Supplementary Material

Chapter 7: The Republican Era—Criminal Justice/Punishments/Capital Punishment

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Wilkerson v. State of Utah, 99 U.S. 130 (1878)

Wallace Wilkerson shot William Baxter after they each accused the other of cheating in a game of cribbage. Wilkerson was arrested for murder, convicted, and sentenced to be executed by a firing squad. After the Supreme Court of the Utah Territory sustained his conviction, Wilkerson appealed to the Supreme Court of the United States. His lawyers claimed that death by firing squad was cruel and unusual punishment.

The Supreme Court sustained the death sentence and the means of execution. Justice Clifford's unanimous opinion emphasized that the Eighth Amendment forbade only torture and punishment inflicting "unnecessary cruelty." How does Clifford determine that a firing squad does not inflict unnecessary cruelty?

The Supreme Court in In re Kemmler *(1890) issued a similar opinion when declaring electrocution a constitutional means for execution. Chief Justice Fuller's unanimous opinion asserted,*

> *Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous,—something more than the mere extinguishment of life. The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such; that it was for the legislature to say in what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the legislature was possessed of the facts upon which it took action.*

JUSTICE CLIFFORD delivered the opinion of the court.

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Cruel and unusual punishments are forbidden by the Constitution, but . . . the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment. Soldiers convicted of desertion or other capital military offences are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial. . . .

. . .

Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. . . .

. . .

Other modes besides hanging were sometimes resorted to at common law, nor did the common law in terms require the court in passing the sentence either to prescribe the mode of execution or to fix the time or place for carrying it into effect, as is frequently if not always done in the Federal circuit courts.

At common law, neither the mode of executing the prisoner nor the time or place of execution was necessarily embodied in the sentence. Directions in regard to the former were usually given by the judge in the calendar of capital cases prepared by the clerk at the close of the term; as, for example, in the case of murder, the direction was 'let him be hanged by the neck,' which calendar was signed by the judge and clerk, and constituted in many cases the only authority of the officer as to the mode of execution.

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