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## The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the *Weems v. United States* Excessive Punishment Doctrine

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THE EIGHTH AMENDMENT, BECCARIA, AND THE  
ENLIGHTENMENT: AN HISTORICAL JUSTIFICATION FOR THE  
WEEMS v. UNITED STATES EXCESSIVE  
PUNISHMENT DOCTRINE\*

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\* The authors would like to acknowledge the pioneering scholarship of Professor Emeritus Mitchell Franklin of the State University of New York at Buffalo. Having at one time complained about the dearth of sources to properly trace the origins of the Bill of Rights, he has labored for many years to uncover and bring them to the attention of the legal profession. Professor Franklin’s contributions to this emerging area of study are so profound, that serious scholarship cannot be undertaken without considering his papers.

INTRODUCTION

Although notions of excessiveness and disproportionality of punishment to the crime committed under the eighth amendment's "cruel and unusual punishments"<sup>1</sup> clause were enunciated in *Weems v. United States*<sup>2</sup> in 1910, the Supreme Court has not actively utilized the *Weems* doctrine since its inception. This hesitancy might be attributed to the Court's uncertainty as to the constitutional and historical justification of the *Weems* doctrine.

Regarding the historical foundation of the United States Constitution and the eighth amendment, scholarship has in large part been confined to, and understood solely through, English historical developments. The fact of English influence is not to be discounted; the framers were concerned with preserving particular English guarantees, as well as preventing specific English abuses. Clearly, the eighth amendment has as one purpose the abolition of the torturous and brutal methods of punishment that characterized Stuart England. English intellectual and political history, however, did not provide the only philosophical source of the eighth amendment. England and America of the 17th and 18th century did not exist in a political, economic or philosophical vacuum.

It is imperative to shatter the unitary perspective through which the Constitution and the Bill of Rights are viewed. The necessity for accomplishing this task is due not only to the need to correct the inaccuracy which prior single source scholarship has left for those interested in understanding the history of our political institutions, but it is also due to the need for lawyers and judges to know the true intent of the framers in order that the principles which underlie the words of the eighth amendment can be actively applied in today's judicial system. English thinkers such as Bacon, Locke and Hobbes were significant figures in the early stages of the Enlightenment, but their thought was developed and refined on the European continent before it influenced American political thought as expressed in the Constitution and the Bill of Rights. Of particular importance to a complete understanding of the eighth amendment prohibition against

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1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. 217 U.S. 349 (1910).

cruel and unusual punishments are the European philosophes—Voltaire, Montesquieu, and especially Beccaria. Beccaria's treatise *On Crimes and Punishments*,<sup>3</sup> together with the works on criminal law reform of these other great thinkers, provided the philosophical basis for the principle of proportionality of punishment. Since these works influenced American colonial leaders, the principle of proportionality must necessarily be reflected in the eighth amendment.

It is the purpose of this Comment to demonstrate the historical and constitutional force of Beccaria's pronouncements. His ideas and programs were not merely a guide for enlightened feudal monarchs and legislatures to follow in reforming the criminal laws; rather, the principles he propagated were of constitutional magnitude. His arguments found their way into the fabric of the eighth amendment. An analysis of the major Supreme Court decisions on that amendment and its historic and philosophical bases will be the subject of Parts I and II. This case analysis will demonstrate a split of authority. Some courts perceive the eighth amendment as forbidding only physical punishments, while others are willing to extend the concept of "cruel and unusual" penalties to punishments which are excessive in light of the nature of the offense. Only by analyzing the historic and philosophical preconceptions regarding the eighth amendment which underlie the *ratio decidendi* of the cases can the bifurcation of opinion be understood. Those courts which seek to interpret the eighth amendment merely in terms of the English political and intellectual experience invariably conclude that the amendment forbids only physical and, to a lesser degree, mental punishments. However, Part III of this Comment will demonstrate that those courts which see the concept of proportionality as inherent in the eighth amendment are also based on firm historical grounds. By examining the profound influence of the Italian jurist Cesare Beccaria and the French philosophes upon the revolutionary leaders who framed the Constitution and the Bill of Rights, it will be made manifest that *Weems v. United States* was correctly decided and that an increasing activism on the part of courts in enforcing the prohibition against excessive or disproportionate penalties is justified. A review of the recent state and federal court cases which have extended the reasoning in *Weems*, in

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3. C. BECCARIA, *ON CRIMES AND PUNISHMENTS* (W. Paolucci transl. 1963).

contrast to the present position of the Supreme Court, will be the subject of Part IV. The tension created by these conflicting trends cannot long remain unresolved.

If the reason for the Supreme Court's reticence is uncertainty as to the doctrinal correctness or historical basis of *Weems*, this Comment shall clearly minimize any such doubt. The historical justification for *Weems* proves that the Supreme Court decided *Weems* correctly and that any withdrawal from enforcing the constitutional standards enunciated in *Weems* is unsound. Rather, attorneys should challenge excessive prison sentences under the eighth amendment and the courts should strike down excessive sentences with a new certainty.

I. THE TRADITIONAL UNDERSTANDING OF THE EIGHTH AMENDMENT:  
"INHERENTLY CRUEL" MODES OF PUNISHMENT

One method of ascribing content to the eighth amendment's prohibition of cruel and unusual punishment has been to adopt a fixed historical approach which attempts to ascertain "the particular abuses that the framers of the Constitution had in mind to correct, [by looking to] those immemorial usages in England that were not rejected by the Colonies."<sup>4</sup> This retrospective process has led, on one extreme, to a rigid use of the English materials which allows only those penalties which were actually proscribed at the time of the adoption of the amendment to come within its protection.<sup>5</sup> However, the use of the English historical sources has been somewhat more flexible. Instead of limiting the eighth amendment protection to the actual penalties outlawed in 18th century England, the English historical content has been used to determine the category of punishment which had been contrary to English law prior to the American Revolution, and therefore, it is assumed, must have been the sole concern of the framers of the Bill of Rights to prohibit also. This somewhat broader use of historical purpose has consistently been employed by both legal writers and judges to demonstrate that the eighth

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4. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 339 (1957). The author deals with the general Supreme Court approach in giving content to the fourteenth amendment by the incorporation of specific guarantees of the Bill of Rights.

5. *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring).

amendment was intended by the framers to prohibit only barbaric and torturous methods of punishment.<sup>6</sup>

This narrowly drawn intent-based analysis has led “the Court as a whole, and sometimes individual justices . . . to suspect, if not invalid, and to inconsistent, if not incompatible, methods and explanations in applying the theory of the ‘intent of the framers’ to the interpretation of the Constitution.”<sup>7</sup> This orientation has elevated one strand of eighth amendment jurisprudence, the prohibition against tortures, to an unchallengeable and secure position with limited meaning in the 20th century. Concomitantly, a second strand, the excessiveness notion, has been virtually abandoned because of the Court’s failure to find a specific and particularized intent with which to support it.

### A. *English Sources*

The origin of the historical substance of the constitutional limitation embodied in the eighth amendment has sometimes been traced to the provisions of the Magna Carta,<sup>8</sup> the document which so often

6. *E.g.*, *Weems v. United States*, 217 U.S. 349, 390 (1910) (White, J., dissenting). Why the framers would be so concerned with something that had already fallen out of favor is a question not often asked. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1075 (1964).

7. C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 3 (1969). The author quotes Jacobus ten Broek, concluding that this is one of the Supreme Court’s “fundamental doctrinal fallacies.” *Id.* at 4.

8. *See, e.g.*, Note, 34 MINN. L. REV. 134 (1950); Note, 1960 WASH. U.L.Q. 160, 161. In *Trop v. Dulles*, 356 U.S. 86 (1957), Chief Justice Warren merely repeats the language in the above article. *Id.* at 100. He disregarded the content of the provision as it appears in the Magna Carta itself. That provision reads:

20. A free man shall not be fined for a small offence, except in the proportion to the measure of the offence; and for a great offence he shall be fined in proportion to the magnitude of the offence, saving his freehold; and a merchant in the same way, saving his merchandise; and the villain shall be fined in the same way, saving his wainage, if he shall be at our mercy; and none of the above fines shall be imposed except by the oaths of honest men of the neighborhood.

21. Earls and barons shall be fined only by their peers and only in proportion of their offence.

MAGNA CARTA, *quoted in SOURCES OF OUR LIBERTIES* 15 (R. Perry ed. 1959) [hereinafter cited as Perry].

