

1953

Cruel and Unusual Punishments

Nancy-Nellis Warner

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Nancy-Nellis Warner, *Cruel and Unusual Punishments*, 3 Cath. U. L. Rev. 117 (1953).
Available at: <https://scholarship.law.edu/lawreview/vol3/iss2/5>

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

willing seller. Earnings would be taken over a reasonably long period and adjusted to a common level.

No attempt is made here to justify these principles or bases from a philosophical or jurisprudential view-point. It is merely desired to point out that, no matter what the actual measure of compensation today for nationalization of property, any valid and lasting measure of compensation must take into consideration the factors set out above.

EARL A. SNYDER*

*A.B. '39 Indiana University; LL.B. '47, Indiana University, Member of Indiana Bar; Major, USAF; Attached to Office of Judge Advocate General, USAF.

Cruel and Unusual Punishments

A punishment is regarded as a penalty imposed by authority on one who transgresses the law. Its infliction is consequent upon the evil act of the offender. As a sanction it must operate in opposition to the malfactor's will by effectively depriving him of some good, such as life, integrity of the body, liberty, or exterior goods. The deprivation of any of these goods is a penalty. Hence, punishments are often classified as loss of life, loss of bodily integrity, loss of freedom of spontaneous action, or loss of external goods, e.g. riches, country, and fame.

While the above are generally thought to be substantial deprivations and, therefore, suitable punishments, their intensity of application has varied through the centuries. Under the Old Law of the Hebrews, for example, the means of inflicting punishment was the *lex talionis*, or law of retaliation: a method of mutilation exacting an eye for an eye, a tooth for a tooth, a life for a life.

In the past 200 years alone, there have been at least three schools of penal philosophy, each with varying concepts of punishment. The first was the classical school. When, during the latter half of the eighteenth century, men were keenly aware of the philosophical concept of the freedom of the will, penalties were immutable. The individual breaking the rule did so of his own free will, and if apprehended and convicted, paid the penalty. Hence, it was felt by those of the classical school that the punishment for the same crime should always be the same because the moral responsibility was the same.¹ From this there developed the second or neoclassical school. While recognizing freedom of the will, it also recognized that education, heredity, and other factors may affect freedom of choice, thereby lessening responsibility. The classical theory of punishment underwent a gradual change, so that the penalty for crime soon came to be graded in proportion to the individual's amount of freedom and responsibility. The third or determinist theory denies freedom of the will. If followed to its logical conclusion,

¹ *Orme v. Rogers*, 32 Ariz. 502, 260 Pac. 199 (1927).

this position says that we act, not because we will, but because we must. Under this theory, punishment is just, when it realizes that the offender is a member of society who, through unfortunate circumstances, has become abnormal. Society must treat him as diseased, return him to normalcy, and when this has been accomplished, restore him to his place in that society.² Each school has been approved; each has been rejected.

Thus, we see that punishments, while classified basically as losses of life, bodily integrity, freedom of spontaneous action, or external goods, may vary in application and in severity. In England during the Revolution of 1688, the framers of the Bill of Rights were so impressed by the cruelty of torture that they established the initial prohibition against cruel and unusual punishments:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.³

This was an admonition to the national government, to warn it against such violent proceedings as had taken place in the arbitrary reigns of some of the Stuarts.⁴ In 1791, this clause in the Bill of Rights was incorporated into the Constitution of the United States of America by the Eighth Amendment.

II

Which punishments are cruel and unusual? Admittedly, the answer is fraught with some uncertainty. Madame Defarge's English counterparts of the seventeenth century watched blinding, burning, boiling, and scourging while sipping tea. The curious peeped at the skulls at Temple Bar for the nominal charge of one half penny. Thus, a punishment which is not considered cruel in one era, may be considered cruel in the next era due to the fact that personal scales of value change from generation to generation. In this field it must be recognized that "thinking makes it so." There are, however, certain fundamental conclusions connected with the punishment clause of the Eighth Amendment which should be pointed out.

