

## WHAT IS “CRUEL AND UNUSUAL”?

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The eighth amendment is a jurisprudential train wreck. Its proudly humane language banning “cruel and unusual punishments” may remain among the Bill of Rights’ most famous sound bites, but nobody today has the faintest clue what it means. The reason is as simple as it is sad: The Supreme Court’s case law has left the amendment without coherent meaning. No principle guides its reach. No methodology solemnly pronounced in any case do the justices predictably follow in the next. A punishment upheld today can be, without alteration, struck down tomorrow with no justice even admitting that his or her mind has changed. The justices no longer even pretend to examine whether a punishment offends the amendment’s textual prohibition. Instead they apply perhaps the single most impressionistic test ever devised by the court: whether the challenged practice has run afoul of “the evolving standards of decency that mark the progress of a maturing society.”<sup>1</sup> Unsurprisingly, nine judges of wildly different politics, temperaments, and backgrounds do not generally agree on the standards or the methodology for assessing society’s maturation, much less its substance. As a consequence, more than two centuries after its incorporation into the Constitution, the amendment has been rendered nothing more than a vehicle to remove from the policymaking arena punitive practices that offend a majority of the court at any moment in time.

The train wreck does not end there. Normally, when the court runs a major doctrinal area off the rails, a cogent line of dissent over time helps rationalize the errant line of cases by offering a more legally faithful, a more constitutionally stable, or simply a more sensible alternative. The Eighth Amendment has not proven so lucky. To be sure, the court’s conservative flank — led by Justice Antonin Scalia — has dissented from its emerging Eighth Amendment jurisprudence and has offered a compelling critique. It has even proposed a principled alternative — at the core of which lies the premise that the amendment’s protections are static and contain no evolutionary dimension whatsoever. As Scalia once poetically declared, “the Constitution that I interpret and apply is not living but dead — or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted.”<sup>2</sup>

In reality, however, this principle is not nearly as self-evident, at least in the context of the Eighth Amendment, as Scalia’s bombastic rhetoric would have one believe. It is, rather, somewhat implausible as a textual matter, uncertain as a historical matter, and utterly at odds not only with the court’s jurisprudence during its recent period of intellectual incoherence but with its entire century-long history of interpreting the amendment altogether. Moreover, Scalia’s reading would, in effect, render a major plank of the Bill of Rights a dead letter that protects Americans only against those punishments that are politically unthinkable anyway. The Eighth Amendment is thus trapped in a shouting match between the entirely inconstant and the most foolish of consistencies.

This stalemate by no means flows inexorably from some inherent defect in the amendment itself. Though its specific language presents some unique challenges, the text of the Eighth Amendment is no vaguer than the Fourth Amendment’s requirement that searches and seizures be “reasonable” or the Fifth Amendment’s demand that an individual’s life, liberty, and property be secure from government in the absence of “due process of law.” Yet in contrast to the Fourth and Fifth Amendments, where generations of case law have put meat on these rather bare constitutional bones, the Eighth Amendment’s key terms — “cruel” and “unusual” — remain almost entirely undefined. In their zeal to unravel how society’s standards of decency have evolved — or to snipe at how the court has done so — both sides in the debate seem to have forgotten what the words of the amendment actually say.

In my view, however, a potential key to rationalizing the Eighth Amendment lies in a jurisprudential return to those two words. For they in fact suggest an elegant two-part judicial examination: whether a challenged punishment is “cruel” — that is, needlessly and wantonly harsh and with some significant purpose

of inflicting pain or misery — and, if so, whether it is by some reasonably measurable standard “unusual” or rare. Such a return would place the amendment on a more principled footing that, even in acknowledging the amendment’s dynamic character, would both restrain judicial action and render it more predictable and less freewheeling.

I do not intend this essay as a doctrinal treatise expounding on Eighth Amendment jurisprudence, but rather as a kind of sketch of how it went awry and of how it can now be righted. In the first section, I look at the train wreck itself: how badly the court has foundered and how unacceptable the outcome should be even for those, like me, who find its results politically congenial. In the second part, I look at Justice Scalia’s crude alternative to the court’s path and argue that it is not viable, being both somewhat weaker than the justice contends as an original matter and being, in any event, at odds with the court’s entire history of interpretation of the amendment. In the final section, I attempt a brief outline of what a more textually rigorous approach to the amendment would look like.

