰ *Id.* at 32.
- ⁵¹ *Id.* at 33-34.