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The Meaning of the “Unnecessary Rigor” Provision in the Utah Constitution

James G. McLaren*

I. INTRODUCTION

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. *Persons arrested or imprisoned shall not be treated with unnecessary rigor.*¹

Since 1986, three criminal appellants have attempted to raise issues under the “unnecessary rigor” provision of the Utah Constitution. Each case involved sentencing. In two cases, the court handled the issue under the “cruel and unusual punishment” provisions of the state and Federal Constitutions. The third case was argued solely in terms of the unnecessary rigor provision, which the court decided was not violated. These cases raised questions about the meaning of the unnecessary rigor provision and the types of issues that would be appropriate to address under the provision. This Article explores possible answers to these questions by examining the Utah constitutional convention, the historical context within which the unnecessary rigor provision was adopted, and the case law of states with similar provisions.

II. ORIGIN: SCARCITY OF CLEAR INTENT

At the Utah constitutional convention of 1895, the only record of debate on the unnecessary rigor provision was as follows:

The Secretary read section 9

Mr. VARIAN. I don't know what the purpose of that last phrase or clause is. It seems to me it is a matter of legislation. The section as it stands prior to that, “excessive bail shall not be required; excessive fines shall not be imposed, nor shall cruel or unusual punishment be inflicted,” seems to cover the whole ground. I don't want to raise any

* Copyright © 1996 by James G. McLaren. Scottish H.N.C. 1977, Glasgow College; B.A. 1985, M.A. 1986, J.D. 1989, Brigham Young University; M.Phil in Law 1996, Leicester University, England. As the thespians say, the author is currently “resting.”

1. UTAH CONST. art. I, § 9 (emphasis added).

unnecessary question, and I suggest to the chairman of the committee whether there is any particular reason for putting that in there.

Mr. WELLS. The object [is] to protect persons in jail if they shall be treated inhumanely while they are in prison.

Mr. THURMAN. I would like to ask the chairman of that committee if this is copied from any other constitution?

Mr. WELLS. I will answer the gentleman that I don't think it is, in the language, but there are plenty of provisions in regard to the humane treatment of prisoners.

Mr. THURMAN. I don't think we ought to adopt this unless it is copied from some other constitution; for that reason I shall favor the motion to strike out.

The motion to strike out was agreed to.²

Apparently, the unnecessary rigor provision was intended to be dropped from article I, or perhaps was dropped and later reinserted. In any event, voting on the Utah Bill of Rights as a whole, the delegates passed article I, section 9 with the unnecessary rigor provision on three separate occasions.³ The proceedings are silent as to the change of heart that occurred sometime between the March 21, 1895 debate and the first vote on the adoption of the "declaration of rights" on April 3.

The Utah Supreme Court did not have occasion to cite the unnecessary rigor provision until 1929. In *Davis v. Walton*,⁴ Walton appealed the district court's affirmation of the prison warden's order that Walton be asexualized. The warden had petitioned under an act providing "for the asexualization of persons afflicted with habitual sexual criminal tendencies, insanity, idiocy, imbecility, feeble-mindedness, and epilepsy, who are confined in the Utah state hospital and sanatorium, the state industrial school, and the state prison."⁵ The act required that the petitioner believe that the asexualization be in the best interests of the inmate and of society.⁶

Walton contended that the order was "contrary to, and in violation of, article I, [section] 9 of the Constitution of Utah, in that it provide[d] for the infliction of cruel and unusual punishment."⁷ The court disposed of the issue under the cruel and unusual punishment provision, citing to

2. I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1895, at 257-58 (1898).

3. See vote on declaration of rights, *id.* at 650; vote on adoption of the constitution as a whole, II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1895, at 1834 (1898); vote on the final adoption of the constitution, *id.* at 1850.

4. 276 P. 921 (Utah 1929).

5. *Id.* at 922 (citing 1925 Utah Laws 159).

6. 1925 Utah Laws 159.

7. *Davis*, 276 P. at 922.

a Washington case⁸ which held that an operation for the prevention of procreation was "not contrary to or in violation of the Constitution of the State of Washington which prohibited cruel punishment."⁹ The Utah court found that the act permitting asexualization was "in no sense a penal statute. The operation provided for is not a punishment for a crime. Its purposes are eugenic and therapeutic. Therefore [appellant's] cases dealing with laws that provide for asexualization as a punishment for [a] crime are not applicable to the law here under consideration."¹⁰

The court did not analyze the issue under the unnecessary rigor provision. The appellant probably raised the issue only as one of cruel and unusual punishment. In sweeping aside all other potential bases for a claim of unconstitutionality, the court stated:

The state, of necessity, is charged with the proper care of inmates confined in public institutions. If the welfare of an inmate of a public institution demands an operation, we know of no constitutional provision, either state or federal, that prohibits the legislative branch of the government from directing that such operation be performed without the consent or against the will of such inmate.¹¹

The issue in *Davis* was not one of punishment but rather one concerning "the proper care of inmates in public institutions," and could have been briefed and disposed of under the unnecessary rigor provision. The provision applies to "[p]ersons arrested or imprisoned," and concerns their treatment, which, according to the constitutional convention debate, should not be "inhumane."

III. RECENT UTAH CASES: SEARCHING FOR MEANING

In *State v. Bishop*,¹² the appellant, Bishop, challenged the constitutionality of the minimum mandatory sentencing scheme. Bishop contended that because he was ineligible for immediate participation in the sex offenders program, which was only available three years prior to his release, his minimum mandatory sentence of five years constituted cruel and unusual punishment under both state and federal constitutions.¹³

Bishop did not address the unnecessary rigor provision in his brief. Instead, his arguments were confined to the cruel and unusual punishment

8. *State v. Feilen*, 126 P. 75 (Wash. 1912).

9. *Davis*, 276 P. at 923.

10. *Id.*

11. *Id.* at 924.

12. 717 P.2d 261 (Utah 1986).

13. *Id.* at 267.

provision¹⁴ because the relevant issue was solely whether a sentence prescribed by statute constituted cruel and unusual punishment. However, in section V of the opinion, Justice Stewart, joined by Chief Justice Hall and Justice Howe, used the unnecessary rigor provision of the state constitution to contrast article I, section 9 of the Utah Constitution with the Eighth Amendment of the Federal Constitution:

We have not heretofore defined the meaning of the Utah Cruel and Unusual Punishment Clause of Article I, section 9. However, it is plain on the face of Article I, section 9 that the Utah provision is broader than its federal counterpart. Section 9 states:

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

Except for punctuation and insignificant stylistic changes, the Utah provision tracks the federal provision exactly, except for the last sentence of section 9. Of course, we are free in appropriate circumstances to give the Utah provision a broader interpretation. That is even suggested by the last sentence of section 9, which states: "Persons arrested or imprisoned shall not be treated with unnecessary rigor." That state constitutional guarantee has no counterpart in the Eighth Amendment. We need not in this case fully explicate the content and limitations of section 9; that is a task better done on a case-by-case basis. Nevertheless, we note that the last sentence of the Utah cruel and unusual punishment provision contained in section 9 is broader than the comparable federal provision. For present purposes, we need only hold that the Utah and the federal cruel and unusual punishment provisions apply to this case in the same fashion. To determine how they apply, we look primarily to federal case law.