### **Rank subjectivity**

Over the past few Supreme Court terms, the court has struck down capital punishment for the mentally retarded and for juvenile offenders, both practices it upheld as recently as 1989.<sup>3</sup> In both cases, as Scalia put it this year of the juvenile death penalty in *Roper*, the court was announcing its “conclusion that the meaning of our Constitution has changed over the past 15 years — not, mind you, that this Court’s decision 15 years ago was wrong, but that the Constitution has changed” (emphasis in original). One doesn’t have to share Scalia’s approach to the amendment to conclude, with him, that this will not do. The challenged practices, after all, had not changed. The court admitted no bottom-line error. In neither case could it point to more than incremental evolution in political attitudes toward these controversial punishments. A few more state legislatures had banned the practices and public opinion had moved somewhat. Foreign governments disapproved. Medical and psychological advances had taken place. Somehow, out of these transient developments, a supposed consensus is born.

The dishonesty of the court’s methodology makes it all the more frustrating. The court has never bothered to say how many states need to turn away from a practice before it becomes off-limits to other states. Nor, more broadly, has it ever specified what weight it grants to any particular factor in assessing whether a consensus has developed against a particular punishment. Nor does it even explain why it relies on certain factors while ignoring others in the first place. If American sources of law don’t by themselves form a consensus, the court feels free to consult foreign practice. It relies on scientific studies that support its position but leaves others out without comment. In the end, it’s hard to resist Scalia’s devastating conclusion that the court’s methodological approach “is to look over the heads of the crowd and pick out its friends.”

The court all but admits as much. In the juvenile death case this year, the objective indicia of a national consensus — the acts of state legislatures — just weren’t that strong. So the court relegated that inquiry to the “beginning point” of its review. “This data gives us essential instruction,” Justice Anthony Kennedy writes for the court in *Roper*. But “[w]e then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles” (emphasis added). In other words, at the end of the day, whether society can be reasonably deemed to have turned away from a punishment is less important than whether the justices have. The methodology for assessing an Eighth Amendment claim is simply to put all the factors into a pot, add whatever level of judicial discomfort the majority on the court feels toward that punishment at the current moment in time, let it all stew together, and then apply what Scalia in another context once called “that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ ol’ ‘totality of the circumstances’ test.”<sup>4</sup> Presto! The public finds out that what the Constitution permitted the year before, it now forbids — or not, as the case may be.

So the juvenile death penalty and the death penalty for the mentally retarded are now unconstitutional. Yet executing a florid schizophrenic can still pass constitutional muster, provided that the condemned is

aware of what is about to happen and why he is to suffer death.<sup>5</sup> Meanwhile, locking someone up for the rest of his life for shoplifting less than \$200 in videos under a California three-strikes law is okay.<sup>6</sup> On the other hand, locking someone up for life without parole under a recidivism statute in South Dakota for passing a bad check worth \$100 is unconstitutional.<sup>7</sup> In case that’s too clear, the court has also said that a life sentence under Texas’ recidivism law for fraudulently obtaining \$120.75 is just fine.<sup>8</sup>

Those sanguine about the state of Eighth Amendment law are apt to shrug at such doctrinal nonsense and treat the rank subjectivity of the court’s approach as somehow inevitable. Language as elastic as “cruel and unusual,” after all, invites judges to rule based on their own views, they say. But the development of the Eighth Amendment mess was not predestined by the amendment’s text. It flows, rather, from the court’s cop-out in the 1958 case of *Trop v. Dulles*. In *Trop*, the court considered a challenge to a federal law under which desertion from the military could be punished by revocation of citizenship. Instead of attempting to apply the language of the amendment itself, the court majority invented a kind of surrogate test, one that reflected the evolutionary quality of the Constitution’s words but defined their meaning in terms of the sociological and political development of the country rather than anything fixed and durable. “The Amendment,” Chief Justice Earl Warren fatefully wrote, “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

It is in this language, not in the amendment itself, that the invitation for judicial subjectivity lies. For exactly who is to decide — if not the reviewing judges — how far society’s maturation has progressed? The *Trop* test offers no hint of how broad a legislative consensus needs to be before the court can discover that society’s evolution bars the proposed punishment of an outlying state. If the acts of 49 state legislatures can bind the fiftieth, what about 48? What about 47? Why not a bare majority, supported by nearly uniform foreign practice? Why not, as Justice John Paul Stevens did in striking down the death penalty for the mentally retarded in *Atkins*, treat the raw numbers as less significant than “the consistency of the direction of change” — in other words, why not find a consensus in the fact that some states are doing away with a practice while no new ones are embracing it? For that matter, why does the consensus really need to be legislative at all? Why not a consensus of public opinion? Or elite opinion? Or merely an emerging consensus of one or the other? The court’s underlying doctrine contains barely a word that could constrain judicial discretion.

