

Origins of the Bill of Rights

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CHAPTER ELEVEN

The Eighth Amendment

THE EIGHTH AMENDMENT provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The amendment duplicates a provision in the English Bill of Rights of 1689. Its clause banning excessive bail was intended to prevent the once-frequent judicial practice of devising methods for keeping victims imprisoned indefinitely without trial. Judges used to fix bail at impossibly high rates, far in excess of a prisoner's capacity to raise. Parliament, in effect, reformed that situation when it enacted that punishment should approximate the severity of the crime.

The notion that punishment should not be barbarous or unduly severe but, rather, should be proportioned to the offense goes back to the Old Testament. Leviticus 24:19–20 says, "If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered." This rule of *lex talionis* found expression in Magna Carta. Section 20 (later renumbered section 14) stipulated that "a freeman shall be amerced for a small offence only according to the degree of the offence; and

for a grave offence he shall be amerced according to the gravity of the offence." A document of the thirteenth century required that ameracements or fines should be "according to their offences" and not "exceed the just penalty of the offence." A fourteenth-century document, purportedly copying the laws of Edward the Confessor of the eleventh century, made the policy on ameracements applicable to physical punishments; it provided that punishment should be imposed "according to the nature and extent of the offence." In the mid-sixteenth century Parliament acknowledged that the kingdom would be more secure if the subjects loved their king and if laws did not inflict great penalties for disobedience; nevertheless, Parliament directed that murderers should be dissected and gibbeted. Only a small number of offenses were capital, yet in the time of Henry VIII the death sentence was inflicted on about seventy-two thousand people. As time passed, the number of capital felonies increased until they reached about two hundred offenses. Death was actually inflicted in only a small proportion of the cases, however, because the sentences were usually mitigated by transportation either to America or, later, Australia. The law on the books was savage, in practice far more moderate.

In a book of 1583 Robert Beale, the clerk of the Privy Council, condemned "the racking of grievous offenders, as being cruel, barbarous, contrary to law, and unto the liberty of English subjects." Beale was the first person to object to torture even when authorized by the crown and one of the few Englishmen ever to object to "cruel" punishments. The conventional English objection was aimed at excessive, not cruel, punishments. In 1615 the Court of King's Bench, England's highest criminal court, censured as unlawful or extreme the punishment of a man who, for having criticized an officer of the crown, had been thrown into a dungeon with no bed or food. Imprisonment, the court said, "ought always to be according to the quality of the offence," a point buttressed by a quotation from Magna Carta. Thus, England

had long prohibited excessive or extreme punishments but never actually outlawed "cruel" punishments. A punishment could be extreme without being cruel, as in the instance of a very long imprisonment for some trifling offense.

If an offense was criminal, a man could not suffer loss of life, limb, or property unless he had first been convicted by a jury, but he could not be tried without his consent. The court always asked an accused person whether he would "put himself on the country"—that is, agree to be tried by a jury. If he refused to plead, because he feared the consequences of conviction, his consent was extorted by "punishment strong and hard," or *peine forte et dure*. He was stripped, put in irons on the ground in the worst part of the prison, and fed only coarse bread one day and water the next. Then the refinement of "punishment" was added: he was slowly pressed, spread-eagled on the ground, with as much iron placed on his body as he could bear "and then more." The punishment by pressing, exposure, and slow starvation continued until the prisoner agreed to be tried or died.

The purpose of *peine forte et dure* was not to extort a confession or force a person to incriminate himself or others; the purpose, rather, was simply to extort a plea. The law did not care whether the individual pleaded guilty or not guilty, only that he pleaded. In 1772 a statute provided that a prisoner standing mute to the indictment of felony should be treated as if he had been convicted by a verdict or by a confession, thus ending *peine forte et dure*. But the law permitted a prisoner's thumbs to be painfully tied together. Not until 1827 was the rule altered to direct the court to enter a plea of not guilty for a prisoner who stood mute or refused to plead.

Sir William Blackstone in his *Commentaries on the Law of England* proudly declared that the "humanity of the English nation has authorized, by tacit consent, an almost general mitigation of . . . torture or cruelty." English history, he said, showed "very

few instances” of anyone being disemboweled or burned alive unless first deprived of sensation by strangling. Physical punishments usually consisted of exile, banishment, transportation, or loss of liberty by imprisonment. England confiscated property, personal and real, and imposed disabilities on holding office, employment, or inheritance, and it sometimes mutilated or dismembered an offender by cutting off a hand or foot. Blackstone added that England also stigmatized people by slitting nostrils or by branding, and it also punished by imprisonment at hard labor, by using the pillory, the stocks, or ducking stool, but England never broke anyone’s back on the wheel, or tied people to wild horses which pulled them apart, or buried them alive. Even so, in Blackstone’s time, capital punishment was still the penalty for more than 160 offenses. Blackstone believed that the severe punishments imposed in the time of James II by the Court of King’s Bench accounted for the provision in the English Bill of Rights that the Eighth Amendment copied. He had in mind the fact that Lord Chief Justice George Jeffreys sent 292 prisoners to their deaths and brutally punished hundreds of others. He sentenced 841 prisoners to be sent to the West Indies as slaves for not less than ten years. In one case a young boy named Tutchin who had criticized the government was convicted of seditious libel; he was sentenced to be imprisoned for seven years and to be flogged through every market town in his shire during each of those years, which meant every other week for seven years. The punishment was later mitigated.

