

## 3.9: Substantive Law - Physical Punishment Sentences

### Corporal Punishment

Until 1978, the Supreme Court upheld the use of **corporal punishment** (physical punishment). *Ingraham v. Wright* 430 U.S. 651 (1978). However, it is no longer an approved sanction for a criminal offense in the United States. Nonlethal corporal punishment, such as flogging, was used extensively in English and American common law for non-felony offenses. The misdemeanor was taken to the public square, bound to the whipping post, and administered as many lashes as the law specified.

“An American judge during the early American Republic was able to select from a wide array of punishments, most of which were intended to inflict intense pain and public shame. A Virginia statute of 1748 punished the stealing of a hog with twenty-five lashes and a fine. The second offense resulted in two hours of pillory (public ridicule) or public branding. A third theft resulted in a penalty of death. False testimony during a trial might result in mutilation of the ears or banishment from the colony. These penalties were often combined with imprisonment in a jail or workhouse and hard labor. . .

We have slowly moved away from most of these physically painful sanctions. The majority of states followed the example of the U.S. Congress, which in 1788 prohibited federal courts from imposing whipping and standing in the pillory. Maryland retained corporal punishments until 1953, and Delaware only repealed this punishment in 1972. Delaware, in fact, subjected more than 1600 individuals to whippings in the twentieth century. This practice was effectively ended in 1978 when the Eighth Circuit Court of Appeals ruled that the use of the strap, “offends contemporary standards of decency and human dignity and precepts of civilization which we profess to possess.” <sup>[1]</sup>

### Controversial Issue: Capital Punishment: Death Penalty

Capital punishment (lethal physical punishment) is a popular topic, and much has been written about the death penalty. One excellent resource for learning about the death penalty is the death penalty information center (DPIC), a nonprofit organization that publishes studies and analyzes trends in death penalty law and application.

- Link to Death Penalty Information Center: <https://deathpenaltyinfo.org/>
- Link to Death Penalty Information Center Fact Sheet: <https://deathpenaltyinfo.org/documents/FactSheet.pdf>
- See Death Penalty Fast Facts at <https://www.cnn.com/2013/07/19/us/death-penalty-fast-facts/index.html>

The use of the death penalty as a response to crime in industrialized nations raises many questions:

- Is the death penalty a deterrent?
- Is the death penalty justified by principles of retribution?
- Is the death penalty morally or ethically justified?
- Does it cost more to impose a death sentence or to impose a true-life sentence?
- Are factually innocent individuals erroneously executed (and if so, how often)?
- Is any particular manner of execution cruel and unusual?
- Is the death penalty, in itself, cruel and unusual punishment?

Courts answer only the last two questions, and, to date, the Court has upheld every manner of execution that is currently approved in the United States: firing squad, electrocution, gas chamber, hanging, and lethal injection. The Court appears willing to uphold capital punishment and has found it is not disproportionately cruel and unusual when the crime for which the defendant was convicted resulted in the death of another. It has reached an opposite result when the crime did not involve the victim's death, for example, when the defendant was convicted of rape of an adult woman and a child rape. See, *Coker v. Georgia*, 433 U.S. 584 (1977) The Court prohibited capital punishment for the crime of rape of an adult victim. *Coker* suggests that the death penalty is an inappropriate punishment for any crime that does not involve the taking of human life. In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court invalidated a Louisiana statute that allowed for the death penalty for rape of a child less than twelve years of age. Justice Kennedy (not the defendant, Kennedy) wrote, “the Eighth Amendment bars imposing the death penalty for the rape of a child where the crime did not result and was not intended to result, in the death of the victim.”

