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Recommended Citation

Allen Sultan, Recent Judicial Concepts of Cruel and Unusual Punishment, 10 Vill. L. Rev. 271 (1965). Available at: https://digitalcommons.law.villanova.edu/vlr/vol10/iss2/3

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RECENT JUDICIAL CONCEPTS OF “CRUEL AND UNUSUAL PUNISHMENT”

By Allen Sultan

It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance. . . . A pain can be inflicted upon the wrong-doer, of a sort that does not restore the injured party to his former situation, or to another equally good, but which is inflicted for the very purpose of causing pain. And so far as this punishment takes the place of compensation . . . the prisoner pays with his body.1

Their judgment and their dignity shall proceed of themselves.

Heb. 1:7

IN HIS penetrating study, A Sense of Injustice, the late Professor Edmond Cahn posed the following hypothetical:

The defendant is convicted of treasonable utterances by which he successfully sought to impair the moral and obedience of combat soldiers in time of war. The sentence of the court is that he be compelled to submit to a surgical operation on his vocal chords, so that thereafter he may only bark like a dog. This affronts the sense of injustice.

Here the main concern is with human dignity. From early times, cruel and unusual punishments have been relegated to the discretion of deity or destiny; law has pulled away from vengeance and humiliation. Vicious and debasing punishments are felt to dishonor the court and the humanity whose authority it wields. . . .

Human dignity is one of the tacit assumptions of the law . . . .2

With all due respect to the late New York University law professor, it is submitted that dignity has not substantially overcome vengeance and humiliation:

Item: An escaped prisoner from a state institution is apprehended in another jurisdiction. Extradition proceedings are undertaken. The

convict seeks federal habeas corpus alleging, \textit{inter alia}, that he was forced to serve as a "gal-boy" — assuming the role of a female to satisfy the desires of homosexual prisoners. He is denied relief.\(^3\)

\textbf{Item:} A man is convicted of rape, and is sentenced to imprisonment. In addition, the court orders that he be sterilized, even though the operation will not interfere with his sexual desires or their gratification.\(^4\)

\textbf{Item:} A man is arrested and cannot raise bail. Awaiting trial he is forced to stay with 39 others, crowded together in a room about 27 feet square, most of the floor space being occupied by bunks tiered up along the walls and by tables and benches. There is no place for the prisoners to move about and no recreational facilities whatever are afforded. Youths of 16 are herded together with hardened criminals. Even those who are "mental cases", unless violent, are confined in the same

\(^3\) Sweeney v. Woodall, 344 U.S. 86 (1952). He also offered to prove beatings with a nine pound strap with five metal prongs that frequently caused him to lose consciousness, and that he was forced to work in the boiling sun stripped to his waist all day long without being allowed a rest period. To his claim of his constitutional right against being subject to cruel and unusual punishment, the court left him to local remedies in the requesting state due to "consideration fundamental to our federal system."

An earlier successful attempt in the Third United States Circuit Court of Appeals, resulting in a "split" between circuits, resulted in a reversal by the Supreme Court, Johnson v. Dye, 175 F.2d 250 (3rd Cir. 1949), reversed, 338 U.S. 864 (1949). The reversal, a per curiam decision, was on the authority of \textit{Ex parte} Hawk, 321 U.S. 114 (1944). In Hawk, which held that there must be exhaustion of local remedies, there is dicta to the effect that federal courts will take jurisdiction of state cases under habeas corpus when petitioner has exhausted his state remedies and substantially shows a denial of a federal right. In this instance, there need not be "exceptional circumstances of peculiar urgency" to warrant federal intervention in state proceedings.

Mr. Justice Douglas dissented to the opinion in Sweeney. Pointing out that due process demands standards of decency implicit in our system of jurisprudence, he declared: "If the allegations of the petition are true, the Negro must suffer torture and mutilation, or risk death itself to get relief in Alabama," the requesting state.


\(^4\) State v. Feilen, 70 Wash. 65, 126 Pac. 75 (1912). The court held the vasectomy not to violate Article 1, Section 14 of the state constitution forbidding cruel and unusual punishment since it was easy to perform, does not cause inconvenience to the subject and takes only three minutes. See also, People v. Blankenship, 16 Cal. App. 2d 606, 61 F.2d 352 (1936); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942). In the latter case, the court had the opportunity to invalidate the Oklahoma sterilization statute applicable to habitual criminals on the grounds that it constituted "cruel and unusual punishment"; it chose, however, more technical grounds to do so.

According to a recent study, thirteen states presently have "eugenic sterilization statutes specifically applicable to criminals." They have varying standards with respect to their application, Wis. Stat. Ann. § 46.12 simply stating it may be used whenever "procreation is inadvisable." Morris and Breithaupt, \textit{Compulsory Sterilization of Criminals — Perversion in the Law}, 15 \textsc{Syracuse L. Rev.} 738, 739 (1964).

