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IN THIS ISSUE

Locker Room Video Cameras Violated Fourth Amendment

SUMMARY: Middle school principal and vice-principal violated students' Fourth Amendment rights by installing video cameras in the boys' and girls' locker rooms and recording them changing clothes. The United States Court of Appeals for the Sixth Circuit decided *Brannum v. Overton County School Board* on February 20, 2008.

BACKGROUND: The Overton County (Tennessee) School Board decided to install video cameras in Livingston Middle School to promote safety. The board hired a company called Edutech, Inc., to install cameras and monitoring equipment and charged Director of Schools, William Needham, to oversee the project. Needham delegated the job to Principal Melinda Beaty, who in turn passed it on to Assistant Principal Robert Jolley. No one in this chain of command created guidelines for handling the installation and monitoring.

Jolley met with Edutech employees on several occasions. They concluded that the locations for video monitoring should include the exterior doors, hallways leading to exterior doors, and the boys' and girls' locker rooms. The project team got the cameras installed and operational by July 2002. The images captured by the cameras were directed to a monitor and recording equipment in Jolley's office.

In September 2002, Jolley discovered that the locker room cameras were aimed toward areas where students changed clothes for athletic activities. He testified that he notified the principal and suggested that those cameras be relocated. They were not moved for the rest of the semester.

The video feeds were accessible not only through the equipment in Jolley's office, but also via the internet. Access required a username, password and the feed's internet address. Nobody changed the access codes, so the default settings when the system was set up were valid throughout the semester. Between July 12, 2002, and January 10, 2003, the system was accessed 98 times through computer services in Rock Hill, South Carolina, as well as Clarksville, and Gainsboro, Tennessee.

On January 9, 2003, Livingston Middle School hosted a girls' basketball game. Girls from the visiting team noticed the video camera in the girls' locker room. Their coach asked Principal Beaty about it. Beaty told Carr the camera was not turned on. The following day, Director Needham, Beaty and two other school officials checked the recordings in Jolley's office. The cameras had been operating and had videotaped the previous evening's basketball players changing clothes. None of the girls was naked but the cameras did record them in their underwear. Between July 2002 and January 2003, numerous from several area schools students were recorded by the cameras.

A group of students sued Director Needham, the school board, Beaty and Jolley. The defendants moved for summary judgment, which the district court denied. They appealed to the Sixth Circuit Court of Appeals.

ANALYSIS: The student plaintiffs argued that the school had violated their right to privacy under the Constitution's Fourth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. The defendants asserted that they were protected from suit by the doctrine of qualified immunity.

The Constitution does not specifically mention "privacy." The Supreme Court has recognized that this long recognized notion is embedded in the Constitution, nonetheless. Some jurisdictions associate privacy with due process, but the Sixth Circuit does not. The court therefore chose to analyze their claim only under the Constitution's Fourth Amendment, which protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

The court concluded that video surveillance is a search under the Constitution. To be reasonable, and thus valid under the Fourth Amendment, a student search must be "justified at its inception" and its scope must relate to the circumstances justifying the search.

While the idea of placing video cameras in a school to promote safety raised no concerns for the court, the school had not offered any justification to monitor the locker rooms—areas students understand to offer privacy from the general student population and the opposite sex. Invading an area where students have reasonable expectations of heightened privacy required more than generalized safety concerns; the school's failure to offer any further justification made the locker room search unreasonable. Thus, even if the decision to install video cameras was initially sound—a search justified at its inception—the scope of the search, reaching into locker rooms, recording boys and girls undressing and sending the images to a computer and the internet—was unreasonable.

Finding a constitutional violation is not enough to hold public officials liable, however. Qualified immunity protects school officials unless the constitutional right at issue was clearly established at the time of the challenged conduct and was one the official was or should have been aware of. Although there were no cases in the Sixth Circuit specifically addressing locker room surveillance cameras, the court found the right to be free from secret surveillance in a state of undress was a matter of common sense and decency. The fact that the girls' basketball teams did not undress fully was a matter of degree and not a distinct injury from spying on them without clothing.

The court therefore ruled that the principal and vice principal had violated the students' Fourth Amendment rights by videotaping them undressing in the locker rooms—conduct they should have known was unconstitutional. The court upheld the district court's denial of Jolley's and Beaty's motions for summary judgment. Director Needham and the school board were not aware of the nature and extent of the videotaping, however, and were therefore properly discharged of liability; their summary judgment motions were granted.

EXCERPTS FROM THE COURT'S OPINION (By Judge Ryan): "Perhaps it is merely an abundance of common experience that leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason, for the obverse would be repugnant to notions of human decency and personal integrity.

