Eighth Amendment

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The Eighth Amendment to the U.S. Constitution reads:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Eighth Amendment to the U.S. Constitution, ratified in 1791, has three provisions. The cruel and unusual punishments clause restricts the severity of punishments that state and federal governments may impose upon persons who have been convicted of a criminal offense. The Excessive Fines Clause limits the amount that state and federal governments may fine a person for a particular crime. The Excessive Bail Clause restricts judicial discretion in setting bail for the release of persons accused of a criminal activity during the period following their arrest but preceding their trial.

Courts are given wide latitude under the Excessive Fines Clause of the Eighth Amendment. Fines imposed by a trial court judge or magistrate will not be overturned on appeal unless the judge or magistrate abused his or her discretion in assessing them (United States v. Hyppolite, 65 F.3d 1151 [4th Cir. 1995]). Under the "abuse-of-discretion" standard, appellate courts may overturn a fine that is Arbitrary, capricious, or "so grossly excessive as to amount to a deprivation of property without due process of law" (Water-Pierce Oil Co. v. Texas, 212 U.S. 86, 111, 29 S. Ct. 220, 227, 53 L. Ed. 417 [1909]). Fines are rarely overturned on appeal for any of these reasons. Trial court judges are given less latitude under the Excessive Bail Clause. Bail is the amount of money, property, or bond that a defendant must pledge to the court as security for his or her appearance at trial. If the defendant meets bail or is able to pay the amount set by the court, the defendant is entitled to recover the pledged amount at the conclusion of the criminal proceedings. However, if the defendant fails to appear as scheduled during the prosecution, then he or she forfeits the amount pledged and still faces further criminal penalties if convicted of the offense or offenses charged.

When fixing the amount of bail for a particular defendant, the court takes into consideration several factors: (1) the seriousness of the offense; (2) the Weight of Evidence against the accused; (3) the nature and extent of any ties, such as family or employment, that the accused has to the community where he or she will be prosecuted; (4) the accused's ability to pay a given amount; and (5) the likelihood that the accused will flee the jurisdiction if released.

In applying these factors, courts usually attempt to set bail for a reasonable amount. Setting bail for an unreasonable amount would unnecessarily restrict the freedom of a person who only has been accused of wrongdoing; who is presumed innocent until proven otherwise; and who is entitled to pursue a living and to support a family. At the same time, courts are aware that bail needs to be set sufficiently high to ensure that the defendant will return for trial. Defendants are less likely to flee the jurisdiction when they would forfeit large amounts of money as a result.

Courts are also aware that they must protect communities from the harm presented by particularly dangerous defendants. In this regard, the U.S. Supreme Court has permitted lower courts to deny bail for defendants who would create abnormally dangerous risks to the community if released.

Appellate courts usually defer to lower courts' decisions when a criminal penalty is challenged under the Excessive Fines and Excessive Bail Clauses of the Eighth Amendment. They give much closer scrutiny to criminal penalties that are challenged under the Cruel and Unusual Punishments Clause. State and federal governments are prohibited from inflicting cruel and unusual punishments on a defendant, no matter how heinous the crime committed. The prohibition against Cruel and Unusual Punishment by states derives from the doctrine of incorporation, through which selective liberties contained in the Bill of Rights have been applied to the states by the U.S. Supreme Court's interpretation of the due process and Equal Protection Clauses of the Fourteenth Amendment.

The Eighth Amendment requires that every punishment imposed by the government be commensurate with the offense committed by the defendant. Punishments that are disproportionately harsh will be overturned on appeal. Examples of punishments that have been overturned for being unreasonable are two Georgia statutes that prescribed the death penalty for rape and Kidnapping (Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 [1977]; Eberheart v. Georgia, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 [1977]).

The U.S. Supreme Court has also ruled that criminal sentences that are inhuman, outrageous, or shocking to the social conscience are cruel and unusual. Although the Court has never provided meaningful definitions for these characteristics, the pertinent cases speak for themselves. For example, the Georgia Supreme Court explained that the Eighth Amendment was intended to prohibit barbarous punishments such as castration, burning at the stake, and quartering (Whitten v. Georgia, 47 Ga. 297 [1872]). Similarly, the U.S. Supreme Court wrote that the Cruel and Unusual Punishments Clause prohibits crucifixion, breaking on the wheel, and other punishments that involve a lingering death (In re Kemmler, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 [1890]). The Court also invalidated an Oklahoma law (57 O.S. 1941 §§ 173, 174, 176–181, 195) that compelled the state government to sterilize "feeble-minded" or "habitual" criminals in an effort to prevent them from reproducing and passing on their deficient characteristics (Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 [1942]). Significantly, however, the Court had let stand, fifteen years earlier, a Virginia law (1924 Va. Acts C. 394) that authorized the sterilization of mentally retarded individuals who were institutionalized at state facilities for the "feeble-minded" (buck v. bell, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 [1927]).