Scalia is particularly bitter about the court’s ever more apparent view that the amendment’s strictures depend chiefly on the subjective views of judges rather than on the enactments of democratically elected legislatures. “If the Eighth Amendment set forth an ordinary rule of law,” he argues in dissent in *Roper*, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of “the evolving standards of decency” of our society, it makes no sense for the Justices then to prescribe those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?

Scalia’s complaint is analytically sensible, but it seems a bit naive. Once the court declined in *Trop* to announce a coherent legal test and proposed instead that the amendment vaguely tracks the emerging political sensibilities of the country, the justices had crossed their Rubicon. It asks a great deal of judges to expect them not to equate those emerging political sensibilities with their own evolving attitudes. In other words, having stated the *Trop* principle, it is hardly a surprise that the court would rather swiftly eschew any methodology in assessing society’s evolution that restricts its own role to that of passively noticing a consensus agreed to by others. The *Trop* doctrine, quite simply, suffers from a birth defect, not a developmental one.

### **A dynamic amendment**

To his credit, Scalia does propose a principled alternative to the current morass. Unfortunately, his is the type of principle that gives principle itself a bad name. Scalia regards the Eighth Amendment as banning only those punitive practices it banned at the time of its adoption. The phrase “cruel and unusual punishments” to him “means not . . . ‘whatever may be considered cruel from one generation to the next,’ but ‘what we [the Amendment’s drafters] consider cruel today’ . . . . It is, in other words, rooted in the moral perceptions of the time” — that is, of the eighteenth century.<sup>9</sup>

For Scalia, therefore, constitutional inquiry under the Eighth Amendment is a simple matter. The amendment does not ban disproportionate punishments, no matter how grossly disproportionate, but merely “disables the Legislature from authorizing particular forms or ‘modes’ of punishment” — in other words, certain especially torturous deaths.<sup>10</sup> Life in prison for a parking infraction? No problem.<sup>11</sup> For Scalia writing in the journal *First Things*, “the constitutionality of the death penalty is not a difficult, soul-wrenching question. It was clearly permitted when the Eighth Amendment was adopted (not merely for murder, by the way, but for all felonies — including, for example, horse-thieving, as anyone can verify by watching a western movie). And so it is clearly permitted today.” What’s more, the amendment will tolerate just about any imposition of capital punishment, provided that the condemned is not drawn and quartered. As Scalia cheerfully noted in one opinion, at the time of the amendment’s adoption, “the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7.”<sup>12</sup> In other words, the Eighth Amendment would not be offended by executing a seven-year-old for not wearing a seatbelt.

One may be tempted to defend Scalia’s view on grounds that no state would actually contemplate the execution of a seven-year-old or life imprisonment for a parking offense, and therefore, it is a kind of academic game of gotcha to reject his principle for theoretically tolerating such moral offenses. But this is, in fact, precisely the point. In Scalia’s reading the only punishments the amendment would forbid are those that are politically unthinkable anyway. Scalia defends this reading on the grounds that if the amendment were truly dynamic in character, “it would be no protection against the moral perceptions of a future, more brutal, generation.”<sup>13</sup> But this argument is a red herring. Nobody contends that the amendment does not now and forever ban the barbarities of seventeenth-century English justice that gave rise to it originally — the torturous deaths inflicted under Stuart rule and banned after the Glorious Revolution in 1688.<sup>14</sup> The only question is which, if any, practices the nation has unalterably set its face against since the founding the amendment might also prohibit. If the answer is truly none, as Scalia would have it, then the amendment is nothing more than a historical relic, not an active protection against any government action imaginable in this or any other contemporary democracy.

Scalia could well be right as a matter of original interpretation that this is what the drafters of the amendment had in mind. Justice Joseph Story, an early commentator on the Constitution, treated the amendment as exactly this sort of historical oddity. The prohibition, he wrote,

would seem wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct. It was, however, adopted as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts.<sup>15</sup>

State court judicial interpretation of the amendment during the nineteenth century tended to favor Scalia’s view.

