JOHN D. BESSLER

Cruel & Unusual

THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT

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Also by John D. Bessler

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In memory of
Cesare Beccaria
and
Dr. Benjamin Rush

I am certainly not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.

—THOMAS JEFFERSON

Perhaps the whole business of the retention of the death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, mocking with grim reproach all our clamorous professions of the sanctity of life.

—BENJAMIN CARDOZO

ACKNOWLEDGMENTS

Writing a book is like hiking up a mountain—it's both exhilarating and exhausting. When you hike, you pick a trail, try to follow a few scattered markers, but occasionally wander off a not-so-worn path, getting momentarily lost in the forest as you wind your way to the top. The summit—above the tree line—often seems as if it will never come, but then, after climbing over boulders and logs, contending with pesky mosquitoes, crossing muddy streams, and taking narrow switchbacks through rocky, unfamiliar terrain, you suddenly find yourself with a clear view, from the peak, of all the valleys below. The writer E. L. Doctorow likens authoring a book to driving a car at night—and there's truth in what he says. "You can see as far as your headlights go," he relates, "but you can make the whole trip that way." For me, though, the hiking analogy is more apt. I've always found writing to be a slow, grueling process—and a car ride, even a long one through the dark, doesn't capture all the toil and sweat that goes into a book. There are the outlining and the research; the drafting of sentences and paragraphs, then whole chapters; and the endless revision—not to mention all the laborious proofreading of galleys, let alone the tedious preparation of the index. The publication process proceeds at a hiker's pace, and unlike a road trip, the task of writing a book means countless hours spent alone, away from family and friends.

This book—my fourth on the death penalty—is, in a way, the product of roughly two decades of work. Over the past twenty years, I've spent literally thousands of hours reflecting on capital punishment. For much of that time, I also practiced law full-time, making evenings and weekends—not exactly the most family-friendly times—my only available slots to research and write. I thus owe special thanks—at the very outset—to my wife and daughter, Amy and Abigail, for putting up with my writing life. They are the pride and joys of my life, and as talented writers themselves, they have indulged my odd-hours writing with a generosity of spirit I suspect few other spouses or kids would readily endure. I also owe a debt of gratitude to my friends and colleagues, whose support and encouragement allowed me to finish this book. The debts I owe, in fact, are too numerous to mention. Librarians located hard-to-find sources for me; the law students I've taught since 1998 have continually informed and shaped my views on capital punishment; and even random acts of kindness by fellow lawyers—perhaps nothing more than a forwarded link to a breaking news story—have helped me tremendously along the way. Law professor Victor Streib, at Ohio Northern University, graciously agreed to review

the manuscript, as did Professor Paul Kaplan at San Diego State University. My parents, Bill and Marilyn Bessler, and three close friends—Bruce Beddow, Michael Handberg, and Rob Hendrickson—were also helpful as I wrote the book. I am especially grateful that Sister Helen Prejean—the author of *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States*—recommended Northeastern University Press as the publisher for my first book, getting me off to a good start on my trek.

The path to this book has been a long one. I grew up in Mankato, Minnesota, a wonderful town in the southern part of the state, but also the site of America's largest mass hanging. In 1862, in the midst of the Civil War, President Abraham Lincoln ordered the execution of thirty-eight Dakota Indians. A U.S. military commission sentenced more than three hundred Indians to die for participating in a violent uprising, but Lincoln, believing that number far too excessive, set aside all but thirty-eight of the death sentences. "Anxious to not act with so much clemency as to encourage another outbreak on the one hand, nor with so much severity as to be real cruelty on the other," Lincoln explained, "I caused a careful examination of the records of the trials to be made." That examination—revealing short trials bereft of due process—prompted Lincoln, the Illinois lawyer turned commander in chief, to temper his death warrant with a considerable show of mercy despite intense public opposition. Though Lincoln wrote out his order by hand and took precautions to ensure that only those he listed would die, at least one Dakota captive, Chaska, was executed by mistake. Acquitted for saving a woman's life, Chaska—also known as We-Chank-Wash-ta-don-pee—was confused with Chaskaydon, who had killed a pregnant woman and cut a fetus out of her womb. The lore of that mass execution, conducted on a large, wooden scaffold just a few blocks from where I grew up, gave me my first glimpse of the death penalty's long, sordid history.

