5TH, 6TH & 8TH AMENDMENTS – INNOVATIVE CONSTITUTIONAL SENTENCING ARGUMENTS

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NACDL's 2020 Presidential Summit & Symposium

"Prison Brake: Rethinking the Sentencing Status Quo"

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Individualization & Sentencing

Meghan J. Ryan*

I. Today's Focus on Equality
   A. Disparate Impact of the Pandemic
   B. West Coast Fires
   C. Police Shootings and Black Lives Matter
II. The Importance of Equality in Sentencing
   A. Federal Sentencing Guidelines
      1. Focus on uniformity in sentencing
   B. *Furman v. Georgia*, 408 U.S. 238 (1972)
      1. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." (J. Stewart, concurring)
      2. "Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." (J. Douglas, concurring) (quoting President's Comm'n on Law Enforcement & Admin. of Just.)
   C. But Limitations
      1. *McCleskey v. Kemp*, 481 U.S. 279 (1987)—refusing to find death penalty unconstitutional where study showed that "that black defendants . . . who kill white victims have the greatest likelihood of receiving the death penalty"
III. The Prominence of Individualization under the Eighth Amendment
   A. *Woodson v. North Carolina*, 428 U.S. 280 (1976)
      1. "[J]ustice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."
      2. "Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development."
      3. But emphasis that the Court's holding "rest[ed] squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long."
   B. History of "Death is Different"
      1. Justice Brennan's concurrence in *Furman*—stating that death is different "in its pain, in its finality, . . . in its enormity," and in "the infrequency with which it is imposed"
      2. Court cements the principle in *Gregg v. Georgia*, 428 U.S. 153 (1976); *Harmelin v. Michigan*, 501 U.S. 957 (1991)
   C. Chipping Away at "Death is Different"

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1. *Graham v. Florida*, 560 U.S. 48 (2010)—applies capital evolving-standards-of-decency analysis to conclude that it's unconstitutional to impose LWOP on juvenile non-homicide offenders
2. *Miller v. Alabama*, 567 U.S. 460 (2012)—finding that it is unconstitutional to impose mandatory LWOP on juvenile offenders
3. Uncertainty of the Doctrine as Politics and Court Membership Shift

IV. The Politics of Punishment (and Persuasiveness of Sentencing Arguments)
   A. Law-and-Order Republicans
   B. Progressive Democrats
   C. Some Bipartisan Support for Criminal Justice Reform

V. The Potentially Broad Appeal of Individualization
   A. Policy Goals on the Left
   B. Individualism as the Core of Dignity
      1. Religious roots
   C. Religion, Reform, and Rehabilitation
   D. A Skeptic's Foil to Equality
      1. Equality v. individualization endemic to sentencing questions
   E. A Culture of Rugged Individualism
   F. A Society of Heightened Individualism
      1. Movement toward individualized medicine
      2. Improved science and technology related to culpability and pain

When a Successful Execution is Just About an Inmate Ending Up Dead At the End

Corinna Barrett Lain*

Intro Comments:

We tend to view botched executions as aberrant events—snafus that happen, just like snafus happen in every other walk of life. Things go wrong, people make mistakes. Welcome to the real world.

But a closer look at lethal injection executions gone wrong reveals something very different—systemic failures in the form of incompetence, indifference, and intransigence to change—and these failures allow us to see botched executions by lethal injection in a new light. Botched executions aren't random events. They are the tip of the iceberg—what we see on the surface, but a small part of what is actually lurking below.

These institutional failures are the topic of a long chapter in an even longer forthcoming book on lethal injection. For the purposes of the discussion here, I'll just offer a few thoughts on the second of the three problems with the administration of lethal injection—institutional *indifference*.

I. The fact of institutional indifference

a. What prison officials (and executioners) say:

1. Both under oath & when they think they're in private company and no one is listening

2. Statements to the public that botched executions weren't botched—*he died, didn't he*?

b. What prison officials (and executioners) do:

1. "Rapid Flow" method of administering lethal injection drugs

2. Moving forward on executions even when they know they have a problem or there are signs that the inmate is still conscious