Though English common-law courts did not sentence anyone to be tortured, the monarch could authorize the rack by special royal warrant. The rack in the Tower of London was frequently used, especially during the time of the Tudors. Moreover, English law had permitted such grisly punishments as “pulling out the tongue,” slicing off the nose, cutting off the genitals, and, for capital crimes, boiling to death. Torture was thought to mean only

the infliction of cruel punishment for the purpose of coercing a suspect to confess a crime. English judges tended to be harsh and sometimes abused defendants in court by overawing and threatening them, but judges also boasted that torture was illegal at common law and that they preferred guilty parties to escape punishment rather than convict innocent ones. When Sir Thomas Smith, writing about 1565, declared that torture “to put a malefactor to excessive paine, to make him confesse of himselfe, or of his fellowes or complices, is not used in England,” he meant that common-law courts never employed it. But prerogative courts did. The monarch and the Privy Council or its judicial arm, the Court of Star Chamber, could and did authorize torture. The penalty for high treason was particularly gruesome, though it did not come within the ambit of the common law’s understanding of torture. The victim, if male, was hanged but cut down while still alive; his genitals were cut off and burned before him; he was disemboweled, still alive, and then he was cut into four parts and beheaded. That penalty was last inflicted in 1817, though beheading and quartering were not prohibited until 1870. Women convicted of treason were sentenced to being burned alive, although they were usually first strangled until unconscious. The burning of women ended in 1790, and whipping them ended in 1841.

Branding and nose slitting as well as flogging were inflicted as punishments for lesser crimes. In 1630 Alexander Leighton, a Puritan clergyman who had libeled the Anglican bishops, was fined the staggering amount of ten thousand pounds, defrocked by the highest ecclesiastical court, unmercifully whipped until almost dead, pilloried, one ear nailed to the pillory and then cut off, his cheek branded, and his nose slit; a week later he suffered the same mutilations on the other side of his face, and he was imprisoned for the rest of his life. William Prynne, another Puritan martyr, maligned theater productions that included women, though the queen occasionally acted on the stage. Prynne was mistreated in

the pillory, branded on the forehead, and suffered the cutting off of his ears; he was also heavily fined and sentenced to prison for life. Others suffered similar punishments. The Long Parliament freed Leighton, Prynne, and others in 1640. Although the Star Chamber was also abolished, England did not by law then or later prevent excessively severe punishments.

In 1685, after the abortive rebellion of the duke of Monmouth, Chief Justice George Jeffreys of the King's Bench conducted his "Bloody Assize" against captured rebels, for which James II awarded him the lord chancellorship. But the provision of the Bill of Rights of 1689 against "cruel and unusual punishments" had nothing to do with a hostile parliamentary reaction to Jeffreys's conduct. The chief prosecutor during the Bloody Assize was Sir Henry Pollfexen, a close friend and supporter of Jeffreys who did not view the Bloody Assize as illegal; Pollfexen was one of the chief backers of the Bill of Rights. Its provision against cruel and unusual punishments derived mainly from the reaction to the case of Titus Oates.

Oates underwent punishments that even then seemed excessive or unduly severe, although he was not mutilated as Leighton and Prynne had been. A cleric of the Church of England, Oates was the author of the infamous Popish Plot hoax, an accusation that English Catholics, led by Jesuit priests, intended to assassinate Charles II. In the national hysteria that followed Oates's sensational accusations, fifteen people, including the leader of the Jesuit order in England, were disemboweled, quartered, and beheaded for high treason. When evidence of Oates's hoax was revealed in 1685, he was indicted for perjury. Two of his four judges, Francis Withens and George Jeffreys, expressed regret that the law did not permit Oates to be hanged for perjuries that had resulted in the deaths of so many innocent people. The court sentenced Oates to be defrocked, to pay a fine of two thousand marks (approximately ten thousand dollars), to be whipped from Aldgate to Newgate, a

distance of about a mile and a half, and, after a day's intermission, to be whipped from Newgate to Tyburn, another two miles, and then to be imprisoned for life as well as be pilloried four times annually. Oates's case is the only one in which contemporaries described his punishment as "cruel" as well as extreme or excessive, even though severe floggings and sentences of life imprisonment were not unusual.