"We recognize, of course, that this is not a case of 'naked bodies' being viewed by the surveillance cameras, but rather underwear clad teen and pre-teen boys and girls. However, the difference is one of degree, rather than of kind. A student search is justified in its *inception* when there are reasonable grounds for suspecting that the search will garner evidence that a student has violated or is violating the law or the rules of the school, or is in imminent danger of injury on school premises. In this case, the policy of setting up video surveillance equipment throughout the school was instituted for the sake of increasing security, which is an appropriate and common sense purpose and not one subject to our judicial veto. However, the scope and manner in which the video surveillance was conducted is subject to Fourth Amendment limitations and therefore appropriate for our inquiry.

"A search—and there can be no dispute that videotaping students in a school locker room is a search under the Fourth Amendment—is 'permissible in its *scope* when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the *infraction*.' It is a matter of balancing the scope and the manner in which the search is conducted in light of the students' reasonable expectations of privacy, the nature of the intrusion, and the severity of the school officials' need in enacting such policies, including particularly any history of injurious behavior that could reasonably suggest the need for the challenged intrusion. To meet the requirements imposed by the Constitution, the method chosen by the defendants to improve school building security in this case need not have been the only method available or even the one this court might have chosen; it is necessary, however, that the method chosen was, in the circumstances, *justifiably* intrusive in light of the purpose of the policy being carried out.

"In this case, the scope of the search consisted of the video recording and image storage of the children while changing their clothes. In ... this case, the school officials wholly failed to institute any policies designed to protect the privacy of the students and did not even advise the students or their parents that students were being videotaped.... The students here were observed in their undergarments while they were in the school locker rooms. We believe that the scope of the secret surveillance in this case significantly invaded the students' reasonable expectations of privacy."

COMMENTS & QUESTIONS

1. What did the school do that the students' opposed?
2. Had the students done something wrong?
3. Who saw the videotapes of the students in the locker room?

In this case, the court found the installation and operation of the video cameras in the locker room violated the Fourth Amendment rights of the students. The court characterized this right as a "right to privacy". The Fourth Amendment to the United States Constitution states: *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"*

Where is the right to privacy mentioned in the Fourth Amendment? While the Amendment does not specifically mention a right to privacy, the courts have interpreted the reasonableness of searches under the Amendment by determining whether the person subject to a search has a "reasonable expectation of privacy" in the area being searched. What does privacy mean to you?

Do you think the students have a reasonable expectation of privacy in the locker rooms? Do they have the same expectation in the school hallways? What about in school restrooms?

Do you think that video cameras have any place in the school? Is your behavior modified by the existence of the cameras? If the cameras are needed for security, could recording of locker rooms or restrooms ever be justified? What if there was evidence that drug deals were being done in those places? Would it be sufficient if the students were warned of the cameras? Would the cameras be OK then? Cameras sometimes record you in department store dressing rooms. Is this OK or do you have an expectation of privacy there?

Since the cameras did not record anyone naked, are there really any damages in this case? What if the images ended up on You Tube? Would there be greater damages? Would You Tube be liable for having the images on their site, or do you think they should be required to take the images down?

The court stated that there can be no doubt that videotaping is a "search". Do you think that videotaping someone is a "search" within the meaning of the Fourth Amendment?

If the school sent out a survey and more than half of the students said they didn't care whether they were videotaped in their underwear, would there be no Fourth Amendment violation?

School officials have a difficult job and sometimes may not make the best decisions in running their schools. However, they are not always subject to lawsuits every time they don't make the best decision. Even if they don't make the best decision, they may have "qualified immunity" from a lawsuit if their decision was reasonable and they did not know it was constitutionally improper. The court found that the defendant principal and vice principal were not immune from suit because their actions were unconstitutional and they should have know so. Should any reasonable school official know that locker room video cameras are unconstitutional?

Religious Message Properly Excluded From School Exercise

SUMMARY: A public school principal did not violate a student's First Amendment rights when she prohibited him from attaching a card with religious messages to candy-cane Christmas ornaments he made for a school activity. The United States Court of Appeals for the Sixth Circuit decided *Curry v. Hensinger* on January 16, 2008.

BACKGROUND: Handley School in Saginaw, Michigan, has a program called Classroom City, through which students gain insight into the adult world. In the program, students prepare a product that they "sell" to the rest of the student body with fake money at a marketplace they create in the school gymnasium. The students do market research, create the product themselves and put up a stand at which to offer the item to classmates. The school gave the students a short list of rules about their product, including maximum manufacturing cost of $10 and a ban on food products and gambling games. Each student had to submit a sample of his or her product for school approval prior to the three-day event.