We hold that the cruel and unusual punishment provisions of the State and Federal Constitutions do not prevent the State from incarcerating the defendant for a term longer than the time required to complete the state prison's sex offenders program.¹⁵

Justice Durham, concurring in the result and joined by Justice Zimmerman, disagreed with the treatment given to the state constitutional provision:

Section V contains neither an exploration of the distinct content and meaning of the federal and state provisions regarding cruel and unusual punishment nor a reasoned conclusion that no distinctions exist. An

14. See Brief for Appellant at 14-15, Brief for Respondent at 4-5, *State v. Bishop*, 717 P.2d 261 (Utah 1986) (Nos. 19733, 19797, 19847) (1228 SUPREME COURT OF UTAH BRIEFS).

15. *Bishop*, 717 P.2d at 267.

examination of the briefs discloses that no attempt was made by counsel to illumine the state constitutional law questions beyond mechanical reliance on federal precedents. Under those circumstances, we should either require supplemental briefing, give the questions full treatment *sua sponte*, or decline to treat them all; but in any event we should be clear and explicit about the course we undertake in developing principles of state constitutional law. Otherwise, we abdicate our responsibility to articulate the meaning of our own constitutional provisions and simply "march lock-step with interpretation given to . . . the United States Constitution."¹⁶

This encouragement to brief separately on state constitutional claims, coupled with the majority's mention of the unnecessary rigor provision in a sentencing context, prompted a separate unnecessary rigor claim in *State v. Russell*.¹⁷

Russell was convicted of aggravated sexual assault and aggravated kidnapping which he had committed when he was fifteen. He was sentenced to a fifteen year minimum mandatory sentence with a five year enhancement for using a firearm. He contended that his sentence, imposed after he was certified as an adult, constituted cruel and unusual punishment. In addition, citing *State v. Bishop*, he contended that his sentence violated the unnecessary rigor provision:

As an offender under the age of sixteen, the minimum mandatory sentence applied to Mr. Russell is disproportionate to his level of culpability. The sentence is applied with unnecessary rigor when imposed upon a juvenile this age and fails to take into account the distinct roles of retribution and deterrence as well as increased possibilities for rehabilitation where an offender is fifteen years old rather than an adult.¹⁸

At oral argument, the State disagreed with Russell's characterization of the unnecessary rigor provision as one dealing with the proportionality of sentencing. The State thought that the provision spoke only to the terms of confinement, but could offer no further explanation under questioning from Justice Stewart.¹⁹ Justice Durham offered this thought from the bench:

16. *Bishop*, 717 P.2d at 272 (quoting *State v. Jackson*, 672 P.2d 255 (Mont. 1983) (Shea, J., dissenting)). Justice Durham stated that "This question has apparently never been addressed by this Court, although the structure of the opinion in *Davis v. Walton* suggests that the state and federal provisions do require separate analysis." *Id.* at 272, n.1 (citation omitted).

17. 791 P.2d 188 (Utah 1990).

18. Brief for Appellant at 16, *State v. Russell*, 791 P.2d 188 (Utah 1990) (No. 880172).

19. Oral Argument at 907-12, *State v. Russell*, 791 P.2d 188 (Utah 1990) (No. 880172) (tape #1, January 1990).

I had always thought . . . that the second sentence of the provision which says that "Persons arrested or imprisoned shall not be treated with unnecessary rigor" might embody an entirely separate notion, having been written in an historic time when forced labor, convict labor, and pretty primitive prison conditions were not unknown both in this state and other parts of the country, and that it really had to do with the personal treatment that an individual prisoner received while in the custody of the state or the authorities.²⁰

The appellant, Russell, rebutted this interpretation, claiming that the history of the clause (meaning, perhaps, the lack of history) supported neither Justice Durham's interpretation nor one encompassing proportionality of sentence. The source of the clause was "not known."²¹

Justice Howe, writing for a unanimous court, disposed of the issue as follows:

Defendant also argues that his sentences violate[] article I, section 9 of the Utah Constitution on the basis that broader protection is afforded by its provision that "[p]ersons arrested or imprisoned shall not be treated with unnecessary rigor." While we indicated in *State v. Bishop* that section 9 was arguably broader than its federal counterpart, we nevertheless stated that its content and limitations were best explicated on a case by case basis. As we examine the facts of this case, we do not find that the concurrent fifteen-year minimum mandatory sentences are unnecessarily rigorous. The crimes and defendant's manner of committing them were severe and shocking; he had an extensive juvenile criminal record of violent crimes; and all attempts at rehabilitation in the juvenile system had failed. Strong corrective measures were justified.²²

In *State v. Deli*,²³ the defendant had been sentenced to consecutive prison terms in accordance with Utah statutes for two counts of criminal homicide, murder in the second degree, attempted criminal homicide, aggravated arson, two counts of aggravated kidnapping, aggravated robbery, theft, and aggravated assault. He received seven firearm enhancement penalties. Deli relied on language in *Russell* and *Bishop*, asserting that Utah's section 9 was broader than its federal counterpart. Deli interpreted the court's determination to explicate section 9 "on a case by case basis"²⁴ as an invitation to defendants to bring complaints

20. *Id.* at 1067-1135.

21. *Id.*

22. *State v. Russell*, 791 P.2d at 190-91 (citation omitted).

23. 861 P.2d 431 (Utah 1993).

24. *Russell*, 791 P.2d at 190-91.

under the unnecessary rigor provision of excessive sentencing that would not prevail in a cruel and unusual punishment argument. The prosecution fairly characterized the defendant's argument as follows:

Defendant has not challenged any of [the trial court's specific findings which support the consecutive sentences]; the only argument he raises to support his claim that he was treated with unnecessary rigor is that the victims, police, and prosecution were dissatisfied with the jury verdicts of second degree murder instead of capital murder.²⁵

Justice Hall disposed of the issue as Justice Howe had done in *Russell*, noting that the sentences were consistent with statutory guidelines and that the trial court had taken into account, among other things, the senselessness and brutality of the murders, lack of compassion, and risk to society if the defendant were released from prison.²⁶

The court's language in *Russell* and *Deli* indicating that a "sentence was not unnecessarily rigorous" has created confusion. Even if the drafters of the Utah Constitution had contemplated sentencing in the unnecessary rigor clause of section 9, all sentencing arguments are now comprehensively dealt with under the cruel and unusual punishment provision.²⁷

Only sentencing arguments have been presented to the Utah Supreme Court under the unnecessary rigor clause. However, the court apparently prefers to deal with such arguments under the cruel and unusual punishment provision. If presented with an argument on sentencing that relies solely on the unnecessary rigor provision, the court will decide, with a minimum of dicta, that the sentence does not typically violate the provision. An examination of the case law so far reveals the current standing of the unnecessary rigor provision:

1. It relates to the prevention of inhumane treatment of prisoners;
2. It may or may not relate to the proportionality of sentencing;
3. The supreme court will interpret the clause when the appropriate case is presented; and
4. It is unclear what an appropriate case would be.

