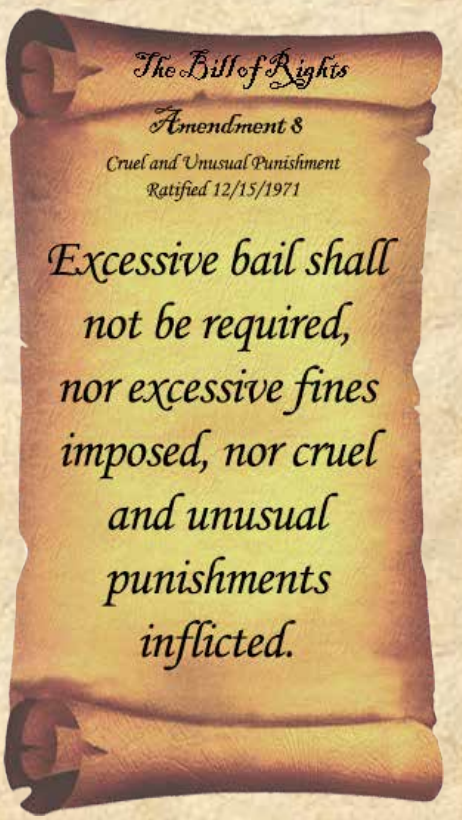
Citizen's Courier

# CRUEL AND UNUSUAL PUNISHMENT




## The 8th Amendment to the Constitution

By Don Shrader, Chairman

On January 16 of this year, Dennis McGuire was executed by the State of Ohio. I like what a young reporter for Civitas Media, Megan Kennedy, wrote about the case and the execution. Megan, who had taken some criminal justice classes in school, studied the documents in the case before witnessing the execution first hand. The lethal injection "cocktail" was designed to be quick and efficient in bringing about the defendant's death but evidently something went awry with the mixture and it took much longer than expected, on the order of 30 minutes. (If quickness of death is the primary prerequisite, I can provide a few options - Don.) Anyhow, Megan wrote this about the execution:

*I had read the effects of the two-drug cocktail…and how painful it could be for McGuire if it did not work. He would be lying on the table in excruciating pain unable to move. Immobile as Joy Stewart (McGuire's victim in the case) was on Feb. 11, 1989. Under the weight of McGuire, Stewart spent the last few moments of her life kidnapped, raped, sodomized, and eventually stabbed, attempting to fight for her life.*

On the gurney, intravenous needles containing the concoction were inserted into the skin of both of McGuire's arms to reach his veins, similar to the blade he drove through the victim's carotid artery in the lethal and final blow he inflicted on Stewart; all to bring them to one final conclusion: death.

Stewart was not McGuire's only victims. Stewart was 7 month's pregnant. Later, the prosecution was able to determine that McGuire had raped and murdered Joy Morningstar, but he was not caught at the time. Ten months after the rape of Joy Morningstar, he tried to rape, probably with intent to murder, a 15-year old girl. Though the girl was beaten and cut by McGuire, fortunately family and friends heard

the ruckus outside the house and intervened in time to rescue the girl and identify McGuire.

Now McGuire's children are threatening suit against the state claiming that the length of time the new, and somewhat controversial, two-drug "cocktail" took to bring about McGuire's death constituted cruel and unusual punishment in violation of the 8th Amendment – I am sure with coaxing by some politically liberal attorneys. As the Preble County Prosecutor, Martin Votel, stated, "I believe if there has been any injustice done it's in a delay of 20 years between the imposition of that sentence by a Preble County jury, and the execution of that sentence by the State of Ohio."

If ever there was an amendment that has been misconstrued and misapplied by the liberals and progressives, it is the 8th Amendment. Certainly the 2nd, 4th, 5th, 9th, and 10th have been abused, misinterpreted, maligned, and ignored by most liberals, progressives, and even moderates, but the 8th has been uniquely misappropriated as in the potential suit by McGuire's children against the state of Ohio. Of course the 8th Amendment has been used by Progressives / Liberals for years as an argument for doing away with the death penalty altogether.

