Montana Law Review

Volume 29
Issue 2 *Spring 1968*

Article 9

1-1-1968

Constitutional Laws: Cruel and Unusual Punishment—Solitary Confinement (Jordan v. Fitzharris, 257 F.Supp. 674 (N.D.Cal. 1966))

Peter Michael Kirwan
University of Montana School of Law

feasor's liability to be determined at the whim of a plaintiff.[58] This is irrational, inequitable and not in accord with the mores of the community.

DOUGLAS M. GREENWOOD

CONSTITUTIONAL LAW—CRUEL AND UNUSUAL PUNISHMENT—SOLITARY CONFINEMENT—The prisoner was incarcerated in the California Correctional Training Center at Soledad. He was placed in solitary confinement for 12 days. The cell, approximately 6' x 8', was filthy and unheated; it had no interior lights, no facilities for personal hygiene, and no furnishings except a toilet which flushed from the outside of the cell. For eight days the prisoner was kept naked, for the other four days he was given a rough pair of overalls to wear. He was denied adequate medical treatment prior to, during, and after his confinement. The prisoner brought this action for an injunction against such punishment and for monetary relief. *Held,* confinement in a cell maintained in the foregoing condition falls within the Eighth Amendment prescription against cruel and unusual punishment. Permanent injunctive relief was granted but the claim for monetary relief was denied. *Jordan v. Fitzharris,* 257 F.Supp. 674 (N.D. Cal. 1966).

The Eighth Amendment to the United States Constitution prohibits any punishment which is cruel and unusual.[1] The scope of the Eighth Amendment has expanded greatly since its adoption and today prohibits punishments which were acceptable in former times. If the instant case had arisen twenty years ago, it is likely that no relief would have been granted because then society would not have considered such punishment cruel and ususual.[2] But in 1966 standards of justice had changed and the repulsive conditions attending the solitary confinement were found intolerable to society and the punishment was held to be cruel and unusual.

The prohibition against cruel and unusual punishments, which originally appeared in England in the Laws of Edward the Confessor, can be traced to the Magna Carta and to the English Bill of Rights.[3] The Eighth Amendment, as originally adopted, was intended to be much broader than the rule in England. For example, punishments allowed in England under the Bill of Rights included dragging to the place of execution,

[58]PROSSER 275.

---

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

[2]Compare the extreme facts in Louisana *ex rel* Francis v. Resweber, 329 U. S. 459 (1947) discused in text at note 14, *infra.*

[3]34 MINN. L. REV. 134, 135 (1950); Weems v. United States, 217 U. S. 349, 371 (1910).

embowling alive, beheading, quartering, public dissection, burning alive, cutting off a hand or ear, slitting the nostrils and branding.[4] Although the Eighth Amendment was originally adopted to prohibit these tortures[5] the framers also intended it to have a wide enough application to prohibit forms of cruel and unusual punishment which might arise in the future.[6]

The Eighth Amendment does not define cruel and unusual punishment and it has not been defined by the Supreme Court.[7] However, the Court has developed some standards with which to determine whether penal sanctions fall within the proscription of the Eighth Amendment. The first cases which construed the Eighth Amendment questioned whether execution by shooting[8] or electrocution[9] would be cruel and unusual, and the Court held that neither were. The Court said that in order for execution to be cruel and unusual within the meaning of the Eighth Amendment it must be more than the mere extinction of life and involve torture or lingering death similar to those enumerated above.[10] Thus the Court was applying the Eighth Amendment in the manner contemplated by its framers.

The Court began to expand the scope of the Eighth Amendment in *Weems v. United States* (1910)[11] when it reversed a sentence which included fifteen years of hard and painful labor with chains on the ankles and wrists, disqualification from public office and surveillence for life. This case represents a departure from the historical application of the Eighth Amendment because the punishment involved was not similar to the tortures originally prohibited by the Eighth Amendment.[12] The cases following Weems continued to expand the scope of the Eighth Amendment.[13] Perhaps the most important development was first expressed in the minority opinion in *Louisiana ex rel Francis v. Resweber* (1947).[14] The petitioner was sentenced to death by electrocution, but the first attempt failed because of a malfunction in the electric chair. The state wanted to try again but the prisoner contended that a second attempt would be cruel and unusual and petitioned the Supreme Court for relief. The Court authorized the second attempt because electrocution was sanctioned as a humane and nontorturous means of execution.[15] The Court reasoned that the Eighth Amendment of the Constitution only prohibited means