25. Brief for Respondent at 10, Brief for Appellant at 8-10, *State v. Deli*, 861 P.2d 431 (Utah 1993) (No. 910306).

26. *State v. Deli*, 861 P.2d at 435; cf. *Russell*, 791 P.2d at 191 (defendant's crimes and "manner of committing them were severe and shocking").

27. In 1895 cruel and unusual punishment was not thought to include sentencing. See *infra* note 34.

The court has expressed its willingness in both *Bishop* and *Russell* to independently interpret the unnecessary rigor provision. However, until the provision is "subjected to the kind of briefing and analysis that is helpful to the development of doctrine and precedent,"²⁸ the court will be justifiably reticent to expound the meaning of the provision. In order to help practitioners brief and analyze the provision, this Article now suggests two possible approaches: historical context and comparison with other states.

IV. HISTORICAL CONTEXT

Justice Durham has suggested that Utah's unnecessary rigor provision relates to the personal treatment received by prisoners, since it was written when forced labor, convict labor, and poor prison conditions were prevalent.²⁹ This section examines the validity of this suggestion by comparing federal and state attitudes toward prisoners during the nineteenth and early twentieth centuries, and by analyzing the territorial laws and constitutional provisions which were the forerunners to Utah's unnecessary rigor provision.

A. Federal Hands-Off Doctrine

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In the nineteenth century, "scholars and jurists . . . traditionally interpreted [the Eighth] [A]mendment merely to prohibit certain forms of punishment."³⁰ The Eighth Amendment was regarded by courts as the embodiment of the rejection of Old World barbarism rather than the creation of rights yet to be defined. In 1878, the United States Supreme Court, expounding upon permissible modes of capital punishment in *Wilkerson v. Utah*,³¹ used examples from England where "the King" or "the humanity of the nation by tacit consent" mitigated cruel and painful punishments; as a result, emboweling alive, beheading, quartering, and burning alive "were seldom strictly carried into effect."³² As one federal court stated, there was "[n]o doubt [that the] delegates to the conventions, in providing against cruel punishment, had largely in mind" the prohibition of these and other

28. Christine M. Durham, *Employing the Utah Constitution in the Utah Courts*, UTAH BAR J., Nov. 1989, at 25, 26.

29. See *supra* note 20 and accompanying text.

30. Note, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 649 (1971).

31. 99 U.S. 130 (1878).

32. *Id.* at 135.

atrocities.³³ It was not until 1910 that the United States Supreme Court extended the meaning of the Eighth Amendment to prohibit disproportionate sentences.³⁴

The protection of the Eighth Amendment did not extend to prisons, where "the traditional role of the judiciary was . . . merely to interpret statutes and to review a narrow range of administrative actions."³⁵ The "absence of effective judicial intervention" in correctional matters "has been attributed both to the procedural limitations associated with the most common forms of action utilized by inmate-plaintiffs —[habeas corpus and others]— and to the judiciary's philosophic commitment to the 'hands-off' doctrine."³⁶ This doctrine, which persisted³⁷ into the mid-1960s, provided that courts were "without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."³⁸ Thus courts would deny "jurisdiction over the subject matter

33. *Davis v. Berry*, 216 F. 413, 417 (S.D. Iowa 1914), *rev'd*, *Berry v. Davis* 242 U.S. 468 (1917); see Note, *supra* note 30, at 649 n.18. Whether this was the sole concern of the framers, or whether they also sought to prohibit excessive or disproportionate punishment, has been a matter of debate. See Arthur B. Berger, Note, *Wilson v. Seiter: An Unsatisfying Attempt at Resolving the Imbroglia of Eighth Amendment Prisoners' Rights Standards*, 1992 UTAH L. REV. 565, 569-70 & nn.25-28.

34. *Weems v. United States*, 217 U.S. 349 (1910), extended the protection of the Eighth Amendment to sentencing. The Eighth Amendment's ban on cruel and unusual punishment was not made obligatory on the states until *Robinson v. California*, 370 U.S. 660 (1962). While mindful of *Weems*, Utah courts prior to 1962 did not regard excessive sentencing as cruel and unusual punishment, which was "ordinarily thought of in terms of the thumbscrew, the rack, burning at the stake, nailing one's tongue to a post, crucifixion, disembowelment, beheading, quartering, public dissection and the like" *Chapman v. Graham*, 270 P.2d 821, 822 (Utah 1954).

35. Note, *supra* note 30, at 654.

36. *Id.* at 655. The phrase "hands-off doctrine [is] taken from *Fritch*, Civil Rights of Federal Prison Inmates 31 (1961)." Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L. J. 506, 506 n.4 (1963).

37. This persistence has not been without some exceptions, however. "A few courts . . . either expressly or by implication rejected the hands-off doctrine." Note, *supra* note 36, at 507; see, e.g., *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) ("A prisoner retains all of the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."); *United States ex rel. Yaris v. Shaughnessy*, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) (Courts "will interfere if the treatment of prisoners amounts to [the] deprivation of [their] constitutional rights."); see also *Trop v. Dulles*, 356 U.S. 86 (1958) (crime cannot be punished by deprivation of federal citizenship). While these courts recognized that prisoners had rights, generally, the obligation "to define and enforce the prisoner's rights . . . was not met." Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 987 (1962). For a discussion of the evolving standards used by the U.S. Supreme Court in Eighth Amendment cases, see Berger, *supra* note 33; Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 B.Y.U. L. REV. 857.