Nor are the statutes of relatively old vintage. The \textsc{Utah Code Ann.} § 64-10-7 (Supp. 1961), has as its standard that the criminal "would be unlikely to be a proper parent," See also, \textsc{Iowa Code} Ann. §§ 145.2, 145.9 (Supp. 1963), and N.D. Cent. Code § 23-08-03 (Supp. 1963), the latter's standard being that the criminal's "children would be social menaces or wards of the state." See also 84 \textsc{Time} (Nov. 13, 1964, p. 88).
room . . . there is only one shower bath for the use of the prisoners and only one toilet bowl. Sometimes the sewage outlets are clogged because they are as dilapidated as the rest of the structure.  5

The possibility of tedium dictates that further examples not be posed. Rather, attention shall be turned to a brief historical sketch and the recent judicial interpretations of the eighth amendment provisions proscribing “cruel and unusual punishments.” This study will then conclude with a discussion of the possible future role of that limitation in the administration of criminal laws. More extensive discussion of the topic has been rendered unnecessary by its coverage in The Law of Criminal Correction.  6

5. Ex parte Pickens, 101 F. Supp. 285, 286 (Terr. of Alaska, 1951). The facts also indicate, at pp. 286-87, that,

The jail physician has made an affidavit as to the unsanitary conditions of the jail resulting from crowding and lack of ventilation and lack of adequate bathing and toilet facilities and the danger of spread of contagious diseases.  .  .  .

But the feature of the imprisonment which in some of its aspects comes most closely to constituting cruel and inhuman treatment, lies in the ever present possibility of fire. The room where the prisoners are confined is heated by a coal stove of ancient type, bulging in the middle, tapering above and below, with flares at top and bottom. During the daylight hours the very number of the prisoners would probably in itself guarantee that the fire would not spread because it would be stamped out immediately, but at night when most of the men are asleep, or endeavoring to sleep, on the floor, on the tables, in the bunks and in the benches, a fire might conceivably get beyond control rapidly. There is always the chance that among the prisoners is one so unstable in mind, or so wicked, as to deliberately start a fire regardless of personal danger. Local records indicate the jail and courthouse in this division, then located at Valdez, were completely destroyed by fire from such an act of a prisoner. The only exit is into and through the adjoining kitchen and the door between the kitchen and the prison itself is necessarily kept locked to prevent the escape of prisoners. Nor is there any other exit, or place that could be made an emergency exit without danger of facilitating such an escape. Altogether, the place is not fit for human habitation and to crowd into this room so many prisoners at once well justifies the comment of representatives of the health service of the Federal Government who referred to it as a “fabulous obscenity.”

Another feature that should not be overlooked is the insufficiency of sleeping accommodations, although that alone is not so important. There are altogether fewer than 20 bunks to accommodate the 40 prisoners and accordingly they are required to sleep in shifts. At night, when most of them prefer to sleep, they not only fill the bunks but lie down on the floor, on the one table, and on the benches.

The court held, at page 289, that the phrase cruel and unusual punishments was “obviously . . . relative.” Consequently, the conditions were “scarcely deserving of the name when compared with the danger and misery under which our own soldiers . . . now in action in Korea live — and die.” The court concluded, at page 290, that, “Dangerous as such a comparison may be, it is not to be abruptly excluded, remembering that the term involved is not capable of precise definition.” In so doing, it looked to the 1904 decision of In re Ellis, 76 Kan. 368, 191 P.2d 81, involving “a dark, filthy, disease-breeding dungeon.”

Having been a member of the group used as a basis of comparison by the court, the writer cannot refrain from submitting, with all due respect, that the court “missed the point” completely. Those of us in Korea, who comprehended the necessity for our being there, believed that when we were “rotated stateside” we would return to a society where the dignity of the individual vis-à-vis the state was still maintained. This, after all, was the basic difference between the philosophies of the social systems locked in combat on that ill-fated peninsula. We would not want to believe that, not yet having been found guilty of any criminal act, we would be subject to conditions which, in the court’s own admission, were “inexcusable and shocking to the sensibilities of all civilized persons.”

II.

Although it has been traced back to the Magna Charta, the first specific proscription against “cruel and unusual punishments” appeared in England at the end of the seventeenth century. In 1641, the Long Parliament abolished the Star Chamber forever. However, so great was the oppression of that institution, and so deep were the scars it left in the memory of the English people, demands continued for a guarantee against similar behavior in the future by representatives of established authority.

Immediately after the expulsion of the Stuarts, Parliament passed “an act declaring the rights and liberties of the subject and setting the succession of the crown.” Intended as “a solemn condemnation of the arbitrary and oppressive proceedings which had taken place in the courts during the preceding reigns,” the statute set forth various grievances, among them that “illegal and cruel punishments [had been] inflicted” and then stated that “cruel and unusual punishments” shall not be imposed.

