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John F. Sonnett Memorial Lecture Series: Cruel and Unusual Punishment: The Proportionality Rule

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Introduction for:

MULLIGAN

At Fordham Law, students often debate the roles that judicial restraint and judicial activism should play in our legal system. Supporters of judicial activism argue that an innovative judiciary is essential to clearly define and protect individual rights in a world far more complex than that of the founding fathers. Opponents of judicial activism criticize the doctrine as anti-democratic, because unelected judges can substitute their judgments for those of a popularly elected legislature. From Constitutional Law classes to late afternoon meetings of the Federalist Society, debate over the costs and benefits of judicial activism occurs almost daily in the safe halls of our law school.

Outside law school halls, the debate is not always safe. For California Superior Court Judge Howard Broadman, an activist sentence he imposed in January 1991 almost cost him his life. When a mother plead guilty to child abuse, Judge Broadman conditioned her probation in part on acceptance of a surgically implanted contraceptive device. Judge Broadman's sentence drew volleys of praise and criticism from all over the country. Two months later in his courtroom, a self-proclaimed holy warrior against contraception pulled out a gun and fired at the judge's head. Judge Broadman was not hit, but the assassination attempt stands as an extreme example of the stress judicial activism can place on the legal system.

Judge William Hughes Mulligan's Sonnett Lecture examines

the roles of judicial activism and judicial restraint in the context of Cruel and Unusual punishment cases. Judge Mulligan analyzes the workings of the "proportionality principle", a feature of eighth amendment jurisprudence that allows a federal court to strike down a punishment that is, in its judgment, excessively severe. Judge Mulligan's topic illuminates the difficulties experienced by the judicial branch when it sets aside a punishment approved by the legislature.

Judge Mulligan's conclusion, that federal courts should defer to the state legislatures on the proper length of sentences for criminal offenses, is particularly relevant in today's "get tough on crime" environment. As the national war on drugs wages on, individual states lengthen sentences, build more prisons, and create alternative methods of punishing criminals. Military-style boot camps and electronic tracking devices used to enforce house arrest are just two examples of recent innovations in the fight against crime. Sooner or later, many of these and other measures will be challenged on constitutional grounds. Judge Mulligan's support for the legislature's role is important; his analysis will help to dispose of the weaker of these challenges while preserving the Court's status as protector of eighth amendment rights.

Hon. William Hughes Mulligan
Sonnett Lecture No. 9.

Those of you who have come to be entertained are doomed to disappointment. This paper is devoted to the subject of cruel and unusual punishment and you may well be subjected to it this evening. Since the fifty footnotes take up less space than the text, I toyed with the idea of reading them instead. However, my law clerks felt that although the text was not that great it was probably more understandable than the footnotes. This paper was the result of my writing Carmona v. Ward which involved an attack on the Constitutionality of the New York Penal Law provisions mandating lifetime parole terms in certain drug dealing convictions. The New York Courts had unamimously upheld the constitutionality of the law as applied in those cases - 3 appellate divisions had ruled and finally the New York Court of Appeals. In the Southern District Court the statute was held unconstitutional and the Second Circuit reversed 2 to 1. The Supreme Court earlier this month denied certiorari 7 to 2 - Judges Marshall and Powell dissenting. Had certiorari been granted this oration would have to be

put aside and I would read you instead a chapter on Offer or Acceptance according to Calamari and Perillo.

I am thankful to my current law clerks Mike Malone and Mary Anne Wirth for their assistance and criticism and primarily of course to Charles Carberry who worked closely with me on Carmona. All three are graduates of the great Fordham Law School, of course.

The Sonnett Lecture
Fordham University School of Law
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"Cruel and Unusual Punishments: The Proportionality Rule"

The Eighth Amendment to the United States Constitution provides in the usual stark and unadorned constituional prose "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] The constitutional restriction binds both the legislative and judicial branches of the federal government and through the Fourteenth Amendment is applicable to the states as well.[2] While both branches are governed by the constitutional limitation, our system of judicial review provides an enormous potential power for the federal judiciary to strike down sentences presumably fixed by state legislatures as appropriate sanctions reflecting the judgment of their constituencies as to the seriousness of particular criminal offenses.