38. *Banning v. Looney*, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954). This position was "held with virtual unanimity by the courts." See Note, *supra* note 36, at 508 & n.12.

of petitions from prisoners alleging some form of mistreatment or contesting some deprivation undergone during imprisonment."³⁹

B. *State and Territorial Prison Conditions*

State prisoners in the nineteenth century fared no better. They were not regarded as having "rights" in the modern sense of the word. While "due process" existed in state criminal trials, "it was carefully bounded, and showed little propensity to expand. Outside the courtroom were zones of power and immunity: the Army, schools, factories, *prisons*, poorhouses, and institutions of all sizes and sorts."⁴⁰ The United States Supreme Court held in 1833 that the Federal Bill of Rights was not a limitation upon the states;⁴¹ however, state courts of the period were reluctant to use "state constitutions to prevent infringement of core . . . liberties,"⁴² which prisoners were deemed to have forfeited anyway. The Virginia Supreme Court expressed the prevailing view: "He [the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."⁴³ Friedman illustrates with an example from Pennsylvania:

[A prisoner] refused to go to religious services on Sunday. He was punished by the keeper, who put him in the dungeon. Afterwards, a deputy warden forced him to "attend the religious exercises." The court derisively rejected any claim that rights had been violated. The court looked at the prison as the locus of a private sphere of authority, and the warden's power was likened to a parent's control over children.⁴⁴

In the mid and late nineteenth century, the majority of states "expended tremendous political energy on making, unmaking, and remaking constitutions."⁴⁵ The Utah Constitution is said to be represen-

39. Note, *supra* note 36, at 506.

40. Lawrence M. Friedman, *State Constitutions and Criminal Justice in the Late Nineteenth Century*, 53 ALB. L. REV. 265, 274 (1989) (emphasis added). The state courts were said to have "uniformly adopted" the hands-off doctrine. See Note, *supra* note 36, at 508 n.12 (citing cases from Maryland, Mississippi, Nebraska, New York, and Pennsylvania).

41. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

42. Suzanna Sherry, *The Early Virginia Tradition of Extra-Textual Interpretation*, 53 ALB. L. REV. 297 (1989).

43. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871), *quoted in* Note, *supra* note 37, at 985.

44. Friedman, *supra* note 40, at 274 (citing *Merrick v. Lewis*, 22 Pa. D. 55, 55-56 (1912)).

45. *Id.* at 266, (citing MORTON KELLER, *AFFAIRS OF STATE PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 11-14 (1977)); see also John J. Flynn, *Federalism and Viable*

tative of an "era of popular mistrust and hostility toward government" in Utah.⁴⁶ It could be postulated that the outburst of "unnecessary rigor" and other prisoner protection clauses in these remade constitutions was partly a manifestation of this mistrust. However, the paucity of cases enforcing prisoners' rights and the fact that some states did not enforce these rights until 1965 belie any notion of popular sentiment toward inmates. For example, Georgia, despite its constitutional prohibitions against abuse of prisoners, was notorious in the 1940s and 1950s for "treat[ing] chain gang prisoners with persistent and deliberate brutality,"⁴⁷ and for failing "signally in its duty as one of the sovereign [s]tates of the United States to treat a convict with decency and humanity."⁴⁸

As Justice Durham suggested, such maltreatment of prisoners was not uncommon in the late nineteenth century. In Utah, the desire to eliminate brutality and to ensure decent and humane treatment for convicts may have been the catalyst of the unnecessary rigor provision.

C. *The Mormon Dimension*

In Utah, "[e]arly officials of the territorial prison were Mormons."⁴⁹ They believed that the convicts should work, in part because they abhorred idleness and considered work a privilege, and in part because "a hard working convict would be more interested in sleep and rest at night than escaping"⁵⁰ The system of contracting out prisoners was practiced in Utah from 1860 until 1888, when it was ruled illegal.⁵¹ Prisoners were "sold" to their employers for the term of their sentences. "The conditions of the contract were of such nature that the employer was to feed, clothe, guard and meet all charges incurred in the execution of the convict's sentence and to pay the warden the amount set forth in the agreement."⁵² In addition, convicts sentenced to hard labor were used in making prison improvements, quarrying, mining, territorial roadworking, logging, farming, making saddle cinches and other

State Government - The History of Utah's Constitution, 10 UTAH L. REV. 311, 314 (1966).

46. Flynn, *supra* note 46, at 314.

47. See *Johnson v. Dye*, 175 F.2d 250, 253 (3d Cir.) *rev'd per curiam on other grounds*, 338 U.S. 864 (1949) (proof of mistreatment was made partly by articles from magazines of national circulation), *cited in* Note, *supra* note 37, at 1005.

48. *Johnson v. Dye*, 175 F.2d at 256.

49. James B. Hill, *History of Utah State Prison 1850-1952*, at 4 (1952) (unpublished M.S. thesis, Brigham Young University).

50. *Id.* at 72. The practice of fully employing prisoners continued into statehood, with the warden reporting in 1898 that every prisoner had been employed for the previous two years. See *Warden's Report, Document 19*, in 1898 STATE OF UTAH PUB. DOCS.

51. Hill, *supra* note 49, at 4.

52. *Id.* at 79.

laborious jobs.⁵³ This treatment of prisoners in Utah was reported to be humane.⁵⁴

The territorial prison, however, was described by the legislative assembly in 1864 as "almost totally unfit for the purposes for which it [was] designed."⁵⁵ The walls were in decay and the cells were unsafe and unhealthy. Conditions had not improved by the late 1880s and early 1890s. Bunks in cell houses were built three high. The cells were seven feet high, seven feet long, and five feet wide. An iron cage called the "sweat box" was used to discipline prisoners and the inmates' water "was often muddy and unfit to drink."⁵⁶

These conditions were perhaps not exceptional for the era. In Utah, however, the situation was complicated by the imprisonment of Mormon church leaders for practicing polygamy.⁵⁷ "During the 1880's upwards of a thousand men were sent to the Utah State Penitentiary for failure to discard their wives and families. Hundreds were driven into hiding and thousands were disenfranchised. Women were also sent to prison for failure to testify against their husbands."⁵⁸ Male prisoners "were shaved of their beards and dressed in stripes,"⁵⁹ [and] were hardly recognized by their own wives and . . . children . . ."⁶⁰ The penitentiary became over-populated, "filled mostly with Mormons convicted on charges of polygamy."⁶¹ Until 1889, Mormons perceived that federal

53. Governor's Message, in 1899 STATE OF UTAH PUB. DOCS. 26; see Hill, *supra* note 50, at 72.

54. Prisoners were "not worked to death" and no criminals died in prison from 1855 to 1878. As part of their humane treatment they had access to a library and had a school. Hill, *supra* note 50, at 4, 7.

55. Hill, *supra* note 49, at 47.

56. *Id.* at 55-56.

57. The term polygamy is used generally to include the two separate offenses of polygamy and unlawful cohabitation. Most prosecutions involving Mormons were for unlawful cohabitation, rather than polygamy. An unlawful cohabitation prosecution could proceed on evidence of cohabitation with more than one woman, using community reputation. See Thomas G. Alexander, *The Odyssey of a Latter-Day Prophet: Wilford Woodruff and the Manifesto of 1890*, 17 J. MORMON HIST. 169, 175 (1991).