The Rutherford Institute addresses the question, "What exactly constitutes 'cruel and unusual' punishment?" The Institute goes on to state, "The U.S. Supreme Court has struggled to establish a conclusive answer to this question. A few Supreme Court justices subscribe to the idea that what was considered 'cruel and unusual' at the time of our nation's founding more than 200 years ago should still shape our idea of what is considered 'cruel and unusual' today. A majority of the Court, however, has determined that what constitutes 'cruel and unusual' should be dependent on the 'evolving standards of decency that mark the progress of a maturing society.'"

American Creation internet blog notes, "The 8th Amendment's protection against 'cruel and unusual punishment' is more clearly affected by societal change than any other amendment in the Constitution. After all, the very nature of the phrase 'cruel and unusual' appeals to evolving societal standards. What we consider to be 'cruel' or 'unusual' today was seen as routine and just to our forefathers." This is no doubt true. Let's look at some of the punishments meted out before and during the time of our founding fathers. Some, I am sure, they would have considered even in their day to be "cruel and unusual," others they did not.

On a spring day in May, 1527, Michael Sattler was sentenced to death at the imperial city of Rottenburg on the Neckar River. The sentence read:

> *Michael Sattler shall be committed to the executioner. The latter shall take him to the square and there first cut out his tongue, and then forge him fast to a wagon and there with glowing iron tongs twice tear pieces from his body, then on the way to the site of execution five times more as above and then burn his body to powder as an arch-heretic.*

Sattler's crime? He had become a leader in the Anabaptist movement and opposed Ulrich Zwingli regarding infant baptism as a legitimate form of Christian baptism. The label "Anabaptist," meaning to "re-baptize" was a name given by Zwingli and others to this sect as a demeaning term because they dared to "re-baptize" adults who had been baptized as infants by the church. Sattler and others taught that infant baptism was not a legitimate form of biblical

baptism and that the only biblical baptism was by a person after knowingly accepting Jesus as their savior. Zwingli, the Bishop of Zurich and proclaimed father of the reformed evangelical Christian movement, oversaw the conviction and subsequent similar punishment of many such Anabaptist "heretics" as Sattler. Besides the method of execution used on Sattler, other times the entire family would be drowned in the river one by one by repeated dunking in the river until they were dead with the perpetrator (preacher) the last to be executed after watching his wife and children executed first. The repeated dunking until dead was a sort of poetic justice regarding their "heretical teaching" as well as a warning to others that might be tempted to side with the Anabaptists.

Cruel and unusual punishment refers to the punishment inflicted upon a person to create as much suffering and humiliation on that person as possible. All capital punishments throughout most of the world's recorded history have been purposely designed to be extremely painful. Examples of such painful acts of capital punishment include boiling to death, flaying, disembowelment, crucifixion, crushing, sawing, impalement, and necklacing which were practiced in many different countries throughout the world, such as France, England, Germany and the countries of Asia. Such punishments were not only cruel and painful because of the method in which they were carried out, but also because of the occasionally slow process in which they were carried out leading to further suffering. Impalement and crucifixion often required the condemned person to suffer for many days before finally dying.

The following incident occurred during the famous exploration by Lewis and Clark, commissioned by none other than President Thomas Jefferson. One of the young men hired to be part of the exploration, an Alexander Hamilton Willard, was sentenced by Lewis to receive 100 lashes to be given over four consecutive nights. Typically in those days, lashes were administered by a "cat of nine-tails," otherwise known as "the cat." The cat was made up of nine knotted thongs of cotton cord, about 2 ½ feet long, designed to lacerate the skin and cause intense pain. After the flogging was completed, the lacerated back was frequently rinsed with brine or saltwater, which served as a crude antiseptic. Although the purpose was to control infection, it caused the sailor to endure additional pain, and gave rise to the expression, "rubbing salt into his wounds." Whether or not the instrument used to inflict Willard's punishment was "the cat" or not is unknown but it was certainly a similar instrument of some kind. Willard's crime: falling asleep (although he claimed he was not asleep but merely lying down) on guard duty one night. Upon their return, President Jefferson never reprimanded Lewis for issuing "cruel and unusual punishment." As a matter of fact, other crewmen on the trip received 50 lashes. So while I am sure it would be considered cruel and unusual today, it was not so in the 19th century.

