Supplementary Material

Chapter 6: The Civil War and Reconstruction—Criminal Justice/Punishments

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Garcia v. Territory of New Mexico, 1 N.M. 415 (N.M. Terr. 1869)

Nestor Garcia was arrested and convicted of larceny after he stole a mule from Felipe Chaves. The trial judge sentenced him to "be whipped on Monday next . . . , receiving thirty lashes on the bare back, well laid on." Garcia appealed this sentence to the Supreme Court of the Territory of New Mexico. He claimed that the statute imposing his punishment violated the cruel and unusual punishment clause of the United States Constitution.[1]

The Supreme Court of the Territory of New Mexico ruled that whipping was not a cruel and unusual punishment. Chief Justice Watts's opinion emphasized that whipping was a necessary sanction on the frontier. Why did he make that claim? Might he have made a different decision had this case arisen in New York City?

By Court, CHIEF JUSTICE WATTS

. . .

. . . All punishment is more or less cruel, and the kind of punishment to be inflicted upon criminals to induce reformation and repress and deter the thief from a repetition of his larcenies has generally been left to the sound discretion of the law-making power. In old communities where law and order prevail, and some security exists for property in the honesty of the people, the mild remedy of imprisonment for theft is usually adopted, but in new countries, without jails, with many opportunities for thieves to steal and escape with their plunder, and no secure jails in which to confine them when convicted, a pressing necessity for the adoption of the punishment of whipping for the offense of larceny exists. At some stage in the existence of almost every state and territory, they have resorted to this mode of punishment, and in no instance has its infliction been held to be unconstitutional. Until recently, it was the common punishment in the army for disobedience of orders and other trivial offenses, and was never held to be unconstitutional.

In many of the states the practice of whipping criminals convicted of theft has prevailed for over fifty years, without any doubt as to its constitutionality. . . . The practice of whipping for theft was planted here by the Spanish adventurers who first settled the valley of the Rio Grande. It was found here as a usual mode of punishment in 1846, when General Kearny took possession of New Mexico, and was adopted and practiced by him, and has been sanctioned by the legislative assembly ever since, and certainly can not be considered an unusual punishment. The word cruel, as used in the amendatory article of the constitution, was no doubt intended to prohibit a resort to the process of torture, resorted to so many centuries as a means of extorting confessions from suspected criminals, under the sanction of the civil law. It was never designed to abridge or limit the selection by the law-making power of such kind of punishment as was deemed most effective in the punishment and suppression of crime. If a father, without the charge of cruelty, may administer stripes to his vicious and disobedient child, may not the supreme power of a territory, state, or nation administer the same kind of punishment to its vicious and lawless citizens? However averse the court may be to this mode of punishment, it can not authorize the court in disregarding and annulling the law providing for the punishment of this crime, and, until repealed, it is the duty of the court to enforce it.

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[1] Garcia appealed to the Constitution of the United States because New Mexico at the time was a territory.

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