American colonial leaders, who had fought for the “rights of Englishmen,” were well aware of this guarantee. Thus, one hundred years later, in 1789, when James Madison placed the guarantee in his draft of the amendments to the new Constitution of the United States, it was approved by Congress with little debate.

Originally, the provision applied to the wanton infliction of pain — punishments that “invoke torture or a lingering death.” Thus, it implied “something barbarous, something brutal, something more than the ending of life.”

Ordinarily thought of in terms of “the thumbscrew, the rack, burning at the stake, nailing one’s tongue to the post, crucifixion, disembowelment, beheading, quartering, public dissection and the like,” the meaning of the eighth amendment guarantee changed with the

10. 1 W.&M. c. 2 (1688).
15. Ibid.
progress of our civilization.\textsuperscript{17} From generation to generation, as personal scales of values changed, affecting the total societal values, the "outer limits" of characterization adjusted accordingly. What was not cruel and unusual punishment in one era became so in the next.\textsuperscript{18}

As we would expect, this enlargement of meaning was a slow process since the determination of societal values is often a nebulous venture. Thus, the cautious were deterred.\textsuperscript{19} In addition, traditionalist judges were prone to look to the history of the provisions and its meaning at the time of promulgation. The result was an uneven development, frequently very sketchy in nature.

These factors, as well as others,\textsuperscript{20} have permitted the three examples cited above to fit within the restraints of the eighth amendment. Limiting the concomitant growth of that guarantee, and thus not allowing it to keep pace with the increasing sophistication of our society, they represented much of the "judicial atmosphere" at the time of the recent decisions interpreting the proscription against cruel and unusual punishment, decisions which we shall now discuss.

\section*{III.}

The earliest case to be contained in the classification of "recent decisions," and the only one more than three years old at the time of writing, is the 1958 decision of the United States Supreme Court in \textit{Trop v. Dulles}.\textsuperscript{21} Trop had been convicted of wartime desertion, an offense that resulted in his loss of citizenship under then existing statutes.\textsuperscript{22} Desiring a passport in 1952, he brought an action for declaratory judgment to have the courts affirmatively declare his citizenship. The Supreme Court \textit{held} 5-4 that Trop was still a citizen and deserving of the protection of the United States government, abroad as well as at home.

Speaking for a total of four members of the Court, Mr. Chief Justice Warren declared that deprivation of citizenship under these circumstances constitutes cruel and unusual punishment contrary to

\begin{itemize}
  \item[17.] Weems v. United States, 217 U.S. 349 (1909).
  \item[18.] Warner, \textit{supra} note 14, at 118.
  \item[19.] United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952): To the defendant's claim that test to be applied was that punishment that "shocks the conscience and sense of justice of the people of the United States," Judge Jerome Frank responded that community standards are usually unknowable and that the necessary reasonably good assurances of it cannot be obtained.
  \item[20.] \textit{Id}. Judge Frank also challenged the above characterization on the grounds that it shifted the moral responsibility from the Judge to the "common conscience," a process that is contrary to recognized judicial discretion in sentencing.
  \item[21.] 356 U.S. 86 (1958).
  \item[22.] 8 U.S.C. § 1481(a)(8). As a result of his court martial conviction, Trop was sentenced to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge.
\end{itemize}
the eighth amendment, since it destroys Trop's status in organized society. This, to the Court, is not within the "limits of civilized standards" as they were established by the constitutional proscription. Where do these standards come from? They are, according to the Court, drawn from "the evolving standards of decency that mark the progress of a maturing society."23 Those who feel this characterization will not provide a proper basis for predictability should derive satisfaction from the fact that, as the Chief Justice pointed out, civilized nations are unanimous in the belief that statelessness is not a proper criminal punishment.

The deciding vote, cast by Mr. Justice Brennan, was based upon different grounds. In his concurring opinion, the penalty was measured against the traditional objectives of the criminal law as well as the war power of Congress. Thus measured, it was found to be lacking. To Justice Brennan, it represented naked vengeance and nothing more.

Even though the rule of "civilized standards" is nebulous at best, even though it was the view of only four members of the tribunal, the "Opinion of the Court" in Trop represents a major constitutional breakthrough. Not since Weems v. United States24 declared that the eighth amendment proscription applied to the length as well as to the nature or mode of the sentence imposed had the Supreme Court made such a general statement regarding the provisions. In addition, the statement in Trop constitutes a broader base for subsequent growth of the vitality of the provisions than did that in Weems. As we shall soon see, this possibility was not lost to the Court.

A second indication of the possible breadth of this new approach to the eighth amendment resulted four years later in a case where neither mode nor duration of punishment was involved. Rather, Robinson v. California25 involved a crime of "status," the type of statute too often experienced in contemporary life.

