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Constitutional Law - Cruel and Unusual Punishment

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administration. While *Antosh* does not come to the limits (if any) of *Carroll,* it can be said to be a timely decision. If there is a movement toward equality with the private labor sector by the public employee,[36] *Antosh* must be considered a significant step.

Jon J. Vichich

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT—Confinement under conditions shocking to the conscience of reasonably civilized people—The Supreme Court of Pennsylvania has held that habeas corpus is available to seek relief from a confinement under conditions which amount to cruel and unusual punishment, even though the detention itself is legal.

Commonwealth ex rel. Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971).

Bryant was confined in Holmesburg State Prison on an indictment charging him with burglary, larceny, and receiving stolen goods. He was also subject to a military detainer. On a writ of habeas corpus, he complained that the *general conditions* of his confinement constituted cruel and unusual punishment in violation of his eighth amendment right.[1] The evidence indicated dirty and overcrowded cells which were infested with cockroaches and rats. Specifically, he alleged that he was in constant fear for his personal safety. Prisoners charged with serious crimes were confined with prisoners charged with lesser offenses. The prison ran on an open cell system whereby cells were left open during the day, allowing prisoners to walk freely from cell to cell. There was an insufficient number of guards in proportion to the prison population, and the guards were inadequately trained. The unsafe conditions were manifested by incidents of sexual assaults, possession of weapons, narcotics traffic, and theft. The medical staff was inadequate. And finally, the guards launched an oppressive campaign of violence after a prison riot. The court found the conditions "disgusting and degrad-

36. *See* Oberer, *The Future of Collective Bargaining in Public Employment,* 20 LAB. L.J. 777, 778 (1969).

1. U. S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

ing,"[2] and held that since these conditions taken as a whole fell short of satisfying the "idealistic concepts of dignity, morality, and decency,"[3] Bryant was denied his fundamental right to be free from cruel and unusual punishment. As a result, the court granted the writ, and ordered Bryant *released* to the Marine Corps, which held a detainer on him for absence without leave.

The Supreme Court of the United States long ago recognized that "difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted."[4] But even in the absence of a clear definition, it was established that punishments of torture and all other punishments of unnecessary cruelty were forbidden. Such punishments included those which were "manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel or the like,"[5] and those which were cruel, such as ones that involve torture or a lingering death.[6] It was also advanced that the amendment's prohibition was directed against punishments "which by their excessive length or severity are greatly disproportioned to the offences charged."[7] Conduct within the scope of the eighth amendment's prohibitions is that which falls below the traditional humanity of modern Anglo-American law or produces unnecessary pain or wantonly inflicts pain.[8] Probably the most inclusive approach was that the amendment includes nothing less than the "dignity of man"[9] and assures that a state's punishment power "be exercised within the limits of civilized standards."[10] The amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[11]

The *Bryant* decision in applying these standards added another dimension to the meaning of cruel and unusual punishment. For the first time in Pennsylvania, the eighth amendment was applied to the general, cumulative conditions of detention. It is significant that at no time did Bryant testify that he *personally* was beaten or abused. His allegations were centered around his fear for his personal safety. In

2. 444 Pa. 83, 94, 280 A.2d 110, 115 (1971).
3. *Id.* at 98, 280 A.2d at 117.
4. Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878): *See generally* Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969).
5. *In re* Kemmler, 136 U.S. 436, 446-47 (1889).
6. *Id.* at 447.
7. O'Neil v. Vermont, 144 U.S. 323, 339-40 (1891) (dissenting opinion).
8. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1946).
9. Trop v. Dulles, 356 U.S. 86, 100 (1958).
10. *Id.*
11. *Id.* at 101.

the past, the courts had only concerned themselves with isolated practices in which prisoners had experienced personal abuse.[12] In fact, the state argued that the writ should not lie for just that reason, and added that the testimony concerning the general living conditions was irrelevant. To this the lower court responded that "to contend that evidence of these conditions is 'irrelevant' is like contending that if an untried prisoner were committed pending trial to a leper colony he would be unable to secure a writ of habeas corpus unless he proved that he contracted leprosy."[13]

Non-intentional treatment can constitute cruel and unusual punishment. The prison officials had no effective control over the age of the cells or their overcrowding; they did not intend that prisoners should abuse other prisoners. The officials did not intend the conditions any more than a jury in finding a man guilty of a crime intends any additional punishment beyond the length of the sentence imposed by law. Prior to this decision, the acts complained of were always intended as a means of discipline.[14]

Finally, in *Negrich v. Hohn*,[15] it was held that to be cruel and unusual punishment within constitutional prohibition, it was first necessary that the hardship suffered be punishment. That court affirmed the notion that punishment was a penalty inflicted by a judicial tribunal in accordance with law in retribution for criminal conduct. Obviously, *Bryant* departs from that position since there could have been no punishment in the constitutional sense as the petitioner was in pre-trial confinement in lieu of $3,500 bail.

