Another Face of "American Exceptionalism": Capital Punishment in the United States

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The debate over the meaning of "American exceptionalism" typically generates much heat and little light. There are many accomplishments and values that do make the United States exceptional among the countries of the world, and those are justifiable sources of nationalistic pride. But little pride should be felt about one aspect of American exceptionalism: an area in which the United States is nearly unique, certainly among developed countries. That is its retention of the death penalty as a punishment for crimes. Recent Supreme Court jurisprudence has reminded observers of the extremely arbitrary factors that literally determine who lives and who dies. There is little logic that supports these decisions, which appear to be grounded in biblical and not constitutional principles. The support for judicial executions dangerously conflates justice with vengeance, and the confusion between those very different notions threatens to undermine the role of the Supreme Court, and therefore puts at risk the democratic culture of the United States that other nations might be encouraged to emulate.

The notion that the United States is an "exceptional" nation has become a political rallying cry in our highly partisan age. The degree to which the notion is espoused is taken by some to be a barometer of patriotism, and by others as a measure of gullibility. But generally speaking, the notion of "American exceptionalism" suggests that the United States is unique and essentially different from other countries in its commitment to benevolent goals and an ideology to which the rest of the world should aspire. Some would go so far as to attribute this uniqueness to Providence.[ii]

"Exceptional" is a word that generally suggests praise, admiration, even veneration. Of course, the dictionary does not assign these connotations. To be "exceptional" means merely to be different from the norm in some noticeable way. Yet it cannot be denied that with the notion of "exceptionalism" often comes more than a whiff of arrogance, claiming exemption from rules, principles, and standards – perhaps even legal requirements – applicable to everyone else who is not similarly "exceptional."

There are doubtless many regards in which the United States today can legitimately claim to be "exceptional," so to speak, "in a good way." Among those certainly would be this country's commitment to its founding document, and the confidence of its people in the rule and the institutions of law. After all, it was in living memory that a quadrennial election for the highest position in the nation was decided by a single vote in the Supreme Court, and the people accepted the result and moved

on. There was neither violence nor substantial resistance to the legitimacy of the President-Elect, so chosen. It is far from certain that such an outcome could have occurred anywhere else on the planet.

Other areas in which the United States is "exceptional" – or perhaps merely different – reflect a deep-seated resistance to change. These include the nearly unique retention of the old imperial system of weights and measures and the preservation of the Fahrenheit scale for recording temperatures. And the United States dollar is the lowest-value unit of currency in the Western world that is still circulated as paper banknotes, rather than coins.

More importantly, however, there have been many instances in recent years in which this country has insisted on the right to engage in conduct that its closest peers in the international community condemn, and to hold itself outside (and even to impede) legal regimes promoting the adoption of rules designed to apply to all. Examples abound: the United States is the only member of the United Nations that has failed to ratify the Convention on the Rights of the Child,[iii] and the nation's attitude toward the International Criminal Court ("ICC"), from the "unsigning" of the Treaty of Rome to the adoption of legislation aiming to punish states that participate in the Court, can fairly be described as hostile.[iv]

But among the most visible spheres in which the United States stands nearly alone among the nations of the developed world is its use of capital punishment. The Organization for Economic Cooperation and Development (OECD) – comprising those states most advanced according to economic and social metrics – currently has 36 members. Of those 36, precisely two, the United States and Japan, still have legal systems that provide for judicial execution as punishment for crimes. It has been abolished everywhere else.

Membership in the Council of Europe requires repudiation of the death penalty, and its rejection remains an important focus of concern.[v] In 2007, the Council of Europe and the European Union jointly announced the establishment of an event – "the European and World Day against the Death Penalty" – observed every year on 10 October, to reinforce the significance of the issue.

Yet in the United States as of early 2019, 30 States (and the federal government[vi]) provide for capital punishment, although four States (Colorado, Pennsylvania, Oregon, and most recently, California, the State with nearly 750 residents on the largest Death Row in the country) have at least temporarily suspended the practice, and three others (Kansas, New Hampshire,[vii] and Wyoming) have not executed anyone since before the year 2000. While this is a sharp decline from the recent record of 98 executions in 1999, 25 individuals were executed nationwide in 2018 (13 in Texas alone; three in Tennessee; two each in Alabama, Georgia, and Florida; and one each in

Nebraska, Ohio, and South Dakota). Through August 9, there have been 10 executions in 2019 (three each in Texas and Alabama, two in Georgia, and one each in Tennessee and Florida), with 22 others (12 of them in Texas) scheduled before the end of the year.[viii]

It is very hard to argue that the practice of judicial executions was not countenanced by the framers of the Constitution, who in the late eighteenth century made explicit and approving reference to it in the Fifth Amendment ("No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, …; nor shall be … deprived of life, liberty, or property, without due process of law…"). The Eighth Amendment's prohibition of "cruel and unusual punishments" has never been interpreted by the courts to ban the death penalty per se.