The California legislature promulgated a law making one addicted to the use of narcotics a criminal, and subjecting him to imprisonment even though there is no proof of possession or use in the state. Although one would have believed that the Court probably would have struck down the statute on established rules of criminal law, such as the necessity for a criminal act or actus reus,28 it chose the eighth amendment proscriptions as a means of declaring the law unconstitutional. Mr. Justice Douglas added in his concurring opinion, also predicated upon

cruel and unusual punishment, that "This age of enlightenment cannot tolerate such barbarous actions." 27

The Court's opinion in Robinson, written by Mr. Justice Stewart, clearly distinguished the problems of mode 28 and duration of sentence 29 from that at issue. It's encompassment of status within the eighth amendment proscription, without precedent, 30 resulted from the conclusion, which the counsel for the State recognized, that "narcotic addiction is an illness."

This holding, "that a state law which imprisons a person thus afflicted as a criminal . . . inflicts a cruel and unusual punishment in violation of the fourteenth amendment," 31 was not rejected by either of the two dissents in the case. Rather, Mr. Justice Clark held that the statute in fact represented "a program of compulsory treatment for those addicted to narcotics," 32 and Mr. Justice White at the outset of his dissenting opinion states that if the "conviction rested upon sheer status, condition or illness or if he was convicted for being an addict who had lost his power of self-control, I would have other thoughts about this case." 33 Although the jury was instructed that they could convict Robinson "if they found simply" that his "status" or "chronic condition" was that of being "addicted to the use of narcotics," Justice White felt his conviction was based upon "the regular, repeated or habitual use of narcotics immediately prior to his arrest and in violation of the California law." 34 To Justice White, the majority used the constitutional provision as a means of imposing its own views of narcotics control.

There is one further pronouncement from members of the Supreme Court that merits consideration. One year after Robinson the Court denied certiorari in a case involving the imposition of the death penalty for the crime of rape. 35 To date, courts have upheld the death penalty for rape, as well as for other infamous crimes, as not violating the eighth amendment. 36 Yet, a dissenting opinion by Mr. Justice Goldberg, subscribed to by Justices Douglas and Brennan, contended that the tribunal should look into the issue. In so doing, Mr. Justice Goldberg separated the evolving "civilized standards" test enunciated in

32. Mr. Justice Clark also felt that three months imprisonment was not "unreasonable" for one who has voluntarily placed himself in a condition that threatens the state.
34. Id. at 686.
Trop from those of excessive severity and "unnecessary cruelty," thus predicating a possible three-pronged subsequent use of the constitutional proscription.

Although strongly criticized, this elaboration of the Trop doctrine seems to clearly establish it as a distinct consideration in measuring the nature of the punishment. Moreover, the decision in Robinson (already followed in one state), deals with the punishment or the sentence imposed as an indirect means of reaching the statute determining the criminal act. This suggests that the concept of "civilized standards" may become an instrument of constitutional decision making sufficiently broad to encompass not only diverse situations as those in the Trop and Robinson cases, but other subsequent determinations by lower courts or by legislatures that deviate from modern, rational, sophisticated concepts of criminal administration. Seen by one commentator as the result of a search by the Court for a euphemism to develop "notions of substantive due process," it is clear that if there is "something in the wind," we shall in the future hear far more from the Court than we have in the past with respect to the many possible applications of that constitutional guarantee.

These concepts are slow to emerge. The Court must await the proper cases. But, to this writer, the pattern suggests itself: "Meat" may be placed upon what had been the relatively "bare bones" of the eighth amendment — a fact that may have been recognized by at least some of the practising bar in the last few years.

IV.

Judicial decisions from state and lower federal jurisdictions indicate that the new concepts of what may constitute cruel and unusual punishments has not always been properly understood, or if understood, accepted as binding on the state jurisdictions. Aside from the Missouri decision following Robinson, perhaps the most significant opinion in recent years is the 1963 decision of State v. Cannon in which the Delaware Supreme Court upheld the state's statute prescribing corporal punishment as not violating the state constitutional proscrip-

37. Parker, supra note 30, at 1071. Professor Parker feels that this is a device to mitigate the use of the death penalty, "Whether [the] death penalty in rape cases is so irrational as to offend substantive due process, an issue that exists quite independently of the command of the Eighth Amendment."
38. State v. Bridges, 360 S.W.2d 648 (Mo. 1962).
39. Parker, supra note 30, at 1071.
41. Id. at 21-24 (Supp. 1964).
42. State v. Bridges, 360 S.W.2d 648 (Mo. 1962).
43. 190 A.2d 514 (1963).
tion against “cruel punishments” or the federal provision against “cruel and unusual punishments.”

Oliver Wendell Holmes once said that “[t]he degree of civilization which a people has reached, no doubt, is marked by their anxiety to do as they would be done by.” Yet few would acquiesce in the “justice” of a sentence that directed them to the whipping post. Nevertheless, between 1900 and 1945 Delaware has whipped over 1,600 prisoners.