This paper is primarily concerned with only one aspect of the "cruel and unusual" clause--the so-called proportionality principle which simply expressed is that a punishment which is grossly or excessively severe in relationship to the gravity of the crime charged must be struck down by the courts as violative of the Eighth Amendment. Even before Gilbert and Sullivan's Mikado,[3] it had been an article

of popular faith that the punishment fit the crime. In American jurisprudence however this is deemed to be the responsibility of the legislature which created the crime and fixed the sanction. Only recently has it become recognized that punishment grossly in excess of the gravity of the offense may offend the Constitution of the United States. I will briefly review the history of the principle and the test which has been developed to apply it. I will suggest some inherent weaknesses and dangers in the test and indicate the balancing of principles which must be employed in applying it lest it become a device for the imposition of judicial concepts of criminal punishment in the guise of constitutional interpretation.

I

The history of the cruel and unusual punishment clause has been set forth in several law review articles[4] and in expansive judicial opinions.[5] There is no need to present it in detail here.

The phrase itself, "cruel and unusual punishments", first appeared in the English Bill of Rights of 1689 which prohibited such sanctions. Historians generally have perceived the prohibition to be a reaction to the treason trials of 1685--the "Bloody Assize" caused by the abortive

rebellion of the Duke of Monmouth. The penalty for treason committed by a man involved hanging by the neck, to be cut down while still alive and then disembowelled, beheaded and quartered. I omit some of the more grisly details.[6]

That the methods of punishment employed by the English then and later were cruel and barbarous by today's standards is quite apparent.

There is another view which has gained some acceptance that the phrase "cruel and unusual punishment" was inserted in the English Bill of Rights not simply as an interdiction of barbarous methods of punishment but also to prohibit sentences which were disproportionate to the gravity of the crime committed. One theory is that the conviction of the infamous Titus Oates for perjury in 1685 and his subsequent sentence support the proposition that a sentence disproportionate to the crime was cruel and unusual within the meaning of the Bill of Rights.

In 1679 Oates had sworn that he was present at a meeting where a group of influential Catholic laymen and Jesuit priests had plotted to murder the Protestant King Charles II and to place his brother James, a Catholic, upon the throne.

Oates who had a vivid imagination provided certain lurid details--the Jesuits were to kill the King with silver bullets and if that failed four Irish Ruffians were to stab him to death. As a result of the alleged "Popish Plot", panic prevailed in London and as a result of Oates' testimony a score of innocent Catholics were executed in the manner heretofore described. James II eventually did ascend the throne, evidence of Oates' perjury became overwhelming and in 1685 he was convicted of perjury; sentenced to prison for life, severely flogged, fined, placed in a pillory four times a year and defrocked as a Minister of the Church of England. After the revolution of 1688, the flight of James II and the ascension to the throne of William and Mary of Orange, Oates was not only pardoned but even given a lifetime pension.

An influential law review article which has espoused the view that "cruel and unusual punishments" should be equated with the disproportionality of the sentence and not simply the barbarity of the method of punishment, argued that Oates' sentence was cruel and unusual not because of the flogging and pilloring which were normal methods of punishment in

those days but because a term of life imprisonment was disproportionate to the crime of perjury.[7] This argument in my view is, unpersuasive both logically and historically. Oates' perjury has led directly to the barbaric execution of some 21 innocent Catholics including seven Jesuits, one of whom was the provincial of the English Society.[8] Winston Churchill hardly an Anglo-phobe, in his discussion of the "Popish Plot" describes Oates as "being as wicked as any man who ever lived."[9] The usual punishment for perjury included "branding or tongue boring, or both".[10]

Oates' sentence viewed in the light of contemporary penological practices was neither cruel or unusual. His eventual release and reward by William of Orange was not due to any belief that he had been subjected to cruel and unusual punishment but as described by a modern biographer of Oates, it was "as an act of gratitude by William of Orange .. who knew his friends and recognized the instruments which helped him attain the throne of England."[11] While Titus Oates was a fascinating as well as frightening character, I do not believe his sentence casts any light upon the meaning of the phrase cruel and unusual nor does it support the proportionality principle.