Nevertheless, as the Supreme Court has noted, "[t]o determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'"[ix] It is on this basis that the Court, in 2008, restricted the application of the death penalty to homicide crimes, noting that "[d]ifficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim."[x] Subject to that constraint, the Court has permitted States a wide margin of appreciation in deciding precisely what categories of homicides make a perpetrator eligible for the ultimate punishment.

In gauging those elusive "evolving standards," the Court has, on occasion, considered the practices and attitudes of other countries. It did so when, for example, if forbade the execution of individuals with mental disabilities,[xi] as well as those below the age of 18 at the time they committed the murders of which they were convicted.[xii] This recognition of the significance of developing attitudes around the world was, and remains, not without controversy, and there are those (including some members of the Court itself) who deem nearly any Supreme Court reflection on international or foreign law to be ultra vires.

Despite this sometime openness to the spirit of the age, however, it remains extremely unlikely that the Supreme Court will, in the foreseeable future, consider judicial executions, by whatever method they are carried out, to be "cruel and unusual punishment" in violation of the Eighth Amendment to the Constitution. Nor does it seem that the geographical arbitrariness, the racial imbalance, and the extraordinary inefficiency that characterize capital jurisprudence will change this outcome.

The number of States jettisoning the death penalty, however, is increasing, the frequency with which such sentences are handed down across the country is declining,[xiii] and polling data are showing a marked erosion in popular support for the practice.[xiv] Yet for those who consider judicial executions to be unacceptable in a

civilized society, there is little cause for optimism. The Supreme Court, whose nine members have the authority to determine whether the United States is to be brought into line with virtually the whole of the developed world or will maintain its "exceptionalist" posture, has shown no sign that capital punishment in the United States will be discarded once and for all.

Justice Stephen Breyer, in a dissenting opinion in 2015, observed that "[t]he circumstances and the evidence of the death penalty's application have changed radically since [1976] … those changes, taken together with my own 20 years of experience on this Court, . . . lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment.'" He was joined in that dissent by Justice Ruth Bader Ginsburg. It is certainly possible, given their own writings on the subject, that Justices Sonya Sotomayor and Elena Kagan also share those views. But four Justices do not constitute a majority of the Court, and as the late Justice William Brennan famously quipped, the most "critical talent for a Supreme Court Justice was the ability to count to five."[xv]

Attempting to identify definitively the cultural, sociological, and psychological factors that cause the United States to cling to a practice condemned around the world, and continued today almost exclusively in China, the Middle East, and a few places in the Caribbean and South and Southeast Asia, is far beyond the scope of this essay, and well outside the competence of its author. But a few observations may be drawn from the recent jurisprudence of the Court, and from the reactions around the country to those decisions. Some of the writings of the Justices make clear the source of their conviction that judicial execution is not only a legal, but also a moral, response to at least certain homicides committed by certain defendants. This thinking, however, seems anchored in biblical rather than constitutional exegesis.

In its October 2018 Term, which ended in June of this year, the Court issued opinions or orders in two cases concerning the right of a condemned inmate to be accompanied to his death by a spiritual adviser, and two others addressing claims that methods of execution would cause extraordinary pain and suffering. These cases read together demonstrate a marked degree of inconsistency, but they nevertheless reveal a grounding in "lex talionis" derived from the Old Testament, according to which: "he that killeth any man shall surely be put to death. … Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again."[xvi]

It certainly may be argued that such a premise is a highly unreliable basis on which to affirm the right of the state to take the lives of its citizens in a planned, methodical way. For one thing, in no State is the death penalty permitted for "simple murder," even if it is the result of calculated deliberation. "Capital murder," as most death-penalty States define it, is a homicide characterized by some factor that makes it especially heinous, cruel, reprehensible, or disruptive to the good order of society, or

compounded by another felony (such as robbery or rape). The cool, dispassionate, and meticulously organized dispatch of a romantic rival, for example, will not be punished by death (unless the killer is foolish enough to steal the victim's wallet). So the law in the United States does not require, and never can require, "a life for a life." Yet that does not prevent the ritual invocation of such principles, whether or not expressly sourced in *lex talionis*.

