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Pretrial Detention and the Eighth and Fourteenth Amendments

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> The work in the name of equality is far from done. . . . Beyond the schools lie . . . public accommodations of every sort . . . housing, jobs, voting, police protection, and so on. And still beyond them all are poverty and the victims of poverty . . . where race prejudice, minority status, and many other social and personal factors are compounded.[1]

IT IS THE INTENT OF THE WRITER of this paper to examine the conditions endured by indigent defendants through their pretrial detention in *Cuyahoga County Jail* with respect to the Constitutional prohibitions of "cruel and unusual" punishment and a denial of "equal protection of the laws." Cuyahoga County is better known as Cleveland, Ohio.

Expediency requires that the important concept of the rights of indigent inmates as they relate to civil rights statutes, and particularly Title 42 U.S.C. Section 1983, not be considered here. It may be hoped, however, that the propositions and legal considerations put forth in this paper will lead logically to an in-depth consideration of this area as well as in some future article.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[2]

These guarantees to the individual, and prohibitions to the State, were included in the Bill of Rights. They stand, with the other provisions of the Bill of Rights (Amendments I to VIII), as being so basic to the system of justice which the framers envisaged that they may neither be abridged nor denied by the government of the United States, or through the due process clause of the fourteenth amendment, by any of the sovereign states.[3]

That concept being properly established and agreed upon,[4] the question then becomes, What is the import and effect of such sacred and fundamental guarantees? Yet the Supreme Court of the United States has been perhaps unwilling, perhaps unable to answer this question. With regard to the concept of "cruel and unusual punishments," it has traditionally been a simpler task to state with certainty those situations which are not protected by this guarantee than to assert the areas within its realm.[5]

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1 J. TENBROCK, EQUAL UNDER LAW 15-16 (rev. ed. 1965). Taken from Abascal, *Municipal Services and Equal Protection*, 20 HASTINGS L. J. 1367, 1374 (1968).

2 U. S. CONST., amend. VIII.

3 Johnson v. Dye, 175 F.2d 250, 254 (3rd Cir. 1949).

4 Robinson v. California, 370 U.S. 660, 666 (1962); Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968); Cooper v. Pate, 378 U.S. 546 (1964).

5 Weems v. U. S., 217 U.S. 349 (1910); Louisiana v. Resweber, 329 U.S. 459 (1947); *Ex Parte* Pickens, 101 F. Supp. 285 (Terr. of Alaska 1951).

The Supreme Court has continually acknowledged that "cruel and unusual punishments" is a phrase and a guarantee elusive of definition.[6] This is, of course, little comfort to the man who, held pending trial and presumed by the law to be innocent, is made to lie on the floor of a cell at Cuyahoga County Jail because there are not enough beds in that facility to accommodate all who are housed therein and, even if there were enough beds available, there would be no place to put them.[7] Already in this man's cell block there are approximately 160 men huddled together in confinement in an area designed to hold a maximum of 60 inmates.[8] What small floorspace there might have been in the past for the prisoners to walk, is now taken up exclusively by beds.[9] There are no recreation areas either inside or outside of the Cuyahoga County Jail.[10]

None of this is to say, of course, that it is the malicious intent of the State of Ohio or the Cuyahoga County Commissioners to sustain and perpetuate such conditions.[10a] Budget considerations and administrative decisions with regard to allocation of available funds seem more to blame for the existing conditions. But Judge Medina, in *United States v. Fay* in 1957, cautioned, "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency." [11]

The concept of what constitutes "cruel and unusual punishments" is flexible. This is perhaps the essential ray of promise in an otherwise much-forsaken area.

> The Eighth Amendment is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice. . . .[12]

This inherent flexibility in the eighth amendment's prohibition of inflicting "cruel and unusual punishments" has been noted and reaffirmed by the courts.

> In summary, then, so far as the Supreme Court cases are concerned, we have a flat recognition that the limits of the Eighth

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[6] Wilkerson v. Utah, 99 U.S. 130, 135-136 (1878); In re Kemmler, 136 U.S. 436, 447 (1890); Weems v. U. S., 217 U.S. 349, 368-371 (1910); Trop v. Dulles, 356 U.S. 86, 87, 99 (1958); Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968).