Although the practice “was not effective in reducing the recidivism rate,” Delaware still permits the lash as punishment for five crimes. If the people of Delaware and their representatives believe in the propriety of the punishment as a deterrent, one wonders why they also make it a crime to take a picture of the whipping post. Indeed, even carrying a camera near the post is similarly punished. Since paradoxes are not supposed to exist in criminal enforcement practices, the only possible answer is that the whipping post represents “naked vengeance” — to borrow a phrase from Mr. Justice Brennan in Trop, and that the people and their representatives are ashamed of it. Yet, the State of Delaware persists in prescribing the lash, a persistence that evidences the generally accepted morality of their society.

In the Cannon decision, the Delaware Supreme Court recognized the “generally accepted” view “that constitutional law to some extent may be likened to a progressive science.” They agreed this means that “the words employed are not necessarily static but grow and change as the conditions of modern society grow and change with the passage of years.” They agreed that “constitutions are living documents.” Yet they upheld the validity of the whipping post.

Recognizing also the significance of the “historical context within which a particular constitutional safeguard was first adopted,” the court felt it not their function to recognize the modern view condemning corporal punishment for crime and declare that the infliction of lashes as punishment is the remnant of a cruel age, and should be declared to be a violation of the constitutional prohibition against cruel punishments.

44. Holmes, op. cit. supra note 1, at 44.
45. Rubin, op. cit. supra note 3, at 359.
46. Ibid.
47. Del. Code Ann. tit. 11, §§ 3905–08 (1953); grand larceny — up to 20 lashes; burglary — 20 to 40 lashes; poisoning with intent to murder — 60 lashes; robbery by violence — 40 lashes; wife beating — 5 to 30 lashes.
48. See infra, p. 281.
49. Del. Code Ann. tit. 11, § 411. The fine is from $500 to $1,000 and costs of prosecution.
50. Ibid.
51. Holmes, op. cit. supra note 1, at 44.
53. Ibid.
54. Id. at 517.
Whose function was it? The court, in a classic statement of judicial deference declared,

We think, however, that this change, this growth, this enlightened meaning of words used in Constitutions, comes about by reason of the beliefs of the people themselves. The change may not come solely by reason of the individual belief of an individual judge. What better way is there for the people to express an enlightened attitude toward the punishment of crime than through their elected representatives, the members of the General Assembly who, indeed, hold their office for the very purpose of expressing the will and beliefs of the people who elected them.  

* * *

Today, however, there has been no legal and effective expression of the people speaking through the General Assembly that whipping is a cruel punishment in the constitutional sense. Indeed, we think we may judicially notice the fact that there is undoubtedly a decided difference in view on the part of the people. What the weight of public opinion pro or con is, we have no way of knowing. Certain it is, however, that as yet the only constitutionally sound way of expressing the public sentiment, by act of Assembly, has not condemned the imposition of lashes as a cruel punishment.

It is the province of the General Assembly in its wisdom to give expression to the public will. It may either by inaction permit the practice to continue or, by action, condemn it as a cruel punishment. Judicial restraint and a proper recognition of the function of the Legislative and Judicial branches of government compel us to express no opinion upon the propriety of doing either.  

The Delaware Court concluded its opinion by pointing out "that the abolition of whipping as a punishment for crime in these States of the Union which in the past provided for it, has uniformly been accomplished by legislative action," and that neither counsel nor the court have been able to find a single case "in which a court as a matter of constitutional law held the punishment to be cruel and unusual and thus prohibited."  

Given the nature of the problem and the court's response to it, it would be interesting at this point to enter into a discussion of the value of judicial deference in a government established on the balance of powers. It is submitted, however, that it would not be relevant to do so. However valid the court's attitude may be as a general jurisprudential proposition, in the Cannon decision the primary consideration was with
the federal system — with Delaware's obligations under the federal constitution — and not with theoretical, or even practical, problems of Delaware's tripartite balance-of-power system.

By 1963, when Cannon was decided, the Supreme Court of the United States had announced both Trop and Robinson. Indeed, the court in Cannon cited Robinson for the proposition that the eighth amendment "is binding upon the several States of the Union." However, it held that the United States Supreme Court "has not as yet held the punishment of whipping, in itself, cruel. It has spoken of it as infamous, but that is possibly true of all punishment for crime."

It is submitted that a specific condemnation is not necessary. Should the doctrine of "civilized standards," those that represent the maturing United States society, be deemed by the Delaware court in their independent judicial judgment to no longer permit the whipping post, it must outlaw that means of punishment — the personal values of the people of Delaware and the previous legislative methods of change notwithstanding. Since the cruel and unusual punishments provision in the Federal Constitution are directly applicable to state governments, the duty of Delaware's highest court was as clear in that state as it was in Missouri.