Of course, methods of execution in the U.S. in the 19th century that were not considered cruel or unusual at the time of our nation's founding included hanging and firing squad, among others. While many today would consider these methods cruel and unusual, they were quick and effective when done properly. Most of these methods were replaced by the gas chamber and the electric chair. Today, almost all state executions are by lethal injection, which in my mind is too good for the likes of Dennis McGuire.

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## Is the Death Penalty Cruel and Unusual Punishment?

You may think the death penalty is too cruel in any case, but the United States does permit the death penalty in certain cases. Whether the death penalty will be imposed is dependent on the state in which you live, because most criminal cases are tried based on state laws. For the few cases that make it to the federal level, there are rare instances where the death penalty can be imposed.

Daryl Renard Atkins started on the path to death row on August 16, 1996, when he and his friend William Jones abducted and robbed Eric Nesbitt with a semiautomatic handgun. The pair took all the money Nesbitt had on his person, then drove him to an automated teller machine (ATM). While there, they were caught on camera forcing him to withdraw more money. After getting the additional money, they drove Nesbitt to an isolated location and killed him by shooting him eight times.

Atkins was convicted of abduction, armed robbery, and capital murder and sentenced to death. Both Jones and Atkins testified in the guilt phase of the Atkins' trial. They each confirmed the incident, but differed on who actually shot and killed Nesbitt.

Jones, whose testimony was more coherent and credible to the jury than the mentally retarded Atkins, led the jury to convict Atkins and blame him for the shooting.

During the penalty phase of the trial, the state introduced victim-impact evidence and proved two aggravating circumstances to push for the death penalty. The state proved to the jury that Atkins posed a future danger because of his prior felony convictions. In addition, the state called four victims of earlier robberies and assaults to testify against Atkins. Also, the state proved the "vileness of the offense" by pointing to the pictures of the deceased's body and the autopsy report, which were part of the initial trial record.

Dr. Evan Nelson, a *forensic psychologist*, testified in the penalty phase that based on his evaluation of Atkins, he was "mildly mentally retarded." He testified that after reviewing Atkins school and court records plus administering a standard intelligence test, Atkins had a full scale IQ of 59 and was functioning somewhere between the ages of 9 and 12.

Based on this testimony, the jury sentenced Atkins to death, but the Virginia Supreme Court ordered a second sentencing hearing because the trial court used a misleading verdict form. At the second sentencing hearing, the same forensic psychologist testified, but additional testimony was added for the state by expert witness Dr. Stanton Samenow, who said that Atkins was not mentally retarded, but was of "average intelligence, at least" and diagnosable as having antisocial personality disorder. The jury again sentenced Atkins to death.

In 1989, when the Supreme Court last looked at the issue of sentencing mentally retarded people to death, most states did allow that. In 2002, when the Supreme Court decided to revisit the issue, the political winds had changed and state legislatures were deciding against the death penalty in cases involving people with mental retardation. So the justices overturned *Penry* and ruled in favor of Atkins, reversed the Virginia Supreme Court, and remanded the case back to the lower courts for further decision.

The 6 to 3 ruling that the death penalty for Atkins was "cruel and unusual punishment," was written by Justice John Paul Stevens, who was

joined by Justices Breyer, Ginsburg, Kennedy, O'Connor, and Souter. Chief Justice Rehnquist wrote a dissenting opinion and was joined by Justices Scalia and Thomas. Scalia also wrote a dissenting opinion and was joined by Rehnquist and Thomas.

*Read Court opinions and more at:*

http://www.infoplease.com/cig/supreme-court/death-penalty-cruel-unusual-punishment.html

(Editor's note: The Constitution Party favors the right of states and localities to execute criminals convicted of capital crimes and to require restitution for the victims of criminals.)

