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For now, death is not 'cruel'

EIGHTH AMENDMENT: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'

Opinion by Sarah Garrecht Gassen

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The Eighth Amendment is another in the Bill of Rights intended to provide common people with protection from the state's authority. Here, the people are given a counterweight to the criminal court's reach by requiring that bail and fines not be excessive.

But the subjective wording of the Eighth Amendment opens the question of what is "excessive," and what constitutes "cruel and unusual punishments." The lack of a definitive yardstick outlined in the amendment leaves room for interpretation.

The Eighth Amendment's prohibition on cruel and unusual punishments has been used to reform prison systems, although cruel and unusual has not been found by the courts to be automatically synonymous with outlawing incarceration conditions that are considered harsh.

The provision is an underpinning argument for many who oppose the death penalty. And while the U.S. Supreme Court has not yet found that capital punishment is, in fact, cruel and unusual, hope remains alive that it one day will, said Andy Silverman, a professor at the University of Arizona James E. Rogers College of Law and the director of its clinical program.

Questions about when the death penalty is sought, how it is applied and the fact that innocent people have been wrongly convicted raise serious concerns for death-penalty abolitionists, including Silverman.

Editor's note: The U.S. Constitution lays down the structure of the government and separates the powers among three distinct branches — legislative, executive and judicial. The landmark document was signed Sept. 17, 1787. Subsequently, the Bill of Rights, the first 10 amendments to the Constitution, went into effect Dec. 15, 1791. The Constitution imposes a series of checks and balances among the branches of government. The Bill of Rights guarantees that government cannot take away rights from its citizens and protects citizens from excessive government power. During the past few months, the Star's editorial staff took an in-depth look at the U.S. Constitution and the Bill of Rights. The series concludes today, before Bill of Rights Day, which is Friday. Read previous articles online at www.azstarnet.com/special/usconstitution

"It's the ultimate punishment a government can give somebody — that's it, it's final," he said. "There's no more heinous punishment than killing somebody, and to do so is cruel and unusual. And I think especially today with questions that have arisen about people who've been found to be innocent who've been on death rows — it's even more cruel and unusual."

A man on California's death row has filed a challenge in federal court to that state's use of lethal injection in executions, citing the prohibition against cruel and unusual punishment. Lawyers for Michael Morales, who was convicted of the 1981 rape and murder of a teenage girl, argue that the lethal injection process causes the inmate undue pain, which they contend constitutes cruel and unusual punishment. Inmates in other states that use lethal injection have filed similar lawsuits.

Excessive bail

While the Sixth Amendment has been used to ensure that criminal defendants who cannot afford an attorney will be provided free legal representation, the Eighth Amendment attempts to ensure that people facing criminal charges are treated equally before trial. The Eighth Amendment prohibits courts from setting excessive bail, a rule mirrored in the Arizona Constitution.

Every day, judges set bail for people charged with crimes with the intent of ensuring that the accused shows up for trial. The amendment doesn't guarantee a right to bail, only that the bail cannot be "excessive," said Pima County Superior Court Judge Michael Cruikshank. Bail is set individually, which means that a judge may set bond higher for one person than another, even if they're facing identical charges. Superior Court bonds are set from \$1,100 to \$1 million, he said.

A person's financial status, as well as the details of the alleged crime, community ties and employment, go into the calculation, he said. "Bail is not necessarily excessive just because they can't post it, and if they can post it, ideally it's enough money to them that they wouldn't want to lose it by not showing up."

Cruikshank said it's important to view the Eighth Amendment in its historical context, because when it was written, it was still possible to be imprisoned for owing debts.

"The purpose is to level the playing field so wealthy people don't get an easier freedom," he said. "The goal of that is that people are treated equally and financial resources alone don't decide who gets out and who gets in."

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