

8th Amendment: *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

8th amendment cases:

Wilkerson v. Utah (1878)--upheld death by firing squad and hanging, but commented that drawing and quartering, public dissecting, burning alive and disemboweling were cruel and unusual.

These “punishments of torture” are forbidden by 8th.

Weems v. U.S. (1910)--Weems was given 12 years in shackles with hard labor for falsifying documents. Court ruled it was excessive and disproportionate, and so violated 8th.

Trop v. Dulles (1958)--Court ruled that expatriation violated 8th

Robinson v. California (1962)--ruled that California’s law making drug addiction criminal was excessive/disproportionate.

Coker v. Georgia (1977)--Death penalty for rape violates 8th

Rummel v. Estelle (1980)--upheld life sentence for three-time felon for fraud totaling \$230.

Lockyer v. Andrade (2003)--upheld a 50-life sentence of three-time felon who stole videotapes worth a total of \$150.

Atkins v. Virginia (2002)--execution of mentally retarded

violates 8th.

Roper v. Simmons (2005)--execution of juvenile offenders (under 18) violates 8th.

Furman v. Georgia (1972)--Ruled the death penalty violated 8th. 5-4 decision with no majority opinion, but 5 separate opinions. Result was mass confusion. Brennan and Marshall seem to suggest it's cruel and unusual in principle. Stewart, White and Douglas focused more exclusively on its application.

Gregg v. Georgia (1976)--Court clarified its Furman ruling by making it clear that death penalty is not cruel and unusual in principle, and is constitutional if appropriate guidelines and safeguards are in place.

Woodson v. North Carolina (1976)--Mandatory death penalty statutes are unconstitutional. Must have individualized consideration of sentencing.

McClesky v. Kemp (1987)--Court ruled that statistics showing racial bias in capital cases is not relevant to the constitutionality of the particular case.

Herrera v. Collins (1993)--Claims of actual innocence are not grounds for habeas relief. It would interfere with the "need for finality in capital cases."

Brennan on the 8th amendment:

A punishment is cruel and unusual if:

- (1) It degrades human dignity
 - (a) inherently degrading (torture)
 - (b) grossly disproportionate

OR

- (2) It is inflicted arbitrarily or capriciously

OR

- (3) It is rejected as wrong or unjust by society

OR

- (4) It is unnecessary or ineffective

Brennan thinks the death penalty fails on all counts.

How should we interpret the 8th amendment?

Literalism--a punishment only violates 8th if it involves great suffering AND it occurs infrequently. That is, it is literally cruel and unusual.

On the view, the worst torture imaginable could pass the 8th amendment test provided it was done often enough to not be unusual. But if the 8th rules out anything, surely it's torture.

Historical authority--a punishment violates the 8th only if it is a punishment that was recognized as cruel and unusual at the time the amendment was enacted.

If a punishment was found to be cruel and unusual at the time, surely it was so for some reason, or because it has some property, *P*, that makes it C & U. But if we now find another punishment that also has *P*, surely it is C & U too, even if it wasn't thought so at the time.

Consensus test (Brennan's #3)--a punishment is cruel and unusual if it's rejected by society.

This is a horrible way of interpreting 8th amendment. The Bill of Rights is anti-majoritarian. That is, the amendments place constraints on what majorities may do. It is irrational, and defeats the purpose of the Bill of Rights to allow a consensus to determine the content of these restraints.

Utilitarian interpretation (Brennan's #4)--a punishment is cruel and unusual if it is unnecessary. That is, it's C&U if a lesser punishment could have accomplished the same end, e.g. deterrence or prevention.

This also seems like a bad way of interpreting 8th amendment. The Bill of Rights is deontological. That is, the point of the amendments is to put constraints on what may be done in pursuit of other social goals. This interpretation seems to suggest that a punishment would cease to be cruel and unusual if it accomplished something important. But surely torture doesn't become okay even if it deters. There are some things you just can't do to people. That's the point of the Bill of Rights

Degrading to human dignity (Brennan's #1)--a punishment violates 8th if it is inherently degrading or grossly disproportionate.

This seems more promising. It proposes a deontological constraint on what we may do when punishing someone. But is the death penalty inherently degrading or grossly disproportionate?

Is it inherently degrading? consider torture. Can you respect a person's dignity while attaching electrodes to his genitals and sending electric shocks through his body? Seems unlikely. Torture is supposed to cause pain and suffering. That's the point of it. It is, almost by definition, degrading to human dignity, since the point is to reduce the person to the level of an animal. It's a paradigm case of not treating a person as a person.

So is death like that? Not necessarily. We can execute someone while at the same time showing respect for them as a person. Consider Socrates' death. Or consider the phrase "death with dignity." It makes sense in a way "torture with dignity" does not, suggesting that it is possible to kill someone in a dignified way. If so, it's not inherently degrading, even if some of the ways we actually execute people are.

Is it disproportionate? First, why is disproportionate punishment degrading to human dignity? Because as a person, your punishment ought to be addressed to that

status, and to the individual, autonomous conduct that you're being punished for. When punishment is disproportionate, you are not being treated as you deserve, you are being punished for something beyond that for which you are responsible.

So is death penalty disproportionate? Doesn't seem to be, and as some of you have suggested, if anything, it's too little punishment for some crimes.