#### Mental Illness, Mental Deterioration and the Death Penalty

According to Court interpretations, the Eighth Amendment forbids the execution of someone who is legally insane. *Ford v. Wainwright*, 477 US 399 (1986). In 2007, the Court ruled that a prisoner is entitled to a hearing to determine his mental condition upon making a preliminary showing that his current mental state would bar his execution. *Panetti. v. Quarterman*,

551 US 930 (2007). In one case, the Texas Court of Criminal Appeals in 2013 held that a trial court illegally ordered the forcible medication of a mentally ill death row inmate, Steven Stanley, for the purpose of rendering him competent to be executed. See, <http://www.deathpenaltyinfo.org>. Stanley's mental health began to deteriorate when he entered death row in 1991. He received an execution date in 2006 but was deemed too ill to be executed. A court ordered that his paranoid schizophrenia is treated by forcible medication, which continued for six years. In its ruling, the Texas Court of Criminal Appeals held that "the evidence conclusively shows that appellant's competency to be executed was achieved solely through the involuntary medication, which the trial court had no authority to order under the competency-to-be-executed statute. The finding that appellant is competent must be reversed for lack of any evidentiary support". The ruling did not address whether the state constitution forbids the execution of someone forcibly drugged or whether the defendant, in this case, is too ill to be executed at all. Another mentally ill individual, John Ferguson, was executed in August 2013 in Florida through four mental health organizations maintained that he had suffered from mental illness for at least 40 years. Similarly, Marshall Gore, another Florida inmate with mental illness, was executed in October 2013.

Link to mental illness and the death penalty

<https://deathpenaltyinfo.org/mental-illness-and-death-penalty>

A different but related issue is the constitutionality of executing mentally retarded individuals who have committed capital offenses. In 1989, the Court held that executions of mentally retarded prisoners do not necessarily violate the Cruel and Unusual Punishment Clause if juries are allowed to consider evidence of mental retardation as a mitigating factor in the sentencing phase of a capital trial. *Penry v. Lynaugh*, 492 U.S. 302 (1989). Later, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court reconsidered, holding that there was a sufficient national consensus for the Court to prohibit the execution of mentally retarded persons via the Eighth Amendment. Justice Stevens concluded,

"[M]entally retarded person who meets the law's requirement for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct" <sup>[2]</sup>.

On February 27th, 2019 the Court affirmed that the states may not execute a death row inmate who was unable to understand his punishments due to dementia. In *Madison v. Alabama*, \_\_\_ U.S. \_\_\_ (2019), the 70-year-old defendant had spent 33 years in solitary confinement after having been sentenced to death for killing a police officer in 1985. Madison had suffered a series of strokes causing severe cognitive impairment due to vascular dementia and the inability to remember his crime. Justice Kagan's majority opinion held that an inmate's failure to remember his crime does not by itself render him immune from execution, but "such memory loss still may factor into the 'rational understanding' analysis that *Panetti* demands." If memory loss "combines and interacts with other mental shortfalls to deprive a person of the capacity to comprehend" his death sentence, "then the *Panetti* standard will be satisfied." \_\_\_ U.S. \_\_\_, at \_\_\_ (2019)

According to the Court, it doesn't matter if these "mental shortfalls" stem from delusions, dementia, or some other disorder. Courts must "look beyond any given diagnosis to a downstream consequence"—whether a disorder can "so impair the prisoner's concept of reality" that he cannot "come to grips with" the meaning of his punishment."

### Juvenile Offenders and the Death Penalty

Historically, juveniles were treated no differently than adults in the criminal justice system, and thus, there is a long history of executing juveniles convicted of capital crimes. In the late 1980s, the Court considered whether national sentiment had changed to the point where it would now be considered cruel and unusual punishment to apply the death penalty to juveniles. The Court first held that the Constitution prohibits executing a juvenile who was fifteen years of age or younger at the time he or she committed the capital crime. *Thompson v. Oklahoma*, 487 U.S. 825 (1988). One year later, the Court, in a 5-4 decision, held that a juvenile sixteen years or older at the time of the crime could be sentenced to death. *Stanford v. Kentucky*, 492 U.S. 361 (1989). Then, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court said that the Constitution forbade the execution of anyone who was under eighteen at the time of their offense. The *Simmons* decision pointed to the decreasing frequency with which juvenile offenders were being sentenced to death as evidence of an emerging national consensus against capital punishment for juveniles. The Court noted that only 20 of the 37 death penalty states allowed juveniles to be executed, and since 1995, only three states had actually executed inmates for crimes they had committed as juveniles.

1. Lippman, M.R. (2016) *Contemporary Criminal Law: Concepts, Cases, and Controversies* (4th ed., pp. 57). SAGE Publishing.

2. *Atkins v. Virginia*, 536 U.S. 304 (2002). ↩

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