Joel Curry, a fifth grader at the school, decided that he would prepare candy-cane Christmas ornaments made from pipe cleaners and beads. He made a sample, which was approved. Before the three-day event, Curry's father printed up cards to attach to the candy canes during the sale. Neither Curry nor his parents told the school about their plan to add these cards to the ornaments during the 3-day program. The cards described how the candy-cane ornaments were symbols of Christianity. They said:

The Meaning of the Candy Cane

Hard candy: Reminds us that Jesus is like a "rock," strong and dependable.

The color Red: Is for God's love that sent Jesus to give his life for us on the cross.

The Stripes: Remind us of Jesus' suffering–his crown of thorns, the wounds in his hands and feet; and the cross on which he died.

Peppermint Flavor: Is like the gift of spices from the wise men.

White Candy: Stands for Jesus as the holy, sinless Son of God.

Cane: Is like a staff used by shepherds in caring for sheep. Jesus leads us and watches over us when we Trust him.

Students worked in pairs during the event, setting up their stand and preparing the product for sale. Curry and his partner decided that Curry would prepare the candy canes, while the partner set up their stand. The partner did not know of the cards until day one of the event. When he saw them, he objected to the message and did not want to add it to their product. When Curry refused to "sell" the candy canes without them, the partner made his own product.

The teacher supervising the gymnasium area learned on the first day that Curry had added a religious message to his candy canes. She asked the teacher leading the program, Lisa Sweebe, whether that was appropriate. Sweebe said she would have to ask the school principal. Teachers had Curry refrain from selling the cards with the candy canes until they had the matter resolved. They told Curry that he was not "in trouble"—they were concerned only with the appropriateness of the cards for school use.

Curry's mother learned of the school's objection to the cards and came to the school with materials from the internet talking about religion and students' First Amendment rights. She told them Curry had a constitutional right to include the cards with his school product. After discussions between the principal, Irene Hensinger, and the district's assistant superintendent, John Norwood, school officials decided to keep the cards out of Classroom City for the rest of the event. They said that Curry could sell the candy canes with the cards in the school parking lot after school if he wished to do so.

Curry did not elect to sell the ornaments and cards in the parking lot. He finished the Classroom City event "selling" only the candy canes. He received an A grade for his work during the project.

Curry's parents sued the principal and school district for preventing Joel from offering the cards along with his candy-cane ornaments during the Classroom City program. They argued that prohibiting the cards violated Joel's First Amendment rights. Hensinger moved for summary judgment on grounds of qualified immunity. The district court granted the motion and the Currys appealed.

ANALYSIS: The Currys argued that Joel's First Amendment rights included the power to spread to other students a religious message he believed. They noted that the school's rules for Classroom City, which was to represent the world beyond school, did not prohibit religious messages. Stopping Joel from spreading a message he believed in was therefore unconstitutional.

The Sixth Circuit set forth the standards for evaluating student speech. The issue was not whether Joel had a right to express his belief in Christianity, but whether he could present the message on the cards during Classroom City. Courts have long recognized that students have some expressive rights within the schoolhouse, but that these rights are more limited than students' liberties elsewhere. The reason for the limitation is schools' responsibility to educate students and watch over them during the school day. Expression that interferes with the educational process may be limited so that schools can fulfill their duties.

The court identified two types of expression in an educational setting. Personal expression—things students say to one another during the school day—enjoys a fair amount of protection as long as the speech is not disruptive. But expression that might be viewed as endorsed by the school is subject to more control. The first type includes a student wearing a cross to school or talking about a church function at lunch. The latter type arises when the student's message is delivered more broadly, as when a student states a particular viewpoint in a school speech or an article in the school paper. When school officials reasonably conclude that a particular message might be viewed as having the school's endorsement, they have more power to limit the expression to avoid controversy and disruption.

The Currys' claim focused on Joel's individual right to express his beliefs. The Sixth Circuit reasoned that the facts of this case were more suited to the school-sponsorship analysis. Classroom City was a schoolwide activity during which students promoted, or "sold," products to the rest of the student body, including children younger than fifth grade. The process for "selling" the products required submission to and approval by school leaders. The court reasoned that in this scenario, other students and their parents might reasonably infer that the principal and teachers overseeing Classroom City supported or approved Christianity and wanted other students to accept that viewpoint. Other family's rights to hold different or no religious beliefs would leave the school open to criticism and conflict if the community thought the school promoted one particular view.

Because school officials have the power to exercise editorial control over messages that might be seen as school-sponsored and to make decisions on how best to fulfill their educational mission, the principal and school district did not overstep their bounds in stopping Curry from attaching the religious cards to his candy canes. Hensinger did not violate Curry's more limited constitutional right of personal

expression within the school. She had censored only the message to be delivered throughout the student body through the Classroom City exercise.