[4] 4 BLACKSTONE, COMMENTARIES *377 (Lewis ed. 1900).
[5] Wilkerson v. Utah, 99 U. S. 130, 136 (1878).
[6] *Weems v. United States, supra* note 3, at 373.
[7] *Id.* at 368; *Instant case* at 679.
[8] *Wilkerson v. Utah, supra* note 5.
[9] In Re Kemmler, 136 U. S. 436 (1890).
[10] *Id.* at 447.
[11] *Weems v. United States, supra* note 3.
[12] *Id.* at 373.
[13] Mickle v. Henricks, 262 F. 687 (D. Nev. 1918). In Davis v. Berry, 216 F. 413 (S. D. Iowa 1914), vasectomy as a criminal punishment was held to be cruel and unusual.
[14] *Louisiana ex rel. Francis v. Resweber, supra* note 2.
[15] *Id.* at 464.

of execution which were cruel in themselves, like embowling and burning, and did not prohibit means of execution which, like electrocution, were considered essentially humane.[16] The minority contended that electrocution would be carried out in installments and would therefore be cruel and unusual.[17] They stated that the determination of whether a punishment is cruel should depend on the fundamental instincts of civilized man, and that in 1947 a second attempt at electrocution would clearly be unacceptable to American society. In 1958 the Court adopted the standard proposed by the minority in the Francis case.[18] The concept underlying the prohibition against cruel and unusual punishment is the dignity of man and the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[19]

Today, in determining whether a punishment is cruel and unusual, the courts examine it in the light of contemporary human knowledge and the mores of society.[20] In other words, punishment is cruel and unusual if society thinks that it is. With this new concept the courts have extended the prohibition against cruel and unusual punishment to areas which would have been closed by the older application of the Eighth Amendment. A Statute punishing desertion by revoking citizenship has been held invalid because the punishment was disproportionate to the offense committed.[21] Statutes punishing the status of narcotic addiction have been declared unconstitutional because addiction is an illness.[22] Similarly, the Circuit Court of the District of Columbia declared a conviction of a chronic alocholic unconstitutional as punishment of the uncontrollable symptoms of an illness.[23]

The administration of non-capital sentences in state prisons is another area of penal law which the new concept of the Eighth Amendment has affected. Although the Eighth Amendment is compulsory on the states through the Fourteenth Amendment,[24] the federal courts have been extremely reluctant to interfere with state prison officials in their administration of internal prison affairs. The judicial attitude in the past has been to ignore the treatment received by convicts if their sentences were within the bounds of valid penal statutes.[25] This has menat that if a prisoner was incarcerated under a constitutionally acceptable sentence he could get no judicial relief no matter how cruely he was treated while

[16]Electrocution was accepted as a valid means of execution in *In Re Kemmler, supra* note 9.

[17]*Louisiana ex rel Francis v. Resweber, supra* note 2 at 474.

[18]Trop v. Dulles, 356 U. S. 86 (1958).

[19]*Id.* at 101.

[20]Robinson v. California, 370 U. S. 660, 666 (1962).

[21]*Trop v. Dulles, supra* note 18, at 122.

[22]*Robinson v. California, supra* note 20.

[23]Easter v. District of Columbia, 361 F.2d 50 (D. C. Cir. 1966); *contra,* Driver v. Hinnant, 243 F. Supp. 95 (E.D.N.C. 1965).

[24]*Robinson v. California, supra* note 20, at 664.

[25]Perkins v. North Carolina, 234 F. Supp. 333, 337 (W.D.N.C. 1964); United States v. Fay, 211 F. Supp. 812, 814 (1962).

the sentence was being discharged. A case decided in 1952[26] demonstrates this attitude of the Court. There the prisoner offered to prove that he was beaten with a nine pound strap with five metal prongs on the end of it; that he had scars and wounds from such beatings; that he was forced to work all day in the sun without a shirt or hat; and that he was forced to submit to homosexual activities of other convicts.[27] The court ignored these allegations and avoided determining whether this treatment was cruel and unusual by deciding the case on a procedural basis. It held that the Petitioner had to exhaust all the remedies available in the State Court before he could seek relief in federal court.[28]