Bryant relied upon the leading case of *Holt v. Sarver*[16] in finding the conditions of prison life at the particular institution unconstitutional, but went beyond that case in light of the remedy permitted. In *Holt*, a class action which alleged unconstitutional living conditions was brought under sections 1343(3)[17] and 1983[18] of the Civil Rights Act.

12. *See* Wiltsie v. California Dep't of Corrections, 406 F.2d 515 (9th Cir. 1968) (beating with fists and clubs); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), *modifying* 268 F. Supp. 804 (E.D. Ark. 1967) (whipping with strap); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (solitary confinement without blankets, clothes, or sanitary facilities); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) (whipping with strap).

13. 444 Pa. 83, 98, 280 A.2d 110, 117 (1971).

14. Cases cited note 12 *supra*.

15. 246 F. Supp. 173, 176 (W.D. Pa. 1965).

16. 309 F. Supp. 362 (E.D. Ark. 1970).

17. Civil Rights Act of 1957, 28 U.S.C. § 1343(3) (1970) [hereinafter referred to as Civil Rights Act].

18. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) [hereinafter also referred to as Civil Rights Act]. Under the Civil Rights Act, a prisoner can sue for civil damages or obtain injunctive relief in federal courts. 42 U.S.C. § 1983 applies where the alleged injury is

There the court granted a declaratory judgment that the *entire* penal system at the institution was unconstitutional, and issued an injunction in favor of the entire inmate population.[19] The *Holt* decision, as *Bryant*, favored the total impact of prison life as opposed to the traditional examination of specific instances of mistreatment. Both courts recognized that curing the cumulative conditions of prison life was more realistic and effective than to prevent isolated instances which, after having been found unlawful, could be replaced by a more sophisticated version of the same punishment.

Whereas *Holt* fashioned relief through injunction, *Bryant* effected relief by granting a writ of habeas corpus which would cause either transfer or discharge of prisoners from confinement. Traditionally, the writ functioned only to test the legality of a prisoner's commitment and detention,[20] and to challenge the jurisdiction of the convicting court.[21] The writ was never a substitute for an appeal,[22] because habeas would not lie to test the ordinary procedural errors at trial; only if such errors were enough to cause the entire detention to become unlawful was the writ available as a remedy.[23] Normally, this meant that there was some constitutional infirmity in the proceeding such as a conviction based upon a coerced confession.[24] But the guilt or innocence of the petitioner was never in issue as the collateral challenge only tested the legality of detention. However, the *Bryant* court rejected the writ's traditional use as it conceded that the writ would issue even though the detention was legal if the general conditions infringed a constitutional right.

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caused by a person acting under color of any law. 42 U.S.C. § 1983(3) applies to conspiracies to deprive rights. Cases often arise under the Civil Rights Act involving unjustified violence amounting to a denial of due process. Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961) (religious freedom); Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957) (guard mistreatment); Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953).

19. 309 F. Supp. 362, 382-85 (E.D. Ark. 1970).

20. 444 Pa. at 87, 280 A.2d at 112. There are other limits to the use of habeas corpus such as exhaustion of remedies. Johnson v. Dye, 338 U.S. 864 (1969) (per curiam). *See* Williams v. Steele, 194 F.2d 32 (8th Cir. 1952) (issuance of writ could only effect immediate release from custody); Commonwealth *ex rel.* Milewski v. Ashe, 362 Pa. 48, 66 A.2d 281 (1949); Commonwealth *ex rel.* Wright v. Banmiller, 195 Pa. Super. 124, 168 A.2d 925 (1961), *cert. denied*, 368 U.S. 928 (1962) (the writ was unavailable to review the mode of confinement or internal prison administration); Note, *Prisoners' Remedies for Mistreatment*, 59 YALE L.J. 800 (1950).

21. *Ex parte* Siebold, 100 U.S. 371 (1879); Passmore Williamson's Case, 26 Pa. 9, 18 (1855).

