Notes on the 8th Amendment:

Amendment VIII
(December 15, 1791)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The subject of our constitutional examination is again our criminal justice system: how it works and how it doesn’t, but in this case the focus changes. Instead of the rights of the accused, the 8th Amendment is about the “rights of the convicted----the guilty.” Why should guilty people have rights? A moment’s reflection should provide an answer.

Main themes to consider:

Jails:
1. Jails, in contrast to prisons, are not intended as places of punishment. They are places of detainment, housing those accused of crimes until their trials. Their inmates are *presumptively innocent* and protected by the due process clauses of the 5th Amendment (for federal jails) and the 14th Amendment (for state jails) as well as the 8th Amendment’s prohibition against excessive bail. The Bail Reform Act of 1984 was intended to reduce the number of crimes committed by defendants awaiting trial by allowing the practice known as “preventive” or pretrial detention. The law was tested in *US v. Salerno* (1987), and was upheld by the Rehnquist Court (a communitarian decision).
2. Only a small percentage of those arrested end up doing time in prison. Even so, the prison population in America has been doubling each decade since the 1970s, in part because of public demand for a “get tough” approach to criminals. The jail population has also increased at an alarming rate, causing congestion and pressure upon facilities.
3. Although recent Supreme Court decision have admonished federal judges not to get too involved in the details of prison administration, the lower federal courts have been pressing prison and jail administrators to improve inmates’ living conditions and provide them with more space.

Prisons:
1. Prisons, as places of long-term confinement, are relatively new in Western history. They began under Quaker auspices as “penitentiaries,” places designed for “penitence.” Later, under the influence of modern psychology and social work, they were intended as “correctional centers.”
2. Imprisoning criminals has been justified under one or more rationales: a) rehabilitation, b) deterrence, c) incapacitation, and d) retribution. Each of
these rationales has its supporters and critics. You should evaluate these justifications for yourself. Which of the four seems the most defensible?

Death Penalty:

1. The framers of the 8th Amendment were not opposed to capital punishment. (The same Congress that wrote the 8th Amendment also passed death penalty statutes. Furthermore, the 5th Amendment states that grand jury indictments are necessary in cases involving "capital" crimes. The 5th Amendment also prohibits holding someone twice “in jeopardy of life or limb.” Finally, the 5th Amendment prohibits government from depriving people of “life, liberty or property,” without due process of law, which means that government may deprive people of their lives if due process is used.) By “cruel and unusual punishment,” they meant punishment that involves “torture” and other barbarous methods. The Supreme Court has interpreted this to mean the deliberate, wanton infliction of pain and/or use of degrading punishment.

2. The Court has also, in the case of Weems v. US (1910) outlawed punishments that are grossly disproportionate to crimes (e.g. fifteen years in chains and hard labor for petty embezzling.)

3. In Trop v. Dulles (1958), the Court said that today’s courts should not be bound to the standards of “cruel and unusual” that prevailed in 1791. The 8th Amendment should draw its meaning from our “evolving standards.” The assumption was that our country is progressing morally---that its standards are improving.

4. In Furman v. Georgia (1972), the Court outlawed the death penalty in the three cases brought before it. However, only two of the justices thought the death penalty per se was unconstitutional. The “swing justices” thought it was unconstitutional only because it was applied arbitrarily and capriciously.

5. In Gregg v. Georgia (1976), the Court upheld the death penalty under certain circumstances and with what the Court deemed proper safeguards against arbitrariness, passion and prejudice. It rejected the argument that the death penalty per se violates the 8th Amendment. Safeguards developed by Georgia include:
   a. Bifurcation: two jury trials—one to determine guilt, the other to decide between imprisonment and execution.
   b. Ten aggravating circumstances---one of which must be found to exist before a death sentence can be imposed.
   c. Mitigating circumstances including defendant’s youth, emotional state, and cooperation with authorities.
   d. Automatic appeal to state Supreme Court to determine proportionality.