Nor is it clear that such a biblical underpinning is proper under a Constitution enshrining the separation of the state from religion. A most interesting phenomenon in deeply Christian and even fundamentalist parts of the country is the strength of the notion that justice may be served only if homicide crimes are punished with death, because of course Jesus Himself expressly rejected the apparently harsh dictates set out in the Book of Leviticus: "Ye have heard that it hath been said, 'An eye for an eye, and a tooth for a tooth:' But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also.'"[xvii] The teachings of the New Testament seem, therefore, to undermine the foundation of *lex talionis*, and to counsel a more nuanced approach.

Yet the gratuitous cruelty and inhumanity of *lex talionis* continue to characterize High Court opinions and the responses to them. On February 7, 2019, the Court addressed a petition by the State of Alabama to allow it to carry out the execution of Domineque Ray, a convert to Islam while on Death Row, without the attendance of an imam. The Supreme Court denied the petition in an unsigned memorandum order, on the grounds that Ray's alleged delay in seeking the requested relief constituted a procedural bar. Four Justices dissented, in an opinion authored by Justice Kagan. The dissenters observed that Christian ministers are regularly permitted to be present at executions. The Court's summary disposition flagrantly ignored what Justice Kagan called "the core principle of denominational neutrality" enshrined within the First Amendment, which provides that the "Government] may not . . . aid, foster, or promote one religion or religious theory against another."[xviii] And they pointed out that the Court of Appeals for the Eleventh Circuit specifically rejected the State's argument regarding untimeliness.

A nearly identical case, *Murphy v. Collier*, came before the Court just six weeks later. Patrick Henry Murphy, a Texas inmate, is a Buddhist. The Texas Department of Criminal Justice permitted Christian and Muslim spiritual advisers who were employees of the State to accompany prisoners to their deaths. But the Department did not employ clerics of other faiths, and so those were barred from entering the death chamber. This time, the Court by a vote of 5-4 held for the inmate. Justice Brett Kavanaugh, who had joined the majority in *Ray*, switched positions, without so much as mentioning the *Ray* case decided so recently. His concurring opinion, concluding that "the State may not ... allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser

of their religion in the execution room,"[xix] was fully on all fours with Justice Kagan's impassioned dissent in *Ray*.

The Texas execution was stayed. There was no discernible difference between the two cases with respect to the procedural bar that ended Ray's life, but that was overlooked in *Murphy*. And it should be noted that neither man was asking the Court to cancel his execution: they sought only the same spiritual solace that Christian inmates are routinely afforded in their last moments. Domineque Ray was killed at Holman Correctional Facility in Atmore, Alabama, on February 7, the very day on which the High Court denied his petition for a stay. He walked into the death chamber unaccompanied by a religious adviser. Patrick Murphy, granted the right to have the cleric of his choice with him at the time of his death, is still alive as of this writing.

On April 1, 2019, the Court handed down an opinion in the case styled *Bucklew v. Precythe*. Russell Bucklew, a Death Row inmate in Missouri, suffers from a condition called cavernous hemangioma, which causes vascular tumors -- clumps of blood vessels – to grow in his head, neck, and throat. His petition to the Supreme Court argued that executing him in accordance with the Missouri standard protocol, the injection of the lethal chemical pentobarbital, would produce excruciating pain, effectively causing him to drown in his own blood.

An exasperated and even angry Justice Neil Gorsuch wrote the Court's opinion for himself and four colleagues: the same majority that had accelerated the death of Domineque Ray in Alabama. He made it clear that, in his view, the petition was a nothing more than a desperate and last-ditch effort to avoid execution motivated, if not sponsored by, death penalty opponents, and that it offered no basis for its contention that injecting Bucklew with the State's preferred chemical would violate the Eighth Amendment. The Court denied relief, concluding that Bucklew had to discharge the responsibility to propose an alternative method by which the State of Missouri could kill him, and he failed to do so.