A constitutional standard that allows judges to strike down legislation that they find shocking, but to let stand other legislation they find less disturbing, has an inherently subjective and malleable quality. A punishment that seems outrageous to one judge on one particular day might seem sensible to a different judge on the same day or to the same judge on a different day. For example, in Hudson v. McMillian, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), the U.S. Supreme Court reviewed a case in which a prisoner had been handcuffed by two Louisiana corrections officers and beaten to the point where his teeth were loosened and his dental plate

was cracked. Seven U.S. Supreme Court justices ruled that the prisoner had suffered cruel and unusual punishment under the Eighth Amendment. Two justices, Antonin Scalia and Clarence Thomas, disagreed.

Another amorphous measure by which the constitutionality of criminal sentences is reviewed allows the high court to invalidate punishments that are contrary to "the evolving standards of decency that mark a maturing society" (Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 [1958]). Under the Trop test, the Court must determine whether a particular punishment is offensive to society at large, not merely shocking or outrageous to a particular justice. In determining which criminal sentences are offensive to society, the Court will survey state legislation to calculate whether they are authorized by a majority of jurisdictions. If most states authorize a particular punishment, the Court will not invalidate that punishment, as it is not contrary to "evolving standards of decency."

Applying this test, the Court ruled that the death penalty may be imposed upon 16-year-old U.S. citizens who have been convicted of murder, because a national consensus, as reflected by state legislation, supported Capital Punishment for juveniles of that age (Stanford v. Kentucky, 492 U.S. 361, 109 S. Ct. 2969, 106 L. Ed. 2d 306 [1989]). Under the same reasoning, the Court permitted the state of Texas to execute a mentally retarded person who had been convicted of murder, despite claims that the defendant's handicap minimized his moral culpability (Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 [1989]).

In the years after the Court decided Penry, several states, including Texas, exempted mentally retarded individuals from their death-penalty statutes. Moreover, very few states that did not proscribe such executions actually executed mentally retarded defendants, meaning those individuals with IQs of lower than 70. In 2002, the Court reviewed its conclusion in Penry in Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). Because so few states allowed execution of the mentally retarded, the practice had indeed become "unusual." Moreover, justifications for the death penalty, such as retribution on the part of the defendant and deterrence of capital crimes by prospective offenders, did not apply to the mentally retarded. Accordingly, the Court categorically excluded the mentally retarded from execution under the Eighth Amendment.

Atkins demonstrated that the Eighth Amendment, like other constitutional provisions, evolves as society evolves. Nevertheless, Justice Antonin Scalia, in a scathing dissent in Atkins, attacked the majority opinion as lacking in precedent. He noted, "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members." According to Scalia, the abolition of executions of mildly mentally retarded individuals by 18 states did not amount to a "national consensus" that such executions were so "morally repugnant as to violate our national 'standards of decency.'" Moreover, Scalia noted that execution of mildly retarded individuals in 1791, when the Eighth Amendment was adopted, would not have been considered "cruel and unusual." Rather, only the severely and profoundly retarded were historically protected.

Another test that the Court employs to evaluate the constitutionality of particular punishments is somewhat less pliable, but still controversial. Popularly known as the originalist approach, this

test permits the U.S. Supreme Court to invalidate punishments that the Framers "originally" intended to remove from legislative fiat. In attempting to ascertain which punishments the Framers disapproved of, the Court has developed a simplistic formula: If a particular punishment was prohibited by the states at the time they ratified the Eighth Amendment in 1791, then that particular punishment is necessarily cruel and unusual; if a particular punishment was permitted by most states, or at least some states, in 1791, then the Framers did not intend to remove that punishment from the legislative arena.

The narrow, originalist formula has been criticized on a number of grounds. Some critics argue that a state representative's vote to ratify the Eighth Amendment need not mean that representative believed that all the punishments authorized by the government comported with the Cruel and Unusual Punishments Clause. The representative might not have considered whether a particular punishment was in any way cruel or unusual as he cast his vote for ratification. Conversely, the representative might have cast his vote for ratification primarily because he believed that a certain punishment would be deemed cruel and unusual under the Eighth Amendment. No documentary evidence from the state ratification proceedings reflects which punishments particular representatives found permissible or impermissible under the Eighth Amendment.

Nor is there much evidence indicating that the Framers intended their understanding of the Constitution to be binding on subsequent generations. James Madison, who was the primary architect of the Bill of Rights, believed that the thoughts and intentions of the Framers should have no influence on courts when they interpret the provisions of the Constitution. "As a guide in expounding and applying the provisions of the Constitutions," Madison wrote, "the debates and incidental decisions of the [Constitutional] Convention can have no authoritative character." For this reason, Madison refused to publish his Notes of the Debates in the Federal Convention during his lifetime.

Another criticism of the narrow, originalist approach emanates from the language of the Eighth Amendment itself. Proponents of this viewpoint observe that the Eighth Amendment is written in very abstract language. It prohibits "excessive" bail and "excessive" fines, and does not set forth any specific amount that judges may use as a yardstick when setting bail or imposing fines. Although it prohibits cruel and unusual punishments, it does not enumerate which criminal penalties should be abolished.