In 1791 the same phrase "cruel and unusual punishments" was adopted with little debate as part of the Eighth Amendment of the United States Constitution. It is quite clear that the framers intended to outlaw barbarous punishments. The first Eighth Amendment cases to come before the Supreme Court established that punishments involving torture or lingering death which were acceptable to our Anglo Saxon legal forbears, were cruel and unusual under the interdiction of the Eighth Amendment.[12] In In re Kemmler, 136 U.S. 436, 447 (1890) the Court held that death by electrocution was not cruel and unusual under either the New York or United States Constitutions.

The question as to whether a term of imprisonment could be so excessively disproportionate to the offense so as to be within the Eighth Amendment was not addressed in the Supreme Court until 1892 and then only in dicta in a dissenting opinion. In O'Neil v. Vermont, 144 U.S. 323, the defendant, who was licensed to sell liquor in New York, had been sentenced to 19,914 days (over 54 years) for conviction on 307 counts of the illegal sale of liquor shipped to Vermont. The majority did not reach the question of whether the penalty violated the Eighth Amendment since that point had not been raised as error.[13] However,

in his dissenting opinion Mr. Justice Field, considering the fact that the penalty was more harsh than could have been imposed for burglary or manslaughter, concluded that "[i]t was one which, in its severity, considering the offences of which [the defendant] was convicted, may justly be termed both unusual and cruel."[14]

In 1910 the Supreme Court decided Weems v. United States,[15] which is now regarded as the seminal case with respect to the proportionality principle. The defendant, an official of the Philippine government, was convicted of falsifying public records and was sentenced under the Penal Code of the Philippines, then a United States territory, to 15 years of hard and painful labor, with a chain at the ankle hanging from the wrists. He was stripped of the right of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property and the right to dispose of his property. He was placed under surveillance by the state for the rest of his life, could not vote, hold office, receive retirement pay or even change his residence without permission.[16] Only six judges participated in this

decision and two, White and Holmes, dissented. The majority found that this punishment was "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind." [17] (Emphasis supplied). The Court was repulsed by the nature of the penalty as well as its lack of proportion to the seriousness of the underlying crime. Thus, the Court compared the punishment of the defendant to those imposed in the same jurisdiction for crimes which the Court considered to be more serious than the one for which the defendant had been convicted. [18] It also compared the punishment under attack with those imposed in other jurisdictions for the same crime. [19] These two steps have become major parts of the contemporary proportionality test. [20]

While the language of Weems does support the doctrine of proportionality, it must be remembered that the Court was considering not simply a 15 year prison term but one accompanied by "painful labor" in chains, lifetime supervision and civil interdiction. It is difficult indeed to believe that the Supreme Court would have held a 15 year term of imprisonment unconstitutional had it not been for the barbarous terms which accompanied and, indeed, followed its service. [21]

Weems is an important decision in any event because of its affirmation of two principles of Eighth Amendment jurisprudence, the first of which is indeed basic and the second almost obvious. The first is as the Court stated:

> [T]here is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and it is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge.[22]

The second is that the Eighth Amendment prohibition is evolutionary in nature.[23] This principle was succinctly formulated by Chief Justice Warren: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[24] I believe that there may well be some question as to whether we Americans have, in general espoused higher standards of decency and whether our society is becoming more instead of less mature. Nonetheless

in the context of criminal sanctions no one can seriously contest the proposition that the physical and mental human torture, degradation and loss of personal dignity acceptable to the Sassenach or the Sioux have long since been rejected, at least in democratic societies. Hence it is beyond doubt that what was an acceptable sanction at the time of the adoption of the Constitution is hardly permissible today and forms no basis for judicial inquiry to determine Constitutional criteria.