The relatively scarce citations to the Magna Carta in works on the eighth amendment may have something to do with the language which seems to clearly convey the idea of a prohibition of excessive punishment in favor of punishment proportioned to the offense. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

has been credited as the source for all the principal doctrines of our personal liberties. However, it is the English Bill of Rights of 1689<sup>9</sup> which is said most often to be the origin of the phrase "cruel and unusual punishment,"<sup>10</sup> and the wording of the subsequent American Bill of Rights, thus, has been seen as a mere verbatim copy with, naturally, a coextensive meaning.<sup>11</sup> This obvious connection in language has provided the impetus for judges, who are always anxious to legitimate their opinions with ancient English precedent, to endeavor to discover just what the earlier document was intended to forbid. A conspicuous source from which to begin such a search is Blackstone's *Commentaries*,<sup>12</sup> in which the cruel and unusual punishment provision is said to have "a retrospect to some unprecedented proceedings in the Court of King's Bench in the reign of King James the Second."<sup>13</sup> Most historians interpret Blackstone as referring to the Bloody Assizes which followed the Monmouth Rebellion, the perjury trial of Titus Oates, the treason trial of Algernon Sidney, and the

9. "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." *Quoted in Perry, supra* note 8, at 247.

It is significant to note that a draft of a declaration presented to the English Commons, on February 2, 1689, by Sir George Treby, read as follows: "19. The requiring excessive bail of persons committed in criminal cases and imposing excessive fines, and *illegal* punishments to be prevented." 10 H.C. JOUR. 17 (1688-1689), *cited in Granucci, supra* note 8, at 854-55 (emphasis added). Similarly, a portion of the final draft of the English Bill, which was enacted into law in December of 1689, complains of "illegal and cruel punishments." For no apparent reason, however, clause 10 uses the seemingly more narrow phrase "cruel and unusual punishments." *Id.* at 855.

Granucci writes concerning this language:

Indeed, John Somers, reputed draftsman of the Bill of Rights, wrote later of the "horrible and illegal" punishments used during the Stuart regime. The final phraseology, especially the use of the word "unusual," must be laid simply to chance and sloppy draftsmanship. There is no evidence to connect the cruel and unusual punishments clause with the "Bloody Assize." On the contrary, everything points away from any connection.

*Id.* (emphasis added).

10. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846 (1961); Note, 1960 WASH. U.L.Q. 160.

11. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 19 (1962) [hereinafter cited as RUTLAND]; Note, 34 MINN. L. REV. 134, 135 (1950).

It should be mentioned that, in fact, the eighth amendment to the United States Constitution is not an exact copy of the English Bill of Rights. The American version substitutes the imperative "shall not" for the flaccid "ought not." This emphatic change in a tone must not be overlooked. 2 THE BILL OF RIGHTS 1008 (B. Schwartz ed. 1971) [hereinafter cited as Schwartz].

12. 4 W. BLACKSTONE, *COMMENTARIES*.

13. *Id.* \*448.

generally excessive and arbitrary power wielded by both Chief Justice Jeffreys and King James II which culminated in the Revolution of 1688.<sup>14</sup> The protection of personal rights which was produced by the reaction to such abuses has prompted some writers to suggest that the amendment clearly proscribed those tortures used during the late years of the Stuart Monarchy.<sup>15</sup>

### B. *The Supreme Court*

Whether the colonists merely went beyond their ancestors in drafting their laws,<sup>16</sup> whether they actually intended to give the phrase a far different meaning than that which was intended by its English counterpart,<sup>17</sup> or whether the American framers misunderstood the thrust of the English provision,<sup>18</sup> the Supreme Court has continuously used the search for the English origins of the eighth amendment as the focal point and structuring concept for all its decisions interpreting that amendment. Although it is difficult to define with precision the extent of the eighth amendment protection, "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty are forbidden."<sup>19</sup> Thus, not only would the amendment forbid inhuman and torturous punishment, but it would also prohibit other forms or modes of punishment which were marked by inherent cruelty.<sup>20</sup> Therefore, in an early decision on the question, the Supreme Court expressed the belief that legislatures possessed the authority to prescribe the mode of execution for a prisoner even

14. I. BRANT, *THE BILL OF RIGHTS* 147-65 (1915).

15. 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1896 (1970); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 847 (1961). However, this narrow interpretation is historically incorrect for Blackstone clearly catalogues cruel punishments including disembowelling alive, burning, whipping, or some degree of corporal pain. 4 W. BLACKSTONE, *COMMENTARIES* \*376. None had ceased in 1689, but were finally abolished by statute in the 19th century. If such evidence can be taken to weaken the causal connection between the prohibition of solely physical torture and those penalties which were prohibited by the English Bill of Rights, content to the eighth amendment can still be supplied with reference to the English historical materials as they could not have been ignored by the former Englishmen who framed the provision.

16. See, e.g., RUTLAND, *supra* note 11, at 22.

17. See *Furman v. Georgia*, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting).

18. See Granucci, *supra* note 8, at 860.

19. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878).

20. Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 997 (1964).



if the method was not often resorted to at common law.<sup>21</sup> This minimum content of the provision was recognized in *In re Kemmler*<sup>22</sup> where the English Declaration of Rights was used to circumscribe the coverage of the eighth amendment. Thus, any penalty would be unconstitutionally cruel if it involved "torture or a lingering death,"<sup>23</sup> that is, "something inhuman and barbarous, something more than the mere extinguishment of life."<sup>24</sup> Again, it is the mode of punishment, here electrocution, which is challenged, and which the Court felt may be legitimately reviewed.

In *Louisiana ex rel. Francis v. Resweber*<sup>25</sup> the Court was presented with a distasteful factual situation. Willie Francis, who had been convicted for murder and sentenced to death, managed to survive the state's attempted electrocution presumably due to a mechanical failure. When a second death warrant was issued, Francis appealed on the ground that such a second execution would be unconstitutionally cruel. Mr. Justice Reed, in stating the opinion of the Court, rejected Francis' contention. He pointed to the "traditional humanity of modern Anglo-American law [which] forbids the infliction of unnecessary pain in the execution of the death sentence."<sup>26</sup> That "prohibition against the wanton infliction of pain,"<sup>27</sup> he derived from the English Bill of Rights of 1689. "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."<sup>28</sup> Mr. Justice Reed then proceeded to distinguish two categories of cruel punishment on the basis of the purpose or intention of the punisher in inflicting physical pain.<sup>29</sup> However, since there was no intent to impose unnecessary pain, the Court had little difficulty in deciding this case. The standard for judg-

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21. *Wilkerson v. Utah*, 99 U.S. 130 (1878). Although English practice usually consisted of hanging a convicted murderer by the neck until death, the Utah statute permitted the imposition of capital punishment by the public shooting of the offender. The Court easily dismissed the eighth amendment challenge by finding that the method of shooting did not fall within the categories of torturous punishments forbidden under the amendment. *Id.* at 135.

22. 136 U.S. 436 (1890).

23. *Id.* at 447.

24. *Id.*

25. 329 U.S. 459 (1947).

26. *Id.* at 463.

27. *Id.*

28. *Id.* at 464.

29. See also Note, *supra* note 20, at 1001-02 n.29.

ing the constitutionality of a particular punishment remained the examination of the mode of its infliction. It can be seen, therefore, that the Court, at a minimum, has wholeheartedly accepted the history of the cruel and unusual punishment provision as a protection against barbarous modes of punishment.

One of the rare instances in which the Supreme Court declared a law cruel and unusual was in *Trop v. Dulles*<sup>30</sup> where the penalty of denationalization for wartime desertion was struck down. Although the rationale for the decision is unclear, Chief Justice Warren, writing for the majority, expressly rejected the argument that denationalization could be considered excessive in relation to the nature of the crime since such a crime is punishable by death.<sup>31</sup> Therefore, "the question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the eighth amendment."<sup>32</sup> The Court was clearly concerned only with the nature or mode of the punishment and not with the amount,<sup>33</sup> and it looked to the basic policy embodied in the English Declaration of Rights for a standard of comparison by which to measure this punishment. The Court found the measuring concept which arose from the English tradition to be the "dignity of man."<sup>34</sup>

While seeming to broaden the concept of cruelty to those punishments which are "motivated by a purpose inconsistent with the recognition of the humanity of the criminal,"<sup>35</sup> Chief Justice Warren in fact contributed significantly to the preservation of the existing judicial concern with fixed standards when he stated: "Fines, imprisonment, and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."<sup>36</sup> Yet, later in the same

30. 356 U.S. 86 (1958).

31. *Id.* at 99.