The Framers could have drafted the Eighth Amendment to explicitly outlaw certain barbaric punishments. They obviously were familiar with ways to draft constitutional provisions with such specificity. For example, Article I, Section 9, of the Constitution provides that "[n]o Bill of Attainder or ex post facto law shall be passed." No clearer or more precise language could have been used in this provision. The Framers could have employed similar concrete language for the Eighth Amendment, some critics reason, but did not choose to do so.

Although there is not enough evidence to determine conclusively the appropriate manner in which the Framers expected or hoped that the Constitution would be interpreted, the origins of the Eighth Amendment are fairly clear. The notion that the severity of a punishment should bear

some relationship to the severity of the criminal offense is one of the oldest in Anglo-Saxon law. In 1215, the Magna Charta, the ancient charter of English liberties, provided, "A free man shall not be [fined] for a small offense unless according to the measure of the offense, and for a great offense he shall be [fined] according to the greatness of the offense" (ch. 20).

By the seventeenth century, England had extended this principle to punishments that called for incarceration. In one case, the King's Court ruled that "imprisonment ought always to be according to the quality of the offence" (Hodges v. Humkin, 2 Bulst. 139, 80 Eng. Rep. 1015 [K.B. 1615] [Croke, J.]). In 1689, the principle of proportionality was incorporated into the English Bill of Rights, which used language that the Framers of the U.S. Constitution later borrowed for the Eighth Amendment: "[E]xcessive bail ought not to be required, nor excessive fines imposed, or cruel and unusual punishments inflicted." Nine states adopted similar provisions for their own constitutions after the American Revolution.

The concerns underlying the Eighth Amendment were voiced in two state-ratification conventions. In Massachusetts, one representative expressed "horror" that Congress could "determine what kind of punishments shall be inflicted on persons convicted of crimes" and that nothing restrained Congress "from inventing the most cruel and unheard-of punishments" that would make "racks" and "gibbets" look comparatively "mild" (as quoted in furman v. georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 [1972]). In Virginia, Patrick Henry was worried that Congress might legalize torture as a method of coercing confessions from criminal defendants, and that the government should be prevented from employing such "cruel and barbarous" tactics (as quoted in Furman).

The concerns expressed by these representatives were legitimate in light of the punishments authorized by many states at the time the Eighth Amendment was ratified. These punishments ranged from whipping, branding, and the pillory to various methods of mutilation, including the slitting of nostrils and the removal of body parts. The death penalty was also prevalent. If James Madison or the other Framers intended to preserve these forms of punishment, they kept their intentions to themselves.

The U.S. Supreme Court continues to consider specific instances of punishment in order to determine whether they violate the Eighth Amendment. In Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), the Court considered a case where Alabama prison officers had handcuffed a prisoner to a hitching post on two occasions, once for more than seven hours without water or a restroom break. Use of a hitching post, according to the Court, violated the Eighth Amendment.

The prisoner in Hope brought a civil action against the officers, who claimed that they were protected by the doctrine of qualified Immunity, which applies when state actors are not put on notice that their conduct violates judicial precedent or other federal or state law. Precedent from the Eleventh Circuit Court of Appeals, which includes the state of Alabama, was clear that this type of punishment was unlawful. Moreover, the department of justice had submitted a report to the Alabama Department of Corrections (ADOC), informing the state agency that the use of hitching posts violated the constitution, and the ADOC had issued regulations forbidding that

form of punishment. Because the officers had had notice that their actions were unlawful, qualified immunity did not apply.

Other punishments that have been the subject of Eighth Amendment challenges are the socalled "three strikes and you're out" laws, which increase punishment for repeat offenders. Under such laws, when an offender commits his or her third crime, the severity of the crime is elevated. Several defendants, particularly in California, have been sentenced to lengthy prison terms after committing relatively minor offenses.

In Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003), the U.S. Supreme Court held that the three-strikes laws did not violate the Eighth Amendment. In that case, the defendant had stolen a total of nine video tapes worth a total of $153, usually a misdemeanor offense under California law. However, the defendant had received two previous convictions, and when he was convicted on two counts of petty theft, the counts were considered his "strikes" three and four. The trial court elevated the charges to felonies and sentenced the defendant to life in prison with no possibility of Parole for 50 years. The Court allowed the sentence to stand, reversing a decision by the Ninth Circuit Court of Appeals.

On the same day it decided Lockyer, the Court ruled that a sentence of 25 years to life given to a defendant who had stolen three golf clubs worth $399 apiece was not cruel and unusual punishment. The case of Ewing v. California, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003), unlike Lockyer, was an appeal from a California state court that had found nothing unconstitutional about the three-strikes law in California. The two rulings made it clear that states may prescribe elevated punishment for repeat offenders without violating the Eighth Amendment, even if the punishment does not meet the actual crime that led to the punishment.

Further readings

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Cross-references
Criminal Law; Criminal Procedure; Original Intent; Prisoners' Rights.