*The Rutherford Institute on:*

## Amendment VIII: Cruel and Unusual Punishment

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

In a speech before the Virginia House of Burgesses, Patrick Henry stated: "I have but one lamp by which my feet are guided; and that is the lamp of experience. I know of no way of judging the future but by the past." The "past," as the Founders knew it, was one shadowed by the threat of torture for any who disagreed with government policies. Torture in the form of "pillorying, disemboweling, decapitation, and drawing and quartering" was commonplace throughout Medieval Europe. Believing that inhumane punishments had no place in a nation founded upon the principle of liberty, the Founders enacted the Eighth Amendment, which prohibits cruel and unusual punishment. The colonists were also wary of authority figures and were particularly concerned about guarding against an abuse of power by such individuals. The Eighth Amendment spoke to this concern by prohibiting judges from imposing arbitrary punishments upon individuals who came before the court.

In some countries, "disloyal or troublesome" citizens are jailed indefinitely on trumped-up charges. If they cannot pay their bail, they don't get out. The U.S. Constitution, however, recognizes that those accused of crimes have rights. The Bill of Rights guarantees the basic human right of people to be treated with respect, even if they are convicted criminals. In this way, the Eighth Amendment is similar to the Sixth: it protects the rights of the accused, the people most susceptible to abuse because they have the least resources. And it prohibits the use of cruel or unusual punishment.

### The Eighth Amendment Today

What exactly constitutes "cruel and unusual" punishment? The U.S. Supreme Court has struggled to establish a conclusive answer to this question. A few Supreme Court justices subscribe to the idea that what was considered "cruel and unusual" at the time of our nation's founding more than 200 years ago should still shape our idea of what is considered "cruel and unusual" today. A majority of the Court, however, has determined that what

constitutes "cruel and unusual" should be dependent on the "evolving standards of decency that mark the progress of a maturing society."

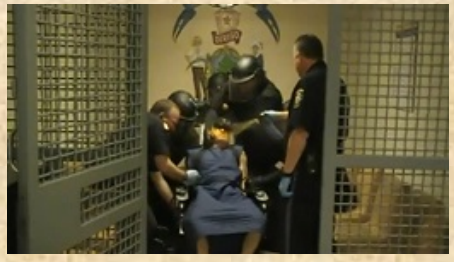
Given such a benchmark as "evolving standards of decency," one might think that Americans are safe from being subjected to punishment that the average person would consider cruel and unusual. Yet that is not so. It should be noted that while the Supreme Court has determined that executing mentally retarded people is "cruel and unusual," it has left it up to the states to determine whether a particular inmate qualifies as "mentally retarded." Consequently, mentally retarded inmates are still being executed for lack of uniform guidelines and standards.

Lethal injection is one form of execution that has come under great scrutiny, especially in recent years, and is often painted as a civilized and benign way to die. Lethal injection was supposed to end the debate about how states execute prisoners. As U.S. Supreme Court Justice Antonin Scalia stated in the 1994 case *Callins v. Collins*, "How enviable a quiet death by lethal injection." Over the past few years, however, growing concerns have been raised that lethal injection may actually inflict greater pain on the condemned, which raises the specter of constitutional violations.

Despite reports indicating that death by lethal injection causes extreme pain when not properly performed, 37 states still use this method. In December 2006, Governor Jeb Bush halted executions in Florida after the botched execution by lethal injection of Angel Diaz. Diaz took 34 minutes to die—twice the usual time—after the needles carrying the drugs were inserted into the flesh of his arms, rather than his veins. Coroners found chemical burns on his arms, suggesting that Diaz suffered considerable pain during the execution.

Concerns about the reliability of the lethal injection protocol have been raised with the Supreme Court. Central to these concerns is the possibility that an inmate about to be executed who is not properly sedated by the first drug and then paralyzed by the second drug is able to feel the effects of the painful third killing drug but unable to express that pain due to his paralytic state. The Court was asked to determine whether this scenario is likely and, if so, whether it constitutes cruel and unusual punishment.

