

The Breakfast Club

Constitutional Minute for 18 Jul 2023

Right #24: Protection from cruel and unusual punishment

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

In the movie “Braveheart, William Wallace, played by Mel Gibson, is drawn and quartered after being convicted of treason. The director mercifully spared us some of the graphic detail of the historic ritual, and I think Mel Gibson purposefully underplayed the pain and suffering such a procedure would have inflicted. Even though the 1689 English Bill of Rights provided that “*cruel and unusual punishments [ought not to be] inflicted,*” the last time the drawing and quartering part of the treason sentence was used was 1782 (one source even says 1817!¹; beheading after hanging was last carried out in England in 1820.²

I hope we can agree that drawing and quartering is a cruel and (today) unusual punishment; during America’s founding period, however, other punishments were routinely inflicted which today would be considered quite unusual, if not cruel; these included branding,³ ear cropping,⁴ and dunking. The use of public stocks, pillories and whipping posts⁵ was also common.

Capital punishment in the founding period was usually carried out by hanging. Firing squads were used for soldiers convicted of desertion, particularly during the Civil War, in WWI, and once in WWII.⁶ As of 2023, Mississippi, Oklahoma, South Carolina, and Utah still authorize the use of the firing squad. The invention of the electric chair in 1890, and the gas chamber in 1924, gradually decreased the number of hangings but amazingly, after a short hiatus when all forms of capital punishment were prohibited, the last state execution by hanging was carried out by Delaware in 1996!⁷

The Constitution clearly contemplates capital punishment in the Fifth Amendment: (“No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...”) and the Supreme Court has held that the concept of capital punishment does not violate the 8th Amendment. But in [Coker v. Georgia, 433 U.S. 584 \(1977\)](#) the court held that any penalty must be proportional to the crime.

The Court has upheld both execution by “public shooting” (*Wilkerson v. Utah (1879)*), and electrocution (*in re Kemmler (1890)*).

Famously, in 1972 (*Furman v. Georgia*), the Court held (5/4) that the Eighth Amendment banned the *arbitrary* infliction of the death penalty. State laws at the time were a mish-mash of confusing and inconsistent guidance. Executions were prohibited while the states rewrote their laws to give judges and juries better guidance as to when the penalty could be imposed. Four years later, in *Gregg v. Georgia* the Court, satisfied that its guidance had been implemented,

allowed the death penalty to resume. The following year, Oklahoma became the first state to adopt lethal injection as a means of execution.

Other significant “cruel and unusual” Supreme Court opinions:

A state may not execute a person under eighteen years of age (*Roper v. Simmons* (2005))

A state may not execute a person for being a drug addict (*Robinson v. California*).

The death penalty cannot be administered in cases of child rape in which the victim lives (*Kennedy v. Louisiana*, 554 U.S. 407 (2008)) Note: six states had permitted it.

In *Atkins v. Virginia* (2002), the Court prohibited executing intellectually/developmentally disabled criminals.

On a lighter note: in *Ingraham v. Wright* (1977), the Court declared that the 8th Amendment does not prohibit corporal punishment in public schools (“Spare the rod and spoil the child,” anyone?)

The death penalty persists in America even despite the fact that many European countries have discarded it. But remember, America was originally guided by English Common Law and Biblical Law. The concept of capital punishment was established in Genesis 9:6: “*Whoever sheds the blood of man, by man shall his blood be shed.*” Later, in Leviticus 24:19-20, all punishment was made proportional (“eye for eye, tooth for tooth”), but capital punishment was still permitted.

The Law given to Moses on Mt. Sinai, prescribed execution for murder (but not accidental killing), striking or cursing a parent, kidnapping, adultery, incest, bestiality, sodomy, rape of a betrothed virgin, witchcraft, incorrigible delinquency, breaking the Sabbath, blasphemy, sacrificing to false gods, oppressing the weak, and other transgressions. (See Exod. 21, 22, 35; Lev. 20 & 24; Deut. 21-24.). The 1641 Massachusetts Body of Liberties assigned most of these as capital offenses. But we note that not all Biblical characters who committed murder (ex: Cain, Moses, and David) were put to death. Not only did Jesus refuse to condemn the woman caught in adultery, He also suggested that only those without sin were qualified to perform the (at the time) required execution. Lastly, while Paul reminds his readers in Romans 13:1-7 that government “does not bear the sword in vain,” opponents of the death penalty note this refers to the *authority* of the state, not an *obligation*.

With lethal injection drugs becoming impossible to obtain,⁸ states are being forced to implement new mechanisms. After a series of botched lethal injection executions, Alabama is close to instituting death by hypoxia, where the condemned is placed in a chamber where nitrogen gradually replaces all the oxygen.⁹

Does the death penalty pose a deterrence to murder? You will find both positions defended online. ([No](#) and [Yes](#)).

For further reading:

[Cruel and Unusual; The American Death Penalty and the Founder's Eighth Amendment](#), by John D. Bessler, 2012.

[Cruel and Unusual: The Supreme Court and Capital Punishment](#), by Michael Meltsner and Evan J. Mandery, 2011.

Next week: Right #25. Ninth Amendment: Protection of Unenumerated Rights.

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¹ Leonard W. Levy, *Origins of the Bill of Rights*, Yale University Press, 2001, p. 235.

² https://en.wikipedia.org/wiki/Hanged,_drawn_and_quartered.

³ Branding with a capital B in the right hand for the first offense, in the left hand for the second, "and if either be committed on the Lord's Daye his Brand shall bee sett on his Forehead as a mark of infamy," <https://research.colonialwilliamsburg.org/Foundation/journal/spring03/branks.cfm>.

⁴ If you search for information on "ear cropping" today you will only find procedures that are performed on dogs.

⁵ The 1641 Body of Liberties of Massachusetts limited the amount of whipping that could be inflicted: "No man shall be beaten with above 40 stripes, nor shall any true gentleman, nor any man equall to a gentleman be punished with whipping, unles his crime be very shamefull, and his course of life vitious and profligate."

⁶ https://en.wikipedia.org/wiki/The_Execution_of_Private_Slovik.

⁷ https://en.wikipedia.org/wiki/Hanging_in_the_United_States.

⁸ <https://www.pharmaceutical-technology.com/features/lethal-injection-pharma-kill-death-penalty/>

⁹ <https://www.theguardian.com/world/2023/feb/17/alabama-nitrogen-hypoxia-new-execution-method>.