[7] From an interview with Sgt. C. Zigarrio, Sheriff's Department, Cuyahoga County, Ohio (Aug. 11, 1970). (This article focuses specifically on the conditions at the Cuyahoga County Jail. Limitations imposed by time and space made personal inspection of other similar institutions impossible. Clearly, many jails in Ohio and throughout the United States share many of the problems manifested in the Cuyahoga County Jail and described in this paper.)

[8] *Id.*

[9] *Id.*

[10] *Id.*

[10a] In November, 1970, the voters of Cuyahoga County approved a bond issue calling for the expenditure of $22 million to construct a new jail with facilities to house 2,000 prisoners. Perhaps superficially it might appear that the people have recognized the problems presented in this paper and have solved them. However, it is not expected that the new jail will be completed for at least five years. During this time, thousands of men and women will be detained pending trial in the present 40-year-old facility. Many of these will be held in violation of the eighth and fourteenth amendments to the U. S. Constitution.

[11] U. S. v. Fay, 247 F.2d 662, 669 (2d Cir. 1957).

[12] Weems v. U. S., 217 U.S. 349 (1910).

> Amendment's proscription are not easily or exactly defined, and we also have clear indications that the applicable standards are flexible . . . and that broad and idealistic concepts of dignity, civilized standards, humanity and decency are useful and usable.[13]

That flexibility and "evolving standards of decency" are desirable in a "maturing society" [14] cannot be denied. Flexibility and evolving standards of decency unapplied, however, are meaningless. The eloquent rhetoric of Mr. Justice Douglas in *Robinson v. State of California,* wherein he appealed to the conscience of a country, saying:

> The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the "cry of horror" against man's inhumanity to his fellow man.[15]

becomes just rhetoric to the ear of a man who has not eaten hot food in weeks or months in Cuyahoga County Jail.[16] Other invocations of the "traditional humanity of modern Anglo-American law" [17] and an aversion to "unnecessary pain" [18] and to that which "shocks the most fundamental instincts of civilized man" [19] and the promise that the eighth amendment's basic concept "is nothing less than the basic dignity of man" [20] fall on the similarly deaf ears of the man awaiting trial who must live in the same cage with a toilet that does not function merely because he is suspected of having committed some crime.[21] But perhaps the *tour de force* of the Court came in the dissent in *Powell v. State of Texas.*

In that case, the appellant had been convicted of public drunkenness. On appeal citing the decision in *Robinson v. State of California,* the appellant contended that he was a chronic alcoholic and as such was unable to control his compulsion to drink or his subsequent behavior and that the statute on which his conviction was based made a "status," chronic alcoholism, criminal. While the majority felt that this appellant was not punished criminally for a status he had no power to control, the dissent in its reference to *Robinson* acknowledged the fundamental concept.

> *Robinson* stands upon a principle which, despite its sublety [sic], must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties

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13 Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

14 Trop v. Dulles, 356 U.S. 86 (1958).

15 Robinson v. State of California, 370 U.S. 660, 676 (1962).

16 This is so because the heating coils do not function in the serving cabinets in which the food is transported from the twelfth floor where the food is prepared to the floors where the inmates are confined, and, in the time required for its transportation, the food becomes cold. From an interview with Sgt. C. Zigarrio, *supra* note 7.

17 Louisiana v. Resweber, 329 U.S. 459 (1947).

18 *Id.*

19 *Id.* at 473 (dissenting opinion).

20 Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

21 OHIO REV. CODE ANN. § 2945.04 (Baldwin 1965).

may not be inflicted upon a person for being in a condition he is powerless to change.[22]

And yet, set quite apart from this volume of elevated language, of the 786[23] human beings confined at the Cuyahoga County Jail or its annex, the Cleveland House of Correction, 707[24] are awaiting trial and thus must be presumed to be innocent, and of these 707 people awaiting trial, 530[25] are being held for non-capital and bailable offenses and would, therefore, be free to go if they had enough money to procure their release through the bail system. Every one of these 530 inmates, then, ipso facto, is, for this purpose, in a condition he is powerless to change, that is, poverty.