In general, the Eighth Amendment restricts the form of punishment rather than its duration.⁵ As a result, it has long been a precept of justice that the punishment for crime should be graduated and proportioned to the offense.⁶ To determine if there is a proper proportion between the punishment and the offense, the court looks either to adjudicated cases and to whether the penalty shocks the moral sense of reasonable men as to what is right and proper under the circumstances.⁷ If a punishment is manifestly out of all proportion to the offense, or has long been disused because of its cruelty so as to have become "unusual," then the penalty will probably be held unconstitutional under the Eighth Amendment.⁸

² *ibid.*

³ Bill of Rights, 1 Will. & Mary, Sess. 2, c. 2 (1688).

⁴ Story on the Constitution, (5th ed., 1891) p. 650.

⁵ *Kistler v. State*, 190 Ind. 149, 129 N. E. 625 (1921).

⁶ *Weems v. U. S.*, 217 U. S. 349 (1910).

⁷ 48 W. Va. L. Q. 63 (1941).

⁸ Cooley, General Principles of Constitutional Law in the United States of America, (2d ed., 1891) p. 307.

The duration of a punishment may be considered by a court if it is manifestly unjust. Thus, 800 years imprisonment and one-half million dollars fine has been held to be in violation of the Constitutional provision.⁹

Within the pale of due process, the legislature has the power to define crimes and fix punishments.¹⁰ Consequently, any statutory punishment based on the common law probably would not be construed as cruel or unusual in the Constitutional sense; and "probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature."¹¹ It has been said that it would be an extraordinary case, indeed, in which the judgment of the legislature would be brought into question.¹²

With these principles in mind, let us consider the basic deprivations individually.

Today there is undoubtedly agreement on the fact that death by crucifixion, breaking at the wheel, burning at the stake, and the like are cruel and unusual punishments. Why? Simply because they involve torture or lingering death; they imply something barbarous, something brutal, something more than the ending of life. The death penalty is not forbidden by the Eighth Amendment.¹³ But it appears that loss of life must be accomplished through relatively instantaneous means. Hence, death by hanging,¹⁴ shooting,¹⁵ electrocution,¹⁶ or lethal gas¹⁷ are not forbidden by the Constitution of the United States.¹⁸

A unique case was presented to the Supreme Court of the United States in 1946, by *Louisiana ex rel. Francis v. Resweber, Sheriff*. The petitioner, having been convicted of murder and sentenced to death by a Louisiana court, was placed on the electric chair. Through some defect in the mechanism, an electrical current sufficient to cause death did not pass through Francis' body. After removal from the chair, he was returned to prison, and a warrant for a subsequent execution was issued. In reviewing the case the Supreme Court said:

Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. . . . We cannot

⁹ *State v. Ross*, 55 Ore. 450, 104 Pac. 596 (1909).

¹⁰ *State v. Woodard*, 68 W. Va. 66, 69 S. E. 385 (1910).

¹¹ Cooley, *Treatise on the Constitutional Limitations*, (7th ed., 1903) p. 472.

¹² See note 8 *supra*.

¹³ *In re Kemmler*, 136 U. S. 436 (1890).

¹⁴ *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914).

¹⁵ *Wilkerson v. Utah*, 99 U. S. 130 (1878).

¹⁶ *McElvaine v. Brush*, 142 U. S. 155 (1891).

¹⁷ *State v. Gee Jon*, 46 Nev. 418, 211 Pac. 676 (1923).

¹⁸ See note, 30 A. L. R. 1452.

agree that the hardship imposed upon petitioner rises to that level of hardship denounced as denial of due process because of cruelty.¹⁹

Loss of bodily integrity by the strict talion is, of course, forbidden as cruel and unusual punishment. As pointed out by one writer,

. . . it seems a little harsh to pluck out a man's eye or cut off his arm or leg, and then cast him forth to find a living, since it is rather a difficult task to garner a living even with all one's members intact.²⁰

A decent respect for the body, and a keen appreciation of man as an individual and social being must be kept in mind.²¹ What right, then, has the legislature to proscribe such mutilations as sterilization or asexualization as punishments for sexual crimes? Do these constitute cruel and unusual punishments? The answers are not in harmony. In advocating sterilization, one court has said that, as the death penalty is imposed in some jurisdictions for the crime of rape, it cannot be cruel to impose a penalty less than death.²² On the other hand, in rejecting sterilization, another court said that while vasectomy was no more cruel than branding, slitting a tongue, or amputating a finger, yet, "when resorted to as punishment, it is ignominious and degrading, and in that sense cruel."²³