32. *Id.*

33. Wheeler, *supra* note 10, at 841.

The Chief Justice's argument is . . . that as a punishment denationalization, like torture, is inherently cruel . . . For the Chief Justice, then, the cruelty of denationalization arises from the nature of its impact upon the punished individual and not from any disproportion between the punishment and the crime. Denationalization is cruel per se: like torture, it may not be imposed as a punishment for any crime, no matter how serious.

Note, *supra* note 20, at 998-99.

34. 356 U.S. at 100.

35. See Note, *supra* note 20, at 1002.

36. 356 U.S. at 100.

paragraph, Warren suggested that the customary inhuman and barbarous test of constitutionality might finally become broader and more flexible: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>37</sup> The vagueness and uncertainty of such a standard as compared with the torture analysis, coupled with the inherent inconsistency and lack of clarity of the decision itself, has reduced the potential impact of *Trop*.

In its search for purposeful standards to give meaning to the eighth amendment, the Supreme Court has usually employed the method of legal historical analysis as its key tool in the process of constitutional interpretation.<sup>38</sup> In pursuing this methodology we have seen the Court examine what it believes to be the historical reasons which led to the constitutional restraint embodied in the cruel and unusual punishment provision. A commentator has observed that the Court determined early on that the problem which concerned the framers of the eighth amendment and to which its provisions still seem most relevant is the problem of the mode of punishment.<sup>39</sup> The Court has come to this conclusion through a reliance on English historical sources.<sup>40</sup> Through repetition in successive decisions this conclusion has attained the stature of settled constitutional doctrine. While the Court's methodology is valid, its conclusions are sometimes incorrect. Errors are the inevitable result of the use of incomplete historical sources. More specifically, the Court has relied on English history while slighting the importance of the Enlightenment which swept Europe and influenced the political ideology of the framers. Consequently, the Court has limited itself to making analogies only to

37. *Id.* at 101.

38. Kadish, *supra* note 4, at 322.

39. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1081 (1964).

40. This conclusion has been successfully attacked: The American framers and the dissenters in *Weems* believed that they were being faithful to the interpretation of the English Puritans who had first drafted the cruel and unusual punishments clause in 1689. However, a fresh look at the history of punishment in England, and especially the framing of the English Bill of Rights of 1689, indicates that the framers themselves seriously misinterpreted English law. Not only had Great Britain developed, prior to 1689, a general policy against excessiveness in punishments, but it did not prohibit "barbarous" punishments that were proportionate to an offense.

Granucci, *supra* note 8, at 843-44 (citations omitted).

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punishments practiced in 17th century England, while a much broader analogical basis would be possible within the established historical methodological model. Incorporating these Enlightenment doctrines into the historical method of reasoning would insure that the eighth amendment becomes the viable protection it was meant to be, rather than an historical curiosity with limited contemporary impact.

### II. WEEMS V. UNITED STATES AND THE EXCESSIVE PUNISHMENT DOCTRINE

#### A. *The Field Dissent in O'Neil v. Vermont*<sup>41</sup>

The judicial hesitancy that is engendered by the Court's rigid adherence to historical particularism<sup>42</sup> has continued to manifest itself in the relative scarcity of Supreme Court decisions dealing with the eighth amendment. As the use of physical torture began to fade in favor of long, but allegedly more humane, imprisonment, defendants began urging alternate grounds on which to invoke the eighth amendment's protection.

The issue of cumulative penalties was raised in *O'Neil v. Vermont*<sup>43</sup> where the defendant, a New York liquor retailer, was found guilty of 307 separate offenses of illegal sale in Vermont, a dry state, and was sentenced to prison for a term of 54 years.<sup>44</sup> The majority of the Supreme Court did not even reach the question of the cruelty of the penalty, holding that a federal question had not been assigned as error or even suggested in O'Neil's brief. In any event, the Court stated that it had always been determined that the eighth amendment did not apply to the states. Although the English origins are nowhere mentioned in the decision, their continued force is implicit in the petitioner's failure to claim that a lengthy term of imprisonment can itself be qualitatively or inherently cruel in much the same way as torture.<sup>45</sup>

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41. 144 U.S. 323, 337 (1892).

42. The term historical particularism is used herein to refer to the tendency of the courts to single out individual acts or objections as the focal point for analysis, rather than attempting to uncover the broader conceptions and principles that underlie a constitutional provision.

43. 144 U.S. 323 (1892).

44. The sentence at trial was a fine of \$20.00 for each offense plus court costs which had to be paid on a certain date. If the defendant could not afford to pay, he would be committed to jail for three days for each dollar owed.

45. See generally Note, *supra* note 20, at 1004.

Mr. Justice Field, in a dissenting opinion which suggested a broader interpretation of the punishments included under the eighth amendment, used traditional historical sources to support an argument that both the character and quantity (or degree) of punishment can make excessive terms of imprisonment susceptible to the "cruel and unusual" prohibition. He relied on the *language* of the eighth amendment itself and noted:

The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition [of the eighth amendment] is against that which is *excessive* either in bail required, or fine imposed, or punishment inflicted.<sup>46</sup>

Justice Field did not rest his argument solely on the eighth amendment. He correctly invoked the fifth amendment<sup>47</sup> which limits the government's ability to infame<sup>48</sup> private citizens and clearly recognized the interrelationships that pertain among the amendments that comprise the Bill of Rights.<sup>49</sup> He did not intend to let the indi-

46. 144 U.S. at 339-40 (Field, J., dissenting) (emphasis added).

47. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. CONST. amend. V.

48. See *Ullmann v. United States*, 350 U.S. 422 (1956), where Justice Douglas writes of infamy:

The curse of infamy . . . results from public opinion. Oppression occurs when infamy is imposed on the citizen by the State. The French jurist, Brissot de Warville, wrote in support of Beccaria's position, "It is in the power of the mores rather than in the hands of the legislator that this terrible weapon of infamy rests, this type of civil excommunication, which deprives the victim of all consideration, . . . which isolates him in the midst of society. The purer and more untouched the customs are, the greater the force of infamy." *I Theorie des Loix Criminelles* (1781) 188. As de Pastoret said, "Infamy, being a result of opinion, exists independently of the legislator; but he can employ it adroitly to make of it a salutary punishment." *Des Loix Penales* (1790), Pt. 2, 121.

*Id.* at 452-53 (footnotes omitted).

49. For a discussion of these interrelationships, see Franklin, *Contribution to an Explication of the Activity of the Warren Majority of the Supreme Court*, 24 *BUFFALO L. REV.* 487 (1975).

However, Article 1.1.22.1,3 of the Mexican constitution, indicates not only the deterring force of the fifth amendment, but perfects it by uniting to it what is contained in the eighth amendment of the American text. The Mexican text says that

[p]unishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property and any other unusual or extreme penalties are prohibited.

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vidual amendments or clauses within an amendment be limited or made impotent by viewing them in splendid isolation. As Justice Field stated, "the cruelty of it, in this case, by the imprisonment at hard labor, is further increased by the offenses being thus made *infamous crimes*."<sup>50</sup>

### B. *Weems v. United States*<sup>51</sup>

The position that the eighth amendment is directed against not only those punishments which include physical pain, but also those which by their aggregate weight are out of proportion to the offenses committed,<sup>52</sup> has not often gained acceptance.<sup>53</sup> The first Supreme Court case to declare a law cruel and unusual within the meaning of the amendment, and the case which forbids punishments which are in some sense excessive in relation to the offense, is the *Weems* decision.<sup>54</sup>

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Capital punishment for political offenses is likewise prohibited. . . .

*Id.* at 534. See also Franklin, *The Ninth Amendment as Civil Law Method and its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 TUL. L. REV. 487 (1966).

50. 144 U.S. at 340 (emphasis added). Field continued: "[T]he selling of the liquors in New York during three years, upon three hundred and seven distinct orders from Vermont, that is, one in every three or four days, to be paid for on delivery in the latter State, are declared by the punishment inflicted three hundred and seven infamous crimes." *Id.* at 341. While the importance of Justice Field's dissent for the proposition that punishment may be excessive in relation to the offense has been noted by every commentator dealing with the eighth amendment, nowhere amongst them is the substance of his argument (i.e. linking the fifth and eighth amendments) dealt with. See, e.g., Turkington, *Unconstitutionally Excessive Punishment: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145, 146 (1967); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 853 (1961); Note, 1960 WASH. U.L.Q. 160, 165.

51. 217 U.S. 349 (1910).

52. 144 U.S. at 340.