It is only with these above-described 530 people housed at Cuyahoga County Jail that this paper concerns itself. It is acknowledged here that the remaining 256 prisoners are properly confined within the dictates of the Supreme Court, though perhaps it is permissible to entertain the conviction that the conditions they, too, must endure must be improved in the interests of humanity and decency.

But it is only as to the 530 inmates awaiting trial for non-capital offenses, that such confinement becomes "cruel and unusual" within the prohibitions of the eighth amendment. It is "cruel" in that such treatment as has been discussed earlier is applied to people who have not been adjudged guilty of any crime and it is "unusual" because the only innocent people in Cuyahoga County forced to undergo such treatment are poor people.[26] It is, then, unusual as to an entire class of people which classification makes the punishment no less unusual, as witness the revulsion of the peoples of the world to the treatment accorded a class of people in Germany during World War II.

In distinguishing these classes on the basis of wealth and in discriminating against the poor alone, the Cuyahoga County Jail is also violative of the fourteenth amendment to the Constitution in its unqualified mandate that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[27]

In Ohio, the statute which provides for pretrial detention proscribes:

> If an offense is not bailable or sufficient bail is not offered, the accused shall be committed to the jail of the county in which he is to be tried. . . .[28]

Because there are no separate provisions for different classes or types of people who are to be confined explicit in the statute, it might be argued that the law applies to all alike and cannot, therefore, be con-

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[22] Powell v. State of Texas, 392 U.S. 514, 567 (1968).

[23] Statistic provided by Sgt. Hossler, Sheriff's Department, Cuyahoga County, Ohio (August 21, 1970).

[24] *Id.*

[25] *Id.*

[26] Interview with Sgt. Zigarrio, *supra* note 7.

[27] U. S. CONST., amend. XIV.

[28] OHIO REV. CODE ANN. § 2937.32 (Baldwin 1965).

strued as violative of the fourteenth amendment's prohibitions. However, as the Supreme Court of Ohio so correctly noted:

> Statutes are capable of violating equal protection in three ways: (1) A statute may be discriminatory on its face; (2) though fair on its face, a statute may be applied in a discriminatory manner; and (3) a statute can violate equal protection because, as in Griffin (*Griffin v. People of the State of Illinois,* 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 1956), the effect of its application causes results which depend upon the solvency of criminal defendants.[29]

In the past decade the courts have taken an increasingly critical view of the practical effects of the bail system itself and the practice of pretrial detention of those who are unable to buy their release.[30] Exhaustive studies have been conducted, the results of which clearly show the deleterious effects of pretrial confinement of those unable to secure bail for bailable offenses.[31] It has also been noted with some consistency that the denial of liberty to a man merely because he is accused of a wrong and cannot supply bail is likely to work additional hardships beyond that of confinement alone.[32]

It is, nevertheless, only the pretrial confinement itself with which this study is intended to deal. For it is in that confinement that the promises made to all citizens of the United States[33] are shattered against the prison doors. The mere fact that, of two men arrested and charged with the same bailable offense, only one must live his day to day existence as a caged menace to society, for the sole reason that he is poor, is a flagrant denial of the guarantee of "equal protection of the laws."

As Mr. Justice Douglas noted,

> It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. . . . Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release.[34]

In this light, the court, in *Butler v. Crumlish,* acknowledged,

> The constitutional authority for a State to distinguish between criminal defendants by freeing those who supply bail and confining those who do not, furnishes no justification for any additional in-

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[29] Strattman v. Studt, 20 Ohio St. 2d 129, 253 N.E.2d 749, 751-752 (1969).

[30] Bandy v. United States, 81 S. Ct. 197, 198 (1960); Bandy v. United States, 82 S. Ct. 11, 13 (1961); Butler v. Crumlish, 229 F. Supp. 565, 567-568 (E.D. Pa. 1964).