Although the courts still consider internal prison discipline primarily a matter of state concern,[29] they no longer subscribe to this strict "hands off" attitude.[30] The federal courts will intervene if the means used to enforce discipline is excessively cruel or is disproportionate to the infraction of the prison rules.[31] But courts have said that they will not allow sentimental or romantic views of Constitutional Rights to induce them to interfere with necessary and reasonable prison discipline.[32] No relief will be granted to complaining prisoners unless the treatment is of such a character as to shock the general conscience or is intolerable to contemporary standards of justice.[33]

The inherent nature of penal institutions makes protection of prisoners against cruel and unusual punishment difficult because prison officials control the evidence. In many instances there may be no support for a prisoner's allegations that he was cruely treated. However, if the prisoner can prove his allegations, the instant case illustrates the modern judicial viewpoint and demonstrates that a conscientious court can effectively protect prisoners against cruel and unusual punishment. The Court has said that unless a punishment serves a legitimate penal function it will be prohibited[34] and retribution is no longer recognized as a legitimate penal function.[35] Though solitary confinement by itself is not prohibited, when it is combined with such cruel and unnecessary treatment that it becomes an instrument of retribution it violates the Eighth Amendment.[36] In the instant case solitary confinement was prohibited because of the

[26]Sweeney v. Woodall, 344 U.S. 86 (1952).

[27]*Id.* at 91-92 (dissenting opinion).

[28]*Id.* at 90.

[29]United States v. Pate, 223 F. Supp. 202 (N.D. Ill. 1963); Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963).

[30]Loux v. Rhay, 375 F.2d 55 (9th Cir. 1967); Cullum v. California Dept. of Corrections, 267 F. Supp. 524 (N.D. Cal. 1967); Wright v. McMann, 257 F. Supp. 739 (N.D.N.Y. 1966).

[31]Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); Fulwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962).

[32]*Wright v. McMann, supra* note 30, at 744.

[33]*Lee v. Tahash, supra* note 31, at 972.

[34]Williams v. New York, 337 U.S. 241, 248 (1949).

[35]*See Trop v. Dulles, infra* note 39.

[36]Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1944); *Fulwood v. Clemmer, supra* note 31, at 379; *Wright v. McMann, supra* note 30, at 744.

filthy cell, the darkness, the lack of facilities for personal hygiene and the absence of medical attention. It was recognized that prison officials can usually fulfill their functions without intervention from the courts but when it appears, as it did in the instant case that

> the responsible prison authorities in the use of the strip cells (or any other disciplinary action) have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene — and intervene promptly — to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States.[37]

The cruel and unusual punishment prohibition of the Eighth Amendment has undergone extensive change since its inception and has become a dynamic instrument with which the courts can insure that criminal punishments are acceptable to contemporary society. As society continues to develop, its attitude toward punishment may change and punishments which are presently acceptable may become unconstitutional.

Probably the most dramatic illustration of this is in the changing attitude toward capital punishment. In the past it was assumed that capital punishment served as an effective deterrent to those inclined toward serious crime. Recent studies establish that this deterrent effect is virtually non-existant.[38] Capital punishment then, if it is to maintain a position of legitimacy, must serve some other penal function which is valid in the light of today's societal mores.[39] Capital punishment does not serve the function of rehabilitation so the only legitimate end it can serve is to insulate society from future transgressions. Whether capital punishment is unconstitutional depends upon whether society feels that it needs such extreme protection. If the Court concludes that society feels that criminal executions are unjust it will be compelled to find that capital punishment is cruel and unusual and prohibited by the Eighth Amendment.

The criterion for determining whether any punishment is cruel and unusual is the contemporary standard of justice. When a case arises challenging a punishment the function of the Court will be to determine the attitude of contemporary society. The attitude of society is not bound by the past decisions of the Court, it may not be based on logic or reason but rather may be grounded on emotion, prejudice and misconception. The rationale behind society's present attitude is irrelevant. Under the Eighth Amendment the attitude itself determines, and a punishment is unconstitutional if society feels that it is cruel and unusual.

PETER MICHAEL KIRWAN

[37] *Instant case* at 680.

[38] MODEL PENAL CODE, Sellin, *The Death Penalty*, following p. 220 (Tent. Draft. No. 9, 1959).

[39] *Trop v. Dulles, supra* note 18, at 111, stated the purposes of penal law as: 1) Rehabilitation, 2) Deterrents of wrongful acts by the threat of punishment, and 3) Insulation of society from dangerous individuals.