"Polygamy prosecutions were not numerous, due to the difficulty of proof," requiring as they did the testimony of the wife. However, Linford notes a striking similarity between the courts' prescription of the evidence necessary to establish these two separate Edmunds Act crimes. The Utah commission reported only 35 convictions for polygamy between 1875 and 1892. REPORTS OF THE UTAH COMMISSION (Utah State Archives), cited in Orma Linford, *The Mormons and the Law: The Polygamy Cases, Part I*, 9 UTAH L. REV. 308, 348 (1964).

58. Hill, *supra* note 49, at 92.

59. *Id.* at 95.

60. *Id.*

61. *Id.* at 97; see also Linford, *supra* note 58, at 349.

judges were strongly prejudiced against them,⁶² and zealous enforcement of the Edmunds and Edmunds-Tucker Acts led to a distrust of federal authority among the Mormon population.⁶³ It also led to allegations of disproportionate sentences for Mormon polygamists in comparison to criminals convicted of other crimes.⁶⁴

The memory of past injustices, real and perceived, may have influenced the Mormon delegates attending the constitutional convention to approve the inclusion of the unnecessary rigor clause. All of the delegates to the constitutional convention, regardless of creed, would have been aware of the past imprisonment of hundreds of Mormon

62. Allegations of prejudice among judges were nothing new. In 1871, the editor of the Indianapolis Journal noted that the pending prosecutions for cohabitation of the Mormon leader Brigham Young were "conceived in folly, [and] conducted in violation of the law" 5 B.H. ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 400 (1965).

63. Beginning in 1884, Judge Charles S. Zane "and his fellow judges began systematically convicting Mormon polygamists of unlawful cohabitation under the Edmunds Act, on evidence of community reputation. Thus began 'the raid,' a species of 'reign of terror' that filled the territorial penitentiary in Sugarhouse with nearly thirteen hundred unrepentant polygamists and sent uncounted others on the underground within the next six years." By 1889 "a great change ha[d] taken place . . . and fair trials [were] not now unusual." Alexander, *supra* note 57, at 176, 184.

64. Joseph Smith Black, who served three months for plural marriage in 1889, recorded in his diary several sentences for non-Mormons: murder - one year; manslaughter - suspended sentence; seduction of two women - thirty days. He compared these with sentences for polygamy of eight years, two years, 17 months and 10 months. Hill, *supra* note 49, at 94-95, quoting Joseph Smith Black's Diary 86 (unpublished manuscript available at Brigham Young University Library). Joseph Smith Black's perception of harsh sentences, however, did not accurately reflect the overall treatment of polygamists in 1889. There were 589 convictions for unlawful cohabitation up to 13 September 1888. By October 1890, there were 1300 convictions. However,

the increase in the number of convictions in the latter part of the Cleveland administration, was . . . because the federal judicial appointees of the Cleveland administration were disposed to pass less severe sentences than their Republican predecessors had done; the element of mercy entered into the administration of the law, and men subject to trial and conviction, regarded the time as opportune to rid themselves of the charges against them, and came in from retirement and exile, pleaded guilty, and often received but half the amount of penalty hitherto inflicted upon violators of the law in this kind.

6 B.H. ROBERTS, *supra* note 62, at 210-11. In unlawful cohabitation cases, imprisonment was often omitted.

Linford notes that the penalty for unlawful cohabitation cases was "much less severe" than for polygamy. "The sentence for polygamy was three years and six months in prison and a fine of five hundred dollars; for unlawful cohabitation . . . six months in prison and a fine of three hundred dollars." Linford, *supra* note 57, at 348-50 (citing *United States v. Clawson*, 5 P. 689 (Utah 1885)). In contrast to Black's subjective selection of non-polygamy sentences, the State Board of Pardons reported parole for persons convicted between 1889 and 1895 to the following sentences: rape, five years; grand larceny, five years; arson, twelve years; burglary, two years, and forgery, one year. 1896 STATE OF UTAH PUB. DOCS.

church leaders.⁶⁵ Several months prior to the vote on article I, section 9, the *Deseret Weekly News* published an expose of "barbarous practices" in the Salt Lake County Jail⁶⁶ (not the penitentiary) which may have stirred memories at a propitious time. Based on reports from the wardens, the territorial legislature had petitioned Congress from time to time to obtain funding to improve the territorial prison. Representations had also been made to the United States Senate concerning the harsh treatment of prisoners.⁶⁷

Heber M. Wells, who was the chairman of the Committee on the Preamble and Declaration of Rights and sponsored the unnecessary rigor clause, was the son of a prominent Mormon polygamist.⁶⁸ Perhaps not coincidentally, Charles R. Varian, who questioned the inclusion of the unnecessary rigor clause, had been in charge of the prosecution of polygamists from 1884-85.⁶⁹ Heber Wells' role in, and motivation behind, the adoption of the unnecessary rigor clause is not documented. However, as the first governor of Utah and the president of the State Board of Corrections, Wells recommended an appropriation of \$57,575 for the prison, which would be used for improvements such as developing a better water supply, providing workshops, and improving the sewers.⁷⁰ Wells and those constitutional delegates who had compiled the territorial laws and constitutions of the previous decades were well versed in the prisoners' plight in the Utah Territory. Undoubtedly, this knowledge contributed to the early protections afforded convicts in Utah.

D. Early Utah Laws and Constitutions

The Constitution of the State of Deseret 1849, article VIII, section 8, provided that "[a]ll penalties and punishments shall be in proportion to the offense; and all offenses before conviction, shall be bailable; except

65. Although Roberts noted the less harsh sentences of the latter part of the Cleveland administration, hundreds of the Church's leading elders were still in prison in 1890. 6 B.H. ROBERTS, *supra* note 62, at 215.

66. *Prison Cruelties*, 50 THE DESERET WEEKLY 437-38 (1895).

67. Franklin D. Richards, a well known Mormon church leader, had testified in the Hearings of the Senate Committee on Territories on the Utah Constitution in February and March of 1888.

68. Daniel H. Wells was a counselor first to Brigham Young, then to the Council of the Twelve Apostles. He had six wives and thirty-six children. He was arrested for cohabitation in 1871. He was mayor of Salt Lake City at the time. Wells was also charged with murder. The charge was false and Wells only spent one day as a prisoner at Camp Douglas, "where he was more the guest of General Morrow than his prisoner." 5 B.H. ROBERTS, *supra* note 62, at 395, 404 & n.11.

69. Ivins, *A Constitution for Utah*, 25 UTAH HIST. Q. 95, 100 (1957); Alexander, *supra* note 57, at 202.

70. Governor's Message, in 1897 STATE OF UTAH PUB. DOCS. 23.

capital offenses, where the proof is evident, or the presumption great."⁷¹ This section was also part of the constitutions of 1856⁷² and 1862.⁷³ In article II, section 8 of the 1856 constitution, a prohibition against "excessive bail" was added, but was omitted from the 1862 constitution. Each constitutional provision mandates that penalties and punishments are to be in proportion to the offense.

