**Citation:**

Thomas G. Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475 (2005).

**Other Sources:**

<http://ssrn.com/abstract=703103>

**Abstract:**

This article critiques the Court's interpretation of the Eighth Amendment's Cruel and Unusual Punishment Clause and defends an alternative understanding. The Court's jurisprudence is plagued by deep inconsistencies concerning the text, the Court's own role, and a constitutional requirement of proportionate punishment. The Justices have said that a punishment is not "cruel" if it significantly advances any legitimate penological objective. It has also recognized that the separation of powers and federalism require that decisionmakers have leeway to make reasonable judgments on this score. Yet all of the punishments the Court has invalidated reasonably can be said to further utilitarian objectives such as general deterrence and incapacitation. The Court also has declared that legislative enactments largely define the Clause's meaning. Such deference to legislation conflicts both with the Court's countermajoritarian reading of the Clause in its prison conditions cases and with the independent interpretative role it assumes in other constitutional contexts. Another puzzle concerns the Court's choice to pursue proportionality very aggressively respecting death sentences and, in effect, not at all respecting sentences of imprisonment.

In search of ways to resolve these conundrums, the article explores several alternatives: 1) A textualist approach; 2) Justice Scalia's view that the Clause forbids only punishments unacceptable for all offenses; and 3) a majoritarian approach that would consistently define cruel and unusual punishment in terms of legislative judgments and penal custom. An inflexible textual requirement that an unconstitutional punishment be both cruel and unusual would make little sense as a matter of either interpretation or principle. Among other things, the Founders wrote State Constitutions that use the term "cruel" as an equivalent of the phrases "cruel and unusual" and "cruel or unusual." The historical evidence also undercuts Justice Scalia's view, instead indicating that the Founders endorsed proportionality on both subconstitutional and constitutional levels. A majoritarian approach overlooks the real danger that majoritarian processes will not accord offender interests the decent weight that the Eighth Amendment implicitly requires. Such processes can and do result in problems of undue generality, excessive pursuit of deterrence and incapacitation, inadequate funding, and desuetude. These can produce gratuitously harsh punishments that merit judicial attention.

The article proposes an understanding of the Eighth Amendment organized around the notion of cruelty. Contrary to the Court's view, which holds that punishment may be supported solely by the utilitarian objectives of deterrence and incapacitation, the article maintains that punishment must be reasonably believed to be consistent with giving the offender his just deserts. It suggests that the term "unusual" play an evidentiary rather than a definitional role and argues for a more nuanced use of legislative judgments and majoritarian practice. The article applies its proposed understanding to several issues, including the abolition of the insanity defense, the use of strict liability, and Roper v. Simmons' ban against the execution of juveniles younger than 18.