EXCERPTS FROM THE COURT'S OPINION (By Judge Norris: "While children [ ] do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school. Local school officials are best situated to determine what is appropriate for children in school, and constitutional claims have consistently been given a less rigorous review in school settings.... In the First Amendment arena and other arenas as well, the Supreme Court thus has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational mission and in developing a reasonable fit between the ends and means of their policies. The very complexity of the problems of . . . managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them. It is often the case that 'the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board rather than with the federal courts.'

"In an elementary school setting, the appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the school's control over the activity in which the expression occurs, and whether the school solicits individual views from students during the activity. Joel's candy cane with the religious card attached was not simply a personal religious observance, analogous to wearing a cross, or a t-shirt with a slogan. The expression was part of a curricular assignment, and not one that invited personal views—the assignment encouraged creative products, but it did not solicit viewpoints.

In this case, the admitted purpose of the plaintiff in distributing the candy cane was to promote Jesus to the other students. The school's assignment requiring students to develop products for sale in Classroom City cannot be seen as a solicitation of personal views on a subject; Joel was in fifth grade and the potential audience included much younger students (these products were to be sold to the entire elementary school student body); and the school had complete control over Classroom City, including a formal approval process for the products to be sold, which Joel evaded.

"It is only when the decision to censor . . . student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights. [The U.S. Supreme Court's decisions do] not require us to balance the gravity of the school's educational purpose against Joel's First Amendment right to free speech[; the caselaw requires] only that the educational purpose behind the speech suppression be valid. Here, the principal decided that allowing the card would not be appropriate because it was religious, and therefore could offend other students and their parents (in fact the religious card *did* offend Joel's business partner for Classroom City). The school's desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home, qualifies as a valid educational purpose.

"Notably, we are not called upon to evaluate whether the principal made the *best* decision in disallowing the card. A federal court is obviously not the ideal body to try to answer such a question. Instead we hold only that the principal's determination that the religious card should not be permitted was the product of her reasonable evaluation of legitimate pedagogical concerns, and fell within her discretion as a school administrator, and therefore did not violate any right Joel enjoyed under the First Amendment."

COMMENTS & QUESTIONS

1. What is Classroom City?
2. What product did Joel Curry make for the project?
3. Was his product approved? Did he bring the product as approved to the Classroom City exercise?

This case deals with the first three clauses of the First Amendment and how those clauses interrelate. Those clauses state: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.*

The first clause prohibits the government from doing anything that seeks to establish or promote a particular religion. Since public schools are instruments of the government, public schools cannot promote a particular religion. On the other hand, under the second clause of the First Amendment, public schools cannot prohibit students from the free exercise of their particular religion. At times, this is a balancing act. Finally, the third clause of the First Amendment quarantees freedom of speech. Sometimes, this speech involves speech about religion. When this speech takes place in a public school, the balancing act gets even tougher.

Do you think that the sale of the candy canes with the religious message could be viewed as the schools approval and therefore endorsement of the religion? The school did not photocopy or otherwise produce the cards. They were produced by Curry. The school did not approve the cards. Why might someone think the school was sponsoring the Christian message on the cards? Do you think the principle made the right decision to not allow the cards in the school assignment? Do you think he made the right decision to allow Curry to sell the cards in the parking lot?

Could the school have told students they could embrace products relating to any culture or religion for Classroom City? Would Curry's cards have been OK then? What if the school said that and Curry was the only student to incorporate a religious theme?

If Curry had an assignment to write a paper on a famous person for class, could he choose Jesus? Answer first assuming the students only had to write the paper, not discuss it or present it in class. Now consider the same question, but after writing it each student would read his paper to the class and discuss his famous person. Would the school be in violation of the second clause of the First Amendment if the school precluded the paper about Jesus?

If the school had a bring-a-parent-to-school day, where mothers and fathers came and talked to classes about their jobs, could a student bring a parent who was a minister? What about a religion professor? Is there a difference for constitutional purposes?

Is it acceptable to talk about the differences between religions in public school? Is it wise to do so? If a teacher did this, would he or she have to mention all religions?

This publication quotes Curry's religious message. What's the difference between quoting it here and attaching it to candy canes in Classroom City?

Should public schools just avoid any discussions about religion or is this a disservice to the education of the students?

Nebraska Rules Electric Chair Cruel and Unusual

SUMMARY: Because of the pain and burning it inflicts and the duration of suffering a condemned prisoner subjected to it experiences, the electric chair constitutes cruel and unusual punishment and is prohibited by the Nebraska Constitution. The Nebraska Supreme Court decided *State v. Mata* on February 8, 2008.