53. *McWilliams v. United States*, 394 F.2d 41 (8th Cir. 1968); *Black v. United States*, 269 F.2d 38 (9th Cir. 1959); *Alberty v. United States*, 91 F.2d 461 (9th Cir. 1937); *Scala v. United States*, 54 F.2d 608 (7th Cir. 1931), *cert. denied*, 285 U.S. 554 (1932). All these decisions held that as long as the sentence for a single count was within reasonable statutory limits, the cumulative effect would not bring the total sentence within the proscription of the eighth amendment.

54. Packer, *supra* note 6, at 1075, argues that the *Weems* decision deals with the mode rather than the proportion of punishment. While the language of the case speaks in terms of excessive severity, the factual situation deals with a penalty involving chains and complete loss of civil and political rights. Such a punishment can also call forth modern humane outrage analogous to that which arose over torture in previous times.

The defendant was convicted in a Philippine court for falsifying public records. For this offense, Weems was sentenced to a minimum of 12 years in chains at hard and painful labor, a fine, plus certain additional penalties including denial of all assistance from outside the prison, denial of all civil rights while in prison, permanent denial of all political rights, and subjection to official surveillance for the rest of his life. Mr. Justice McKenna, writing for a majority of the court, reversed.<sup>55</sup> He stated that

it is 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.<sup>56</sup>

This language demonstrates that it was the combination of an excessive but conventional mode of punishment as well as its obvious severity which made the punishment void. However, Justice White, in his dissent, characterized the opinion as striking down solely disproportionate penalties. It is this interpretation which has for the most part been adopted in subsequent scholarship<sup>57</sup> and in state and lower federal court opinions.<sup>58</sup>

The Supreme Court decided the *Weems* case under the applicable provision of the Philippine Bill of Rights which was determined to have the same meaning as the eighth amendment of the United States Constitution.<sup>59</sup> The Court, therefore, looked to its traditional English sources to find a rationale for the decision. Realizing that the customary use of the English materials would provide little or no support for a proportionality argument, Mr. Justice McKenna barely mentioned the historical connection which had previously provided the fundamental ground for every decision under the eighth amendment.<sup>60</sup>

55. The majority of the Court concurring in the decision consisted of four Justices, McKenna, the Chief Justice, Harlan and Day, while the minority was made up of two, White and Holmes. The case had been argued before seven Justices but one died before the opinion was delivered. The question remains as to whether the Court's later reluctance to rely on the *Weems* decision is attributable to the fact that *Weems* was only a plurality opinion.

56. 217 U.S. at 377.

57. Turkington, *supra* note 50, at 147. *But see* Packer, *supra* note 6, at 1075.

58. *See* text accompanying notes 229-53 *infra*.

59. 217 U.S. at 367.

60. *Id.* at 368. One commentator on the English origins of the phrase cruel and unusual punishment has pointed out that the American framers misinterpreted the intent of the English Bill of Rights which was meant to prohibit excessive punishments and punishments disproportionate to the offense, but not "barbarous punishments that

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Avoiding the implications of *Wilkerson* and *In re Kemmler* for the torture analysis, the Court pointed to the dissent of Mr. Justice Field in *O'Neil v. Vermont* which provided the only case law precedent for the approach taken in this decision. This dissent has been called "the first explicit statement in a Supreme Court case that the eighth amendment forbids . . . punishments . . . excessive in relation to the crime."<sup>61</sup> Having only one previous dissent on which to rely for validation of the proportionality analysis, Justice McKenna examined the debates at the Virginia and Pennsylvania Constitutional Conventions. He found a paucity of historical evidence too weak to actually support or refute either position as to what the eighth amendment was intended to prevent. Faced with the void left by the lack of historical guidance, Justice McKenna began to look for the underlying principles of the provision apart from the well-settled precedent. Employing such methodology, Justice McKenna refused to cast his arguments in a narrow and particularistic form. He abruptly and convincingly dismissed the idea that the Stuart abuses, which were assumedly a concern of the framers, established the entire content of the eighth amendment.<sup>62</sup> Instead Justice McKenna focused his analysis on the more basic preoccupation of the framers: "Their predominant political impulse was *distrust of power*, and they insisted on constitutional limitations against its abuse."<sup>63</sup>

Within this framework, then, Justice McKenna found the central concept or "motive" behind the eighth amendment's prohibition to be an attempt to protect the citizens from the possibility of a "coercive cruelty" being exercised by governmental authority. He explained his notion of "coercive cruelty" saying that "there was more to be considered than the ordinary criminal laws. Cruelty might

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were proportionate to the offense." Such an interpretation gives rise to a dilemma as to whose intention should actually govern the Supreme Court's explication of the eighth amendment: the intention of the English framers or the misinterpretation of the American framers. Granucci, *supra* note 8.

61. Note, *supra* note 20, at 1004.

62. 217 U.S. at 372.

But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.

*Id.*

63. *Id.* (emphasis added).



become an instrument of tyranny, of zeal for a purpose, either honest or sinister."<sup>64</sup> Thus, the crux of the Court's position can be stated as a condemnation of state terrorism expressed through the threat of excessive terms of imprisonment.<sup>65</sup>

64. *Id.* at 373.

65. In this regard, Justice McKenna writes: "With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power?" *Id.* at 372-73. As the Court had noted in *Wilkerson v. Utah*, at times "other circumstances of terror, pain, or disgrace were sometimes superadded." 99 U.S. at 135 (emphasis added). Similarly, the Court in *Trop v. Dulles* stated: "This punishment [denationalization] is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever increasing fear and distress." 356 U.S. at 102 (emphasis added). This aspect of the eighth amendment that prohibits disproportionate sentences, it must then be noted, is only a portion of the more general constitutional limits imposed upon state or legal terrorism. This more basic restraint upon government is reflected in the fifth amendment. For example: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor shall any person be subject for the same offense to be twice in jeopardy of life or limb . . ." U.S. CONST. amend. V. The grand jury and the petit jury, as provided in the sixth amendment of the Constitution, were utilized to preserve for the people a means whereby to veto or modify the actions of government that might infame or lead to the imposition of criminal sanctions. Moreover, the double jeopardy provision is significant also in this regard. It prevents the state from subjecting the accused to continuous prosecution as a result of one transaction, and thereby condemning him to suffer endless punishment—fear, terror, and infamy.

Discussing punishment and cruelty in the prisons—the excessive utilization of solitary confinement—Circuit Judge Feinberg has stated:

In this Orwellian age, punishment that endangers sanity, no less than physical injury by the strap, is prohibited by the Constitution. Indeed we have learned to our sorrow in the last few decades that true inhumanity seeks to destroy the psyche rather than merely the body. . . . The possibility of endless solitary confinement is still there, unless the prisoner "gives in." The same observation could be made if Sostre were tortured until he so agreed, but no one would argue that torture is therefore permitted. The point is that the means used to exact submission must be constitutionally acceptable, and the threat of virtually endless isolation that endangers sanity is not.

[I] would hold that the punishment here, "which could only serve to destroy completely the spirit and undermine the sanity of the prisoner," runs afoul of the eighth amendment.

Sostre v. McGinnis, 442 F.2d 173, 208-09 (2d Cir. 1971) (dissenting opinion) (emphasis added).

Moreover, it should be noted that indeterminate prison sentences ought to be subject to an analogous attack. Otherwise, legislatures, by imposing one year to life indeterminate sentences for some or all offenses, could conceivably subvert effective review under the eighth amendment since the precise penalty that attached to a particular offense or offender would never be known until after the sentence was served. The imposition of a wide-open indeterminate sentence then should be amenable to an attack on its face due to the real threat of endless imprisonment and its deleterious effect on sanity or, at a minimum, after some time had been served.

The intention is to limit the imposition of state terrorism, as well as the overt

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A critical factor in the resulting desuetude of the *Weems* decision has been the method by which Mr. Justice McKenna sought to give content to the concept of excessive punishment. The Court attempted to employ a comparative standard to determine if the provision under attack was disproportionate to the crime as measured against similar offenses under American federal criminal laws and later Philippine legislation.<sup>66</sup> McKenna decided that the difference in the prescribed punishments was so dramatic as to be more than an exercise of legislative discretion; it was, instead, sufficiently aberrational to condemn the sentence that *Weems* received. The theoretical importance of this comparative analysis has remained only a latent force in eighth amendment adjudication at the Supreme Court level because six years after *Weems*, in *Badders v. United States*,<sup>67</sup> Justice Holmes, who had joined in the *Weems* dissent, implicitly rejected the comparative method as a means of implementing the proportionality protection. In *Badders* the defendant argued that his sentence of 5 years imprisonment for each of five counts of mail fraud (i.e., 25 years in total), one for each letter illegally deposited with the post office, was cruel and unusual punishment because each deposit was considered a separate offense. The Court through Mr. Justice Holmes held that the punishment did not violate the eighth amendment and cited an earlier decision, *Howard v. Fleming*,<sup>68</sup> where the Court stated “[t]hat for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel.”<sup>69</sup> Thus, while the *Weems* principle has not been specifically overruled, Holmes succeeded in circumventing the proportionality requirement by insuring that the comparative means of implementation would be forestalled.