In 1868, the ratification of the Fourteenth Amendment extended the Bill of Rights so that the states were required to comply with its provisions.⁷⁴ Utah, seeking statehood, replaced its proportionality provision in 1872 with one clearly modeled after the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted; nor shall witnesses be unreasonably detained."⁷⁵ The proportional sentencing requirement never reappeared in Utah's constitutions.

The year 1872 was significant in another respect: California enacted three statutes which manifested its commitment to recognize prisoners' rights.⁷⁶ Utah adopted these three statutes in the Compiled Laws of 1876 as follows:

(1900.) SEC. 70. Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody, is punishable by fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year.

(1902.) SEC. 72. Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year.

(2227.) SEC. 397. The person of a convict sentenced to imprisonment in the penitentiary is under the protection of the law, and any injury to

71. The constitution of 1849 can be found in LAWS AND ORDINANCES OF THE STATE OF DESERET 89-90 (1851) (Reprinted 1919); Morgan, *The State of Deseret*, 8 UTAH HIST. Q. 67, 162-63 (1940); ACTS, RESOLUTIONS AND MEMORIALS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH 44-56 (1855).

72. The constitution of 1856 can be found in DESERET NEWS WEEKLY, April 2, 1856, at 30.

73. The constitution of 1862 can be found in H.R. MISC. DOC. NO. 78, 37th Cong., 2d Sess. 1 (1862).

74. REVISED STATUTES OF THE UNITED STATES 31 (2d ed. 1878).

75. UTAH CONST. art. I, § 6. The text of the 1872 constitution can be found in H.R. MISC. DOC. NO. 165, 42d Cong., 2d Sess. 5 (1872). The unreasonable detention of witnesses clause was dropped from the 1882 constitution, leaving article I, § 6 reading almost verbatim with the Eighth Amendment. See UTAH CONST. art. I, § 6, reprinted in UTAH CONSTITUTIONAL CONVENTION 708 (1882).

76. See CAL. PENAL CODE §§ 147, 149, 676 (West 1988) for derivation and subsequent history.

his person, not authorized by law, is punishable in the same manner as if he was not convicted.

These provisions, including the last which guarantees legal protection to convicts, were in force before and after the constitution of 1895, and were not repealed until 1973.⁷⁷ The delegates to the constitutional convention of 1895 could draw upon nineteen years of experience with these statutes when they made the unnecessary rigor provision part of Utah's constitution. The adoption of the provision may, as in Wyoming,⁷⁸ be cited to support the conclusion that the state committed itself to the humane treatment of its prisoners by embodying a recognition of prisoners' rights in its "fundamental law." At the constitutional convention, Heber Wells, the proposer of the unnecessary rigor provision, stated, "there are plenty of provisions in regard to the humane treatment of prisoners."⁷⁹

As previously noted, this support from other states' statutory provisions was apparently insufficient to convince the delegates to adopt the unnecessary rigor provision. The motion to strike out was accepted because the proposer could cite no support from any other constitution.⁸⁰ A change of heart apparently occurred between March 21, 1895 and April 3, 1895, perhaps because the proponents of the provision discovered the precedential support they needed in other state constitutions.

V. COMPARISON WITH OTHER STATES

A. *Indiana*

Article I, section 15 of the Indiana Constitution (1851) provides that "[n]o person, arrested or confined in jail, shall be treated with unnecessary rigor." This provision is the model for at least one other constitution.⁸¹ Early Indiana documents shed little light on the framers' intent regarding this provision. The delegates at the Indiana constitutional

77. The three statutes are found in II COMPILED LAWS OF UTAH §§ 4435, 4437, 4752 (1888); REVISED STATUTES OF THE STATE OF UTAH §§ 4141, 4143, 4504 (1898); 1907 COMPILED LAWS §§ 4141, 4143, 4504; 1917 COMPILED LAWS 8001, 8003, 8536; 1933 REVISED STATUTES §§ 103-26-53, 103-26-56, 103-1-38; UTAH CODE ANN. §§ 76-28-53, 76-28-56, 76-1-39 (1953). The three statutes were repealed by 1973 UTAH LAWS, 584-85; UTAH CODE ANN. § 76-10-1401 (1995).

78. See *infra* note 115 and accompanying text.

79. See remarks of Mr. Wells, *supra* note 2 and accompanying text. The compiler of the Revised Statutes of the State of Utah 1898 cross-referenced the "inhumanity" statutes with the unnecessary rigor provision.

80. *Id.*

81. The Oregon constitutional provision is modeled on the Indiana provision. See *infra* note 103.

convention of 1850 did not discuss the unnecessary rigor provision, though several motions were made to add provisions to the section, such as the right to a pretrial hearing and the necessity of indictment by a grand jury. These alterations were defeated and the section was passed as it now reads.⁸²

It is useful to compare sections 15 and 16 of the Indiana Constitution. Section 16 provides that "[e]xcessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishment shall not be inflicted. All penalties shall be proportioned to the nature of the offense." The unnecessary rigor section is clearly differentiated from the cruel and unusual punishment section, which also contains a provision relating to the proportionality of sentencing. Indiana case law interpreting section 15 reveals a range of causes of action that excludes appeals against sentences.

In the 1928 case of *Hall v. State*,⁸³ the defendant was convicted and sentenced to death for committing murder while engaged in a robbery. He asserted that the court had erroneously overruled his motion for a new trial. In this motion, the defendant claimed that the requirement that he wear shackles, handcuffs, and ankle bars prejudiced the jury against him and violated Indiana's unnecessary rigor section.⁸⁴ The court held that this section was not violated where the defendant "had secured a revolver and shot at the sheriff, had attempted to escape, that his codefendant had escaped, and that effort might be made to release the prisoner during the trial"⁸⁵

The 1931 case of *Bonahoon v. State*⁸⁶ involved an appeal from a conviction of assault and battery. Bonahoon was one of two police officers who beat a suspect with a rubber hose to obtain a confession. In affirming the police officer's conviction, the court quoted the unnecessary rigor section and stated that the acts of the police officers "were indefensible and in violation of the Constitution."⁸⁷ One year later, the Indiana Supreme Court decided *Mack v. State*⁸⁸ which involved an appeal from conviction of murder on the ground that a confession was not obtained voluntarily. Quoting section 15 and citing *Bonahoon*, the court

82. See II REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE STATE OF INDIANA 1368, 1371, 1733, 2067 (1850); JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 72, 187, 353, 572, 869, 872 (1851).

83. 159 N.E. 420 (Ind. 1928).

84. *Id.* at 423.

85. *Id.* at 424.

86. 178 N.E. 570 (Ind. 1931).

87. *Id.* at 571.