In the 1980s, while in high school and college, I read a fair amount about capital punishment. But in truth, my eyes were not fully opened to the harsh reality of America's death penalty until I began studying and practicing law. As a law student at Indiana University in Bloomington, I took a death penalty course from Professor Joseph Hoffmann—a former law clerk for the late Chief Justice William Rehnquist. In that class, I read cases revealing the abysmal quality of counsel that death row inmates so often receive at their criminal trials. I also came to learn that juvenile offenders were then still subject to execution, and that race—then as now—routinely plays a decisive role in deciding who lives and who dies. After graduating from IU in 1991, I took the bar exam and went to work for Faegre & Benson, a large Minneapolis law firm where I worked on capital cases with Jim Volling, one of the firm's senior partners. Motivated by that experience, I wrote my first book, *Death in the Dark: Midnight Executions in America*, and began teaching a death penalty course at the University of Minnesota Law School. I later taught that seminar in Washington, D.C. at The George Washington University Law School and

the Georgetown University Law Center. Two other books followed my first—one about the history of executions and extrajudicial killings in my home state, and another, a book-length essay, about the national, public policy debate surrounding capital punishment.

In *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment*, I now turn my attention to a different, much more focused question: does America's death penalty violate the U.S. Constitution's Eighth Amendment prohibition on "cruel and unusual punishments"? In my quest to answer that question, I gathered lots of materials and was aided by several top-flight research assistants: Michael Ansell, Jonathan Auerbach, Nyasha Griffith, Keith Hinder, Anne Marchessault, Bradley Sarnell, Mark Taticchi, John Tramazzo, and Laura Valden. These law students and recent graduates helped me gather valuable sources, and the book is a better one because of their efforts. I also need to thank the staff of the *Northwestern Journal of Law and Social Policy*. The staff's editing of my 2009 law review article, "Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty and the Abolition Movement," resulted in a much-improved manuscript. Special thanks, too, go to my colleagues at Georgetown and the University of Baltimore School of Law, especially Garrett Epps and C. J. Peters, who took the time to discuss this project with me. I'd also like to thank Fred Lawrence, president of Brandeis University and formerly dean of The George Washington University Law School, and Dean Phillip Closius at the University of Baltimore School of Law. A GWU summer research grant made my Northwestern law review article—and thus the origins of this book—possible, and additional summer research grants from UB allowed me to put the finishing touches on the manuscript.

I want to thank all of my many former students for taking my death penalty seminar and for their thoughtful in-class participation. The papers my students write every year always challenge and inspire me. I also need to thank the many guest speakers who spoke to my students and shared their own insights over the years: the late Hon. Donald P. Lay of the U.S. Court of Appeals for the Eighth Circuit; Sandra Babcock and Joseph Margulies at the Northwestern University School of Law; Robin Maher, Director of the American Bar Association's Death Penalty Representation Project; Richard Dieter, Executive Director of the Death Penalty Information Center; David Lillehaug, former U.S. Attorney for the District of Minnesota; Susan Karamanian, GWU's Associate Dean for International and Comparative Legal Studies; Hennepin County District Court Judge Bruce Peterson; and Amy Dillard, Tom Fraser, John Getsinger, Andre Hanson, Tom Johnson, Steven Kaplan, Greg Merz, Steve Pincus, Tim Rank, Jonathan Shapiro, Jim Volling, and Steve Wells—all lawyers who have handled capital cases. While studying international human rights law at Oxford University, I also had the privilege to take a class on international criminal law from Bill Schabas, the director of the Irish Centre for Human Rights and one of the world's leading experts on the death

penalty. His first-rate scholarship on the abolition of the death penalty in international law has been a special inspiration to me.

Last but certainly not least, I want to thank everyone at the University Press of New England—the entity that acquires and edits, then markets and distributes, all of the books for Northeastern University Press. Richard Pult, my acquisitions editor, and Michael Burton, the director of the press, got behind this project from the start, and the press has done a masterful job of producing the book. I would especially like to thank the staff of the press, including freelance copyeditor David Chu, for all the editing and production assistance. Northeastern University Press has been publishing readable, high-quality books on capital punishment for decades now, and the commitment of the press to providing Americans with up-to-date information on this important topic is as commendable as the unparalleled assistance I received from the press through every stage of the publication process. As this book wound its way uphill, past the initial book proposal, through the writing and editorial phases, and finally, into galleys and proofs, the professionalism of everyone at the press really stood out. It is my sincere hope that this book—a view of capital punishment from the mountaintop, the vista I've reached after a long, arduous climb—will inject some new, much-needed clarity into America's contentious death penalty debate.

