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## Constitutional Issues In the New Millennium

Part II of IV

### The Eighth Amendment Project

*Cruel & Unusual Punishment In the US*

Introduction | Cruel & Unusual Punishment

Capital Punishment | Proportionality - Mandatory-Minimum Sentencing

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#### Leviticus 24: 17-20 (AMP)

And he that smiteth any man mortally shall surely be put to death. . . . And if a man maim his neighbor; as he hath done, so shall it be done to him; breach for breach, eye for eye, tooth for tooth; as he hath maimed a man, so shall it be rendered unto him.

#### Introduction

Cruel & Unusual Punishment In America

The Eighth Amendment to the United States Constitution reads:

*"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."*

#### Cruel and Unusual Punishment

Under the terms of the 8th Amendment, as interpreted by the United States Supreme Court, certain punishments are considered barbaric by definition and are therefore prohibited in all circumstances. In the 21st century, the Supreme Court has extended this prohibition to cover the execution of those below 18 years of age and of those who suffer from a mental handicap.

The Supreme Court has also ruled that other punishments should be considered cruel and unusual under specific circumstances. In particular, the Court has said that a principle of proportionality must be adhered to. In 1972, the U.S. Supreme Court in the case of **Furman vs. Georgia**, 408 US 238 (1972) effectively outlawed the use of capital punishment, however, four years later, in the case of **Gregg v. Georgia**, 428 U.S. 153 (1976) allowed executions to resume.

Only one year later, in **Coker vs. Georgia**, 433 US 584 (1977), the Supreme Court found it unconstitutional – on the grounds of a lack of proportionality – for those found guilty of the crime of rape, where the victim was not killed, to be sentenced to death.

In **Robinson v. California**, 370 U.S. 660 (1962), the Court ruled that it did apply to the states through the Fourteenth Amendment. *Before Robinson, the Eighth Amendment had only been applied against the federal government.*

The test for determining whether a particular punishment is cruel and unusual is:

1. "A severe punishment that is obviously inflicted in wholly arbitrary fashion."
2. "A severe punishment that is clearly and totally rejected throughout society."
3. "A severe punishment that is patently unnecessary."

The "essential predicate" is "that a punishment must not by its severity be degrading to human dignity," especially torture.

## Capital Punishment

Capital punishment has, in the past, been practiced by most societies, as a punishment for criminals, and political or religious dissidents. Historically, the carrying out of the death sentence was often accompanied by torture, and executions were most often public.

Currently 58 nations actively practice capital punishment, 98 countries have abolished it *de jure* for all crimes, 7 have abolished it for ordinary crimes only (maintain it for special circumstances such as war crimes), and 35 have abolished it *de facto* (have not used it for at least ten years and/or are under moratorium). Amnesty International considers most countries abolitionist; overall, the organization considers 140 countries to be abolitionist in law or practice. About 90% of all executions in the world take place in Asia.

Nearly all countries in the world prohibit the execution of individuals who were under the age of 18 at the time of their crimes; since 2009, only Iran, Saudi Arabia, and Sudan have carried out such executions. Executions of this kind are prohibited under international law.

The United Nations General Assembly has adopted, in 2007, 2008 and 2010, non-binding resolutions calling for a global moratorium on executions, with a view to eventual abolition.

Public opinion on the death penalty varies considerably by country and by the crime in question, but in most countries a majority favors its use for [certain categories of] murder, despite evidence against its power as a deterrent.

## Proportionality

Mandatory-Minimum Sentencing

Traditionally, the length of a prison sentence was not subject to scrutiny under the Eighth Amendment, regardless of the crime for which the sentence was imposed. It was not until the case of **Solem v. Helm**, 463 US 277 (1983), that the Supreme Court held that incarceration, standing alone, could constitute cruel and unusual punishment if it were "disproportionate" in duration to the offense. The Court outlined three factors that were to be considered in determining if the sentence is excessive: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

However, in **Harmelin v. Michigan**, 501 US 957 (1991), a fractured Court retreated from the *Solem* test and held that for non-capital sentences, the Eighth Amendment only constrains the length of prison terms by a "gross disproportionality principle." Under this principle, the Court sustained a mandatory sentence of life without parole imposed for possession of 672 grams (1.5 pounds) or more of cocaine. The Court acknowledged that a punishment could be cruel but not unusual, and therefore not prohibited by the Constitution.

**Note:** Mandatory life sentences without parole cannot be imposed on minors, even for homicide. **Miller v. Alabama**, 567 US \_\_\_ (2012).

Always feel welcome to contact me directly with any questions, comments, or great ideas!

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