

What the Supreme Court is repudiating

The Enlightenment, the American Revolution and the ban on cruel and unusual punishment

By Ed Hightower
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The US Supreme Court's decision in *Bucklew v. Precythe* earlier this month, condemning a man to a lethal injection that is likely to cause him to suffocate on his own blood as tumors in his throat burst open, is a testament to the degenerate state of American democracy.

The majority (5-4) opinion by Trump appointee Neil Gorsuch whittles down the constitutional ban on cruel and unusual punishment, forcing the condemned to identify "a feasible and readily implemented alternative method [of execution] that would significantly reduce a substantial risk of severe pain *and* that the State has refused to adopt without a legitimate penological reason." (Emphasis added).

Furthermore, the ruling holds that the US Constitution's Eighth Amendment "does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes."

The "feasibility" requirement proved an insurmountable hurdle for Russell Bucklew, and it is intended to achieve the same result for future challenges to inhumane execution. Putting the burden on the inmate of planning out his own death, the court found that his proposal of nitrogen hypoxia—a mode of execution shown to be effective, simple and painless by recent studies—was lacking because it did not spell out the minutiae of safety measures for those administering the lethal gas.

Bucklew's rare medical condition causes blood-filled tumors inside his throat. He has to sleep on a 45-degree incline to avoid suffocating on his engorged uvula (the dangling ball-like formation at the back of the throat). At the time of his execution, he will be strapped to a gurney, angled parallel to the ground, at which point he will likely begin suffocating on his uvula before any pentobarbital is even administered.

Justice Gorsuch argues that the standard for "cruel and unusual" must be the conventions and mores that prevailed at the time of the ratification of the Eighth Amendment, not modern conceptions that have evolved over the past two centuries. He views as cruel and unusual only those execution practices associated with the Middle Ages, including, as he says, "dragging the prisoner to the place of execution, disemboweling, quartering [having one's limbs removed and posted in various locations], public dissection, and burning alive."

On its own terms, the *Bucklew* opinion is a judicial travesty, turning a foundational limit on state power into a green light for unfettered executions. But a complete appraisal of its retrograde implications requires historical context.

Regarding the legal concept of cruel and unusual punishment, the *Bucklew* ruling squarely attacks the Enlightenment values that inspired the American Revolution and the Bill of Rights, and their antecedents such as the Glorious Revolution of 1688 and the English Bill of Rights of 1689.

The Eighth Amendment to the US Constitution states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted." When proposed at the First US Congress in 1789, the Bill of Rights (as the first ten amendments to the US Constitution are collectively known) included provisions for freedom of speech, press and religion (First Amendment); for a democratic, citizen-run militia system instead of a standing army (Second Amendment); for freedom from having soldiers quartered in one's home (Third Amendment); for freedom from unwarranted searches and seizures, (Fourth Amendment); for the right to due process of law (Fifth Amendment); and for trial by jury and the right to face one's accuser in court (Sixth Amendment).

The remaining Bill of Rights amendments provided the right to a civil jury trial for claims exceeding \$20 (Seventh Amendment); stipulated that the Bill of Rights was not an exhaustive list of a person's rights (Ninth Amendment); and provided that rights not otherwise specified were reserved to the states or the people (Tenth Amendment).

The Bill of Rights limited the powers that the federal government would have under the Constitution that was drafted in 1787 and ratified by the states in 1789 to replace the more limited federal structure under the Articles of Confederation. Delegates to the Constitutional Congress could not have secured the votes to ratify the new federal structure without an agreement to add amendments that would provide specific guarantees of personal liberty, so great was the fear that a stronger government—with a powerful executive in the presidency, new taxation powers, and a federal judiciary—might pave the way for unaccountable autocracy.

The specific language "nor cruel and unusual punishments inflicted" copies verbatim the English Bill of Rights of 1689, itself a bulwark against the unrestrained power of the crown.