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or concealed threat of the same. Naturally, legitimate and orderly protest can be suppressed by the threat of overwhelming sanctions; the willingness to accept a justified punishment for presenting a grievance or staging a protest may not extend to the extreme of self-annihilation through subjecting the self to an indeterminate sentence of 1-50 years for a minor infraction of the social order. It might also be meaningful to ask whether any analogies exist with the “chilling effect” doctrine which proscribes *in terrorem* legislation under the first amendment. See generally Franklin, *supra* note 49, at 499-511, 525-30.

66. 217 U.S. at 380-81.

67. 240 U.S. 391 (1916).

68. 191 U.S. 126 (1903).

69. *Id.* at 135-36.

C. *The "Cruel and Unusual Punishments" Clause in the Supreme Court After Weems*

The Supreme Court has declared a law cruel and unusual punishment only three times since *Weems*. Each time the Court has failed to deal with the implications of the proportionality principle for constitutional adjudication.<sup>70</sup> Not only have expectations as to the delineation of a method by which to employ the *Weems* doctrine been unfulfilled, but the complete lack of use of the decision may lead one to conclude that the Court itself doubts the continuing constitutional validity of the decision. An examination of the cases decided after *Weems* may throw some light on what remains of the excessive punishment principle in the United States Supreme Court.

The most important decision in terms of the *Weems* principle is *Robinson v. California*,<sup>71</sup> where the defendant was convicted under a statute which made it a crime to be "addicted to the use of narcotics."<sup>72</sup> The trial judge had instructed the jury that the defendant could be convicted if he had the status of a drug addict whether or not he had actually used narcotics while in Los Angeles. The statute was construed to be in violation of the eighth and fourteenth amendments because the criminal punishment of an individual for an illness "would doubtless be universally thought to be an infliction of

70. *Furman v. Georgia*, 408 U.S. 238 (1972); *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958).

71. 370 U.S. 660 (1962). The closest important case in time to *Weems* was *Trop v. Dulles*, which has been discussed previously as basically a mode case proceeding under the standard of the dignity of man in light of the evolving standards of decency of a mature society. See text accompanying notes 30-37 *supra*. *Trop* can hardly be considered under the excessiveness rubric as Warren, in the majority decision, points out that the death penalty would not be considered cruel, and as Frankfurter points out in his dissent, denaturalization can hardly be more severe than death. *Turkington*, *supra* note 50, at 153.

72. CAL. HEALTH & SAFETY CODE § 11721 (West 1964) provided:

No person shall use, or be under the influence of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.

cruel and unusual punishment.”<sup>73</sup> In support of this premise, Mr. Justice Stewart cited *Louisiana ex rel. Francis v. Resweber*,<sup>74</sup> a precedent clearly in the mode tradition and concerned only with the avoidance of “unnecessary pain” in the implementation of a statutory punishment. The citation can only confuse the reader as to what evil the court actually intended to reach. The majority did not say, as has been suggested, “that to punish sick people by imprisonment, instead of trying to cure them by compulsory treatment, is an act of inhumanity against the afflicted person prohibited by the eighth amendment.”<sup>75</sup> Rather, the opinion explicitly recognized that penal sanctions may be used against a person who is an addict as long as the purpose is the more benevolent one of treatment and not solely punishment. Such analysis is supported by the Court’s use of the *Francis* case which did focus upon the motives of the punishers.<sup>76</sup> However, the purposive distinction is then obliterated by the Court’s contradictory statement that “even one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold.”<sup>77</sup> This language seems to present a blanket proposition that any punishment unmindful of the intention of the punishers would be cruel and unusual where an illness is concerned.<sup>78</sup> Because neither imprisonment itself, nor one day’s confinement for an act which is actually a crime, has ever been considered inherently cruel, one commentator has argued that

*Robinson v. California* may have established in the eighth amendment a basis for invalidating legislation that is thought inappropriately to invoke the criminal sanction, despite an entire lack of precedent for the idea that a punishment may be deemed cruel not because of its mode or even its proportion but because the conduct for which it is imposed should not be subject to criminal sanction.<sup>79</sup>

Mr. Justice Douglas, in his concurring opinion, also placed em-

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73. 370 U.S. at 666. (This is the first time the eighth amendment has been explicitly applied to the states.)

74. See text accompanying notes 25-29 *supra*.

75. Note, *supra* note 20, at 1009-10.

76. See text accompanying note 29 *supra*.

77. 370 U.S. at 667.

78. *Contra*, Note, *supra* note 20. The author finds inherent in this quoted passage the idea of an excessive punishment in relation to the crime and, thus, views *Robinson* as the progeny of the *Weems* decision. *Id.* at 1010. *But see* *Turkington*, *supra* note 50, at 154.

79. Packer, *supra* note 6, at 1071.

phasis on the state's power to determine what is criminal<sup>80</sup> rather than on the cruelty of the punishment as compared to the crime of addiction.<sup>81</sup> While he noted that both the mode of punishment and the proportion of the punishment to the offense<sup>82</sup> may bring a sanction within the ambit of the eighth amendment, Douglas concentrated on drawing a comparison between the historic treatment of insanity within a criminal context and the punishment of addiction by imprisonment so as to indicate that a civilized approach to illness can no longer allow such barbarous action. Thus, it was the categorization of an illness as a crime which was not permissible, not merely the means chosen of punishing it.

It is questionable whether *Robinson* really presented an eighth amendment issue. One commentator has argued that by resting its decision on the cruel punishment provision, the Court was avoiding the more difficult question of limiting police power<sup>83</sup> in an area (narcotics control) where the states have traditionally wielded wide regulatory authority. It has also been noted that in this regulatory sphere it is impossible for the Court to make a blanket requirement of *mens rea* in the categorization of certain activities as crimes.<sup>84</sup> In addition, the application of the eighth amendment to the nature of the conduct made criminal, instead of the method or kind of punishment, represented a unique use of the amendment's protection. It was so novel, in fact, that one Justice thought "the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than its own notions of ordered Liberty."<sup>85</sup> It may be that the doctrinal uncertainty that emerged out of *Robinson* and obscured the precise eighth amendment standard utilized by the Court is due to the lack of an accepted historical justification for its action. This would explain the Court's failure to implement and extend the principles, especially the excessive punishment doctrine, it has found within the notion of the eighth amendment.<sup>86</sup>

80. Turkington, *supra* note 50, at 154.

81. 370 U.S. at 676.

82. Interestingly, he cited *O'Neil v. Vermont* for the proportionality concept and not *Weems*.

83. Turkington, *supra* note 50, at 156.

84. See *United States v. Balint*, 258 U.S. 250 (1922).

85. 370 U.S. at 689 (White, J., dissenting).

86. The ambiguity as to the legitimacy of *Robinson* under the mode of proportionality limitation of punishment, may have been the reason for the court's failure to extend *Robinson* in *Powell v. Texas*, 392 U.S. 514 (1968).

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While *Robinson* gives little hope that the proportionality principle of *Weems* will finally become accepted constitutional doctrine, there has been some indication that vestiges of the excessive punishment doctrine still remain. One of the rare instances where the issue surfaced was in *Rudolph v. Alabama*<sup>87</sup> in which three Justices dissented from a denial of certiorari to a petitioner who argued that sentencing him to death for rape was unconstitutionally excessive. Justices Goldberg, Douglas, and Brennan felt that this case presented the Court with the opportunity to decide whether it would take an active role in determining the appropriate relation between the crime and the punishment. They phrased the issues presented in three questions:

1. In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate "evolving standards of decency that mark the progress of [our] maturing society," or "standards of decency more or less universally accepted"?
2. Is the taking of life to protect a value other than human life consistent with the constitutional proscription against "punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged"?
3. Can the permissible aims of punishment (e.g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (e.g., by life imprisonment); if so, does the imposition of the death penalty for rape constitute "unnecessary cruelty"?<sup>88</sup>

It is unclear whether these questions were intended to raise the issue presented by *Weems*<sup>89</sup> or whether they are essentially more readily comparable to the substantive due process issue of the rationality of the means chosen by the legislature.<sup>90</sup> However, the fact that only three Justices on the Supreme Court would even attempt to grapple with the question of excessive punishment, further weakens the viability of the *Weems* doctrine.

