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***Jackson v. Bishop***, 404 F 2<sup>nd</sup> 571 (1968). Inmates of the Arkansas penitentiary seek an injunction barring the **use of the strap as a disciplinary measure** in Arkansas' penal institutions...

Corporal punishment in the Arkansas system was authorized formally only in 1962 but evidently it had been employed for many years. At that time the Board...authorized such punishment whenever, in the Superintendent's judgment, its infliction was necessary in order to maintain discipline.

Board rules state that certain "major offenses will warrant corporal punishment." The ones listed are homosexuality, agitation, insubordination, making or concealing weapons, refusal to work when medically certified able to work, and participating in or inciting a riot. They further state:

No inmate shall ever be authorized to inflict any corporal punishment...on another inmate.

Punishment shall not, in any case, exceed Ten lashes with the strap, the number of lashes to be administered shall be determined by a Board of inquiry, consisting of at least two officials of the Arkansas State Penitentiary, the Superintendent or Assistant Superintendent, and the head Warden or an associate Warden. The Board of Inquiry will request that the accused inmate appear before the Board and speak in his own behalf.

No Punishment will be administered in the field.

The straps used in Arkansas vary somewhat but all are similar. Each is of leather and from 3 1/2 to 5 1/2 feet in length, about 4 inches wide, and 1/4 inch thick. Each has a wooden handle 8 to 12 inches long...

[W]hippings are administered by wardens. The prisoner lies face down and the blows are to his buttocks. Supposedly, they are administered while the prisoner is fully clothed. Petitioners Ernst and Mask, however, testified...that they...received lashes on the bare buttocks. There...was proof...of deep bruises and bleeding.

**Whipping is the primary disciplinary measure used in the Arkansas system.** Prisoners there

have few privileges which can be withheld from them as punishment. Facilities for segregation and solitary confinement are limited.

There is testimony that the strap hurts the inmate's pride, that it has been needed in order to preserve discipline, and that the work level improves after its administration. Contrarily, there is testimony that the **whipping generates hate** in the inmate who is whipped and that this hate flows toward the whipper, the institution and the system.

Testifying as a penologist, it was Mr. Bennett's opinion that the whippings administered to the three plaintiffs were "cruel, degrading and certainly they were unusual in this day and age."...

The Eighth Amendment's guarantee against the infliction of cruel and unusual punishments seems now to have come to be regarded as directly applicable to the states through the due process clause of the **Fourteenth Amendment**. *Robinson v. California*<sup>1</sup>...

[T]he use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess...

Our reasons for this conclusion include the following: (1) We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse...(2) Rules in this area seem often to go unobserved. Despite the January 1966 requirement that no inmate was to inflict punishment on another, the record is replete with instances where this very thing took place. (3) Regulations are easily circumvented. Although it was a long-standing requirement that a whipping was to be administered only when the prisoner was fully clothed, this record discloses instances of whippings upon the bare buttocks, and with consequent injury. (4) Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. (5) Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power. (6) There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual? (7) Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. **It is degrading to the punisher and to the punished alike.** It frustrates correctional and rehabilitative goals. This record cries out with testimony to this effect from the expert penologists, from the inmates and from their keepers. (8) Whipping creates other penological problems and makes adjustment to society more difficult. (9) **Public opinion is obviously adverse. Counsel concede that only two states still permit the use of the strap.** Thus almost uniformly has it been abolished. It has been expressly outlawed by statute in a number of states...

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<sup>1</sup>Case 8A-CUP-6 on this website.

Since when is “public opinion” relevant to a proper interpretation of the Constitution? If “public opinion” ruled, then, by definition, all legislation (presumptively the outcome of public opinion) would be constitutional and, by further definition, we would not need the Constitution at all! Think about it.

The district court's decree is vacated and the case is remanded with directions to enter a new decree embracing the injunctive relief heretofore granted but, in addition, restraining the Superintendent of the Arkansas State Penitentiary and all personnel of the penitentiary system from inflicting corporal punishment, including the use of the strap, as a disciplinary measure.