Both the American Bill of Rights and its English antecedent bear the unmistakable stamp of the Enlightenment. The term Enlightenment can best be summarized as the intellectual, political and cultural movement accompanying the ascendancy of the bourgeoisie as a social class and the concurrent decline of the feudal nobility, the great monarchies and the Catholic Church. Some of its principal features include the elevation of the individual vis a vis the state; the belief that the state derives its authority from consenting individuals and exists to defend their liberties; and the belief that reason can harmonize and improve human life. Institutions hindering human happiness and progress have to justify their existence or step aside.

One Enlightenment philosopher who profoundly influenced the American Revolution was the Italian humanist Cesare Beccaria. Born in Milan in 1738, Beccaria studied law in his early years before joining a literary-philosophical club called "the Academy of Fists" in his mid-twenties. There he became acquainted with the works of Enlightenment thinkers such as Diderot, Helvetius, Montesquieu and Hume. Encouraged by his colleagues at the academy, he authored the

highly influential work *On Crimes and Punishment*.

Applying Enlightenment-era rationalism to the field of criminal law and policy, *On Crimes and Punishment* rejected the “eye for an eye, tooth for a tooth” approach to punishment. While this *lex talionis*—Latin for “law of equal”—view of punishment had a certain straightforwardness to it, the costs of retribution exceeded rational justification in Beccaria’s view. Instead, punishment “should have only that degree of severity which is sufficient to deter others,” because “every act of authority of one man over another that does not derive from absolute necessity is tyrannical.” Beccaria supported a more utilitarian approach (which heavily influenced Jeremy Bentham) instead of the prevailing retributive approach to punishment.

With the boldness characteristic of the best Enlightenment works, *On Crimes and Punishment* unsparingly criticized the common practice of extracting confessions through torture, attributing this practice to vestiges of the religious absolution of sins. The book features eloquent arguments for jury trials, due process and the types of government restraints that ultimately found expression in the American Bill of Rights. It also opposes what Beccaria called “secret accusations,” which we would today call sealed indictments.

The section *On the Death Penalty* develops the first modern arguments against that irreversible punishment. “Is it not absurd, that the laws which detect and punish homicide should, in order to prevent murder, publicly commit murder themselves?”

And, as if anticipating the words of Gorsuch in the *Bucklew* ruling, Beccaria adds: “What must men think when they see wise magistrates and grave ministers of justice, with indifference and tranquility, dragging a criminal to death, and whilst a wretch trembles with agony, expecting the fatal stroke, the judge who has condemned him, with the coldest insensibility and perhaps with no small gratification from the exertion of his authority, quits his tribunal to enjoy the comforts and pleasures of life?”

The French Enlightenment author Voltaire seized on Beccaria’s work immediately, calling the Italian “a brother” and “a beneficent genius whose excellent book has educated Europe.”

On Crimes and Punishments became so popular in Europe and in America too that it underwent six printings in the space of a few years. Voltaire himself wrote an introductory essay to two editions, which, according to one study, found their way into the personal libraries of more than a third of the American revolutionary leaders.

In his autobiography, Thomas Jefferson refers to Beccaria as an influence for reforming criminal law in Virginia: “Beccaria and other writers on crimes and punishments had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death.”

His collaborator in the Virginia Revisal of the Laws project, James Madison, included *On Crimes and Punishments* on the suggested reading list for the project’s participants and for participants in the Continental Congress as well.

One exchange of letters between Jefferson and Madison indicates how deeply influenced the two revolutionists were by the Milanese philosopher. The pair discussed whether hanging would be appropriate in cases of treason and insurrection, which crimes were usually held as examples even by death penalty opponents of an exceptional circumstance that might require the ultimate penalty to preserve a free society from tyranny. (This was Beccaria’s view, for example.) In the exchange, Jefferson argued against the hanging of rebels, going so far as to say that some rebellion from time to time was a good thing.

Beccaria’s influence on other American revolutionists is also apparent.

Thomas Paine, the great propagandist of the American Revolution, author of the pamphlet *Common Sense*, opposed the death penalty even in the case of the deposed king in the French Revolution. So did his friend, Dr. Benjamin Rush, a signatory to the Declaration of Independence and

the surgeon general to the Continental Army.

