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Book Review, Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment by John D. Bessler, 104 Law Libr. J. 581 (2012)

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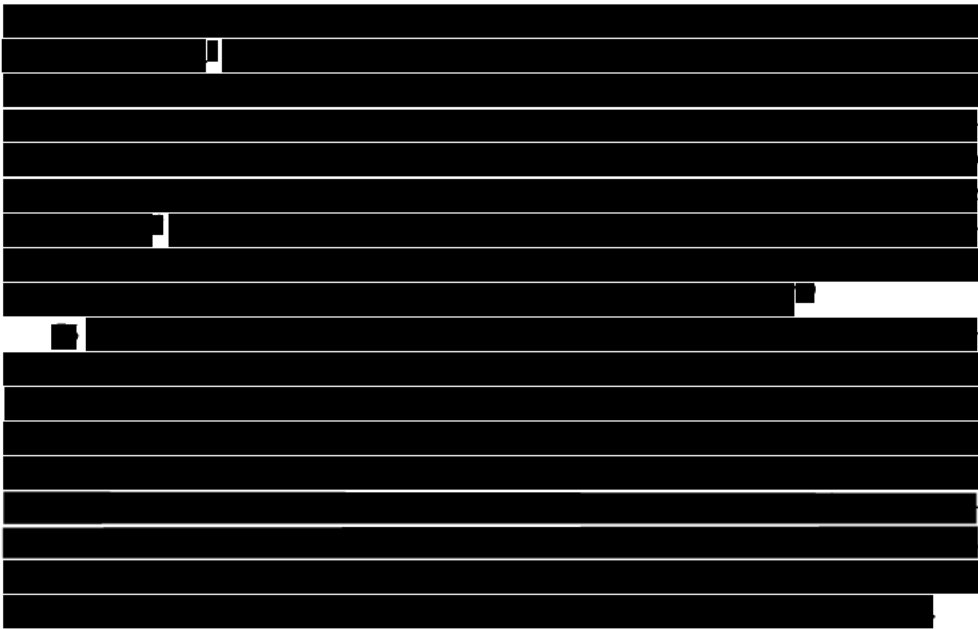
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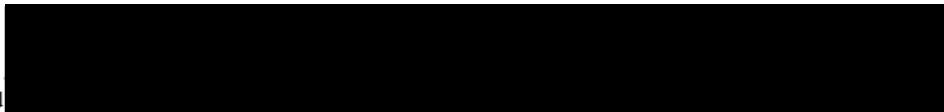
Bessler, John D. *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment*. Boston: Northeastern University Press, 2012. 456p. \$39.95.

Reviewed by Ramsey B. Donnell

¶7 Jurists and scholars alike generally acknowledge that most of our nation's Founding Fathers accepted capital punishment as a basic feature of the young republic's criminal justice system and that these Founders did not view the Eighth Amendment's Cruel and Unusual Punishments Clause as undermining the legality of the ultimate sanction. Even John D. Bessler, an ardent death penalty abolitionist and author of the new book *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment*, concedes that capital punishment was commonly employed, without controversy, both immediately before and after ratification of the Eighth Amendment in 1791. However, rather than accept an originalist analysis focused myopically on late eighteenth century practice, Bessler argues convincingly that the Eighth Amendment's language was intended by the Founders to permit future generations to interpret "cruel" and "unusual" according to ever-evolving understandings of those terms.

¶8 Bessler, an associate professor at the University of Baltimore School of Law, devotes most of his scholarly efforts to death penalty issues—*Cruel and Unusual* is his fourth book on the topic.¹¹ In this new work's early chapters, Bessler focuses

Wise



11. See JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* (1997); JOHN D. BESSLER, *KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY* (2003); JOHN D. BESSLER, *LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA* (2003).

much of his attention on the influence that two early death penalty opponents had on the nation's Founding Fathers. The first, Cesare Beccaria, was an Italian aristocrat who published a small book in 1764 advocating for proportional punishments and the replacement of the death penalty with lifetime incarceration; *On Crimes and Punishments*,¹² the 1767 English translation of Beccaria's tract, was widely read and repeatedly cited by America's founders. Dr. Benjamin Rush, Bessler's second subject, was a Philadelphia physician and an early advocate of penal reform and death penalty abolition; Rush was also a contemporary and friend of various Founding Fathers, including John Adams, Thomas Jefferson, James Madison, and Benjamin Franklin. In linking Beccaria and Rush to the Founders, Bessler argues not that certain Founders were converted to the cause of capital punishment's abolition, but rather that engagement with such thinkers reflects the Founders' willingness to countenance basic penal reform. Ultimately, Bessler's analysis suggests a general process of liberalization in the thinking of many Founding Fathers, a trend marked by a growing opposition to torture, an increased use of pardons, an interest in penal servitude as an alternative to death for at least some categories of offenses, and an overall reduction in the number of offenses subject to capital punishment. If the Founding Fathers proposed the Eighth Amendment at a time when their views on punishment were in such flux, Bessler submits, surely they recognized that views on the subject would continue to evolve and that each generation would bring its own interpretation to the words "cruel and unusual."

¶9 If the Cruel and Unusual Punishments Clause is not a petrified embodiment of late eighteenth century penal practices, what does this mean for the constitutional analysis of capital punishment today? Bessler forcefully argues that the time is right for the death penalty's abolition. To formulate this argument, he brings to bear the full panoply of horrors and absurdities associated with capital punishment in America: the mental torment produced by years of incarceration on death row; the ever-present risk of botched executions; well-documented racial disparities in capital punishment; judicial interpretations of the Eighth Amendment that require the provision of medical care to inmates but permit executions; and substantial geographic disparities in capital sentencing. In Bessler's telling, the flaws in America's death penalty are myriad, and the system beyond repair. Justice in capital cases takes the form of a grotesque lottery—cruel in its execution, bizarre in its application—in which factors such as the quality of appointed counsel, the race of the victim and the offender, and accidents of geography bear as heavily on the outcome as do the merits of any given case. Southern states increasingly account for the majority of executions—more than eighty percent by the end of the twentieth century. Texas routinely produces the highest number of executions in a given year, and four counties in Texas, out of a total of 254, account for roughly half of the state's executions.

¶10 Bessler is unlikely to change any minds already firmly decided on the question of capital punishment. However, his analysis of the impact that Beccaria and Rush had on the Founders is nuanced and thought-provoking, while his case

12. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS (London, Printed for J. Almon 1767).

against the present-day constitutionality of the death penalty brings together in one source most of the significant rationales for abolition. Written for lawyers and legal scholars, *Cruel and Unusual* is at times dense and overburdened with quotations. Thus, it is most appropriate for academic law libraries, academic and government libraries supporting criminal justice research, and law firms with postconviction or capital sentencing practices.

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