58. Ibid.
59. Ibid.
60. For a breakdown of state proscriptions of a similar nature, see Rubin, op. cit. supra note 3, at 367.
61. Palko v. Connecticut, 302 U.S. 319 (1937); Wolf v. Colorado, 338 U.S. 25 (1949); Rochin v. California, 342 U.S. 165 (1962); the fact that Wolf was overruled by Mapp v. Ohio, 367 U.S. 643 (1961), does not affect its validity for this proposition; rather it substantiates it, as subsequent experience proved that the standard was not met.
62. In Ex parte Watkins, 32 U.S. 568 (1883), Mr. Justice Story held that notwithstanding the Eighth Amendment, the United States Supreme Court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases "even if the excess... were apparent on the record." This early holding, not overturned until the 1909 decision of Weems v. United States, 217 U.S. 349 (1909), was probably based upon Story's view that the Eighth Amendment "provision would seem to be wholly unnecessary in a free government, since it so scarcely is possible that any department of such a government should authorize or justify such atrocious conduct." 2 Story, op. cit. supra note 11, § 1903. The persistence of this theory is evidenced by the fact that Watkins was cited with approval as authority as late as 1947 in Hemans v. United States, 163 F.2d 228 (6th Cir. 1947), in sustaining a 5-year sentence state to avoid giving testimony in a felony case.

Due to this constricted attitude, the Supreme Court held well into this century that it does not set down any precise standards as to what constitutes cruel and unusual punishment. Wilkinson v. Utah, 99 U.S. 130 (1878). This holding was buttressed by dicta in O’Neil v. Vermont, 144 U.S. 323, 332 (1892), to the effect that the Eighth Amendment is not applicable to the states by means of the Fourteenth. In 1922, the Court decided Louisiana v. Resweber, 239 U.S. 459 (1922), indicating that this was no longer true. This new proposition was taken or granted by the Third Circuit in Johnson v. Dye, 175 F.2d 250 (3rd Cir. 1949), where the Court, at 255, said "We entertain no doubt that the Fourteenth Amendment prohibits the infliction of cruel and unusual punishment by the state." With the belief that "history is as potent a force as anticipation," the Court held, at 256, that the state's obligation was both positive and binding.

The Supreme Court's reversal of Johnson, supra note 3, for failure to exhaust local (state) remedies does not affect the validity of the view that the proscription is
One decision from the federal courts indicates that the doctrine of "civilized standards" has been recognized. *Fulwood v. Clemmer* involved a prohibition by a prison warden against the holding of religious services by the "Black Muslims" on the basis that they taught racial hatred and that the services were likely to create disciplinary problems. Even though there was evidence proving that both of the warden's grounds for refusal were true, the court found his treatment of the prisoner was unreasonable and constituted cruel and unusual punishment. In so doing, it used as standards of evaluation the nature of the prison rule that was violated and the physical, emotional and mental background of the prisoner.

The *Fulwood* decision is noteworthy for a number of reasons. Although the Supreme Court of California, in passing on a similar set of facts a year earlier came to the opposite conclusion due in part to the precepts of the Black Muslims, the Federal District Court for the District of Columbia refused to make any negative value judgment on that faith as such. Although the court in *Fulwood* fully recognized the needs and powers of the prison authorities in maintaining discipline, binding on the states. Certainly this fact is inherent in Robinson v. California, supra note 24, as well as in the reasoning of Mr. Justice Goldberg in his desire for the Court to evaluate the sentence in Rudolph v. Alabama, 375 U.S. 889 (1963). See also, Browdy and Saltzman, supra note 12, at 828; Ruben, op. cit. supra note 3, at 365.

Notwithstanding this authority, some still doubt its applicability, holding that the questions of violation of the Eighth Amendment and the Fourteenth Amendment due process clause are independent of each other, and that the fundamental prohibition of the former is not part of the latter. Parker, supra note 30, at 1074. Those who still hold this position do agree that the due process clause of the Fourteenth requires that the state maintain "canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses." Adamson v. California, 332 U.S. 46 (1947). Even they would hold to the view, expressed by Mr. Justice Frankfurter dissenting in Lambert v. California, 355 U.S. 225, 231 (1958), that "a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment, and, in respect to the States, even offend the Due Process Clause of the Fourteenth Amendment." As Mr. Justice Douglas points out in Sweeney v. Woodall, supra note 3, this is a most restrictive approach. The latter remark, made in 1952, seems to be correct, as indicated by Robinson ten years later.