The four dissenters, led by Justice Breyer, put the case starkly: "the evidence establishes at this stage of the proceedings that executing Bucklew by lethal injection risks subjecting him to constitutionally impermissible suffering. The majority holds that the State may execute him anyway."[xx] Nor does that characterization misstate the Court's ruling; to the contrary, Justice Gorsuch seemed to embrace it. In words that will surely be cited regularly as the "sound bite" of contemporary capital jurisprudence, he wrote, "the 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."[xxi]

This invocation of the human suffering of the victims of homicides in determining the constitutional rights of the perpetrators of those crimes is deeply troubling.[xxii] It

can have no constitutional relevance: the Constitution does not scale the rights of the accused to the heinousness of the crime with which he or she has been charged. Certainly there is no appeal here to the alleged deterrent effect of the death penalty: a claim debunked so frequently that its espousal is the equivalent of denying evolution or the reality of climate change. Justice Gorsuch's position finds no foundation in any justification for punishment except retaliation. Its logical corollary will surely be that a prisoner who acted with callous disregard for the life of his victim is thereby disentitled to the due process of law, and his life may be disregarded to the same measure.

Lest the message of *Bucklew* – that the Court will not interfere with States rushing Death Row inmates into the execution chamber – somehow be lost in the peculiar facts of that case, the Court drove the point home less than two weeks later, in the Alabama case of *Dunn v. Price*.[xxiii] Christopher Lee Price, an inmate on Death Row, presented evidence that, because of an unusual medical condition, execution by lethal injection would cause him too extreme pain. In *Price*, however, there was no need for the inmate to devise the means by which the State would execute him, because in Alabama, unlike Missouri, Death Row prisoners are entitled to elect "nitrogen hypoxia" – that is, suffocation – as an alternative to injection. The Eleventh Circuit Court of Appeals granted the petitioner a 60-day stay of his execution, pending resolution of jurisdictional questions raised by the petition. The State sought immediate review of the stay in the Supreme Court. It filed its request at 9:00 p.m. EDT on Thursday, April 12.

While its emergency request was pending before the High Court, the State canceled the execution, recognizing that the death warrant would likely expire before the Supreme Court could resolve the matter. Justice Breyer asked that the case be placed on the agenda for the Court's regularly-scheduled conference the next day. Five Justices of the Court, however – the same five, once again, who formed the majority in *Ray* and in *Bucklew* – simply granted the petition and vacated the stay, in an unsigned order, early in the morning of the very day of their conference. Although the Court did not disclose its analysis of the facts or the applicable law, it appears that the majority based their disposition of the case on a concern over the timeliness of Price's request: an argument that had been expressly rejected by the District Court, and that remained unresolved in the U.S. Court of Appeals.

Justice Breyer's dissent, in which Justices Ginsberg, Sotomayor, and Kagan joined, was issued after 3:00 a.m. It begins with these words: "Should anyone doubt that death sentences in the United States can be carried out in an arbitrary way, let that person review the following circumstances as they have been presented to our Court this evening."[xxiv] And after narrating the facts and procedural history of the case, Justice Breyer concluded, "To proceed in this way calls into question the basic principles of fairness that should underlie our criminal justice system. To proceed in this matter in the middle of the night without giving all Members of the Court the opportunity for discussion tomorrow morning is, I believe, unfortunate."[xxv]

The Justice was, of course, quite right to point out that summary resolution – without briefing, argument, or serious judicial consideration – of important constitutional and jurisdictional arguments does "call into question" some very fundamental principles. He did, however, seriously (and almost certainly deliberately) understate the case when he called the outcome "unfortunate." It was far more than "unfortunate." It was outrageous, and should be seen as such by any observer, irrespective of her or his position on the propriety of the death penalty. Surely if such a system is to be maintained, it must be permeated by the most scrupulous adherence to constitutional rules, and to basic tenets of fairness.

There was absolutely no reason for the Supreme Court to weigh in on this case, which surely would have returned to the Court once the Court of Appeals resolved the open jurisdictional issue that remained before it. And because the State of Alabama allowed the writ of execution to expire, and therefore would have to obtain a new one regardless of the Supreme Court outcome, any need for urgency was entirely illusory: the denial of the stay sought by the Court did not expedite the execution.