What is significant is that since Weems was decided in 1910 there has been no opinion in the Supreme Court which has struck down a non-capital punishment on proportionality grounds. Indeed, since then there has been only one other case in which a majority of that Court found that a non-capital penalty violated the cruel and unusual punishment clause. In Robinson v. California,[25] as noted by Chief Judge Kaufman in a prior Sonnett Lecture[26] the Court ruled that a person could not be convicted of a crime simply because he suffered from the condition or status of being addicted to a narcotic drug. Although the two are often confused, whether a certain act should be a crime and whether the punishment should fit the crime are entirely separate inquiries.[27]

Throughout the present decade the Supreme Court has struggled with the apparently intractable problem of capital punishment.[28] A judge must be careful in applying these precedents, in which a majority opinion is rare and which involve the ultimate irrevocable sanction to cases involving much different considerations because of the lesser penalties involved.[29] However, from the opinions in the death penalty cases two propositions are clear. One is that the Supreme Court accepts the principle of proportionality as constitutionally mandated.[30] The other is that there is a strong presumption that the legislative penalty is valid because "the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards."[31]

Whether or not the proportionality concept was within the "cruel and unusual punishments" clause of the Bill of Rights of 1689 or in the minds of the founding fathers when the Eighth Amendment was adopted is really academic. It has now been espoused in principle by the Supreme Court,[32] the New York Court of Appeals[33] as well as a large number of State Courts.[34]

II

The cases have developed a generally accepted three pronged test to determine whether a sentence is so excessively disproportionate to the crime that it violates the Eighth Amendment. The three steps are--first, a judgment by the court of the gravity of the offense. Second--a comparison of the sentence under review with that imposed in the same jurisdiction for other crimes which the court considers to be more serious; and third--a comparison of the challenged sentence with those imposed in other jurisdictions for the same crime.[35] There is even authority that the comparison can include the penalties imposed by foreign nations.[36]

The aim of the test is to reduce the input of judicial subjectivity in Eighth Amendment jurisprudence. While a three pronged test facially phrased in objective terms is not to be lightly discarded (and I suppose must be viewed with more respect than a two pronged test,) I am frankly becoming less and less convinced that the proportionality rubric is of any real value in cases where the only claim is that the Eighth Amendment has been violated simply because of the length of the term imposed. There is no case in fact in

either the Supreme Court, the Second Circuit, or the New York Court of Appeals where a sentence has ever been set aside for this reason even though the test has been accepted.[37] This is because Weems itself has emphasized the great deference which must be paid to the state legislature. As Chief Justice Marshall pointed out in 1820, "It is the legislature, not the court, which is to define a crime, and ordain its punishment."[38] Mr. Justice Stewart has recently emphasized "a heavy burden" rests on those who would attack the judgment of the representatives of the people.[39]

The first prong of the test requires the court to make a judgment as to the seriousness of the crime charged and this of course invites the substitution of the subjective views of the judge for that of the legislature.[40] The concern here is both constitutional and practical. We must observe the doctrine of separation of powers as well as federalism.[41] This emphasizes the need for judicial restraint. A practical consideration of course is the institutional limitation on judicial fact finding. The legislature, acting through commissions and committees with funds for

counsel, staff and public hearings is patently better equipped than the judiciary to make the factual and social determinations which underlie any decision as to the gravity of a crime.[42] It is also more attuned to contemporary community standards and can best judge the public's concern about particular criminal activity.[43]

The second prong of the test is even more vulnerable since it calls for a comparison by the judicial branch of the statutory sentence imposed for the crime committed with those imposed for more serious offenses in the same jurisdiction. The problem of determining the gravity of a particular crime is difficult enough without having to make judgments about other crimes. It is rather simple to make a decision that smoking in the subway is not as serious as rape. But comparing the crimes and punishments for arson and kidnapping, automobile larceny and drunken driving requires the digestion of a vast amount of penological and sociological data not usually available to the jurist. The comparions cannot be mechanically applied and the danger of the judicial substitution of its judgment on a social issue for that of the legislature charged

with the responsibility of making the decision initially, is apparent.

