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Due Process of Law: Cruel and Unusual Punishment by Electrocution

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Due Process of Law — Cruel and Unusual Punishment by Electrocution — Petitioner, Willie Francis, was duly convicted of murder in a state court in the state of Louisiana and sentenced to be electrocuted for said crime. He was placed in the electric chair in the presence of authorized witnesses. The executioner threw the switch, but due to a latent electrical defect, the attempt to electrocute Francis failed. The Governor proposed to issue another death warrant, and petitioner brought certiorari in the Supreme Court of the United States from a State Court decision upholding the Governor's action. He claimed the protection of the due process clause of the Fourteenth Amendment on the ground that an execution under the circumstances detailed would deny due process to him, on the theory that due process includes the cruel and unusual punishment protection afforded under the Eighth Amendment. Petitioner contended that these constitutional protections would be denied him because he had once gone through the difficult preparation for execution and had once received through his body a current of electricity intended to cause death. *Held:* Carrying out of the execution of the convicted murderer, after the first attempt failed because of a mechanical defect in the electric chair, would not constitute "cruel and unusual punishment", or violate due process. *State of Louisiana ex rel Francis v. Resweber, Sheriff,* 67 S. Ct. 374 (1947).

This case is unique, being without precedent in any court. English history has been characterized by many examples of cruel and unusual punishments. Due to these experiences, the Eighth Amendment[1] to the Constitution of the United States was adopted in 1791 and was followed by the Fourteenth Amendment[2] in 1868. In determining whether a case of cruel and unusual punishment constitutes a violation of due process of law, each case must be considered upon its particular facts. There have been but few decisions construing this provision of the Eighth Amendment. No case has arisen in the Supreme Court of the United States which called for an exhaustive definition of cruel and unusual punishment. Most of the cases in which the protection of the Amendment has been invoked came from state courts of last resort, and the opinions seem to proceed upon the recognized assumption that the Eighth Amendment does not restrict the States, and the further assumption that its provisions are not included within the Fourteenth Amendment.[3] However,

[1] Eighth Amendment: "Excessive bail shall not be required, nor cruel and ununusual punishments be inflicted."

[2] Fourteenth Amendment: ". . . Nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

[3] Pervear v. Massachusetts, 5 Wall. 475 (1867); Wilkerson v. Utah, 99 U.S. 130; 9 Otto 130 (1879; In re Kemmler, 136 U.S. 436; 34 L. ed. 519 (1890); McElvaine v. Brush, 142 U.S. 155; 35 L. ed. 971 (1891); O'Neil v. Vermont, 144 U.S. 323; 36 L. ed. 450 (1892); Howard v. Fleming, 191 U.S. 126; 48 L. ed. 121 (1903).

in *Wilkerson v. Utah,*[4] the clause came up for consideration. A statute of Utah provided that "a person convicted of a capital offense should suffer death by being shot, hanged, or beheaded as the court may direct." The statute was sustained. The Supreme Court pointed out that death was a usual punishment for murder and concluded that it was not forbidden by the Constitution of the United States as cruel or unusual. The Court quoted Blackstone as saying that the sentence of death was generally executed by hanging, but also that circumstances of terror, pain or disgrace were sometimes superadded. "Cases mentioned by the author", the court said, "are where the person was drawn or dragged to the gallows, hanged and cut down alive and burnt in oil or where he was disembowelled alive, beheaded and quartered. Mention is also made of public dissection in murder and burning alive in treason committed by a female". The Court's final commentary was that:[5]

> "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, such as those mentioned by Blackstone, and all others in the same line of unnecessary cruelty of the past, are forbidden by the Eighth Amendment to the Constitution."

It was in line with this ruling that the Court said subsequently in *In re Kemmler,* in sustaining the validity of electrocution:[6]

> "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 Supreme Court of the United States has continuously ruled that the due process clause of the Fourteenth Amendment expresses a demand for civilized standards which are not defined by the express guarantees of the first eight amendments. In *Snyder v. Commonwealth of Massachusetts* the court stated:[7]

> "The due process clause of the Fourteenth Amendment did not withdraw the freedom of a state to enforce its own notions of fairness in the administration of criminal justice unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

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[4] Supra, Wilkerson v. Utah.
[5] Ibid., 99 U.S. at 135.
[5] Ibid., 99 U.S. at 135.
[6] Supra, In re Kemmler, at 447.
[7] Snyder v. Commonwealth of Massachusetts, 291 U.S. 97 at 105, 78 L. ed. 675 at 678 (1934).

In the case in question, the dissenting opinion contended that the proposed execution would deny due process to the petitioner and that the judgment should be vacated and remanded to the Supreme Court of Louisiana for further proceedings which should include the determination of material facts not previously determined, including the extent, if any, to which the electric current was applied to the relator during his attempted electrocution.[8] It stressed that: (1) The Supreme Court of Louisiana, in deciding the case, regarded the carrying out of the death sentence as a purely executive function not subject to judicial review and thus evaded the constitutional issue; (2) the standard set down by the Court in *In re Kemmler*[9] for a humane and legal electrocution was not complied with in the instant case, and (3) the Louisiana Statute[10] prescribing capital punishment should be strictly construed. It appears to the writer that the dissenting opinion is little more than an application of mere personal standards rather than that "tradition and conscience of our people" which, for purposes of due process, is the standard enjoined by the Constitution as previously interpreted. The mere fact that the petitioner had already been subjected to a current of electricity does not render his subsequent execution cruel or inhuman in the constitutional sense. The attempt was accidental, not malicious or intentional. The important fact, however, is that no current of suffcient intensity to cause death passed through the body of the petitioner, as required by the Louisiana Statute.[11] Undoubtedly, had the attempt been willful, or had the statute provided for electrocution by interrupted or repeated applications of electric current at intervals of several days, or even minutes, different questions would be raised.

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[8] These material facts refer to the following statements relating to what transpired after the petitioner had been strapped into the electric chair and a hood placed before his eyes:
". . . Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: "Take it off. Let me breathe." Affidavit of official witness Harold Resweber.
". . . This boy really got a shock when they turned that machine on." Affiidavit of official witness Ignace Doucet.
". . . The boy told me on leaving the chair that the electric current had "tickled him." Statement of a sheriff of a neighboring parish.

[9] Supra, In re Kemmler, at 443: "Application of electricity to the vital parts of the human body must result in instantaneous, and consequently in painless death . . ."

[10] Louisiana Code of Criminal Procedure (1928), Act No. 2 of 1928, Art. 569; Every sentence of death imposed in this State shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead."

[11] Ibid., Art. 569, Louisiana Statutes.

This decision illustrates that in the state cases, without a single exception, there is no prohibition upon the lawmaking power to determine the adequacy with which crimes shall be punished, provided only the cruel bodily punishments of the past are not resorted to. So long as they do not offend present standards of decency and make one shudder with horror to read of them, as do for instance drawing, quartering, burning and the like, the Fourteenth Amendment to the Constitution of the United States does not put any limit on state legislative discretion.

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