Following the Revolution of 1689, Oates was released, and he petitioned Parliament for redress. His judges initially contended that his sentence was deserved because his perjuries had resulted in innocent deaths. A majority of the House of Lords agreed, but several dissenting lords argued that the judgment against Oates had been erroneous, that the secular court could not defrock a clergyman, and that the severe whippings and the sentence of imprisonment for life in a case of perjury were "barbarous," "inhuman," "unchristian," and "unjust." With Oates in mind, the majority of the House of Lords, including the common-law judges who had sentenced him, declared that "excessive bail ought not to be required nor excessive fines imposed, nor cruel nor unusual punishments inflicted." Despite Oates's whippings, he had not undergone any physically brutal treatment as Leighton had, and whipping was not cruel as a matter of law. Indeed, whipping continued as a punishment in England well into the twentieth century. However, the House of Commons agreed with the dissenters in the House of Lords, and as a result the English Bill of Rights of 1689 outlawed cruel and unusual punishments.

In America, colonial Virginia in 1610 sentenced a soldier to lose rank, have his sword broken, stand in the pillory with both his ears nailed, and pay a fine of one hundred pounds sterling—a huge amount—or suffer having both ears cut off. Section 46 of the Massachusetts Body of Liberties of 1641, drafted by Nathanael Ward of Ipswich, declared that "for bodilie punishments we allow amongst us none that are inhumane Barbarous or cruell." This

was the first American ban on cruel punishments. Nevertheless, Massachusetts required robbers, especially highwaymen, to be burned on the forehead and in some cases suffer life imprisonment. Horse thieves as well as other thieves were branded and flogged. Generally speaking, punishments in America were probably more lenient than in England. Mutilations were rare, and women were hanged, not burned, for the crime of witchcraft. Whipping was the most common punishment, though humiliating penalties like the ducking stool, the pillory, and a variety of public penances such as the scarlet letter were also common.

On the other hand, the provision of the 1689 Bill of Rights on excessive bail and fines and cruel and unusual punishments was widely copied in America. Several states, including Virginia and Pennsylvania, added that punishments ought to be moderate. Maryland stipulated that sanguinary laws ought to be avoided consistent with the safety of the state and made the ban on cruel and unusual punishments apply to legislative enactments as well as judicial sentences. South Carolina required punishments to be proportionate to crimes. Six of the first thirteen states constitutionally prohibited cruel and unusual punishments, and a seventh did so by statute.

New Hampshire most fully provided a constitutional section on punishment: "All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences; the people are led to forget the real distinction in the crimes themselves; and to commit the most flagrant with as little compunction as they do those of the lightest dye. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform; not to exterminate, mankind." And in another section of its constitution, New Hampshire banned magistrates

and courts from demanding excessive bail or sureties, imposing excessive fines, or inflicting cruel and unusual punishments.

In the Northwest Ordinance of 1787, the Congress of the Confederation provided a bill of rights with a clause saying, "All fines shall be moderate, and no cruel or unusual punishments shall be inflicted." That same Congress, however, rejected a variety of proposals by Richard Henry Lee of Virginia to frame a bill of rights for the nation as well as for the northwest territories. One of Lee's proposals would have prohibited "cruel and unusual punishments." During the controversy over the ratification of the Constitution, a Massachusetts delegate objected to the Constitution because it did not prohibit Congress from inflicting cruel and unusual punishments. "Racks and gibbets," he predicted, "may be amongst the most mild instruments of their description." In Virginia, Patrick Henry and other Anti-Federalists claimed that Congress would prescribe "tortures" and "barbarous punishments" as well as excessive fines. The Pennsylvania minority, also expecting the worst, proposed a bill of rights whose provisions outlawed infliction of cruel and unusual punishments. North Carolina, New York, and Rhode Island also ratified the Constitution with recommendations for amendments, among them one that would ban cruel and unusual punishments.

When the Eighth Amendment was being framed in the First Congress, one member, Samuel Livermore of New Hampshire, argued that death by hanging was sometimes necessary, moreover that some offenders deserved to be whipped and even have their ears cut off. He hoped those punishments would still be possible and not come within the prohibition of cruel and unusual punishments. Representative James Madison, when introducing the proposals that became the Bill of Rights, offered one that became the Eighth Amendment. It said that excessive fines and cruel and unusual punishments "shall" not be inflicted. Madison was personally responsible for the imperative verb "shall," using it in

place of its universal flabby predecessor, "ought." The Senate accepted Madison's proposal verbatim.

Cruel and unusual punishment referred to methods of punishment as well as their severity; they had to be as swift and painless as possible and in no circumstances involve a lingering death or any form of torture. Death itself was an acceptable punishment. Life can be extinguished by the state if it provides due process of law to convict an offender. Unusual punishment must always be cruel to come under the constitutional ban. An unusual or novel punishment that is administered speedily and humanely passes constitutional muster. But punishment must also be proportioned to the offense. A conventional punishment, such as whipping, could not be so excessive as to become a form of cruelty. Imprisonment for many years would be excessive punishment for a petty crime.