BACKGROUND: In the fall 1998, Raymond Mata moved in with Patricia Gomez and her son, Adam, age 3. Although Patricia did not see Mata act unkindly toward Adam, he complained to her that Adam was "in the way all the time." Patricia's relationship with Mata grew troubled and she obtained a restraining order against him. Yet she saw him on one or more occasions afterward.

On March 11, 1999, Mata came to Patricia's house. Adam was watching television on a sleeping bag until Mata sent him to bed. Patricia continued to watch TV until she fell asleep. When she awoke, Mata and Adam were gone. The following day, Mata told Patricia that Adam was probably with his father, who shared custody although not under a formal arrangement.

Patricia did not realize Adam was not with his father for several days. As soon as she realized this, she contacted police, who questioned Mata. In a subsequent search, police discovered a sealed garbage bag in a dumpster behind Mata's sister's residence, where Mata lived. The garbage bag contained Adam's sleeping bag and a boning knife. Police then searched the inside of the residence. In the refrigerator they found an item wrapped in foil; it was human flesh. There was also human flesh in the dog food bowl and in a bag of dog food in the residence.

Mata lived in a basement room. Hidden above the ceiling tiles, police discovered a fractured human skull wrapped in plastic and duct tape. They also discovered human remains clogging the sewer line leading from the home. Genetic testing revealed that all of the human remains on the premises were Adam's.

Mata was tried, convicted and sentenced to death in Nebraska state court. As a death-penalty defendant, he was able to appeal directly to the Nebraska Supreme Court. He challenged the constitutionality of death by electrocution, the prescribed method in the state.

ANALYSIS: Mata argued that death in the electric chair violated the federal and state constitution's prohibitions on cruel and unusual punishment. In support, he argued that all states except Nebraska had abandoned the electric chair as the primary method of capital punishment.

Mata and the state produced expert witnesses at trial to offer their opinions on the electric chair's effects on the human body. The state's evidence indicated that death through this device occurs virtually instantaneously and therefore does not produce unusual pain or suffering. Mata's evidence, which included eyewitness accounts of executions as well as testimony from post-execution autopsies, revealed otherwise.

Mata argued that the electrocution process produces severe and extended pain and suffering akin to torture. Electrocuted inmates flex violently in response to the electrical current because of strong muscle contractions. Some inmates suffer broken bones from the force. Burned flesh is also common in electrocutions where the electrodes make contact with the skull and leg. Some inmates killed in the electric chair catch fire and a fire extinguisher is always kept present. Mata's experts testified that the electrical charge's effects on the brain, skin and muscles would produce extreme pain. Numerous execution accounts stated that the inmate continued breathing for some period after being jolted. Mata's experts concluded that this was proof the brain was not immediately shut down by the voltage but continuing to process the effects.

The U.S. Constitution's prohibition on cruel and unusual punishment in the Eighth Amendment has wording identical to the Nebraska constitution's provision. The Nebraska court therefore looked at federal law and U.S. Supreme Court decisions for guidance. Electrocution was presented in the late 1800s as a means of terminating life more swiftly and humanly than through hanging. The U.S. Supreme Court decided in 1890 that New York could proceed with an execution, influenced by scientists' testimony on this new technology. Based on its review of U.S. Supreme Court case law, the Nebraska Supreme Court concluded that the highest court in the land had examined little further evidence of electrocution's effects on the body. The extensive evidence introduced at Mata's trial convinced the state supreme court that it had a duty to respond to the alleged inhumanity surrounding electrocution.

A majority of the Nebraska court noted that they could not overrule the U.S. Supreme Court. All lower jurisdictions must follow the U.S. Supreme Court as to federal law. However, state supreme courts are free to make their own judgments as to purely state matters. The Nebraska majority limited its decision to the Nebraska constitution's prohibition on cruel and unusual punishment, informed by the detailed facts provided by witnesses in Mata's trial. While death need not be instantaneous, it cannot involve torture or a lingering painful death. The majority concluded that the pain an electrocuted inmate suffered, the burning and other physical damage, and the comparatively prolonged period the procedure sometimes requires to kill an inmate was more akin to torture and were too extreme for modern notions of justice; the bodily damage involved in the process also violated society's perceptions of dignity. The majority therefore declared electrocution as a means of executing a prisoner sentenced to death unconstitutional under the Nebraska constitution. The majority did not hold that Mata had been wrongly convicted—only that the death penalty could not be carried out via the electric chair.