The delay, however, produced this reaction from Steven Marshall, Attorney General of Alabama: "Tonight, in the middle of National Crime Victims' Rights Week, the family of Pastor Bill Lynn [the victim of Price's murder] was deprived of justice. They were, in effect, revictimized by a killer trying to evade his just punishment."[xxvi]

The Attorney General spoke of "justice" and "just punishment," but these were barely-enshrouded code words for revenge. Under Alabama law, even had Price's death sentence been commuted or had he been resentenced, he would have served a term of life in prison without the possibility of parole. Surely that is "punishment." If "justice" refers to the process for adjudication of the facts by a neutral observer (with the State bearing the burden of proving each essential fact beyond a reasonable doubt) and a proper application of the law, then surely that is also "justice." There is no sense, other than under the *lex talionis* exaction of "a life for a life," in which spending the rest of his years behind bars would not be a "just punishment" for the heinous crime that Price undoubtedly committed. And allowing Price to make the case that he should be permitted to die at the hands of the State without undergoing extreme suffering would have "deprived" the victim's family of nothing of which the law should take cognizance.[xxvii]

The sharp and obviously rancorous division among the Justices of the United States Supreme Court on this issue is a matter deserving serious concern. It portends – it probably even reflects – an increasing polarization on the Court, in line with what we see daily among the body politic, concerning the sources of the principles on which our legal system rests. Ultimately, it threatens the devaluation of the institution of the Supreme

Court itself, removing the linchpin from the system of checks and balances so basic to the architecture of our Government.

It is impossible to miss the irony here. Maintenance of the death penalty is an illustration of "American exceptionalism," in that the United States is virtually alone among developed countries in continuing this practice. Yet if the nation cannot resolve the schism now clearly seen on its highest Court, if it cannot agree on matters so basic as the difference between justice and vengeance, then it will surely put at risk those very accomplishments that have, for over two centuries, made America truly exceptional.

REFERENCES

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[ii]. See, for example, John Winthrop's "City on a Hill," which President Ronald Reagan embellished to add the adjective "shining": "another generation of Americans has protected and passed on lovingly this place called America, this shining city on a hill, this government of, by, and for the people." State of the Union Address, January 25, 1988.
[iii] United Nations Convention on the Rights of the Child, 1577 U.N.T.S. 3 (entered into force Sep. 2, 1990). Although the United States signed the Convention in 1995, no president has submitted it to the Senate for the advice and consent required for ratification. Since the accession of Somalia to the Convention in 2015, the United States is the only eligible state on Earth not to become a party.
[iv] This hostility antedated the advent of the Trump Administration. In 2002, after President George W. Bush "unsigned" the Treaty of Rome establishing the ICC, Congress adopted and the President signed into law the American Service-Members' Protection Act, Title 2 of Pub.L. 107–206, 116 Stat. 820 ("ASPA"), which authorized the president to use "all means necessary and appropriate to bring about the release of any U.S. or allied personnel being detained or imprisoned by, on behalf of, or at the request of" the ICC. ASPA went on to threaten the withholding of military aid to any country that cooperates with the ICC in prosecuting American citizens who might be accused of war crimes. More recently, in March 2019, Secretary of State Mike Pompeo announced that the United States will revoke or deny visas to ICC personnel investigating alleged abuses committed by U.S. forces in Afghanistan or elsewhere.
[v] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms essentially abolished the death penalty in all circumstances. ETS No. 187 (entered into force July 1, 2003). Although as of this writing Armenia, Azerbaijan, and the Russian Federation have not yet ratified the

Protocol, the only European state currently imposing capital punishment is Belarus, which is also the only U.N. member state on the European continent that is not a member of the Council.

[vi] The federal government has not executed anyone since 2003. On July 25, 2019, however, U.S. Attorney General William P. Barr announced that it would resume the practice, listing five convicted murderers whom the Justice Department intends to kill over the next six months. It is likely that this decision will be hotly contested in court.

[vii] New Hampshire appears on the verge of abolishing the practice, with the Legislature likely to override an expected gubernatorial veto.
See https://www.npr.org/2019/04/11/712457692/new-hampshire-poised-to-eliminate-death-penalty.

[viii] A list of cases, together with demographic and other information about the inmates, is set out at
https://en.wikipedia.org/wiki/List_of_offenders_executed_in_the_United_States_in_2019. For many reasons – including further appeals, court stays, administrative reschedulings, reprieves and clemency grants, supply issues, and deaths of inmates from natural causes – the number of executions scheduled for the remainder of the year is quite likely to change.