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87. 375 U.S. 889 (1963).

88. *Id.* at 889-91 (footnotes omitted).

89. The issues presented by *Weems* included the comparative approach here presented by question one in *Rudolph*, and the issue of the Supreme Court's power to interfere with legislatively proscribed punishments, here represented by questions two and three of *Rudolph*.

90. See Packer, *supra* note 6, at 1074.

In *Furman v. Georgia*,<sup>91</sup> the Supreme Court was presented once again with the opportunity to evaluate and explicate the present scope of the eighth amendment within the context of the important question of the constitutionality of capital punishment. Instead of meeting the challenge of deciding what constitutional limitations could be imposed upon the legislature's power to select penal sanctions, the Court, on the whole, retreated, and succeeded in further obfuscating the import of the eighth amendment guarantee. The majority of the Court failed to deal with the constitutionality of capital punishment in terms of the eighth amendment. Three Justices relied on the arbitrariness of the way the punishment was applied, one other majority Justice on a combination of the notions of arbitrariness and the excessive severity of the method of punishment, and another on the grounds that such punishment is simply excessive and unnecessary with arbitrariness as supporting evidence of society's rejection of the punishment. This sidestepping was particularly unfortunate since the factual situation of the case presented a unique opportunity for employment of the *Weems* principle of an inherent proportion between the crime and the punishment. While one petition in *Furman* involved a murder situation where the proportionality argument is obviously more difficult to make,<sup>92</sup> the two other petitions involved convictions for rape. Thus, the latter two factual situations could have been separated by the majority and decided under the proportionality standards. However, none of the Justices dealt with this problem, finding instead that the arbitrariness of the application of the penalty<sup>93</sup> constituted a denial of due process of law. As each Justice submitted a separate opinion, it may be helpful to look briefly at each one.

Mr. Justice Douglas employed a test based on an equal protection component which he found implicit in the cruel and unusual punishment clause.<sup>94</sup> This analysis allowed him to look at the capital punishment laws not merely as they were written but as they were applied. In their application, he found that they were arbitrary and

91. 408 U.S. 238 (1972).

92. The *Lex Talionis*, an eye for an eye idea which originally manifested the idea of proportionality, would seem to suggest that state murder is justified where the individual has committed murder.

93. See generally C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974).

94. 408 U.S. at 249.

discriminatory because of both standardless sentencing procedures, upheld in *McGautha v. California*,<sup>95</sup> and the relative rarity with which the penalty was used. Mr. Justice Stewart also found arbitrariness the primary characteristic of the prevailing system of capital punishment, stating three reasons: (1) the "select handful upon whom the sentence of death has in fact been imposed,"<sup>96</sup> (2) the relative rarity of its imposition, and (3) the fact that its mode is excessive "not in degree but in kind."<sup>97</sup> Mr. Justice White saw the arbitrariness of the punishment in the fact that it was unnecessary in terms of achieving any social or public purpose.<sup>98</sup> Only two Justices, Brennan and Marshall, attempted to employ any variation of the proportionality concept, but they too tended to mix this concern with elements of the traditional use of the eighth amendment.<sup>99</sup> That is, they were really concerned with the mode of punishment, the death penalty as an impermissible penalty, involving inherent pain and suffering, in much the same category as the unconstitutional tortures. However, the measuring concept has become the more sophisticated standard of public abhorrence<sup>100</sup> or comporting with human dignity<sup>101</sup> instead of physical abuse. Thus, the majority merely purported to decide the death penalty issue under the eighth amendment. In actuality, three Justices used the due process standard of arbitrariness and looked to the procedural aspect of how the capital punishment system was administered rather than to the substantive due process protection against the imposition of the sentence itself. Two other majority Justices found

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95. 402 U.S. 183 (1971).

96. 408 U.S. 309-10.

97. *Id.*

98. *Id.* at 312.

99. In his concurring opinion in *Furman*, Marshall wrote that "[p]unishment as retribution has been condemned by scholars for centuries,<sup>85</sup> and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance." *Id.* at 343. In footnote 85, Marshall then cited Beccaria's *On Crimes and Punishments* as representative of such scholarship.

100. 408 U.S. at 332. It has been pointed out by one commentator that the test of popular abhorrence is in essence a proportionality test.

The strongest evidence that a punishment [is disproportionate to a crime] is evidence of public antipathy for the punishment in general or for its application to a particular crime. . . . If juries were regularly refusing to convict men of a particular crime when cognizant of the statutory punishment, it would be absurd to contend that the punishment is proportional to the crime.

Wheeler, *supra* note 10, at 850.

101. 408 U.S. at 271. For a fuller discussion of the opinions of Brennan and Marshall, see Wheeler, *Toward a Theory of Limited Punishment II*, 25 STAN. L. REV. 62 (1972).



a connection—provided in some sense by the *Weems* idea of excessive penalties—between the sanction and the way it was applied. The minority, on the other hand, employed the comparative sentence approach and found the death penalty constitutional in the traditional sense.

The meaning of the *Weems* doctrine in Supreme Court adjudication is obviously uncertain. Any hope that the *Robinson* decision would revitalize the excessive punishment principle was effectively dispelled by *Powell v. Texas*<sup>102</sup> which reiterated the Court's concern with the distinction between a status and an act rather than between an act and a punishment which is the basis of the proportionality idea. Any other remnants of *Weems* were further weakened by *Furman* where the opportunity to use it was ignored by all except two Justices, and even they commingled it with traditional elements of eighth amendment interpretation. Perhaps an account of the intellectual origins of the "cruel and unusual punishments" clause can serve as the means for clarifying the import of the *Weems* doctrine in future adjudication.

### III. THE INFLUENCE OF BECCARIA AND THE ENLIGHTENMENT ON THE EIGHTH AMENDMENT

In order to establish the historical basis upon which rests the constitutional principle that punishment for crime should be to some extent graduated and proportioned to the offense, it is necessary to inquire into the reasons which led to the constitutional restraints embodied in the Bill of Rights in general, and the eighth amendment in particular. While it is generally accepted that the American Revolution was in origin a protest against English oppression,<sup>103</sup> the Bill of Rights has a much broader scope; it is in essence "a criticism of general feudal arbitrariness."<sup>104</sup> The political and social ideas of the European Enlightenment, together with early American political experience, formed the underlying rationale for the Bill of Rights—the protection of the private realm against governmental power.<sup>105</sup> It is, therefore,

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102. 392 U.S. 514 (1968).

103. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 248 (1973).

104. Franklin, *The Encyclopédiste Origin and Meaning of the Fifth Amendment*, 15 LAW. GUILD REV. 41 (1955).

105. *Accord*, H. ARENDT, ON REVOLUTION 256 (1956).

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necessary to examine the writings of certain Enlightenment figures which were received by Jefferson and other colonial leaders<sup>106</sup> and incorporated in the early state constitutions and then in the United States Constitution, to determine the boundaries of legal punishment.

The Enlightenment of the 18th century was both a continental European and English phenomenon. It was based on common experience shared by the leading secular thinkers of the period which grew out of their pursuit of rationalism as the balancing rubric between their affinity for Roman and Greek antiquity and the resulting tension with their Christian heritage.<sup>107</sup> The development of the analytical spirit which marked 18th century thought was the work of three generations of thinkers.<sup>108</sup> The first of these was dominated by Voltaire and Montesquieu and ended by 1750. The second generation, which included Benjamin Franklin, Hume, Rousseau and Diderot, emphasized analysis and dissection and began the task of applying thought to the shaping of its own view of what life should be like. Finally, the third generation, that of Beccaria, Kant, and Thomas Jefferson, moved into the concrete arenas of practical politics and legal reform.<sup>109</sup> Thus, the Enlightenment can be seen as a coherent evolutionary period bearing within it both the deists with their concern for natural law, and the atheists, who were devoted to modern science and utilitarian goals. The significance of the ideas and writings of the leading thinkers of the period had a large impact on the educated world of Europe and America. There is undeniable evidence that the prominent and politically active men in America were fully cognizant of the writings of not only "the radical publicists and opposition politicians of the early Eighteenth Century England who carried forward into the age of Walpole the peculiar strain of anti-authoritarianism bred in the upheaval of the English Civil War,"<sup>110</sup> but also the continental reformers and social critics such as Voltaire, Rousseau, Montesquieu, and Beccaria.<sup>111</sup> And, it is known that these ideas were studied earnestly by the revolutionary leaders, during and after the war, in an effort to re-

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106. Franklin, *supra* note 102, at 41. See Gay, *The Enlightenment*, in *THE COMPARATIVE APPROACH TO AMERICAN HISTORY* 38-39 (C. Vann Woodward ed. 1968).