The Supreme Court's decision to review the case follows in the wake of lower court rulings throughout the country that have found the scenario described above to be at risk of, or actually, occurring. In California, the state with the largest death row population, Judge Jeremy Fogel of the U.S. District Court for the Northern Circuit of California delivered a damning judgment in December 2006, wherein he stated that California's lethal injection procedure represents "an undue and unnecessary risk" of a violation of the constitutional prohibition against cruel and unusual punishment. "This is intolerable under the Constitution," Judge Fogel declared. "The state's implementation of California's lethal injection protocol lacks both reliability and transparency."



In addition to the debate raging over what constitutes cruel and unusual punishment, there is an equally contentious dispute about whether criminal penalties, including the death penalty, are handed out based on factors unrelated to the crime, such as a defendant's race, socio-economic class and quality of legal representation. According to the U.S. General Accounting Office, in "82% of the studies reviewed, race of the

victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks." These, and other concerns, have contributed to a growing national movement calling for a moratorium on the death penalty.

By turning a blind eye to the abuses at Guantanamo Bay and Abu Ghraib and sanctioning torture deliberately and unapologetically, including the use of waterboarding as a benign form of legalized torture, the Bush administration not only violated U.S. laws and virtually every international treaty against torture but raised the bar on what constitutes cruel and unusual punishment. Many of these same practices are still in place under the Obama administration. And the Supreme Court's determination that what constitutes "cruel and unusual" should be dependent on the "evolving standards of decency that mark the progress of a maturing society" leaves us with little protection in the face of a society lacking in morals altogether. The continued reliance on the death penalty, which has been shown to be flawed in its application and execution, is a perfect example of this.

Source:

https://www.rutherford.org/constitutional_corner/amendment_viii_cruel_and_unusual_punishment/

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**LINKS**

Life without Parole for Pot?

Cases by Issue - Cruel and Unusual Punishment

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## Cruel and Unusual Punishment: The Shame of Three Strikes Laws

While Wall Street crooks walk, thousands sit in California prisons for life

*By Matt Taibbi*

On July 15th, 1995, in the quiet Southern California city of Whittier, a 33-year-old black man named Curtis Wilkerson got up from a booth at McDonald's, walked into a nearby mall and, within the space of two hours, turned himself into the unluckiest man on Earth. "I was supposed to be waiting there while my girlfriend was at the beauty salon," he says.

So he waited. And waited. After a while, he paged her. "She was like, 'I need another hour,'" he says. "So I was like, 'Baby, I'm going to the mall.'"

Having grown up with no father and a mother hooked on barbiturates, Wilkerson, who says he still boasts a Reggie Miller jumper, began to spend more time on the streets. After his mother died when he was 16, he fell in with a bad crowd, and in 1981 he served as a lookout in a series of robberies. He was quickly caught and sentenced to six years in prison. After he got out, he found work as a forklift operator, and distanced himself from his old life.

But that day in the mall, something came over him. He wandered from store to store, bought a few things, still shaking his head about his girlfriend's hair appointment. After a while, he drifted into a department store called Mervyn's. Your typical chain store, full of mannequins and dress racks; they're out of business today. Suddenly, a pair of socks caught his eye. He grabbed them and slipped them into a shopping bag.

What kind of socks were they, that they were worth taking the risk?

"They were million-dollar socks with gold on 'em," he says now, laughing almost uncontrollably, as he tells the story 18 years later, from a telephone in a correctional facility in Soledad, California.

Really, they were that special?

"No, they were ordinary white socks," he says, not knowing whether to laugh or cry. "Didn't even have any stripes."

Wilkerson never made it out of the store. At the exit, he was, shall we say, overenthusiastically apprehended by two security officers. They took him to the store security office, where the guards started to argue with each other over whether or not to call the police. One guard wanted to let him pay for the socks and go, but the other guard was more of a hardass and called the cops, having no idea he was about to write himself a part in one of the most absurd scripts to ever hit Southern California.

Thanks to a brand-new, get-tough-on-crime state law, Wilkerson would soon be sentenced to life in prison for stealing a pair of plain white tube socks worth $2.50.