[ix] Estelle v. Gamble, 429 U. S. 97, 102 (1976) (quoting Trop v. Dulles, 356 U. S. 86, 101 (1958) (plurality opinion)).

[x] Kennedy v. Louisiana, 554 U.S. 407 (2008).

[xi] Atkins v. Virginia, 536 U.S. 304 (2002).

[xii] Roper v. Simmons, 543 U.S. 551 (2005).

[xiii] The last three years – 2016 with 31, 2017 with 39, and 2018 with 42 (five of those in California, whose Governor halted executions in the State in early 2019) – have seen the lowest numbers of new death sentences issued around the country since 1972, the year when the Supreme Court halted the practice, temporarily as it turned out, in Furman v. Georgia, 408 U.S. 238. By means of comparison, there were over 300 capital sentences handed down each year between 1995 and 1997. See
https://deathpenaltyinfo.org/2018-sentencing.

[xiv] https://www.washingtonpost.com/national/2018/06/11/american-support-for-the-death-penalty-inches-up-poll-finds/?utm_term=.6c64f115d03b. Gallup reported that in 2016 popular support sank below 50% for the first time in nearly half a century, although there has been a slight uptick since then, and current estimates show that about 55% endorse the practice. Id.

[xv] Anthony Lewis, "In Memoriam, William J. Brennan, Jr.," 111 Harvard L Rev. 29, 32 (1997)

[xvi] Leviticus, 24:17, 20 (King James Version). There is, of course, considerable Biblical and other scholarship debating the real meaning of this passage.

[xvii] The Gospel According to Matthew, 5:38-40 (KJV).

[xviii] Dunn v. Ray, 586 U.S. ___ (mem.) (2019).

[xix] Murphy v. Collier, 586 U.S. ___, 139 S.Ct. 1111, 1112 (mem.) (2019).

[xx] Bucklew v. Precythe, 587 U.S. ___ (mem.) (2019) (Breyer, J., dissenting)

[xxi] Bucklew, supra, 587 U.S. ___ (mem.).
[xxii] It is a troubling phenomenon, but it is not a new one. And the Supreme Court has already witnessed warnings of the dangers it poses. In 1994, shortly before he retired from the Court, Justice Harry Blackmun concluded that the death penalty was beyond constitutional salvation and that he could no longer justify sustaining it. As he eloquently declared, "From this day forward, I no longer shall tinker with the machinery of death." Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of cert.). The late Justice Antonin Scalia mocked his colleague, wondering why he had chosen to make his announcement in the Callins case – a relatively "routine" and not especially brutal homicide – rather than another case awaiting review: "the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. See McCollum v. North Carolina, cert. pending, No. 93-7200." He added, "How enviable a quiet death by lethal injection compared with that!" Id., 510 U.S. 1141, 1143 (Scalia, J., concurring in denial of cert.). Although Justice Blackmun did, in fact, dissent when the McCallum case came before the Court, review was denied, and his capital sentence was affirmed. 512 U.S. 1254 (Blackmun, J., dissenting from denial of cert.). But despite Justice Scalia's absolute confidence that the brutality of McCollum's crime justified his execution, and that a "quiet death" was probably too good for him, Henry Lee McCollum was exonerated and released from prison in 2014. He was in fact not guilty of the crime for which he had been sentenced to die.
See https://www.nytimes.com/2014/09/04/us/north-carolina-death-row-dna.html.
[xxiii] Dunn v. Price, 587 U.S. __, 2019 WL 1575043 (mem.).
[xxiv] Id. (Breyer, J., dissenting).
[xxv] Id.
[xxvi] https://www.nytimes.com/2019/04/12/us/politics/supreme-court-alabama-execution-.html.
[xxvii] A subsequent petition to the Supreme Court for a stay was denied on May 13, Price v. Dunn, 587 U. S. ___ (2019), with Justice Thomas for himself and Justices Alito and Gorsuch elaborately reciting the gruesome details of Price's crime (as if they had some bearing on his entitlement to due process of law). The Justice concluded that "[t]he Constitution allows capital punishment, … and by enabling the delay of petitioner's execution on April 11, we worked a 'miscarriage of justice' on the State of Alabama, Bessie Lynn [the victim's widow], and her family." Id. (Thomas, J., concurring). Christopher Lee Price was executed by the State of Alabama on May 31, 2019.