One judge dissented. He opined that the court overstepped its bounds by declaring that a method approved by the U.S. Supreme Court under the federal constitution would be unconstitutional under an identical state provision. The problem, the dissent wrote, is that the Nebraska Supreme Court had declared that the state's prohibition on cruel and unusual punishment was no more or less protective than the Eighth Amendment. Thus, reasoned the dissent, the Nebraska majority was in effect ruling that the U.S. Supreme Court was wrong in holding that the electric chair was not cruel and unusual. It had no power to do so. The majority had cited evolving standards of decency, but the dissent found this a tricky subjective concept—too imprecise and controversial to justify declaring U.S. Supreme Court precedent outdated. The majority also seemed to be ruling that execution methods must provide the least pain possible, but that is not what the constitutional provisions require.

EXCERPTS FROM THE MAJORITY OPINION (By Justice Connolly): "[B]y 1999, of the 38 states that permitted capital punishment, 34 states offered lethal injection as either a choice or the exclusive method of execution and only four states authorized electrocution as their exclusive method of execution. In 2000, Georgia switched from electrocution to lethal injection as its sole method of execution for capital offenses committed on or after May 1, 2000. Florida also switched in 2000 from electrocution to lethal injection unless the person sentenced to death affirmatively elects electrocution. Finally, in 2002, Alabama followed Florida's lead. Thus, as of July 1, 2002, Nebraska is the only state in the nation to require electrocution as its sole method of execution.

"Responding to horror stories of 'botched' electrocutions in Florida, some states selected lethal injection. It has been stated that courts have switched to lethal injection 'because it is universally recognized as the most humane method of execution, least apt to cause unnecessary pain.'

"Faced with changing societal values, we cannot ignore Nebraska's status as the last state to retain electrocution as its sole method of execution. But this is not our only consideration. We must also consider whether electrocution comports with the Eighth Amendment's protection of 'the dignity of man.'

"The U.S. Supreme Court has implicitly condemned some punishments as barbaric, such as beheading and drawing and quartering, that inflict unnecessary physical violence. As Justice Brennan stated: '[B]asic notions of human dignity command that the State minimize mutilation and distortion of the condemned prisoner's body, irrespective of the pain that such violence might inflict.' As one jurist has noted:

"'[W]hile beheading results in a quick, relatively painless death, it entails frank violence . . . and mutilation . . . and disgrace . . . and thus is facially cruel. Post-execution disfigurement . . . and displaying of the mutilated corpse similarly would be forbidden even though this practice involves no conscious pain.'

"Although the state and federal Constitutions prohibit the 'unnecessary and wanton' infliction of pain, we do not believe 'wanton' in the context of state sanctioned punishment [addresses the government's intent to cause pain].... '[W]anton' means that the method itself is inherently cruel. We believe that if a prisoner were required to show a legislature's malicious intent in selecting a method of punishment, it is unlikely that courts would ever find any punishment to be unconstitutional. And, undoubtedly, a punishment may be cruel and unusual despite legislative approval.

"[W]hile the Legislature may vote to have the death penalty, it must not create one that offends constitutional rights. We recognize the temptation to make the prisoner suffer, just as the prisoner made an innocent victim suffer. But it is the hallmark of a civilized society that we punish cruelty without practicing it. Condemned prisoners must not be tortured to death, regardless of their crimes."

EXCERPTS FROM THE DISSENT (By Justice Heavican): "It seems ... that a standard which prohibits the use of 'unnecessary pain' is really a standard which demands the least painful method. It is beyond dispute, however, that neither the Eighth Amendment nor the Nebraska Constitution requires the least painful method of execution; those provisions prohibit only the use of cruel and unusual methods. This is evident from the structure and language of the constitutional provisions themselves. Had those provisions been intended to require the least painful method of execution, they would have been written as directives, not limitations.

"Whether or not a least-painful standard was the majority's intent, its formulation is open to such an interpretation. To avoid this pitfall, I would refrain from using the phrase 'unnecessary pain' as the guiding principal in the analysis. Rather, I believe prior references to 'unnecessary pain' refer to methods of execution that are 'manifestly cruel and unusual,' such as those involving torture, a lingering death, or other hallmarks of a purpose to inflict unnecessary pain.

"It is true that electrocution has fallen into disfavor among American jurisdictions. Nebraska is the only jurisdiction that retains the electric chair as the sole method of execution and is one of a handful of states that uses the electric chair at all. Even so, it is not necessarily true that the movement away from electrocution has been uniformly precipitated by concerns regarding decency. It may be, for example, that states widely favor lethal injection over electrocution simply because lethal injection is a more practical method of terminating a life.

"There is also reason to believe that [t]he nationwide change to lethal injection was motivated at least as much by a desire to end the litigation over the previous methods [of execution] and the attendant delays as it was by the actual desire to abandon the old methods [themselves]."

COMMENTS & QUESTIONS

1. What did the majority hold on Mata's appeal?
2. Is Mata free to go until the legislature changes its capital punishment method?
3. What do the facts suggest Mata was trying to do with Adam's body?