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Cruel & Unusual

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Introduction

In 1971, the U.S. Supreme Court agreed to hear the appeals of three black, indigent defendants—William Furman, Lucious Jackson, and Elmer Branch, all sentenced to death by Southern juries. The National Association for the Advancement of Colored People (NAACP) had launched a moratorium campaign against the death penalty in the 1960s, and the grant of certiorari in the three cases came at a time when, in America, more than six hundred inmates sat on death row. A racial disparity in the imposition of death sentences for rape had spurred lawyers at the NAACP's Legal Defense Fund to file legal challenges, especially after three U.S. Supreme Court Justices dissented in a 1963 case in which a black man had been sentenced to death for raping a white woman. The dissenters in *Rudolph v. Alabama*—Justices Arthur Goldberg, William Douglas, and William Brennan—raised questions about the death penalty's constitutionality under the Eighth and Fourteenth Amendments for rapists who did not kill their victims, citing a United Nations (UN) report detailing a worldwide trend against punishing rape by death. The dissenters specifically asked whether the death penalty's imposition for rape constituted "unnecessary cruelty" and violated the "evolving standards of decency" of a "maturing society"—the legal standard for evaluating Eighth Amendment claims; whether the taking of human life "to protect a value other than human life" was disproportionate to the crime; and whether permissible aims of punishment, such as deterrence, could be achieved just as effectively by punishing rape by life imprisonment.[1]

When the Supreme Court agreed to hear the claims of William Furman, Lucious Jackson, and Elmer Branch in 1971, no executions had taken place in the United States since 1967—and the death penalty's popularity, as reflected in public opinion polls, was declining. The NAACP's frontal assault on the death penalty, led by law professor Anthony Amsterdam, focused largely on

the issues of race and whether death sentences were disproportionate to the crimes. Furman had been sentenced to die for killing—he claimed unintentionally—a white homeowner during a burglary, and Jackson and Branch had both been convicted of raping white women. In each man's case, the Court indicated its review would be limited to a single question: "Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" The Eighth Amendment bars "cruel and unusual punishments," while the Fourteenth Amendment—a post–Civil War amendment making the Eighth Amendment applicable to the States—reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[2]

The NAACP's amicus brief—joined by the National Urban League, the Southern Christian Leadership Conference, the Mexican-American Legal Defense and Educational Fund, and the National Council of Negro Women—highlighted the pattern of racial discrimination associated with lynchings and capital punishment. The NAACP had helped secure the passage of state antilynching laws after its formation in 1909, and the NAACP's brief recounted the history of slavery, lynchings, and vigilantism from 1882 to 1935, including the disparate punishment of minorities charged with rape. In making its case, the NAACP pointed to early American slave codes that—on their face—punished blacks more severely than whites and permitted "[t]he most brutal and inhumane forms of punishment—crucifixion, burning and starvation." In the era of slavery, the NAACP noted, every Southern state had laws defining felonies that carried capital punishment for slaves but lesser punishments for whites. Under those laws, slaves could receive the death penalty for murder or attempted murder, manslaughter, rape or attempted rape of a white woman, rebellion or attempted rebellion, poisoning, robbery, or arson. "This pervasive authorization of capital punishment," the NAACP argued, recalling the country's use of executions to achieve social order, "was, ironically, due to the fact that the slave trade was so thriving; often the masters of the slaves were so largely outnumbered that there was always the fear of violent rebellion." The first antislavery society was not formed until 1775 in Philadelphia; many of the Founding Fathers, including George Washington, James Madison, and Thomas Jefferson, owned slaves; and in 1791—the same year the Eighth Amendment was ratified—a bloody slave rebellion in St. Domingue (now Haiti) spurred dread among American slave owners that America, too, might witness a violent insurrection of its own.[3]

The NAACP's brief specifically sought to place the death penalty within "the full context of the struggle for racial justice." "The total history of the administration of capital punishment in America, both through formal authority, and

informally," the NAACP argued, "is persuasive evidence, that racial discrimination was, and still is, an impermissible factor in the disproportionate imposition of the death penalty upon non-white American citizens." The NAACP made a strong statistical case: from 1882 to 1903, 1,985 blacks were killed by Southern lynch mobs, a number far higher than the figure for whites who met a similar fate; from 1903 to 1935, 1,015 blacks were also lynched, a number that did not even include "kangaroo court actions, unreported murders, or blacks killed in race riots"; and of the 3,334 persons executed for murder between 1930 and 1968, almost half, 1,630, were black, with 1,231 of those executions from one geographic region, the South. Of the 443 convicted rapists executed in the South from 1930 to 1968, an overwhelming number, 398, were black. Such social science data, the NAACP asserted, proved that "the death penalty is discriminatorily imposed in contravention to the Equal Protection Clause of the Fourteenth Amendment." "To take a life, without refutation of that impermissible factor," its brief argued, is "inconsistent" with the Eighth Amendment's Cruel and Unusual Punishments Clause.[4]