3. The drugs states use: midazolam, a paralytic

4. Sketchy suppliers, unfit executioners, google searches

II. How might we explain indifference?

a. Legal structures aren't designed to make institutional actors care

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b. Competing priorities

c. Social cognitive theory: mechanisms of moral disengagement

d. An important (but under-appreciated) role of death row

III. Implications of indifference as a baked-in feature of institutional design

William W. Berry III The Supreme Court has rendered the Eighth Amendment a dead letter with respect to non-capital, non-juvenile without parole sentences. Its cases have erected a gross disproportionality standard that seems insurmountable in most cases, even for draconian and excessive sentences. State courts have adopted a similar approach in interpreting state constitutional Eighth Amendment analogues, finding that they are no broader than the Court's narrow interpretation of the Eighth Amendment, despite linguistic variations in many cases. Nonetheless, in a handful of state cases, state courts have found that state punishments violate the state constitutional analogue to the Eighth Amendment. This article examines those cases to identify what non-capital punishments have caused courts to limit state punishment practices even in the shadow of an overwhelming, albeit unfortunate, trend of according constitutional deference to state punishment practices. In light of these decisions, this Article advances a series of possible arguments by which to attack state and federal punishment practices in an effort to create more exceptions to the draconian status quo constitutional rule. In Part I, the Article begins by providing an overview of Eighth Amendment gross disproportionality doctrine and its use in state constitutional analogues to the Eighth Amendment. Part II examines the handful of state court cases that have found punishments unconstitutionally disproportionate. In Part III, the Article advances one set arguments—both systemic and case-based—for use in attacking non-capital state punishments under state constitutions. Part IV, the Article advances a second set arguments—both systemic and case-based—for use in attacking non-capital state punishments under the Eighth Amendment.*

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Outline

Introduction

I. What Punishments are Cruel and Unusual?
   a. The Federal Approach
      i. *Weems* and *Trop*
      ii. Differentness and the Evolving Standards
      iii. Non-capital, non-juvenile cases
   b. State analogues

II. Cruel and Unusual Non-Capital State Punishments
   a. States Adopting the Eighth Amendment Approach
   b. States Using a Separate State Constitutional Approach

III. Challenging Non-Capital Punishments under State Constitutional Analogues
   a. State constitutions are broader than and different than the 8th Amendment
   b. Making sense of the winning cases

IV. Challenging Non-Capital Punishments under the Eighth Amendment
   a. *Miller* undermines *Harmelin*
      i. Differentness
      ii. Higher scrutiny for non-capital cases
   b. There must be some disproportionate punishments
   c. Analogizing from state constitutional law Conclusion

Conclusion

Reconstruction Sentencing:
Imagining Drug Sentencing in the Aftermath of the War on Drugs

Jelani Jefferson Exum
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I. Introduction: Contextualizing War Rhetoric

The year is 2020, and the world has been consumed by a viral pandemic, social unrest, increased political activism, and a history-changing Presidential election. In this moment, anti-racism rhetoric has been adopted by many, with individuals and institutions are pledging themselves to the work of dismantling systemic racism. If we are going to be true to that mission, then addressing the carnage of the failed War on Drugs has to be among a top priority.

II. The Need For Reconstruction: Then and Now

The answer to Southern defiance during the age of Reconstruction was for Congress to step in with Military Reconstruction Acts and the ratification of the Fourteenth and Fifteenth Amendments. This time of Congressional Reconstruction – also called Radical Reconstruction – required the same type of constitutional rebirth that is necessary to dismantle War on Drugs and restore the damage of that war.

III. The Current Drug War: Carnage

The War on Drugs officially began in 1971 when President Nixon decried drug abuse as "public enemy number one." The goal of the war rhetoric was clear – to cast drug abuse and the drug offender as dangerous adversaries of the law-abiding public, requiring military-like tactics to defeat. Criminal sentencing would come to be the main weapon used in this pressing combat. The full force of the 1986 Act was dispatched against Black communities, and as is the scene with any warzone, the result was catastrophic.

IV. Possibilities for Constitutional Re-Invigoration

8th Amendment Cruel and Unusual Punishment
5th and 14th Amendment Due Process Clauses
14th Amendment Equal Protection Clause

V. Conclusion: Avoiding the Pitfalls of Reconstruction

Of course, the Reconstruction Era only lasted 10 years and then was followed by 100 years of Jim Crow segregation during which the Constitutional provisions enacted during the Reconstruction Era were interpreted to support racial oppression. The current anti-racist movement offers strategies for avoiding the pitfalls of Reconstruction.

EIGHTH AMENDMENT FEDERALISM AND MODERN SENTENCING
Michael J. Zydney Mannheimer

Oct. 20, 2020

Prison Brake: Rethinking the Sentencing Status Quo

Panel: "5th, 6th & 8th Amendments – Innovative Constitutional Sentencing Arguments"

Introduction

I. State-Specific Use of the Term "Cruel or Unusual" in the Articles of Confederation Period
II. The Eighth Amendment's Proportionality Principle
    a. Eighth Amendment Disproportionality of Carceral Punishments
    b. Square Peg, Round Hole: The "Gross Disproportionality" Test Applied to Federal Sentencing
III. The Original Understanding of the Cruel and Unusual Punishments Clause
    a. The Cruel and Unusual Punishments Clause as a Bar Against Great Deviations from Common-Law Sentencing Practices in the Direction of Greater Severity
    b. The Anti-Federalist Origins of the Bill of Rights
    c. Differing Views of the Common Law at the Founding
    d. Heeding the Anti-Federalist View
    e. Cruel and Unusual Punishment in George Mason's *Objections to the Constitution*
IV. Modern Implications of Eighth Amendment Federalism
    a. Federal Carceral Sentencing
    b. Federal Capital Sentencing

Conclusion