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

Reviewed by Paul Kaplan, San Diego State University

John D. Bessler's *Cruel and Unusual* is a meticulously researched and clearly written treatise on the Eighth Amendment and capital punishment. Through an extensive description of the influence of Cesare Beccaria's *On Crimes and Punishments* on American legal thinkers, this book offers a compelling normative argument that the death penalty violates the Eighth Amendment.

*Cruel and Unusual* begins with a discussion of *Roper v. Simmons* (2005), one of the three twenty-first-century U.S. Supreme Court cases that curtailed the death penalty in the United States, and as such exemplifies the recent trend in America away from capital punishment. The question at issue in *Simmons* was whether the Eighth Amendment prohibited executing persons who were under 18 when they committed murder (Simmons was 17) due to "evolving standards of decency." The Court's ruling in *Simmons* allows Bessler to delineate the two basic jurisprudential positions on how to interpret the Eighth (or any) Amendment, namely the "evolving" view and the "originalist" view. In *Simmons*, the "evolvers" won by a bare majority, and their arguments exemplify Bessler's position—that the meaning of the Eighth Amendment was not "frozen" in 1791 and that Supreme Court Justices should consider contemporary facts about the world when deciding legal controversies. Bessler argues this "evolutionary" approach is "principled" and should allow Justices to "follow the arc of history, logic and human rights" (p. 30) to total abolition.

Bessler's primary source of "logic" and "human rights" is Beccaria's (1764) classic *On Crimes and Punishments*. Bessler makes clear that Beccaria was a staunch utilitarian, arguing that only "necessary" punishments were just (p. 36). But missing from this discussion is enough attention to the alternative view. Kant believed the opposite of Beccaria and said so at the time (p. 39). These contrasting Enlightenment-era perspectives reflect an abiding and fascinating dialectic about punishment: Should we punish if it does not benefit society? *Cruel and Unusual* would be stronger had the author attended more to this fundamental debate. Nevertheless, Bessler makes clear that Beccaria "identified or anticipated nearly all of the problems that have plagued and—continue to plague—capital punishment" (p. 55) and had a significant influence on the founders of the United States, despite their almost universal support of at least some form of capital punishment.

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The middle part of *Cruel and Unusual* traces the arguments for penal reform that emerged during early American history, mostly in relation to the work of abolitionist and humanist Dr. Benjamin Rush, and his and Beccaria's influence on the Founding Fathers. In doing so, Bessler identifies an important complexity in understanding early utilitarian penal reformers: "For Rush, solitude—not death—was the worst possible punishment" (p. 78). If this is so, how does that make Rush such a reformer? Would not isolated confinement constitute cruel and usual punishment? This lack of clarity in the big picture of *Cruel and Unusual* is minor, but it, along with a few others sticks out, perhaps reflecting a minor case of normative blinders on the author. Despite minor lapses such as this, this section conveys that the Framers believed in or at least entertained utilitarian/reformist ideas under their era's "standards of decency" and, by implication, would probably be abolitionists today.

Bessler next tackles the complex history of the Eighth Amendment itself, examining in detail the legal antecedents of our "cruel and unusual" clause. This is important because it uncovers the English and colonial sources that the authors of the Bill of Rights relied on, and also delineates much of the important jurisprudence on the Eighth Amendment. Along the way, Bessler identifies problems that Eighth Amendment rulings in capital cases have created, including the contradiction between *protecting* and *killing* prisoners. The Eighth Amendment, bizarrely, allows both. This rightly incenses Bessler and he concludes, "Regardless of what standard is used, though, the *Rhodes, Hudson, Farmer* and *Whitley* cases all make clear that intentionally harming prisoners when it is unnecessary to do so—exactly what executions do—is not permitted under the Eighth Amendment" (p. 221).

The last parts of *Cruel and Unusual* constitute a thorough reiteration of the current situation in the United States having to do with the death penalty and its potential abolition. This conclusion interestingly addresses lesser known aspects of the debate like the "death row phenomenon"—"a concept associated with the extreme emotional distress experienced by death-row inmates during their confinement" (p. 227)—which, Bessler contends, is itself an Eighth Amendment violation. This section is convincing, and Bessler excels at breaking down the sometimes vexing problems created by death penalty jurisprudence (e.g., "death qualification"), and again pointing out the absurdity of having a jurisprudence that allows for both protection and hurting, most recently upheld in *Baze v. Rees* (2008).

*Cruel and Unusual* concludes with a history of abolition of capital punishment, which includes some interesting notes on Abraham Lincoln's views about the death penalty (he didn't like it much), and where Bessler makes his case explicitly for why the Eighth Amend-

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ment prohibits the death penalty today. The key is his belief that the Framers wanted the Amendment to be flexible, as exemplified by their (arguably) deliberately vague words: "If the Framers had wanted to prohibit only those punishments they themselves considered 'cruel and unusual' in 1791, they could have said so. They did not, choosing instead to employ 'excessive,' 'cruel,' and 'unusual'—familiar words that any judge, in any time, can interpret perfectly well and with relatively little difficulty" (p. 312).

Taking this explicitly "evolvist" position, Bessler aims to demonstrate why the death penalty, nowadays, is cruel and unusual. His arguments here are not always entirely convincing (e.g., his assertion that execution is "cruel" because dictionary definitions say that it is cruel to inflict suffering on a person suffers from the basic point that all punishments inflict suffering) but are for the most part convincingly grounded in jurisprudential interpretations of the words.

Ultimately, Bessler passionately urges his readers to look forward to abolition in the United States by looking back to Beccaria's utilitarian vision of penal reform. Perhaps because of the author's fervently normative stance on the topic, the arguments are occasionally unclear, and he occasionally neglects discourses about punishment that directly address the death penalty. Despite these problems, *Cruel and Unusual* is an important contribution.

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*The Right to Be Out: Sexual Orientation and Gender Identity in America's Public Schools*. By Stuart Biegel. Minneapolis: University of Minnesota Press, 2010. 300 pp. $19.95 paper.

Reviewed by Joe Rollins, City University of New York

Stuart Biegel's *The Right to Be Out* offers an expansive treatment of the legal and policy issues facing LGBT students and educators in America's public schools. Separated into two parts, the first surveys "the legal principles underlying the right to be out," and the second "sets forth the research-based principles that inform a proactive focus on school climate" (p. xix). Both parts begin with an introductory overview that is followed by three case studies. The author describes the project as "a series of building blocks, with each chapter expanding on what has come before." Although the book stands as an integrated whole, "each of the eight chapters is also designed to stand alone" (p. xix).

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