The third step of the proportionality test requires the court to compare the sentence under review with those imposed in other jurisdictions for the same crime. This is the least susceptible to misuse as a tool facilitating the substitution of individual judicial policy views for those of the legislature. At the same time, it is flawed and is basically antagonistic to the principles of federalism. The Supreme Court has recognized for example that there is no national standard for obscenity and that the courts are to apply local community standards.[44] Yet this leads to the anomaly that while a jury is required to apply local standards in determining whether or not an act is criminally obscene, national standards are encouraged to be considered in determining whether the punishment is constitutional. The rationale supporting the distinction of using local standards to determine whether a First Amendment violation has occurred but a national standard to decide whether an Eighth Amendment infraction has transpired, is not at all clear.

The use of the standards of foreign nations to determine the constitutionality of punishment seems to be generally of little or no help. Aside from differing moral, social and cultural standards, I would suspect that a few years in a dungeon in some foreign climes can hardly be compared with incarceration in most modern American penal institutions.

In any event, a state may be faced with a particularly virulent type of criminal activity and I submit it should have some latitude in determining a strategy to combat that crime and one means may be the imposition of a longer sentence. In Carmona v. Ward, the most recent case in our circuit to challenge a prison term as unconstitutional because of its length, we held it to be significant, as had the New York Court of Appeals, that New York had a particularly acute drug problem.[45] The State legislature in 1967 had embarked upon a penal law approach which emphasized treatment of the addict and not incarceration. Six years and over 1 billion dollars later, the Legislature determined that the program was not successful and adopted admittedly stern measures with life time maximum prison terms.[46] It is not

for the courts to determine the wisdom or effectiveness of the program. It has engendered criticism and it may well not be working. But the Legislature has already made changes and is clearly in the best position to make more.[47] We held the drug statute not to be violative of the Constitution and the Supreme Court denied certiorari--7-2 earlier this month.[48]

In conclusion I would point out that a prison term so disproportionate in length in comparison with the gravity of the crime so as to shock the conscience should be held to be cruel and unusual under the Eighth Amendment of the Consitution. This is so not because it was in the mind of the framers of the English Bill of Rights in 1689 either because of the Bloody Assize or the trial of Titus Oates and not because the founding fathers had it in mind in adopting the language of the prior act. What books Jefferson may have read hardly supports the inference that he believed the maxim "let the punishment fit the crime" was of constitutional dimension. Nor do I believe that a lone dissent in O'Neil v. Vermont or the majority opinion in Weems which involved barbarous treatment necessarily preordained acceptance of

proportionality principle. I see no reasons to strain or struggle with doubtful historical or judicial precedent to establish the point. Since barbarous methods of punishment have generally disappeared, unless the Eighth Amendment is to become totally moribund and the phrase simply a shibboleth, it must apply to extraordinarily excessive terms. This we accept because as we have indicated the clause is evolutionary in character and not because the Founding Fathers had it in mind.

However, I also believe that [redacted] state legislatures usually do not act aberrantly and are normally responsive to and reflect community standards. Unlike federal judges who serve for life, the legislator must answer to his constituency after relatively brief terms of office. The deference we must pay the legislative determination is due not only to constitutional concepts of separation of powers and federalism but because of the institutional difficulty of the judiciary making the social, moral and perological decisions inherent in the test which has been constructed. I believe it is of some significance that in the most recent federal case in point the Fourth Circuit,

which had initially employed the proportionality test,[49] has now refused to apply it at least where the sentence is for a term of years. It will set aside such a term which is within the state's statutory maxim only where there are "extraordinary and special circumstances."[50]

So called judicial activists of course will maintain that the refusal to set aside admittedly harsh sentences constitutes an abdication of our constitutional mandate. But this requires an understanding of what our constitutional mandate really is. From the foregoing discussion, I submit that our responsibility is narrow indeed. Aside from the legislative determination made by a state in cases where the state judiciary which has taken an oath to uphold the same Constitution as we have, has itself found the state statute nor to be constitutionally defective, the role of the federal judiciary becomes even less active.