The NAACP next sought to put the information it presented into an even broader social context: "Slavery was exclusively a Southern phenomenon, lynching was primarily a Southern phenomenon, and the general data with respect to all crimes, and particularly the crime of rape, indicates that the South has been the prime contributor to the disproportionate application of the death penalty to blacks." "To vote to put a man to death," the NAACP asserted, "requires the juror to place some distance between himself and the defendant, and this process is facilitated if he can, because of some perception of the defendant, dehumanize him." Arguing that the petitioners "are engaged in a grim struggle for their lives," the NAACP invoked Martin Luther King Jr.'s commitment to nonviolence, noting that even Dr. King's assassination did not alter the Southern Christian Leadership Conference's anti–death penalty stance. After James Earl Ray's conviction, Dr. King's widow, Coretta Scott King, had spoken out against capital punishment on behalf of the civil rights organization her husband once led. "The death penalty for the man who pleaded guilty to the crime," she said, "would be contrary to the deeply held moral and religious convictions of my husband." "Retribution and vengeance," she added, "have no place in our beliefs." King himself—devastated by the brutal killing of fourteen-year-old Emmett Till in Mississippi—had once spoken out against extrajudicial violence, saying that "the law may not be able to make a man love me, but it can keep him from lynching me." Till, an African American boy from Chicago who reportedly whistled at a white woman, was beaten and had an eye gouged out—and was savagely attacked with a hatchet—before he was shot through the head and thrown into the Tallahatchie River.[5]

At oral argument in *Furman v. Georgia,* Anthony Amsterdam—William Furman's counsel—passionately argued that the Supreme Court should not hesitate "to strike down a rare and harsh punishment like capital punishment."

Instead of executing fifteen or twenty people every year, Amsterdam argued before the nation's highest court in January 1972, inmates should simply be imprisoned. Many countries had already abolished the death penalty, either in law or in practice, he noted, asserting that the factual record was sufficient to establish the death penalty as a "cruel and unusual punishment." American juries handed out only about one hundred death sentences each year, he argued, even though a far higher number of death-eligible murders and rapes were committed each year. And the small number of people who received death sentences, he emphasized, were disproportionately poor and minorities who got those sentences from "death-qualified" juries—a practice permitted by the U.S. Supreme Court whereby death penalty opponents are excluded from sitting in judgment in capital cases. The Eighth Amendment, Amsterdam argued, must be measured not only by "legislative disapproval," but by what judges, juries, and prosecutors do in practice. Amsterdam pointed out that while more than six hundred inmates had accumulated on American death rows over the years, executions themselves had fallen "into disuse." Executions—once so prevalent in American society—had dwindled, then ceased, though some juries, most often in the South, still occasionally handed out death sentences.[6]

For the State of Georgia in *Furman,* Assistant Attorney General Dorothy Beasley appeared at oral argument and said it would take a constitutional amendment to do away with capital punishment. Citing the Fourteenth Amendment, she argued that legislative enactments were entitled to a presumption of constitutionality and that a State may deprive someone of life so long as the deprivation is neither discriminatory nor violative of due process. Beasley refused to classify the death penalty as "uncivilized" or "torturous," noting that American juries were still imposing death sentences. After acknowledging that the meaning of "unusual" had not changed since the Eighth Amendment was written, she focused on the regime to be used to assess whether a punishment comports with "the evolving standards of decency that mark the progress of a maturing society"—the standard set out by the U.S. Supreme Court in the 1958 case of *Trop v. Dulles.* Arguing that the Court should defer to legislative enactments, Beasley contended that the petitioners failed to meet their burden of showing that the death penalty was a "cruel and unusual punishment." She believed that jurors' voices should be heard; that juries represent the conscience of the community; and that the Supreme Court should defer to prior judicial rulings upholding the death penalty's constitutionality. Just one year earlier, in *McGautha v. California,* the Supreme Court had rejected a Due Process Clause challenge to capital punishment, ruling that laws giving juries unbridled, standardless discretion to impose death sentences comported with due process. The Court, Beasley argued, should also refuse to classify the death penalty as an Eighth Amendment violation.[7]

On June 29, 1972, the U.S. Supreme Court handed down its landmark deci-

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