107. P. GAY, *THE ENLIGHTENMENT: AN INTERPRETATION* 9 (1966).

108. E. CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 28 (1951).

109. P. GAY, *supra* note 107, at 17.

110. B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS IX-X* (Vintage 1970).

111. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (Belknap Press 1967).

form their own institutions.<sup>112</sup> On the Continent, too, the ideas of the Encyclopedists of the 18th century formed the foundation for the doctrine of human and civil rights which became the Declaration of Human Rights of the French Assembly of 1789 and gave the doctrine of inalienable rights the power witnessed in the French Revolution itself.<sup>113</sup>

#### A. *Beccaria and Enlightenment Criminal Law Reform*

One aspect of late 18th century thought was the systematic attack mounted by the Encyclopedists against feudal criminal law throughout Europe. The philosophers who began to rethink the premises on which their systems of criminal law rested found their spokesman in Cesare Beccaria, whose treatise *On Crimes and Punishments*<sup>114</sup> was written in Italy in 1764. It was Beccaria who suggested that the ideas underlying the penal systems of his time were wrong. He argued for a more enlightened criminal code and popularized the notion that, as one commentator has noted, "the punishment of an offender proved guilty is supposed to fit [in some metaphysical way] the crime that has been proved."<sup>115</sup> Thus, Beccaria, in effect, anticipated the meaning which the *Weems* court was to find implicit in the eighth amendment protection against cruel and unusual punishments.<sup>116</sup>

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112. Bailyn, *Political Experience and Enlightenment Ideas in Eighteenth Century America*, in *THE REINTERPRETATION OF THE AMERICAN REVOLUTION* 277, 283 (J. Greene ed. 1968).

113. E. CASSIRER, *supra* note 108, at 250. Although it has been argued that there is no historical connection between Enlightenment philosophy and the French Declaration of Human Rights, the ideas expressed therein cannot be seen simply as arising out of the narrower context of the English religious controversies of the preceding century. Nor can it be said, as Georg Jellinek maintains in his work, *The Declaration of Human and Civil Rights*, that the American state and federal bills of rights are the ancestor of the French declaration. As Cassirer points out, the American provisions sprang from the generalized development of natural law concepts which were evidenced throughout Europe and not from a straight line progression of purely English thought. The roots of personal freedom stretched much further back than the American Revolution which only formalized and symbolized Enlightenment liberalism rather than being the source for the concepts. E. CASSIRER, *supra* note 108, at 248-49; Franklin, *supra* note 104, at 51.

114. C. BECCARIA, *supra* note 3.

115. K. MENNINGER, *THE CRIME OF PUNISHMENT* 62 (1966). It is suggested, however, that evolving enlightened and unalienated public opinion protected by the first amendment, will determine the precise meaning of this proposition. See Franklin, *Further Considerations Relating to Romanist Infamy and the American Constitutional Conception of Impeachment*, 24 *BUFFALO L. REV.* 29, 32 (1974).

116. Franklin, *supra* note 104, at 43-44. The author draws this kind of connection between Beccaria and the fifth amendment.

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The criminal law which Beccaria encountered was certainly in need of fundamental reforms. The death penalty and bodily mutilations were the usual punishments for the majority of crimes, even minor offenses. The lack of codified laws and scales of punishment allowed arbitrariness in administration to become the primary attribute of the criminal system in all European countries including England.<sup>117</sup> Against this background, Beccaria began by analyzing the origin of penalties and the right of punishment.<sup>118</sup> Employing Rousseau's social contract theory, Beccaria agreed that men, in forming their society, yielded the least possible portion of their individual liberty in exchange for peace and security. Therefore, "[p]unishments that exceed what is necessary to preserve the deposit of the public safety are in their nature unjust."<sup>119</sup> A consequence of this principle was that if it were possible to prove that the severity of a punishment did not add to its utility, it would be contrary to justice and the social contract to retain such a punishment.<sup>120</sup>

While subscribing to the principle that punishment should be proportioned to the crime, Beccaria foreshadowed modern theories of penology when he asked the reason for punishing a criminal.<sup>121</sup> He rejected the theory of retribution in favor of the prevention of future injury and the deterrent effect that would result from the certainty (rather than the severity) of the penalty.<sup>122</sup> "For a punishment to attain its end, the evil which it inflicts has only to exceed the advantage derivable from the crime . . . . All beyond this is superfluous and for that reason tyrannical."<sup>123</sup> Beyond the abuse of power Beccaria found inherent in the notion of severe penalties which arose from his conception of the nation as a social contract, there were dangers to the system of criminal justice itself. Firstly, the very severity of the punishment would lead men who have committed a crime to dare to commit more evils in the hope of avoiding the penalty for the orig-

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117. For a more detailed discussion of the state of the criminal law, see M. MAESTRO, *VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW* 1-13 (1942).

118. See generally Franklin, *The Contribution of Hegel, Beccaria, Holbach and Livingston to General Theory of Criminal Responsibility*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 94-125 (G. Madden ed. 1968).

119. C. BECCARIA, *supra* note 3, at 13.

120. *Id.*

121. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 36 (1968).

122. See Comment, *The Plea Bargain in Historical Perspective*, 23 *BUFFALO L. REV.* 499, 510 n.58 (1974).

123. C. BECCARIA, *supra* note 3, at 43.

inal crime. Secondly, a just proportion between the crimes and punishments is necessary:

The severity of punishment not only aggravates the likelihood that inhuman deeds will be committed, but also maintaining the essential proportion between the crime and the punishment becomes impossible because there is a limit to human endurance which necessarily measures the extremes of punishment as also impunity itself arises from the severity of the punishment as such cruelty is fatal to a constant system.<sup>124</sup>

Thus, Beccaria explained why every punishment must only be imposed in keeping with a fixed set of laws aimed at protecting the public welfare and, within this general framework, the scale of punishments should be graduated and commensurate with the harm done to society by the act of the criminal.

Beccaria was not alone among 18th century thinkers in his concern with criminal law reform. Due to the influence of humanistic trends on the Continent and in England in the first part of the century, the protests and criticisms of the criminal system had already become numerous.<sup>125</sup> It took, however, almost half the century for the emergence of the realization that the entire field of criminal administration needed basic reform. An important step, but by no means a systematic treatment of the problem, was begun in Montesquieu's *The Persian Letters*,<sup>126</sup> first published in 1721.<sup>127</sup> The question of the severity of punishments was treated in terms of its implications for the society as a whole. For the first time, the opinion was clearly expressed that obedience to the law does not correspond to the increase in the severity of the punishment imposed for breaking the law.<sup>128</sup> In addition, Montesquieu recognized the necessity for a just proportion between the offense and the punishment and found injustice in a system which tries to intimidate its members into submission merely by

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124. *Id.* at 43-44. See also Comment, *supra* note 122, at 526. The author reinforces Beccaria's point by noting that draconian punishments tend to accelerate the frequency of plea bargains and thereby increase arbitrariness and disrupt the potentiality for a "constant system."

125. M. MAESTRO, CAESARE BECCARIA AND THE ORIGINS OF PENAL REFORM 17 (1973).

126. MONTESQUIEU, *THE PERSIAN LETTERS* (Bobbs-Merrill 1964).

127. See generally H. MERRY, MONTESQUIEU'S SYSTEM OF NATURAL GOVERNMENT 263-71 (1970).

128. MONTESQUIEU, *supra* note 126, at 136.

the magnitude of the punishments provided. However, the great work of Montesquieu concerning the criminal law appeared some 25 years later. In *Spirit of the Laws*<sup>129</sup> he made several important points in terms of an enlightened view of punishment. He drew a direct connection between the kind of government one has, the severity of the punishment that would appear therein, and the effect that the punishment has on the inhabitants of that nation. Thus, Montesquieu explained that more lenient penalties characterize more moderate governments, and that the citizens of such enlightened nations are as affected by these lesser penalties as those living in despotic countries are by severer punishments.<sup>130</sup> Montesquieu, who antedated Beccaria, recognized as essential that there should be a certain proportion in punishments, and that excessive punishment, such as punishing all crimes with death, hindered rather than facilitated the execution of the law.<sup>131</sup> His *Spirit of the Laws* was one of the first works to treat the problem of criminal law critically and extensively, and, as such, is considered to be of great importance to the 18th century movement for criminal law reform.