88. 180 N.E. 279 (Ind. 1932).

stated that "[t]he law protects persons charged with crime from ill or unjust treatment, and cruel and brutal methods should never be tolerated."⁸⁹ Confessions obtained through fear or force "are useless because they are not admissible in evidence."⁹⁰

In *Kokenes v. State*,⁹¹ decided in 1938, the appellant prevailed in his appeal from a robbery conviction. Appellant's motion for a new trial was granted when evidence was presented that he had been beaten. The court reasoned that "[r]esort to torture and physical punishment—utter lawlessness—by sworn officers of the law is shocking and intolerable. When such occur, the constitutional rights of the injured person have been invaded"⁹²

Eleven years later, *Suter v. State*⁹³ involved an appeal from a conviction for unlawful breaking, as well as entry with intent to commit larceny. Admission of a confession obtained from the defendant by "third-degree methods"⁹⁴ was held to be prejudicial error. Quoting section 15, the court stated that "[t]his provision applies with equal force to any place where the arresting officers may cause a defendant to be confined. It likewise applies to the period of detention prior to the filing of the affidavit charging the offense and the issuance and service of a warrant thereon."⁹⁵

In the 1955 case of *Matovina v. Hult*⁹⁶ damages were sought against police officers for false imprisonment. Hult, a suspect in a hit and run accident, was taken into custody at 3 p.m. on December 1, 1944. He was initially deprived of food and was not questioned until 2 a.m. the next morning. The jail was dirty and cold, and the defendant was threatened with a beating. The defendant asserted that "[h]e was served food twice a day and on occasion was served cabbage leaves floating on top of water."⁹⁷ The defendant was held for five days under "deplorable conditions" without a prompt arraignment,⁹⁸ and was eventually released from jail on December 6, 1944. While upholding a jury award of \$4,000,⁹⁹ the Indiana Court of Appeals cited article I, section 15 as

89. *Id.* at 284.

90. *Id.*

91. 13 N.E.2d 524 (Ind. 1938).

92. *Id.* at 530.

93. 88 N.E.2d 386 (Ind. 1949).

94. *Id.*

95. *Id.* at 391 (citing *Bonahoon v. State* 178 N.E. 570 (Ind. 1931)).

96. 123 N.E.2d 893 (Ind. Ct. App. 1955).

97. *Id.* at 896.

98. *Id.* at 897.

99. *Id.* at 898-99.

requiring "a prompt arraignment of persons charged with [a] crime."¹⁰⁰ The court appears to have miscited section 15, however, and probably intended to cite section 12 which guarantees the right to a speedy trial.¹⁰¹

B. Oregon

Article I, section 13 of the Oregon Constitution provides that "[n]o person arrested or confined in jail shall be treated with unnecessary rigor." Adopted in 1857 without debate, this clause is almost identical to article I, section 15 of the Indiana Constitution of 1851.¹⁰² The provision was first construed in 1965 by Oregon appellate courts in *Grenfall v. Gladden*.¹⁰³ Gladden petitioned for a writ of habeas corpus based on the alleged cruelty of prison guards. He claimed that three guards brutally beat him. The court held that these facts did not warrant the issuance of a writ of habeas corpus. "[T]he purpose of the writ of habeas corpus is to inquire into the legality of imprisonment and not to supervise administration of the institution."¹⁰⁴ The court stated that the petition failed to allege that the assault was a "routine happening" or "likely to recur," therefore there was no showing of a probable violation of the prisoner's constitutional rights.¹⁰⁵

C. Tennessee

The Tennessee Constitution of 1870, article I, section 13, provides that "[n]o person arrested and confined in jail shall be treated with unnecessary rigor."¹⁰⁶ The Supreme Court of Tennessee construed this section in a 1965 burglary case, *Sanders v. State*.¹⁰⁷ The defendants in this case alleged that the taking of their clothes for several days to obtain soil samples for comparison with those at the burglarized building violated the unnecessary rigor section. One defendant alleged that a delay in furnishing medical treatment for a fractured leg sustained in an automobile accident also constituted a violation of the section. The court

100. *Id.* at 897.

101. *See Owens v. State*, 333 N.E.2d 745, 749 (Ind. 1975). In this appeal from a conviction for first-degree murder there was a six-day delay between arrest and arraignment. Appellants contended that this violated article I, § 15. The court held that appellants had "not explained how the delay complained of resulted in 'unnecessary rigor,' and we do not see that article I, § 15 applies here." *Id.* at 749.

102. *See THE OREGON CONSTITUTION* 28, 310, 468 (C. Carey ed., 1926).

103. 405 P.2d 532 (Or. 1965).

104. *Id.* at 534.

105. *Id.* at 533-34.

106. This section read "arrested or confined in jail" in the constitution of 1796.

107. 392 S.W.2d 916 (Tenn. 1965).

found no unnecessary rigor. There was no allegation that other clothes were not furnished. The defendant was arrested at noon and the medical treatment was given during the early evening of that day. One defendant also testified that "no one had mistreated, threatened or beaten him" in jail.¹⁰⁸

D. Georgia

The Georgia Constitution of 1877, article I, paragraph IX provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison."¹⁰⁹ In the 1969 case of *Hill v. State*,¹¹⁰ the defendant appealed, alleging that he was maltreated and abused prior to the time of trial. He claimed that the trial court erred in failing to protect him from cruel and unusual punishment. The court held that maltreatment occurring prior to sentencing "constituted no part of the sentences imposed as a result of the trial."¹¹¹ Therefore, the prior maltreatment did not violate the cruel and unusual punishment provisions which "have relation to punishment imposed by sentences on conviction for criminal offenses."¹¹² The court concluded: "The defendant's remedy in such a case is a civil action against those directly responsible. Assuming that the alleged maltreatment took place, it is no defense to the crimes with which defendant was charged."¹¹³

E. Wyoming

The Wyoming Constitution of 1889, article I, section 16, provides that "[n]o person arrested and confined in jail shall be treated with unnecessary rigor. The erection of safe and comfortable prisons and inspection of prisons, and the humane treatment of prisoners shall be provided for." In 1898, this section was cited in *State v. Board of Commissioners of Laramie County*¹¹⁴ to support the conclusion that Wyoming's fundamental law declares "that the Penal Code shall be founded upon the humane principles of reformation and prevention."¹¹⁵

Citing *Board of Commissioners*, Robert Keiter has commented that:

108. *Id.* at 919.

109. This provision is now found in GA. CONST. of 1983, art. I, § 1, para. 17.

110. 168 S.E.2d 327 (Ga. Ct. App. 1969).

111. *Id.* at 330.

112. *Id.*

113. *Id.*

114. 55 P. 451 (Wyo. 1898).

115. *Id.* at 459.