64. In spite of the order, a number of informed meetings were held. The prisoner spoke on Muslim dogma and made derogatory remarks about the "white race." The prisoner was then separated from the rest of the prison population for two years.
65. Ibid.
67. Fulwood v. Clemme, 206 F. Supp. 370 (D. D.C. 1962), stating: It is not the function of the Court to consider the merits or fallacies of a religion or to praise or condemn it, however excellent or fanatical or preposterous it may be. Whether one is right about his religion is not a subject of knowledge but only a matter of opinion. "It is sufficient here to say that one concept of religion calls for a belief in the existence of a supreme being controlling the destiny of man. That concept of religion is met by the Muslims in that they believe in Allah, as a supreme being and as one true god. It follows, therefore, that the Muslim faith is a religion."
it cited the opinion of Mr. Justice Douglas in the Robinson case as authority for the proposition that mental and emotional factors can constitute "unreasonable" punishment in violation of the eighth amendment. Finally, in holding this to be unreasonable punishment, the court took an individualistic approach, directing its attention to the recipient of the treatment, and not merely to its mode, duration, or even — as in Robinson — the status of being a member of a class or a group, in this instance the Black Muslims. This factor of mental cruelty, although recognized as early as 182568 was not fully established in the law.69 The wording in Fulwood permits one to hope that this is no longer true, as it may now rest upon a firm foundation — that of the Supreme Court test of "civilized standards" of a "maturing society."

V.

Last spring the Georgia legislature passed a bill71 that to date has resulted in the immediate release of 503 prisoners.72 These were all men who would have continued to be incarcerated if a technicality in the law had not been changed by the legislation. According to official statistics of the State, last year's recidivism rate was 36 percent for felons and 45 percent for misdemeanants.73 Yet, by the middle of October, 1964, only 12 of the 503 prisoners released were re-sentenced to the penal system of Georgia.74

Notwithstanding the fact that with time more of the released prisoners will again no doubt be recommitted, and that others may choose to perpetrate crimes outside the State of Georgia, the extremely low rate of recidivism for those who were properly convicted75 constitutes further evidence76 of a basic fallacy in our system of judicial sentencing and of our concepts and methods of punishment.

It would carry us too far afield to enter into an extensive discus-

68. James v. Commonwealth, 12 S.&R. 220 (Pa.). See also Ho Ah Kow v. Nunn, 12 Fed. Cas. 252 (No. 6546) (C.C.D. Calif., 1879), where the cutting of a Chinese prison's queue was held to be cruel and unusual punishment.
69. See the opinion of the four dissenting judges in Francis v. Resweber, 329 U.S. 459, 472 (1922).
72. Letter to the writer from R. H. Burson, Director, State Board of Corrections, dated October 16, 1964.
73. State Board of Corrections Rep. 77 (1962-3).
74. Supra note 72.
75. The Bill, supra note 58, requires the recomputation of time to be served in all cases where the court at the time of imposition of sentence was silent as to whether or not two or more sentences were to be served consecutively; in other words, unless the judge specifically directed that multiple sentences be served consecutively, this Bill required that the sentences be recomputed and the defendant permitted to serve time concurrently. For the general rule see Rubin, op. cit. supra note 3, at 415.
sion of punishment in general. 77 For our present purposes it is sufficient to point out that,

In studying what is, we cannot totally rule out what ought to be.

... Whatever may be the possibility of complete detachment in dealing with physical things, in social life we cannot afford to disregard the values and goals of acts without missing the significance of many of the facts involved. 78

Thus,

Any discussion concerning justice and the treatment of human beings may proceed on the different levels of sentiment, moral values and objectively determined facts. ... Our final judgment must necessarily be a compound of [. . . all three] if we are to avoid the errors of pre-scientific inquiry on the one hand or the totalitarian negation of human values of Nazi Germany on the other. 79

The eighth amendment proscription against cruel and unusual punishment was born from the consequences of man's inhumanity to man. 80 Its inclusion in our fundamental law is based upon the philosophy that it is better "that a potentially dangerous individual be set free than that the least degree of impairment of an individual's basic constitutional rights be permitted." 81

The recent decisions by the federal courts discussed above represent the view that the Bill of Rights is not a static document. Rather than being limited to Eighteenth Century concepts, the values it embodies are ever in a state of adoption and change, 82 resulting from the impact of the ever increasing knowledge of man, of his environment and of the interaction of one with the other.

Abraham Lincoln once said that "[J]udicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession." 83 Thus, in 1892 the Supreme Court still held that the length of a sentence does not make it "unusual", 84 seventeen years later it changed its mind. 85 Whether

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77. The writer is presently preparing another paper on this subject.
78. WIRTH, MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE, Preface (Wirth and Shils transl. 1936).
80. See note 8 supra.
83. LINCOLN: SPEECHES AND WRITINGS 355 (1946) (Basler Ed.).
it be changing its views on specific points such as the length of sentence, or on the general application or interpretation of the entire provision, such as represented by the *Trop* and *Robinson* decisions, where the words are general and the tradition is established, the procedure is not only proper, it is desirable; to do otherwise would be to permit the dead to bury the living.

In our society, the criminal is a member of a political minority. Moreover, the nature of his status removes most of the relative political power that even a minority group can command. Thus, it is the courts that can best protect his rights. This is one of the lessons of our constitutional history.