I think the significant factor is judicial restraint. I recall to you the Justice Frankfurter elegant articulation of the point:

> [T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. . . In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the peoples representatives.[51)]

FOOTNOTES

1) As with most constitutional language, "[t]he words [the judge] must construe are empty vessels into which he can pour anything at will." Learned Hand, Sources of Tolerance, 29 U. of Pa. L. Rev. 1, 12 (1930).

2) Robinson v. California, 370 U.S. 660, 664, 66-67 (1962). In O'Neil v. Vermont, 144 U.S. 323, 332 (1892) the Court had indicated that the Eighth Amendment was not binding on the States.

3) "My object all sublime
I shall achieve in time
To let the punishment fit the crime
The punishment fit the crime."

Gilbert & Sullivan, Mikado, Act II. The Complete Plays of Gilbert and Sullivan, 331 (Norton ed. 1976).

4) E.G., Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839 (1969)

(hereinafter Granucci); Comment, The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine, 24 Buffalo L. Rev. 783 (1975).

5) E.G., Furman v. Georgia, 408 U.S. 238, 316-22 (1972) (Marshall, J., concurring); Carmona v. Ward, 576 F.2d 405, 425-27 (1978), cert. denied, 47 U.S.L.W. 3460 (Jan. 8, 1979) (Appendix to dissent of Judge Oakes); People v. Broadie, 37 N.Y.2d 100, 119-30, 371 N.Y.S.2d 741, 483-92, cert. denied, 423 U.S. 950 (1975) (appendix).

6) Granucci, supra, note 4, at 854. Nor were the Stuarts the first English monarchs to arouse public anger by inflicting a penalty commonly believed to be disproportionate to the offense. Elizabeth in 1579 incurred public wrath by having the right hand of an author, John Stubbs, and his printer, William Page, hacked off for publishing an attack on a

marriage match that the aging queen desired with a French nobleman. Elizabeth was not unmoved by the public dissent; she didn't stay the sentence but did send her personal physician to attend to the wounds of the criminals. R. Berleth, The Twilight of the Lords 26-27 (1978).

7) Grannuci, supra, note 4, 57 Calif. L. Rev. at 859-60. The argument is adopted in Judge Oakes' dissenting opinion in Carmona v. Ward, supra, at 425 & n.4. See also Furman v. Georgia, supra, at 318 & n.13.

8) The Later Stuarts, G.N. Clark, Oxford p.90.

9) Winston S. Churchill, A History of the English Speaking Peoples, vol. 2, p.361.

10) E. Dakers, Titus Oates 319 (1949).

11) ~~Id. at 329.~~ E. Dakers, Titus Oates 329 (1949).

12) See, e.g., Wilkerson v. Utah, 99 U.S. 130 (1878).

13) 144 U.S. 323, 331 (1892). The majority also opined that the Eighth Amendment did not apply to the states. Id. at 332. But this view was expressly rejected in 1962. See footnote 2, supra.

14) 144 U.S. at 339. It is interesting to note that Mr. Justice Field accepted "whipping for petty offences" as a form of punishment within the State's power. Id. at 340.

15) 217 U.S. 349 (1910). The Court was construing the Philippines' bill of rights which contained a cruel and unusual punishment clause identical to the language of the Eighth Amendment. Id. at 365,367.