Various cultures have used a penalty of death for certain crimes for centuries or longer. France used the guillotine, the American colonies burned "witches" at the stake, and European methods included drawing and quartering—that is, cutting a person in four pieces—and "the wheel," in which a person was tied to a wheel and rolled or beaten to death; the person's shattered body might then be left outside to be fed on by birds. Hanging and firing squad were also common in early United States history.

Over time and in response to legal challenges, many of these execution methods have disappeared. The Constitution's Eighth Amendment prohibits "cruel and unusual" punishments, but does not define what those are. Courts agree that burning at the stake and drawing and quartering fail the test, but the electric chair has survived in declining use for over 100 years. Today, the most common execution method in the United States is by lethal injection, though not all states have death as a criminal penalty.

What aspects of the electric chair did Mata argue were cruel and unusual?

If the object of the death penalty is to kill someone—the ultimate penalty—why do courts and legislatures care if the person being killed experiences pain or suffering in the process? Is it just an issue for government or are society's perceptions involved too?

Beheading is illegal under the Eighth Amendment, but the court comments that this is a painless execution method. Is beheading worse than the electric chair? For whom? Is it just the perception that makes beheading cruel? Which of the following would be the least painful way to die: firing squad; electric chair; hanging; beheading; the wheel; burning at the stake? Which would do the most damage to the body? Which are the most undignified?

If the firing squad is quick, and shooting is one of the most widely understood ways to kill someone, how does the firing squad violate the Eighth Amendment? Is there a tasteful way to kill someone? Is that a relevant standard? If not, how do you make sense of the methods that are permitted and prohibited? Why are we even having this discussion? It appears that any method of execution could be determined to be cruel and unusual. Should there even be a death penalty? If you said that there should be a death penalty, should it be imposed sparingly? Is it is imposed infrequently, doesn't that make it unusual by definition?

Do you agree with the logic of the dissent? Can a state court say that one of its laws, taken word for word from a federal law, prohibits something the U.S. Supreme Court says is OK? If so, under what circumstances? Do those apply here? Should not the Nebraska Supreme Court have followed the reasoning of the U.S. Supreme Court?

Maine Could Not Regulate Tobacco Shipments

SUMMARY: Federal law prohibiting any state from regulating the "price, route, or service of any motor carrier" pre-empted a Maine law that imposed special requirements on tobacco deliveries. The Unites States Supreme Court decided *Rowe v. New Hampshire Motor Transport Association* on February 20, 2008.

BACKGROUND: In an effort to prevent minors from obtaining tobacco products, Maine enacted a law prohibiting anyone other than a licensed tobacco retailer from accepting an order for tobacco delivery. The law also required anyone who delivered the tobacco to verify that the recipient was of legal age.

A person was "deemed to know" that a package contained tobacco if it was marked as to its contents and displayed the name and license number of an authorized tobacco retailer, or if the deliverer received the package from an *unlicensed* dealer named on a list presented to delivery companies by the Maine Attorney General's office. Violation of the law was punishable by a fine up to $1500.

A Maine trucking association challenged the law, arguing that it was pre-empted by federal law and therefore invalid. A federal district court agreed with the truckers and the state appealed to the First Circuit Court of Appeals, which affirmed.

The state petitioned the U.S. Supreme Court for review. Because of the state-federal controversy, the Supreme Court agreed to hear the case.

ANALYSIS: If a union of states is to function harmoniously, the states must treat each other equally. The Constitution's Supremacy Clause facilitates this goal by making federal law superior to state law. If Congress has stepped in to regulate a particular endeavor, states may not apply their own rules to the same matter.

Under federal law, states "may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." The trucking association argued that Maine's tobacco law related to a service they provided—namely, delivering tobacco—and therefore was invalid.

In analyzing the dispute, the Supreme Court examined its decision in an airline case from 1992—*Morales v. Trans World Airlines*. In *Morales*, the Court decided a challenge to a state's attempt to apply its consumer protection laws to deceptive airline fare advertisements. The federal provision in that case was identical to the language here, prohibiting states from regulating a price, route, or service of any airline. The Court held that the state was prohibited from going after the airlines because regulation of airline pricing was pre-empted and the sole province of federal law.

The Supreme Court noted that to create the federal trucking regulation, Congress had borrowed the language it used in the federal airline law on price, routes, and service. Because the Supreme Court is the final arbiter on the constitutionality of laws, Congress follows its decisions. Congress was therefore aware when it created the federal trucking law in this case that the Supreme Court had used the same language in an airline case to strike down a state effort to punish deceptive pricing. The Court therefore concluded that Congress intended to abolish any trucking law like Maine's addressing price, routes or service.