Often the state courts have properly responded to this fact of political life when interpreting provisions proscribing "cruel and unusual punishment." Often, they have not. When they do not they support not "the law of the land," but the mood of the electorate, the experimentation of the officials, or a blindness to the advancement of knowledge in the society in which they function and of which they constitute a vital factor.

Prisoners may still be whipped in Delaware. Its courts may not understand the irrationality of the position of the "people" of the

86. Wechsler, supra note 82, at 32.
87. Id. at 31.
88. Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 694 (1960): "A majority, as De Tocqueville and John Stuart Mill have indicated, can be despotic. It is, accordingly, the quintessence of democracy for an appointive judiciary to further the ends of the integrity of the individual."
91. *In re Oliver*, 333 U.S. 257, 280 (1948) (per Rutledge, J.): "... so long as the bill of rights is regarded here as a strait jacket of Eighteenth Century procedures rather than a basic charter of personal liberty ... experimentation may be expected from the states. And the only check against their effectiveness will be the agreement of the majority of this Court that the experiment violates fundamental notions of justice in civilized society."
93. Taylor, supra note 79, at 408-09:

Other evidence on the effect of judicial corporal punishment is embodied in official reports that were presented to the Canadian and English Parliaments recently. The Canadian committee agreed with the Police view that corporal punishment was not effective against the recidivist, the hardened criminal or the sexual criminal. In other cases the Police and prosecuting authorities differed from prison authorities and those in close contact with criminals about the deterrent value of corporal punishment. The committee commented:

The evidence indicated, however, that, in general, the concern of offenders is to avoid arrest and imprisonment, and that they do not delicately balance their intended crimes against the prospect of corporal punishment and that the crime rate in other democratic countries of the Western world, as in the United Kingdom, has not been affected by the presence or absence of corporal punishment.

The Canadian committee recommended the abolition of corporal punishment, or alternatively a limitation on its use (1956 report).

Recommendations from Parliamentary committees in England were expressed with less hesitation. The Cadogan Committee of 1938 heard opinions and sought
State. If they do understand it, they certainly refuse to recognize it. By refusing to follow their obligations as a judicial body in American society and affording an American citizen his federal constitutional rights, they are derelict in their duty. For the test is not satisfactory if it merely asserts that the legislatures have declared themselves for then the constitutional provision would be a futility.94

To justify a decision regarding the federal constitution on the basis of a relatively local attitude, its absence, or its impossibility of determination is, indeed, a case of allowing "the tail to wag the dog." The result is, of course, contrary to the "almost95 complete abandonment of the most extreme penalties of death and physical torture"96 in the penology of the nation.97

facts, and firmly recommended the abolition of corporal punishment on the grounds that:

We have been unable to find any body of facts or figures showing that the introduction of a power of flogging has produced a decrease in the number of offences for which it may be imposed, or that offences for which flogging may be ordered have tended to increase, when little use was made of the power to order flogging or to decrease when the power was exercised more frequently. We are not satisfied that corporal punishment has that exceptionally effective influence as a deterrent which is usually claimed for it by those who advocate its use as a penalty for adult offenders. (Cmnd. 1213 p. 3.)

Corporal punishment was originally introduced in England as a penalty for young offenders by way of an alternative to imprisonment, but it was gradually forsaken for more constructive methods of dealing with delinquents. Corporal punishment for adults had been used mostly for offences of robbery with violence, but one study of 440 men showed that those who had been flogged had worse subsequent records than those who could have been flogged but were not. Corporal punishment had not been available as a penalty for crimes of violence and sexual offences, and the committee saw no wisdom in extending it and commented that it was especially unsuitable for sexual offences because of the relationship between aggression and perversion. Corporal punishment in England was finally abolished in 1948.

The Barry Committee made a fresh study of the matter in 1960 and concluded that:

There is no evidence that corporal punishment is an especially effective deterrent to those who have received it or to others. We recognize that in a limited number of cases a sentence of corporal punishment would deter both the offender to receive it and other potential offenders; but the same could be said of many forms of drastic and severe punishment which have long since been abolished as affronting the conscience of a civilized community. We are not satisfied that the numbers likely to be deterred are sufficient to justify the reintroduction of a form of punishment that has manifold disadvantages. . . . We were impressed by the argument that the greatest deterrent to crime is not the fear of punishment but the certainty of detection.


95. Id. at 293. Today "Statutes in nine states expressly permit corporal punishment [. . . of prisoners]. Twelve states permit use of chains and shackles," although they have been twice condemned by the United States Supreme Court.

96. Id. at 292: In 1939 "At least twenty-six prisons employed corporal punishment. Whipping with a strap was common. The Virginia "spread eagle," similar to the medieval rack, stretched the body by ropes and pulleys. Men died or came close to death in Florida's sweat box, an unventilated cell built around a fireplace. In Michigan and Ohio, prisoners were kept in a standing position and unable to move; in Wisconsin they were gagged; in West Virginia they were subject to frigid baths."