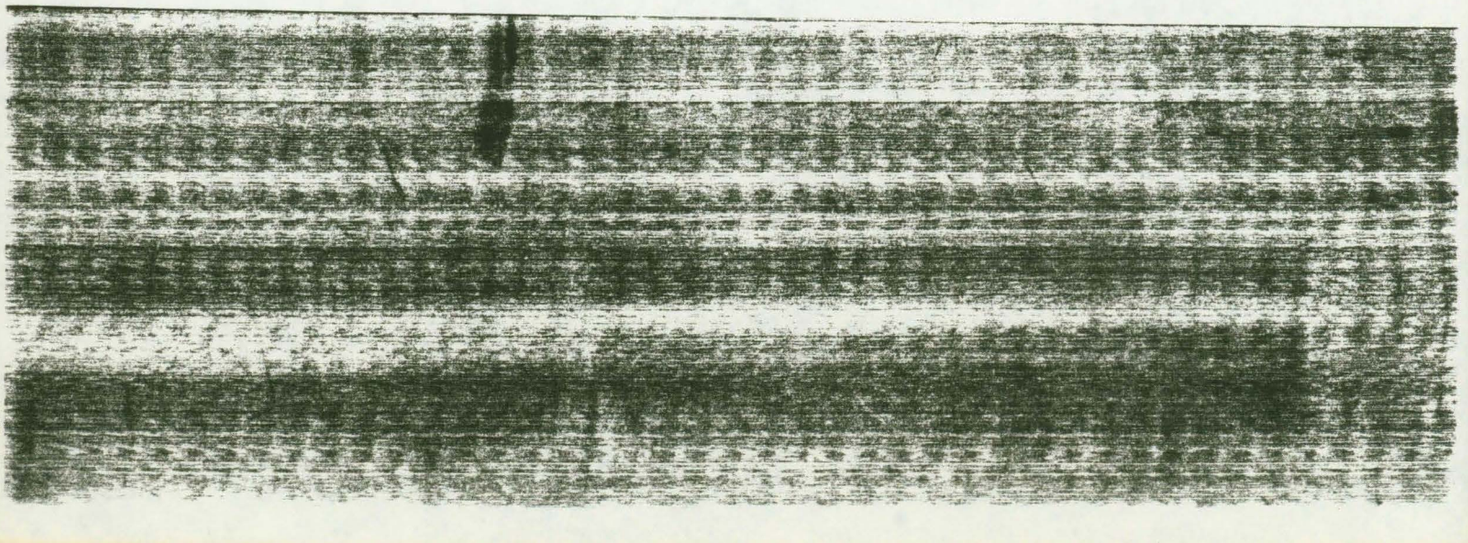
16) Id. at 364-66.

17) Id. at 377.

18) Id. at 380.

19) Id. at 380-81.

20) E.G., Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert.



denied, 415 U.S. 938 (1974); People v. Broadie, supra, see 44 Fordham L. Rev. 637 (1975).

21) Weems was not followed in Davis v. Davis, 585 F.2d 1227, 1229-30 (4th Cir. 1978), where the issue was solely the length of sentence unaccompanied by barbarous conditions. See also Carmona v. Ward, supra, at 408 n.5. A different view is expressed by Judge Oakes' dissent in Carmona, at 420-21.

22) 217 U.S. at 379.

23) Id. at 378.

24) Trop v. Dulles, 356 U.S. 86, 101 (1958).

25) 370 U.S. 660 (1962).

26) Kaufman, Prison:The Judge's Dilemma, 41 Fordham L. Rev. 495, 502 (1973).

27) H.L.A. Hart, Law, Liberty and Morality 36 (1963). See also E. van den Haag, Punishing Criminals 4 (1975).

In Trop v. Dulles, supra, a plurality of the

Court concluded that denationalization for wartime desertion was cruel and unusual punishment. Although the rationale of the decision is not entirely clear, the Court explicitly rejected any argument that the punishment was excessive in relation to the gravity of the crime. Id. at 99.

28) E.g., Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, supra.

29) As Mr. Justice Marshall pointed out in Furman v. Georgia, supra, at 346:

> Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such.

30) Coker v. Georgia, supra, at 592 (plurality opinion of

White, J., concurred in by Stewart, Blackman and Stevens, JJ.); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Gregg v. Georgia, supra, at 173 (plurality opinion of Stewart, J., in which Powell and Stevens, JJ., concurred); Furman v. Georgia, supra, at 279 (Brennan, J., concurring); id. at 331 (Marshall, J., concurring).