The more explicit protection available under the state constitution can plausibly be interpreted to provide greater individual protections than the eighth amendment does. For instance, it might be argued that the humane principles of reformation and prevention governing the penal code prohibit or, at least more narrowly circumscribe, capital punishment than the federal Constitution does. It also appears that a mistreated jail detainee or prisoner could maintain a constitutional tort action against those responsible for his mistreatment without relying upon general due process claims. Furthermore, article I, section 16 may be construed as imposing greater obligations on government officials respecting the maintenance of the state prisons than can be read into those federal constitutional provisions that have been relied upon in prison conditions suits.¹¹⁶

F. Summary of States' Treatment of Unnecessary Rigor

Indiana's unnecessary rigor section is separate from its cruel and unusual punishment section, which allows appeals against disproportionate or cruel sentences. Issues of shackling a prisoner in court to his possible prejudice, or of forcing a confession by means of beating, starving or threatening the prisoner are properly brought under the unnecessary rigor section. Protection under this section applies to any locus of confinement and to the period of detention prior to formal filing of charges.

Oregon's decision in *Grenfell* suggests that an assault on a prisoner by guards may only violate its constitution if it is a "routine happening" or "likely to recur."¹¹⁷ The Tennessee case can be used to support an inference that a constitutional violation occurs if a prisoner is deprived of medical treatment or clothes, or is threatened or beaten. The Georgia Court of Appeals supports the argument that maltreatment constituting a violation of the constitution is not a defense to the underlying crime. Presumably, it would be a defense if a violation led to an involuntary confession or prejudicial jury verdict.

VI. REMEDIES

One authority has noted that "[c]ourts were showing little interest in the conditions of prisons or the rights of prisoners until the late

116. Robert B. Keiter, *An Essay On Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527, 560 (1986).

117. *Grenfell v. Gladden*, 405 P.2d 532 (Or. 1965).

1960s.”¹¹⁸ After section 1983 expanded civil (and prisoner) rights,¹¹⁹ federal courts fashioned relief which may be summarized as follows:

1. Requiring administrative policy reform or enjoining administrative actions;
2. Ordering improvements in institutions or institutional services;
3. Ordering closing of all or portions of institutions;
4. Ordering release from solitary confinement, change from transferred status, or restoration of good time;
5. Awarding damages under Federal Civil Rights Act (and state and federal tort law); and
6. Awarding of attorneys' fees in conjunction with other remedies described above.¹²⁰

Arguably, the unnecessary rigor provision could be cited to claim relief in forms (1) through (4).

A new trial may also be an appropriate remedy if “unnecessary rigor” is construed to include obtaining involuntary confessions, and prejudicing the jury by the manner in which the defendant is brought into court. Governmental immunity precludes a claim for damages against the state;¹²¹ thus, a breach of the unnecessary rigor clause does not give rise to a state constitutional tort.¹²²

A. *Can relief be sought under a writ of habeas corpus?*

The meaning of the unnecessary rigor provision has never been clarified; therefore, Utah courts have, as Justice Durham suggested, followed “lock-step with their federal counterparts” in the interpretation of prisoners' rights under the cruel and unusual punishment provision.¹²³ In the 1963 case *Hughes v. Turner*,¹²⁴ the Utah Supreme Court reiterated “that in the absence of cruel and unusual punishment the

118. SHELDON KRANTZ, *THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS* XVII (2d ed. 1981).

119. 42 U.S.C. § 1983 (1988).

120. KRANTZ, *supra* note 119, at 556.

121. UTAH CODE ANN. § 63-30-10 provides: “Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of . . . (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement.”

122. I do not believe the unnecessary rigor provision will ever be construed as “self executing” in the same way as article I, section 22. Such a construction places a constitutional provision beyond the state's power to declare itself immune. See *Colman v. Utah State Land Bd.*, 795 P.2d 622, 630 (Utah 1990).

123. See *supra* note 16 and accompanying text.

124. 378 P.2d 888 (Utah 1963).

writ [of habeas corpus] should not be used to interfere with the management and control of internal affairs in the prison.”¹²⁵ To that end it examined a “number of complaints” about petitioner’s treatment in the prison, “but the court found only one complaint valid: that respondents had violated the provisions of Sec. 64-9-26, U.C.A. 1953 by failing to provide petitioner with sufficient quantity of food for his sustenance and comfort.”¹²⁶ The court, finding insufficient evidence that the statute had been violated, nullified the lower court’s order granting the writ. The *Hughes* court appears to have looked first at the statutory rights of the prisoner, and then to the “cruel and unusual punishment” precedents. Prisoners have had statutorily created rights since before statehood, but these rights do not, and should not, be regarded as defining any and all rights beyond those defined by federal and state cruel and unusual punishment cases.

The unnecessary rigor provision of the Utah Constitution is currently undefined. The Utah Supreme Court has the sole prerogative to determine its meaning. The court may choose whether to equate the right to be protected from unnecessary rigor with the protections afforded by statute. However, statutes change and the protection they afford is subject to the vagaries of different legislatures. A constitutional right is meant to be protected from such vagaries. Therefore, an argument may be made that certain conduct by prison or other custodial authorities is unconstitutional, even though it violates neither statute nor the cruel and unusual punishment provision. The habeas corpus petition “is [the] proper vehicle to assail” such conduct as unconstitutional,¹²⁷ and the courts have expressed their willingness to interfere with internal prison affairs if conditions of confinement are unconstitutional.

VII. CONCLUSION

The unnecessary rigor provision is an alternative basis upon which persons confined can seek relief from unconstitutional conduct. Two approaches to briefing, and thus defining, the scope of what constitutes unnecessary rigor are suggested. First, from a historical perspective, that the framers may have meant for the unnecessary rigor provision to protect prisoners from disproportionate sentences, as well as from inhumane treatment. However, the modern protections afforded by the Eighth Amendment and Utah’s cruel and unusual punishment provision have rendered this argument superfluous. The Utah Supreme Court is

125. *Id.* at 889.

126. *Id.* at 888.

127. *Termunde v. Cook*, 786 P.2d 1341 (Utah 1990).

unlikely to explicate the unnecessary rigor provision on a sentencing matter, because the court can dispose of sentencing appeals under the cruel and unusual punishment provision. Appellants must therefore look beyond those historical evils which have already been remedied by sentencing case law.

Second, comparison with other state constitutions reveals that Utah's unnecessary rigor clause was probably adopted from Indiana. However, Indiana had not expounded the meaning of the clause by 1895, when it was adopted by Utah. This fact, and the differences of historical and social significance between states, usually necessitate the use of caution when adopting the interpretation of similar constitutional language by another state. Notwithstanding these restrictions, a creatively crafted appeal or writ of habeas corpus has the potential to expand the scope of the Utah Constitution and flesh out the meaning of the unnecessary rigor provision. In this author's view, a creatively crafted appeal will ignore sentencing issues and will liberally use the case law from other states. Given the continuing criticism of the standards used by the United States Supreme Court to limit prisoners' rights, the Utah Supreme Court should be afforded every opportunity to determine its own standards.