But the amendment’s text is a pesky thing. As constitutional scholar John Hart Ely elegantly put it, its language seems “insistently to call for a reference to sources beyond the document itself and a ‘framers’ dictionary.” While it is possible, he acknowledges, to construe the provision as Scalia does, “that con-

struction seems untrue to the open-ended quality of the language.”<sup>16</sup> Indeed, as a textual matter, construing “cruel and unusual punishments” as strictly as Scalia does is a little like construing the right to keep and bear arms as limited to such eighteenth-century firearms as muskets. Scalia is dismissive of the notion that the reference point for cruelty might be a contemporary one rather than the framers’ own reference points. But the framers of the amendment were well aware of the breadth of the language they used. Had they intended to outlaw a specific series of practices, they could easily have elaborated them. Even had they intended to prohibit gratuitously painful deaths or tortures — the general category of Stuart-era cruelty — they could have specified that too. Instead, they chose language — variants of which were already common in state constitutions — that, as Ely puts it, “invite[s] the person interpreting it to freelance to a degree.” The choice was not in any sense a departure from the rest of the amendment, which, after all, also prohibits “excessive” bail and fines — two clauses that similarly seem to beg for a measure of judgment. Surely the excessiveness of a fine is not to be measured in 1791 dollars. As a purely textual matter, it is hard to see why a punishment’s unusualness should be more frozen in time.

Nor is the history of the amendment quite so clear as Scalia contends. It received very little debate during the First Congress. But at least some members worried about the vagueness of its language. One, according to the Congressional Record, “objected to the words ‘nor cruel and unusual punishment,’ the import of them being too indefinite.” Another noted presciently in opposing the amendment that:

The 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. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine. No 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 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.<sup>17</sup>

In other words, the notion that the amendment may have a dynamic character based on changing judicial interpretation of its terms was not beyond the realm of the imagination of members of the Congress that sent it to the states for ratification.

Nor did judges prior to the court’s modern era uniformly adopt Scalia’s orthodox view. In an 1892 case, three Supreme Court justices — including the famed Justice John Marshall Harlan — dissented from a decision not to consider whether a Vermont conviction raised a question under the Eighth Amendment. The dissents, rejecting Story’s view (and Scalia’s), stood unambiguously for the proposition that the amendment banned, as Justice Stephen Field put it, “all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.”<sup>18</sup>

Scalia’s principle has another grave defect: It defies the entirety of the court’s history of interpretation of the amendment. This point bears some emphasis; it is not an exaggeration. Scalia’s view does not merely cut against the modern grain of Warren Court activism. It cuts against the whole of the court’s century-long interaction with the Eighth Amendment.

The court first authoritatively interpreted the “cruel and unusual punishments” language in a 1910 case called *Weems v. United States*. The court’s understanding of the amendment warrants quotation at length, for it illuminates just how long Scalia’s view has been just how decisively rejected. The “predominant political impulse” of the founders, wrote Justice Joseph McKenna,

was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say “coercive cruelty,” because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.

McKenna also wrote that the clause “may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice” (emphasis added). While the court did not return to the subject again for many years, it never repudiated this understanding, which is similar in character to the language it later articulated in *Trop*.

In other words, if the dynamic view of the Eighth Amendment is a deviation from the original understanding, it is neither of recent vintage nor some creature of modern liberal judicial activism. In my view, it is better understood as a plausible understanding of the text and its purpose made essential by the utter pointlessness of an Eighth Amendment limited to what may or may not be its narrow original construction. And, critically, the court — despite a consistent line of dissent — has never understood the amendment as the static restriction which Scalia insists it must be. If the notion of *stare decisis* — that is, the honoring of precedent that may have been erroneous as an original matter — has any meaning at all, surely the uninterrupted understanding of the court over the course of a whole century warrants respect.

### **Defining “cruelty” and “unusualness”**

There exists an alternative both to the unprincipled dynamic approach of the current court and the unfortunate principle Scalia articulates in response. That is, quite simply, to take the amendment's words seriously, to deem a punishment barred by the clause if it meets some coherent legal definition of both “cruel” and “unusual.” These are, after all, words with objective meaning, precisely the sort of words that, elsewhere in the Bill of Rights, have given rise to generations of case law that provide guidance to policymakers and lower courts. How exactly the courts should understand them is a tricky question. As a preliminary matter, however, it seems to me obvious that these two words — rather than the evolving standards of decency — ought to be the focal point of the court's inquiry in every case under the clause.