It should also be noted that the use of sterilization and asexualization as preventatives is seriously questioned.²⁴ In this regard, the following is an excellent thought to keep in mind when considering the problem:

Public magistrates have no direct power over the bodies of their subjects; therefore, where no crime has taken place and there is no cause present for grave punishment, they can never directly harm, or tamper with the integrity of the body, either for the reasons of eugenics or for any other reason. St. Thomas teaches this when, inquiring whether human judges for the sake of preventing future evils can inflict punishment, he admits that the power indeed exists as regards certain other forms of evil, but justly and properly denies it as regards the maiming of the body. 'No one who is guiltless may be punished by a human tribunal either by flogging to death, or mutilation, or by beating.'²⁵

Certain punishments may be considered "mutilations" by one class of people, but not by others. A subject of the emperor of China brought an action in a California court to recover damages for the loss of his queue. It appears that the plaintiff was imprisoned for a misdemeanor, and his queue cut, in compliance with a jail ordinance directing that the hair of inmates be cut within one inch of the scalp. The loss of the queue is regarded by Chinamen as a mark of disgrace, and according to their religion, may subject them to misfortune and suffering after death. The court held that the plaintiff was entitled to damages, since the cutting was unnecessary and unjust.²⁶

¹⁹ 329 U. S. 459, 464 (1947).

²⁰ Friel, *Punishment in the Philosophy of St. Thomas Aquinas*, (1939) p. 56.

²¹ *ibid.*

²² *State v. Feilen*, 70 Wash. 65, 126 Pac. 75 (1912).

²³ *Michle v. Henrichs*, 262 Fed. 687 (9th Cir. 1918).

²⁴ *State v. Troutman*, 50 Idaho 673, 299 Pac. 668 (1931).

²⁵ Pope Pius IX, *Causi Connubii*, quoting *Summa Theo.*, 2a, 2ae, q. 108 a 4 as 2 um.

²⁶ *Ho Al Kow v. Numan*, 5 Sawy. 552 (1879).

The deprivation of freedom of spontaneous action by imprisonment is not *per se* cruel and unusual; "in fact, it is the most common mode of punishment in all civilized countries."²⁷ Nor is imprisonment at hard labor in violation of the Constitutional prohibition.²⁸ It has been held, however, that solitary confinement, if not provided for by statute, is an unusual punishment.²⁹

While a fine is one form of punishment, it is not within the scope of this article to discuss the vast subject of excessive fines.

As to loss of country it has been generally said that banishment from a state is beyond the power of the court as prohibited by public policy.³⁰ Similarly, any punishment which tends to defame a person in the eyes of his associates, such as placing in a ducking stool and plunging a person three times in water for the offense of being a common scold, has been held to be cruel, unusual, and ludicrous.³¹

III

The history of law shows that crimes have been "more effectively prevented by the certainty, than by the severity of punishment."³² To ascertain, therefore, what is prohibited by the provision against cruel and unusual punishments in the Eighth Amendment, one must consider:

1. whether the punishment has ever been adjudicated as cruel and unusual when applied as a penalty to the same or a similar offense;
2. whether the form of the punishment is so manifestly cruel as to shock the moral sense of reasonable men;
3. whether the penalty is properly proportioned to the offense
 - a. in form
 - b. in duration;
4. whether the penalty is similar to the common-law penalty for the same or similar offense.

Blackstone pointed out that as atonement for crime must be left to the just determination of the Supreme Being, the final cause of human punishment is as a precaution against future offenses of the same kind.³³ But he did not forget to add that "though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate, and by any means."³⁴

NANCY-NELLIS WARNER

²⁷ *Ex parte O'Shea*, 11 Cal. App. 558, 105 Pac. 776 (1909).

²⁸ *State v. Gillmore*, 88 Kan. 835, 129 Pac. 1123 (1913).

²⁹ *Williams v. State*, 125 Ark. 287, 188 S. W. 826 (1916).

³⁰ *People v. Baum*, 251 Mich. 187, 231 N. W. 95 (1930).

³¹ *James v. Commonwealth*, 12 Serg. & R. 220.

³² 4 Blackstone's Commentaries, *17.

³³ *ibid.* *11.

³⁴ *ibid.* *10.