31) Gregg v. Georgia, supra, at 175 (plurality opinion of Stewart, J., in which Powell and Stevens, JJ., concurred); accord, Furman v. Georgia, supra, at 383 (Burger, C.J., dissenting); see id. at 465-70 (Rehnquist, J., dissenting).

32) Note 30, supra.

33) People v. Broadie, supra, 37 N.Y.2d at 111, 371 N.Y.S.2d at 475.

34) 44 Fordham L. Rev. 637, 638-44 (1975). Indeed, even prior to Weems Massachusetts had recognized the principle of

proportionality. McDonald v. Commonwealth, 173 Mass. 322, 328, 53 N.E. 874, 875 (1899).

35) Carmona v. Ward, supra, at 409 and sources cited therein.

36) Coker v. Georgia, supra, 433 U.S. at 596 n.10.

37) Downey v. Perini, 518 F.2d 1288 (6th Cir.), vacated and remanded on other grounds, 423 U.S. 993 (1975) is the only Circuit court case striking down a sentence for a term of years solely because of its length. In Downey the defendant received a sentence of 30 to 60 years' imprisonment for his first offense of possession and sale of a small amount of marijuana. Compare Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978) (as applied to petitioner, a Texas statute mandating life imprisonment upon third conviction for any felony held violative of eighth amendment); Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976), cert. denied, 430 U.S. 973 (1972) (setting aside on Eighth Amendment

grounds five years of a twenty year assault sentence to comport with maximum of assault with intent to murder, of which simple assault is merely lesser included offense); Hart v. Coiner, 483 F.2d 136, 139 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974) (mandatory life sentence for third felony conviction unconstitutional where crimes were perjury, passing $50 check with insufficient funds, and transporting $140 of bad checks across state lines). See also state court rulings in this area. In re Foss, 112 Cal. Rptr. 519 P.2d 1073 (1974); In re Lynch, 105 Cal. Rptr. 217, 503 P.2d 921 (1973) (and cases there cited); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972).

38) United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

39) Gregg v. Georgia, supra, 428 at 175-76.

40) See Carmona v. Ward, supra, at 410-12; Rummel v. Estelle, 568 F.2d 1193, 1202 n.3 (5th Cir. 1978) (Thornberry, J.,

dissenting); see 52 N.C. L. Rev. 442, 452-53 (1973). See also 1976 Wisconsin L. Rev. 655, 667-69.

41) It is often said, as it was recently by United States District Judge Frank M. Johnson, Jr., that "[t]he power of the federal judiciary to review and to decide matters involving the legislative and executive branches of government is circumscribed by two basic constitutional doctrines [separation of powers and federalism]." Johnson, The Role of the Judiciary With Respect to the Other Branches of Government, 11 Ga. L. Rev. 455, 463 (1977). However, as Judge Johnson seems to realize, the effectiveness of these principles as a check on judicial power depends on self-restraint. Id. at 466. Where the judiciary is concerned the appropriate question is indeed, "Quis custodiet custodes?"

42) See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1296-96 (1976).

43) See Gregg v. Georgia, supra, at 175-75; J. Stephen, A History of the Criminal Law of England, Vol. II, 81-82 (1883). However, even the legislature can be slow in sensing the public judgment. See J. Wilson, Thinking About Crime 22-23 (1975).

44) Miller v. California, 413 U.S. 15 (1973).

45) Carmona v. Ward, supra, at 412.

46) Id. at 413.

47) Id. at 415-16 & n.19. Cf. Editorial, New York Times, January 18, 1979 section A, page 20, col. 1.

48) 47 U.S.L.W. 3460 (Jan. 8, 1979).

49) See Hart v. Coiner, supra, 483 F.2d at 139-40.

50) Davis v. Davis, supra, 585 F.2d at 1233.

51) Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).