A jurisprudence under such an understanding would not be a freewheeling license for judicial intervention in democratic life, as is the current standard. A punishment could be barred only if it met some articulated definition of cruelty and if it were in some defensibly measurable sense rare. But neither is this reading of the Eighth Amendment a static one, as Scalia's is. It is conceivable, after all, that a punishment understood at one time to have a legitimate penal purpose has seen that purpose so eroded over time as to be rendered a simple act of cruelty; branding and the cutting off of ears come to mind. These were common at the time of the founding for a variety of minor offenses. Few today would describe their infliction as less than cruel. They are certainly unusual. Under Scalia's reading of the amendment, it seems to me that they must be upheld. As he put it about the death penalty, they would not even present “a difficult, soul-wrenching question. [They were] clearly permitted when the Eighth Amendment was adopted. [So they are] clearly permitted today.” A more textual, less historical approach would view them differently. They are cruel. They are unusual. They are consequently forbidden. Notice that the manner of society's evolu-

tion does not play a role in the analysis, which focuses instead on the qualities of the punishment in question.

Such a reading necessarily puts a premium on the question of the definitions of the two key terms. Neither is easy. Both could, if defined mischievously, provide exactly the license for judicial impressionism that the *Trop* test provides today. One man’s reasonable retributive justice, after all, is another’s cruelty; one man’s unusualness is another’s reasonable experimentation with a novel punitive practice. That said, neither term is especially vague by the standards of the sweeping generalities of the Bill of Rights. Without the benefit of argument in many cases with specific facts and the constructive process of application of precedent over time, it is impossible to articulate doctrine fully formed and well developed; constitutional doctrines, unlike Greek gods, do not leap from one’s head full grown, armor-clad, and battle ready. What is possible at this stage, however, is to sketch the outlines of plausible definitions that might guide a healthier doctrinal development.

The hallmark of cruelty, in my judgment, is the needless infliction of pain or suffering. Judging whether a punishment is cruel, therefore, requires an assessment of whether the suffering it entails is necessary for some legitimate government purpose or whether it is senseless. On its face, this inquiry is not a complicated one: A punishment reasonably tied to the goal of deterrence or disabling a criminal from further harm to society is not cruel, however unpleasant it may be. A punishment that goes beyond these goals to wanton violence, irrational harshness, gross disproportionality, or needlessly degrading humiliation can reasonably be described as cruel for constitutional purposes. The essential quality of the cruelty, in other words, is that the punishment in question goes somehow beyond any reasonable punitive purpose.

The chief concern about this definition (which is really more of a sketch of a definition), is that deterrence is an inherently gauzy and immeasurable concept. Breaking someone on the wheel naturally has more deterrent power than merely executing that person. A more modern example is that life in prison for a third felony conviction certainly has more deterrent power than a lesser sentence enhancement. In fact, longer sentences always have more deterrent power than shorter ones, at least in theory. The notion of deterrence as a legitimate government interest — which it certainly is — therefore has the capacity to swallow up the entire definition of cruelty. Where cruelty meets legitimate deterrence is one of the key questions case law would have to develop, and the risks of judicial impressionism here are not trivial. But neither are they prohibitive. The more extreme a punishment, the more difficult would be the governmental burden of demonstrating its reasonableness.

The pressure on this inquiry, in any event, would be ameliorated by the fact that it is only the threshold question. The amendment, after all, does not forbid every “cruel” punishment, only those that are also unusual. So even were judges to adopt a broad conception of cruelty relative to deterrence, their definition still would not give them a roving license to strike down punishments of which they disapproved. It would merely entitle them to render a preliminary negative legal-moral judgment and thereby proceed to assess their frequency.

Unusualness is harder to define, even sketchily. How unusual is unusual enough to bar a practice already deemed cruel? Clearly, if a single outlying state is engaged in a cruel punishment, any reasonable definition of unusualness must be satisfied. One can’t get more unusual than one without the amendment’s becoming a nullity, after all. But what about punishments practiced in a few states, or authorized in many but carried out only rarely? What about punishments in which American law is the outlier set against the uniform (or nearly uniform) practice of other civilized countries?

One possible resolution to this problem is a judicially adopted numerical formula — for example, a punishment is unusual if authorized in the laws of five or fewer jurisdictions, if carried out less than once every ten years, or if practiced in no other Western democracy. Such a definition has the benefit of ana-

lytical simplicity. It would make the inquiry a purely objective one. It would also make it very clear how many states would have to ban a constitutionally cruel punishment before disabling other states from practicing it. On the other hand, any such definition would suffer from a certain arbitrariness. In the hypothetical test just articulated, for example, why five states and not six? Moreover, it would grant unusual power to the legislature of the forty-fifth state to ban a cruel practice, as the enactment of that legislature would effectively bind five other supposedly separate sovereigns.