22. Commonwealth *ex rel.* Ryan v. Rundle, 411 Pa. 613, 192 A.2d 362 (1963).

23. Commonwealth *ex rel.* Roseborough v. Myers, 202 Pa. Super. 31, 195 A.2d 152 (1963).

24. Fay v. Noia, 372 U.S. 391 (1963); Commonwealth *ex rel.* McKenna v. Cavell, 423 Pa. 387, 224 A.2d 616 (1966).

Bryant also reflects a departure from the customary judicial unwillingness to investigate or review internal prison management and discipline not directly related to the sentence imposed.[25] Such intervention, it was thought, would tend to erode the authority that prison officials had established: courts generally adopted a "hands off" policy.[26] But this attitude began to dissipate with the leading case of *Coffin v. Reichard*.[27] The *Bryant* court, although refusing to assume a supervisory role in prison administration, held that Pennsylvania courts would intervene to protect fundamental rights. The courts will not entertain petitions that could easily be remedied by an appeal to internal prison authorities or to an administrative agency, but, nevertheless, *Bryant* represents the latest, and by far the most drastic, judicial intervention into internal prison life.

The essence of the decision was the recognition that habeas corpus can be utilized to secure relief from *any* restraint which violates fundamental law.[28] As the court noted, "there was respectable common law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law."[29] The court emphasized that the scope of habeas has grown "to achieve its grand purpose—the protection of individuals against erosion of the right to be free from wrongful restraints upon their liberty."[30] In attempting to dramatize the meaning of "any restraint," the court cited *In re Jones*,[31] which held that actual detention in prison was not an indispensable condition precedent to the issuance of habeas corpus, and that a person on parole was also entitled to a writ since there was still a presence of restraint. The court also added that "unlike possible alternate remedies, . . . [*sic*] mandamus, injunction and so forth, habeas relief can be initiated by an unsophisticated petitioner. . . ."[32] In summary, the *Bryant* decision affirms the proposition that a prisoner of the state does not lose all his civil rights during and because of his incarcera-

25. Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954); Commonwealth *ex rel.* Butler v. Banmiller, 190 Pa. Super. 474, 154 A.2d 330 (1959).

26. Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506-09 (1963). The traditional view began to dissipate once the eighth amendment was applied to the states in Robinson v. California, 370 U.S. 660 (1962).

27. 143 F.2d 443 (6th Cir. 1944).

28. 444 Pa. 83, 88-89, 280 A.2d 110, 113-14 (1971). The court was citing Peyton v. Rowe, 391 U.S. 54 (1968), and Fay v. Noia, 372 U.S. 391 (1963).

29. 444 Pa. at 88, 280 A.2d at 112.

30. *Id.* at 89, 280 A.2d at 113.

31. *Id.* at 98, 280 A.2d at 117. *See In re* Jones, 57 Cal. 2d 860, 372 P.2d 310, 22 Cal. Rptr. 478 (1962).

32. *Id.* at 92, 280 A.2d at 114.

tion.[33] In particular, he continues to be protected by the due process[34] and equal protection[35] clauses which follow him through the prison doors.[36]

Perhaps the narrower solution would have been to restrict review of general prison conditions through the Civil Rights Act. Under the Civil Rights Act, an award of damages or the issuance of an injunction does not depend upon a showing of physical injury but upon whether the defendant's conduct fell within the scope of the action the statute was intended to penalize. A successful class action under the Civil Rights Act would, as in *Holt*, precipitate an injunction. Under Section 1983 of the Civil Rights Act, release from penal custody is disallowed.[37] Even though the *Holt* court determined that a class action was the proper means to secure relief, *Bryant* recognized that private, individual relief could also be sought. The main difficulty with granting individual relief is that the courts will necessarily be flooded with habeas petitions. It seems that all that any subsequent petitioner would have to prove is that he is an inmate in the same prison. However, the court to a certain extent precluded such a result, for it noted that it would not entertain any further petitions for 30 days so as to allow the authorities time to remedy the conditions that led to the issuance of the writ.[38] But even though the court modified the use of the decision, the court effectively issued an ultimatum to the legislature that the judiciary would not be afraid to utilize its powers if meaningful prison reform was not immediately implemented.