[31] Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. PA. L. REV. 1031-1079 (1954); Foote, *Foreword: Comment on the New York Bail Study,* 106 U. PA. L. REV. 685-692 (1958); Roberts and Palermo, *A Study of the Administration of Bail in New York City,* 106 U. PA. L. REV. 693-730 (1958); Foote, *The Coming Constitutional Crisis in Bail: I,* 113 U. PA. L. REV. 959-999 (1965); Foote, *The Coming Constitutional Crisis in Bail: II,* 113 U. PA. L. REV. 1125-1185 (1965); Fahringer, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny,* 16 STAN. L. REV. 394-415 (1964); McKay, *Poverty and the Administration of Justice,* 35 U. COLO. L. REV. 323-331 (1963); Segal, *Some Procedural and Strategic Inequalities in Defending the Indigent,* 51 A.B.A.J. 1165, 1166 (1965).

[32] Butler v. Crumlish, 229 F. Supp. 565 (E.D. Pa. 1964); Bandy v. United States, 81 S. Ct. 197, 198 (1960); Fahringer, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny, supra* note 31, 410-412; Segal, *Some Procedural and Strategic Inequalities in Defending the Indigent, supra* note 31, 1166.

[33] U. S. CONST., amend. XIV.

[34] Bandy v. United States, 82 S. Ct. 11, 12 (1961).

equality of treatment beyond that which is inherent in the confinement itself.[35]

Yet it is difficult to imagine an advocacy of the proposition that the necessity of sleeping on the floor and eating cold meals in a vastly overcrowded cell block is "inherent" in confinement. Unable to make preparations for his own defense, forced to sleep and eat with convicted criminals, some of whom will use him as an object of sexual assault, living each day in the knowledge that, should there be a fire, he would surely perish,[36] prohibited from personal or telephone contact with his family and friends except on meagerly allotted occasions, mired in filthy and dreary environs, and treated as one convicted rather than as one accused, the indigent defendant in pretrial detention must not be held to stand outside the rhetoric of the Supreme Court or beyond the concepts of fairness and decency on which the American system of justice has built its foundation.

> Therefore, whenever the state is unable to show the increased likelihood of the defendant's presence at trial outweighs the harm done by pretrial imprisonment, it seems that, unless the prisoner is released until trial, the law has been administered to deprive him of equal protection of the laws.[37]

This understanding prompted Mr. Justice Douglas to note affirmatively, "Further reflection has led me to conclude that no man should be denied release because of indigence." [38] There are, nevertheless, 530 men now confined in Cuyahoga County Jail or its annex who must suffer the consequences of the crime of poverty[39] every day despite the admonition that "a State can no more discriminate on account of poverty than on account of religion, race or color." [40]

It has been recognized with some consistency and insight that pretrial detention of indigents for otherwise bailable offenses works a substantial injustice to the rights of the poor. The courts have not dealt with the additional concern raised here: that pretrial detention in Cuyahoga County Jail subjects presumably innocent persons to conditions intolerable in a progressive and enlightened society and that, irrespective of the question of bail which has been analyzed extensively, these conditions alone warrant the immediate release of those individuals who, discriminated against solely because of their indigence, endure such hardships as constitute "cruel and unusual punishments" and a denial of the "equal protection of the laws" within the very essence of the proscription of the eighth and fourteenth amendments to the U.S. Constitution.

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[35] Butler v. Crumlish, 229 F. Supp. 565, 567 (E.D. Pa. 1964).

[36] This is so because there are, practically, only two avenues of escape from the Cuyahoga County Jail, both of which are manually controlled elevators. One elevator can accommodate a maximum of 18 prisoners, while the other elevator can hold up to 13 prisoners. The Cuyahoga County Jail is twelve stories high and prisoners are confined almost throughout the building. While Sgt. Zigarrio told me that the building could be evacuated in ten minutes, it is common knowledge among the inmates that this could not be done. They feel that, should there be a fire, they will be killed. From interviews held at Cuyahoga County Jail (Aug. 11, 1970).

[37] Fahringer, *supra* note 31, at 411-412.

[38] Bandy v. U. S., 82 S. Ct. 11, 13 (1961).

[39] Fahringer, *supra* note 31, at 411.