One way around the problem of both arbitrariness and the granting of inordinate power to the threshold state would be to set the number of states at three-quarters of the number of states in the Union, currently 38. This corresponds to the number of states required to amend the Constitution, which is effectively what the court does when it strikes down a punishment under a dynamic reading of the Eighth Amendment. The advantage to this approach, which I favor, is that it is objective and has a principled basis: Judges may disable a state from using a punishment when that punishment has both been deemed cruel and been banned by enough states to outlaw it in the federal constitution by other means. The amendment in this reading would function as a kind of common law shortcut to the amendment process for those punishments that would never quite warrant a constitutional amendment on their own.

A more difficult possibility would be to assess unusualness as a function of typical punishments for the particular crime in question. A person who can show that a jurisdiction is subjecting him to a cruel punishment it almost never deploys even for comparable offenses seems to me to have a strong claim for the unusualness of the cruelty directed at him. In other words, unusualness here is measured in terms of caprice and randomness. This definition, however, has the problem of necessitating federal inquiry into which offenses are comparable to which other offenses under state law and potentially requiring a broad survey of the frequency of certain punishments under state law. It might also paradoxically create an incentive for states to use their cruelest punishments more often so as to render them less unusual.

As with cruelty, the precise contours of the definition of unusualness can be developed only through case law; they cannot be outlined prospectively. What we can insist on prospectively, however, is that the two terms be defined in some way as to offer some predictability as to which punishments will be upheld and which struck down and to provide some doctrinal constraint on judicial policymaking and discretion.

It is an open question in my mind whether such an approach would, over the long term, generate a more liberal or a more conservative Eighth Amendment jurisprudence in political terms. That depends on the rigor of the specific definitions the court develops and the consistency with which it applies them. To take the juvenile death penalty case as an example, different iterations of the methodology I have outlined could produce radically different results. One could, for example, regard the practice as a cruel abdication of society’s obligation toward children, authorized only by the laws of increasingly few states — only a few of which actually use it — and almost no other countries. Alternatively, one could regard it as authorized by the laws of more than half of the death penalty states and therefore, even if cruel, certainly not unusual. But whatever the outcome, all sides would at least be arguing over the same questions and in the same terms. Indeed, making the court’s Eighth Amendment jurisprudence either more or less muscular matters ultimately less than making it more coherent and principled without denying its dynamic character or reducing it to an historical anachronism.

In other words, how the court decides these cases — and most cases, for that matter — is ultimately more important than the substance of what it decides. In no area of law has the court more completely lost sight of that basic truth than the Eighth Amendment. But it is never too late to put the train back on the tracks.



## Notes

<sup>1</sup> *Trop v. Dulles*, 386 U.S. 86 (1958).

<sup>2</sup> Antonin Scalia, “God’s Justice and Ours,” *First Things* (May 2002).

<sup>3</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002), concerning the death penalty for mentally retarded offenders and *Roper v. Simmons*, 125 S. Ct. 1183 (2005), concerning the death penalty for offenders under the age of 18.

<sup>4</sup> See Scalia’s dissent in *U.S. v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>5</sup> See the concurring opinion of Justice Lewis Powell in *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>6</sup> See *Lockyer v. Andrade*, 538 U.S. 218 (2003).

<sup>7</sup> See *Solem v. Helm*, 463 U.S. 277 (1983).

<sup>8</sup> See *Rummel v. Estelle*, 445 U.S. 263 (1980).

<sup>9</sup> Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997), 145.

<sup>10</sup> See *Harmelin v. Michigan*, 501 U.S. 957 (1991).

<sup>11</sup> See footnote 11 in *Harmelin*: “It seems to us no more reasonable to hold that the Eighth Amendment forbids ‘disproportionate punishment’ because otherwise the State could impose life imprisonment for a parking offense than it would be to hold that the Takings Clause forbids ‘disproportionate taxation’ because otherwise the State could tax away all income above the subsistence level.”

<sup>12</sup> *Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>13</sup> Scalia, *A Matter of Interpretation*, 145.

<sup>14</sup> See, for example, Justice Marshall’s opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), in which he describes essentially universal agreement “that the Eighth Amendment’s ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”

<sup>15</sup> Joseph Story, *Commentaries on the Constitution of the United States*, 3 § 1896 (1833).

<sup>16</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), 13–14.

<sup>17</sup> Quoted in *Weems v. U.S.*, 217 U.S. 349 (1910).

<sup>18</sup> *O’Neil v. Vermont*, 144 U.S. 323 (1892). See also Justice Harlan’s dissent.