Taking stock: #3 and #4 seem irrelevant to determining whether a punishment is cruel and unusual. #1 seems relevant, but doesn't rule out the death penalty. That leaves us with #2.

Is DP applied arbitrarily?

Racial bias and the death penalty

The Baldus Study--examined 2,000 Georgia murder cases in the 1970s. Found that:

- DP in 11% of cases with white victim
- DP in 1% of cases with black victim
- DP in 22% of cases with black defendant and white victim
- DP in 8% of cases with white defendant and white victim
- DP in 1% of cases with black defendant and black victim
- DP in 3% of cases with white defendant and black victim
- odds of receiving DP are 4.3 times greater when victim is white

Maryland Study:

<http://www.newsdesk.umd.edu/pdf/exec.pdf>

Other studies have been done in a number of other states, all with similar findings.

So what? How, exactly, does this constitute an argument against the death penalty?

This was the issue in *McClesky v. Kemp* (1987). The court accepted the findings of the Baldus study, but denied McClesky's appeal in a 7-2 ruling.

“Despite McClesky's wide ranging arguments that basically challenge the validity of capital punishment in our multi-racial society, the only question before us is whether in *his* case the law of Georgia was applied properly.”

So the study doesn't show any racial bias in his particular case.

“McClesky cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty.”

The fact that others are treated differently doesn't show that he is being treated unfairly or unjustly. He is, after all, a convicted killer who is not contesting his actual guilt. Even if others are treated differently, he's getting what he deserves.

Responses to the court's arguments in McClesky:

1. It's unlikely that defendants will be able to show overt racism in particular cases. What, exactly, would this require anyway? Finding judges or juries openly flaunting their racist credentials? That seems unlikely to happen. Racism, and racial biases, especially today, are more likely to show up in more subtle ways, perhaps even subconscious ways.

Prosecutors, judges and juries may not consciously think that killing a white person is worse than killing a black person, but they might nonetheless act and think with such an "implicit" bias in mind.

If so, the only way these biases are likely to show up are through statistical analyses, like the Baldus study.

2. Comparative vs non-comparative justice.

Non-comparative--when you get what you deserve. when you get the punishment that "fits" the crime you committed.

Comparative--when you're treated the same as others who behave similarly.

The court seems to suggest that only non-comparative justice matters. This seems mistaken. You can be treated unjustly even when you "get what you deserve," if others are not treated similarly. Full justice is when both are satisfied.

Consider this: You all deserve 'C's on your next test. That is the grade that is most fitting for your performance. But I give A's to my favorite students, or to the white students, or to the males, or to the students with blue eyes, etc. If you're not in one of my favored groups, do you have a complaint?

It seems to me you do. You have been treated unjustly, despite getting what you deserve.

So if there is systematic arbitrariness in the system, then there is going to be injustice, likely of both kinds. Some criminals will get less than they deserve, some will get more, and none will be treated with comparative justice.

Hey, wait. Isn't this a good argument against all punishment? There's likely arbitrariness in all punishments, and so injustice in all punishments, and so all are unjust. Right?

Not necessarily. The severity of the death penalty requires that we be more careful in its administration. Compare it to the way the law treats negligence.

Negligence--culpable carelessness. subjecting others to an unreasonable risk of harm.

Whether an act counts as negligent depends on two factors--the level of harm you subject others to and the social importance of the act.

As the level of harm goes up, so does the amount of care you

have to take. As the importance of the act goes up, the level of care comes down.

You have to be careful when driving a car because you might kill people. You have to be less careful when riding a bicycle, because the risk of serious harm is less. So driving too fast in your care might ordinarily be considered negligent. But the situation might change if you were driving a severely injured person to the hospital. The level of care you must take while driving decreases because the importance of what you're doing increases.

How does this apply to the death penalty? Well, the government is acting negligently if it fails to take proper care to avoid subjecting others to injustice. The risk of harm, or of injustice, in death penalty cases is more severe than in cases that only involve incarceration. So the standard of care is higher.

The only way to get the standard of care down is to show that there is significant social importance attached to the death penalty. This is why the deterrence argument becomes important. If it's not a deterrent, then it likely lacks the kind of social importance that would justify risking the unjust sentencing or execution of people.

The same does not apply to other forms of punishment, since the level of harm is less severe and, arguably, the social importance is greater.

Okay, but if we're worried about comparative justice, couldn't we fix this by killing *more* people? In other words, this is an argument for using it more, not abolishing it.

Well, maybe, provided it could be applied fairly and equally. The studies suggest this isn't happening, and I sense that it's unlikely to happen in the near future.

Perhaps making it mandatory would work, but the court has ruled that you can't do that, for that fails to treat each case on its individual merits, and each case is different and must be treated as such. So that's out.

The situation we are in is this: prosecutors, judges, juries, etc. must have discretion when prosecuting, deciding and sentencing cases. But when we give them discretion, the result is systematic racial bias, and perhaps other biases as well. This results in injustice, both comparative and non-comparative. Whether or not the injustice can be justified depends on the benefits we get from capital punishment. If there are no significant benefits, then our options are to eliminate the subtle and implicit biases that apparently abound within the judicial system or abolish the death penalty.

Eliminating the first seems unlikely, so that leaves us with the second.

Q.E.D.