The Revolutionary War commander, the Marquis de Lafayette, sarcastically commented that he would support the death penalty as soon as he had sufficient proof of human infallibility in its application. Likewise, Benjamin Franklin and George Washington both disfavored the death penalty and advocated for its less frequent implementation.

As the *World Socialist Web Site* wrote the day after the *Bucklew* decision, the ruling appears to overturn a seminal 1958 Supreme Court case holding that the Eighth Amendment prohibits not merely what was considered “cruel and unusual punishment” in the late 1700s, but any punishment that defies “evolving standards of decency that mark the progress of a maturing society.”

The 1958 standard echoed Jefferson’s words, etched on his memorial in Washington, DC:

“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.”

Bucklew holds that an execution is cruel and unusual only if it “superadds” pain. In short, only pain that is unnecessary, i.e., does not contribute to the causing of death, is cruel and unusual. The “superaddition” concept came from a concurring opinion by Clarence Thomas in the 2008 Supreme Court case *Baze v. Rees*, which legally sanctioned the three-part “cocktail” used for most lethal injections at the time.

What is the significance of this concept? As part of the standard for cruel and unusual punishment it requires specific intent to inflict pain or humiliation on the part of the state, which is virtually impossible to prove. Therefore, the superaddition standard permits virtually any form of killing. If a state, for example, used drowning for execution without adding any pain on top of that which is associated with drowning, this would pass constitutional muster, even though the painless method of nitrogen hypoxia exists, according to the Supreme Court’s latest rulings.

(One should recall that George W. Bush’s Office of Legal Counsel wrote “legal” memos sanctioning the “enhanced interrogation”—i.e., torture—methods used by the CIA after 9/11 against suspected terrorists. The memos made specific intent to cause extreme pain or death the criterion for defining a type of treatment as torture. In other words, if the torturers were supposedly not motivated by the desire to inflict pain, but rather by other ends, such as extracting information, then methods such as waterboarding, stress positions, threats against a detainee’s children or parents, rectal feeding, etc. were permissible. Gorsuch borrowed the same standard for his decision justifying sadistic execution methods.)

Is there any doubt what the reaction of the great American revolutionists would be if they read the opinions of Neil Gorsuch and Clarence Thomas? For all its pretensions to constitutional “originalism,” the right-wing bloc on the Supreme Court has denigrated the clear and unambiguous ban on cruel and unusual punishment (“shall not... be inflicted”) into a remote contingency, with the effective proviso, “unless the state prefers otherwise.”

The unstated premise of this legal reasoning is that it is the *state* and not the *citizen* who possesses rights. This inversion of the Enlightenment view—that states owe everything, including their very existence, to the citizens, who have inalienable rights to life, liberty and happiness—pervades the entire jurisprudence of both “originalism” (the province of the late Antonin Scalia) and the “states’ rights” (of the segregationists) legal theories, which inevitably protect state governments

from federal intrusion on the trampling of individual rights at the state level. Clarence Thomas, for one, actually believes that each state could establish its own religion, and this would not violate the First Amendment's establishment clause. (See the WSWS analysis of *Town of Greece v. Galloway*.)

The *Bucklew* ruling reeks of a quasi-religious self-righteousness, as though prosecutors, politicians, judges and prison officials have the moral standing—and what a rotten and unjust society they stand on, where the greatest criminals invariably suffer no punishment, but wealth and privilege instead—to decide not only if one should live or die, but whether one should suffocate! As though putting down a man like an old dog (or in an even more painful manner) rebalances the scales of justice, or brings anything or anyone back to the victims, or alleviates any social ill whatsoever.

The decay of American democracy expresses, in political form, the unprecedented economic polarization of society. A narrow and venal financial aristocracy feels itself increasingly besieged by a restless working class and broad layers of disillusioned youth. It responds by dismantling even the limited democracy under capitalism and moving rapidly toward dictatorial forms of rule.

At the same time, by rehabilitating torture, the ruling elite aims to intimidate those who oppose the social order and instill fear and terror in the face of the brutality of the capitalist state.

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