Gangster Bankers Broke Every Law in the Book

"No, sir, I was not expecting that one," he says now, laughing darkly. Because Wilkerson had two prior convictions, both dating back to 1981, the shoplifting charge counted

as a third strike against him. He was sentenced to 25 years to life, meaning that his first chance for a parole hearing would be in 25 years.

And given that around 80 percent of parole applications are rejected by parole boards, and governors override parole boards in about 50 percent of the instances where parole is granted, it was a near certainty that Wilkerson would never see the outside of a prison again.

The state also fined him $2,500 – restitution for the stolen socks. He works that off by putting in four to five hours a day in the prison cafeteria, for which he gets paid $20 a month, of which the state takes $11. At this rate, he will be in his nineties before he's paid the state off for that one pair of socks.

As for the big question – does he ever wish he could go back in time and wait it out in that McDonald's for another hour, instead of 18 years in the California prison system? – Wilkerson, who has learned to laugh, laughs again.

"Man," he says, "I think about that every single day."

Wilkerson is unlucky, but he's hardly alone. Despite the passage in late 2012 of a new state ballot initiative that prevents California from ever again giving out life sentences to anyone whose "third strike" is not a serious crime, thousands of people – the overwhelming majority of them poor and nonwhite – remain imprisoned for a variety of offenses so absurd that any list of the unluckiest offenders reads like a macabre joke, a surrealistic comedy routine.

Have you heard the one about the guy who got life for stealing a slice of pizza? Or the guy who went away forever for lifting a pair of baby shoes? Or the one who got 50 to life for helping himself to five children's videotapes from Kmart? How about the guy who got life for possessing 0.14 grams of meth? That last offender was a criminal mastermind by Three Strikes standards, as many others have been sentenced to life for holding even smaller amounts of drugs, including one poor sap who got the max for 0.09 grams of black-tar heroin.

This Frankenstein's monster of a mandatory-sentencing system isn't just some localized bureaucratic accident, but the legacy of a series of complex political choices we all made as voters decades ago. California's Three Strikes law has its origins in a terrible event from October 1993,

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when, in a case that outraged the entire country, a violent felon named Richard Allen Davis kidnapped and murdered an adolescent girl named Polly Klaas. Californians were determined to never again let a repeat offender get the chance to commit such a brutal crime, and so a year later, with the Klaas case still fresh in public memory, the state's citizens passed Proposition 184 – the Three Strikes law – with an overwhelming 72 percent of the vote. Under the ballot initiative, anyone who had committed two serious felonies would effectively be sentenced to jail for life upon being convicted of a third crime.

On Daily Beast: California Death Penalty Survives, Three Strikes Cut Back

The overwhelming support for the measure touched off a nationwide get-tough-on-crime movement, embraced especially by third-way-style Democrats, who seized upon the policy idea as a powerful weapon in their efforts to throw off their party's bleeding-heart image and recapture the political center. Having seen their wonk-geekish 1988 presidential candidate, Michael Dukakis, expertly exploded by the infamous Willie Horton ad cooked up by Republican strategist Lee Atwater – an ad that convinced voters that the Democrats were the party of scary-looking black rapists on furlough – Democrats had spent years searching for a way to send Middle America a different message.

Three Strikes was a perfect way to convey that new message. The master triangulator himself, Bill Clinton, stumped for a national Three Strikes law in his 1994 State of the Union address. When a federal version passed a year later, Clinton took special care to give squeamish wuss-bunny liberals a celebratory kick in the ear, using the same "Either you are with us, or you are with the terrorists" rhetorical technique George W. Bush would make famous a few years later. "Narrow-interest groups on the left and the right didn't want the bill to pass," Clinton beamed, "and you can be sure the criminals didn't either."

Source: (Editor's Note: Not recommended as a regular source)

http://www.rollingstone.com/politics/news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-20130327

## Next Month:

Featuring the 9th Amendment.

**Amendment 9 - Construction of Constitution. Ratified 12/15/1791.**

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

If you have a good source or article on this subject, forward link or article to:

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