Maine defended on the grounds that its law would not impose meaningful additional costs on tobacco deliverers and that its law served the important purpose of keeping tobacco from minors. But the Court found these arguments off the mark. Once Congress has decided a matter is for federal not state regulation, the exact reasoning and effects of comparable state statutes are irrelevant; the states cannot regulate on the same matter. The justices upheld the First Circuit's decision striking down Maine's law.

EXCERPTS FROM THE COURT'S OPINION (By Justice Breyer): "In [our decision in *Morales v. Trans World Airlines*], the Court determined: (1) that [s]tate enforcement actions having a connection with, or reference to, carrier rates, routes, or services are pre-empted; (2) that such pre-emption may occur even if a state law's effect on rates, routes or services is only indirect; (3) that, in respect to pre-emption, it makes no difference whether a state law is consistent or inconsistent with federal regulation; and (4) that pre-emption occurs at least where state laws have a significant impact related to Congress' deregulatory and pre-emption-related objectives. The Court described Congress' overarching goal as helping assure transportation rates, routes, and services that reflect 'maximum reliance on competitive market forces,' thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'

"Finally, *Morales* said that federal law might not preempt state laws that affect fares in only a 'tenuous, remote, or peripheral . . . manner,' such as state laws forbidding gambling. But the Court did not say where, or how, 'it would be appropriate to draw the line,' for the state law before it did not 'present a borderline question.'

"In light of *Morales*, we find that federal law pre-empts the Maine laws at issue here. [T]he Maine statute forbids licensed tobacco retailers to employ a delivery service unless that service follows particular delivery procedures. In doing so, it focuses on trucking and other motor carrier services (which make up a substantial portion of all delivery services, thereby creating a direct connection with motor carrier services.

"At the same time, the provision has a significant and adverse impact in respect to the federal Act's ability to achieve its pre-emption-related objectives. The Solicitor General and the carrier associations claim (and Maine does not deny) that the law will require carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer). And even were that not so, the law would freeze into place services that carriers might prefer to discontinue in the future. The Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for 'competitive market forces' in determining (to a significant degree) the services that motor carriers will provide.

"We concede that the regulation here is less direct than it might be, for it tells shippers what to choose rather than carriers what to do. Nonetheless, the effect of the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate. And that being so, treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense. If federal law pre-empts state efforts to regulate, and consequently to affect, the advertising about carrier rates and services at issue in *Morales*, it must pre-empt Maine's efforts to regulate carrier delivery services themselves.

COMMENTS & QUESTIONS

1. What subject did Maine's law cover?

2. Why did Maine pass its law?

3. Who complained about the Maine law? Why?

This appears to be a very simple, straightforward case decided on the basis of *stare decisis*. *Stare decisis* is a principle in the law that literally means to stand by that which is decided. In other words, courts will generally decide cases the same way they have in the past. Courts are reluctant to interfere with principles announced in former decisions. Only when a court comes to believe that its own prior decision on the same issue was decided wrongly will the court change course and issue a conflicting ruling. Prior decisions will only be overturned when good cause is shown. Another word for *stare decisis* is precedent.

The laws that guide the United States Supreme Court include the U.S. Constitution—the highest law in the land—and the Court's own precedent. In this case, the justices were confident that their 1992 *Morales* decision was correct, that the *Rowe* case raised the same issue, and that therefore they must decide *Rowe* in the same manner—striking down the state law conflicting with the federal language on price, routes, and service.

However, this case is quite interesting from the constitutional analysis perspective.

The Supremacy Clause is the popular title for Article VI of the U.S. Constitution, which is the main foundation of the federal government's power over the states providing in effect that the acts of the federal government are operative as the "supreme law of the land." On the other hand, The 10th Amendment states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

So, where does the federal government get its power to regulate tobacco shipments? Or, is that power reserved for the States? The federal government gets this power through Article I, Section 8, Clause 3 of the Constitution that provides that "Congress shall have Power…to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

In order to have a functioning Union, the Founders knew that the individual states could not be imposing a patchwork of regulations that might impede trade between the states. Therefore, since Congress had addressed the question of "price, route, or service of any motor carrier" Maine could not enact a different law.

However, wasn't Maine's law helpful to the public? Did it not try to address aan important problem of minors receiving tobacco products illegally? If so, why would Congress want to strike down beneficial laws just because they came from a state legislature? Do you think that there should be a federal law similar to the Maine law to deal with this issue?

What about the delivery of alcoholic beverages? Should states be able to regulate this? Interestingly, the states do have the right to control this by virtue of the XXI Amendment. When the XXI Amendment did away with prohibition in 1933, it specifically gave the states the power to control the importation or transportation of intoxicating liquors within their borders.

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