Another possible solution, as the court noted, was a writ of mandamus to the prison officials to perform their duty to protect prisoners. The court was preoccupied with the danger that however cooperative and inoffensive a convict might be, he has "no assurance whatever that he will not be killed, seriously injured or sexually abused. Under the present system, the State cannot protect him."[39] Also, the court noted that the conditions at the prison deprived the petitioner of the right to be free from cruel and unusual punishment, a right to which

33. Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969); Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).
34. *See Ex parte* Hull, 312 U.S. 546 (1941); United States v. Jones, 207 F.2d 785 (5th Cir. 1953); Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949).
35. *See* Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1950); Cochran v. Kansas, 316 U.S. 255 (1942).
36. Cooper v. Pate, 378 U.S. 546 (1964); *Ex parte* Hull, 312 U.S. 546 (1941).
37. Peinado v. Adult Authority of Dep't of Corrections, 405 F.2d 1185 (9th Cir.), *cert. denied*, 395 U.S. 968 (1969).
38. 444 Pa. 83, 87, 280 A.2d 110, 112 (1971).
39. *Id.* at 96, A.2d at 117.

he was entitled. There was a strong suggestion that the state and prison officials were not fulfilling a duty to protect prisoners from abuse. The duty approach, although not generally adopted as a method of relief, was first posited in *Coffin v. Reichard*[40] and in *Logan v. United States*.[41] The writ of mandamus would be the proper method to enforce the duty of the prison authorities, but, in reality, it would be ineffective. In this case, the most effective target of the mandamus is the legislature, but it is questionable whether the judiciary could force the legislature to appropriate funds to build modern prisons or to hire more guards and assure that they are properly trained.

The impact of the decision could be sweeping. It is conceivable that a writ would issue to criminal defendants adjudged incompetent to stand trial and be placed in mental institutions under the Pennsylvania Mental Health and Mental Retardation Act of 1966.[42] State mental institutions are often criticized for their alleged lack of facilities and proper care.[43] There is no question that commitment to a mental institution for the criminally insane is a form of governmental restraint on personal liberty. And it is not unlikely that the same general conditions that existed at Holmesburg Prison could exist at a state mental hospital.

If such an action were initiated, the state would probably argue that *Bryant* should be restricted to penal restraints; that is, application should be restricted to convicted criminals and defendants in pre-trial detention. In *Commonwealth v. Bruno*,[44] the Pennsylvania Supreme Court held that "punitive confinement in prison is not the same as custodial supervision in a hospital."[45] But because *Bryant* refers to any governmental restraint as the basis for habeas relief, the distinction between punitive confinement and custodial supervision should be minimal.

But even if the Pennsylvania Supreme Court recognized the distinction, there is a strong argument that custodial supervision in such an institution is tantamount to a prison sentence. Under the Mental Health and Mental Retardation Act of 1966,[46] a criminally insane de-

40. 143 F.2d 443 (6th Cir. 1944).
41. 144 U.S. 263 (1892); *see also* Johnson v. United States, 258 F. Supp. 372 (E.D. Va. 1966); Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966).
42. PA. STAT. ANN. tit. 50, § 4408 (1969).
43. 110 U. PA. L. REV. 78 (1961).
44. 435 Pa. 200, 255 A.2d 519 (1969).
45. *Id.* at 204, 255 A.2d at 521.
46. PA. STAT. ANN. tit. 50, § 4408 (1969).

fendant can receive outpatient care under conditions imposed by the court, including the posting of bond. In addition, if the defendant regains sanity and, after conviction at trial, is sentenced to prison, the time spent in the mental "hospital" is considered custody, and such time will be credited toward the sentence received from the crime charged.[47] Finally, when a mental competency hearing is ordered by the court, the defendant is granted the right to be represented by counsel.[48]

Civil detention would also be subject to review. As it is imposed by judicial authority, it too is a form of governmental restraint. The *Bryant* decision by implication makes no distinction between criminal and civil detention since the holding prohibits *any* governmental restraint contrary to fundamental law. There is a current controversy in Pennsylvania with respect to the enactment of a right to treatment law for persons civilly committed. Such a law would require proper medical and psychiatric care. The fact that such legislation is under consideration forces the conclusion that, generally, existing treatment is inadequate. The *Bryant* mandate could be applied therefore to civil commitment, and possibly accelerate the passage of such legislation.

The *Bryant* decision leaves one important question unanswered. It fails to specify which, if any, specific instances of mistreatment would satisfy habeas relief. Its holding is restricted to the impact of cumulative conditions that taken as a whole fall short of the standards of human dignity and decency which the eighth amendment requires.

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47. Commonwealth v. Jones, 211 Pa. Super. 366, 236 A.2d 834 (1967).
48. Commonwealth *ex rel.* McGurrin v. Shovlin, 435 Pa. 474, 257 A.2d 902 (1969).