In addition to Montesquieu, whom Beccaria openly recognized as a large influence on his work,<sup>132</sup> Voltaire succeeded in drawing popular attention to many abuses of the criminal law. While there is some evidence of an unfocused interest in criminal law in Voltaires' writings, he had not shown a definitive opposition to any particular aspect of the system or an interest in reform until 1762.<sup>133</sup> At that time, his piecemeal opposition developed into an active program of redressing judicial errors. After having read Beccaria's treatise in 1765,<sup>134</sup> Voltaire began to assume a more radical position toward criminal law reform. In 1766, he published a *Commentary* on Beccaria's treatise in which

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129. MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Hafner Library 1949).

130. *Id.* at 81-83.

131. *Id.* at 87.

132. M. MAESTRO, *supra* note 125, at 18 n.19.

133. M. MAESTRO, *supra* note 117, at 35-50. This change was brought about by the trial of Jean Calas who was convicted of murdering his son and sentenced to be put to death at the wheel. As soon as Voltaire became convinced that the son had committed suicide and that the father had been unjustly punished, he began his campaign to revise the decision of the trial. While he was thus working, the faults of the French criminal system were becoming increasingly evident. For the first time, by attempting to obtain publicity in the Calas case, Voltaire pointed up the dangerousness of secret procedures which could, as they had in the case before him, lead to arbitrariness and injustice.

134. *Id.* at 73.

he took a position largely in agreement with the points that Beccaria had made. Voltaire's *Commentary* had a great impact on the reform movement as he was the most popular writer of his century. In addition, the prestige that accrued to Beccaria's text when the *Commentary* was added as a preface provided the impetus necessary for the translation of the combined edition into all the primary European languages.<sup>135</sup>

In England, which had been the model of a more reasonable criminal system for the Continental countries, criticism of some aspects of the legal structure began to be made. Blackstone, in his *Commentaries*,<sup>136</sup> first published one year after Beccaria's treatise appeared, found the English criminal system much closer to perfection than those of other nations. However, even in England, there were some "particulars" which did need revision.<sup>137</sup> In fact, "[t]he extent to which Sir William Blackstone was critical of English law is not always fully appreciated."<sup>138</sup> He clearly recognized the influence of Montesquieu and Beccaria who had pointed out the injustices existing in other systems,<sup>139</sup> and attributed to them the ideas that crimes which are most destructive of public safety should be the ones most severely punished, certainty of punishment was more important than its severity, and punishments should be proportioned to the offense.<sup>140</sup>

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135. *Id.* at 93. While the ideas which appeared in Beccaria's treatise and which also concerned Voltaire may not have been completely new, the success of the movement which grew out of this source occurred largely because for the first time principles of penal reform had been expressed in a systematic manner. In France itself, where Voltaire's support had helped create a favorable attitude toward reform, the tide quickly moved toward a more radical position than Voltaire had ever taken. Voltaire, who had hesitated to favor the abolition of capital punishment, was supplanted by Michel Sevrin who was to strongly endorse all of Beccaria's theories. M. MAESTRO, *supra* note 125, at 126. Further writings appeared calling for outright reforms by such noted men as Brissot de Warville, Marat, Condorcet, and Pastoret. In addition to France, where the conservative position remained powerful, Beccaria's ideas began to take hold in Italy, his home state, and in Germany and Poland. His work was even condemned by the Inquisition in Spain. In Prussia also, where Frederick II was himself a forerunner of the reform movement, the principles of Beccaria gained most easy acceptance since they were not in general conflict with the interests of the rulers as in the other nations. Indeed, Frederick and Voltaire carried on a correspondence concerning a new criminal code which he had begun to write which made the laws milder and concentrated on the prevention of crimes instead of their punishment. *Id.* at 134-35.

136. W. BLACKSTONE, COMMENTARIES.

137. 4 W. BLACKSTONE, COMMENTARIES \*3.

138. 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 345 (1948).

139. W. BLACKSTONE, *supra* note 137.

140. *Id.*

The latter idea he terms overly romantic but nevertheless suggests that "the wise legislator will mark the principle divisions, and not assign penalties of the first degree to offenses of an inferior rank."<sup>141</sup> Thus, it appears that only one year after its publication, the ideas of Beccaria had attained such wide impact that they already were being read and used by even such a conservative commentator as Blackstone.<sup>142</sup>

B. *The Reform Influence in America in General*

The force of Beccaria's treatise *On Crimes and Punishments* was felt as much in America as in Europe.<sup>143</sup> There were three American translations of Beccaria, each coupled with Voltaire's *Commentary*, which were published in America before the formulation of the Bill of Rights.<sup>144</sup> They became immediately popular at both bookstores and lending libraries.<sup>145</sup> In every colony, the ideas and writings of such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted.<sup>146</sup> As Justice Douglas recognized nearly two centuries later: "[T]he Italian jurist Beccaria and his French and English followers influenced American thought in the critical years following our Revolution."<sup>147</sup> To ignore these philosophers' theories of criminal law, therefore, would be tantamount to cutting oneself off from the very meaning of the Constitution.

The widespread popularity of Beccaria's treatise is evidenced clearly by the fact that, in 1770, John Adams, then a young lawyer,

141. *Id.* at \*18.

142. *Id.* at \*12-16. The question of the severity of the penalties imposed on offenders in England had already been under some criticism, and although there were reform currents among writers of the period, reform was extremely slow in coming, finding fruition only in the next century. M. MAESTRO, *supra* note 117, at 133.

143. In the aftermath of the [American] Revolution, however, a spark of interest appeared, lit by Enlightenment ideology and an awareness of very dramatic events in Europe. Just as Beccaria had insisted that humane laws could eradicate crime, so men like Tuke in England and Pinel in France insisted that kind and gentle treatment would help to cure insanity.

D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 109-10 (1971).

144. BARR, *VOLTAIRE IN AMERICA 1774-1880*, at 121 (1941).

145. *Id.*

146. Baily, *supra* note 112, at 282; B. BAILY, *supra* note 111, at 27; see F. BRODIE, *THOMAS JEFFERSON—AN INTIMATE HISTORY* 98 (1974).

147. *Ullmann v. United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting). In his dissent, Justice Douglas draws freely from Franklin, *supra* note 102, to demonstrate the influence of Beccaria and the Enlightenment on the fifth amendment's protection of the accused from infamy. *Ullmann v. United States*, 350 U.S. at 450-53.



invoked the jury's understanding of this work in his defense of the British soldiers accused of murder after the Boston Massacre. In his opening he argued:

May it please your honors, and you, gentlemen of the jury: I am for the prisoners at the bar, and shall apologize for it only in the words of the Marquis Beccaria: If I can but be the instrument of preserving one life, his blessing and tears of transport shall be a sufficient consolation to me for the contempt of all mankind.<sup>148</sup>

But such mention was not mere form to the educated colonial Americans.<sup>149</sup> Instead, they took the writings of the philosophers and the publicists very seriously. Even before the Revolution began, there were some Americans already protesting the complex mixture of English and American law based largely on antiquated English precedent.<sup>150</sup> The desire to simplify the legal system, a sentiment akin in origin to the reforms of Beccaria and the other Enlightenment thinkers,<sup>151</sup> was increasingly popular in the years just prior to the beginning of the Revolution.<sup>152</sup> In fact, the Continental Congress, which met at Carpenter's Hall in 1774, turned expressly from the traditional English sources to the French for guidance on reconstruction and codification

148. F. KIDDER, *HISTORY OF THE BOSTON MASSACRE* 232 (1870). John Adams made this statement in quoting from Beccaria's treatise which had been translated into English and published in London in 1770. On June 28, 1770, Adams copied a passage from Beccaria into his diary: "If, by supporting the Rights of Mankind, and of invincible Truth, I shall contribute to save from the Agonies of Death one unfortunate Victim of Tyranny, or of Ignorance, equally fatal; his Blessing and Tears of Transport, will be a sufficient Consolation to me, for the Contempt of all Mankind. *Essay on Crimes and Punishments*: Page 42." This passage did in fact appear in the opening statement of his October defense of Captain Preston, who was accused and later acquitted in the Boston Massacre trial. Adams bought his own copy of Beccaria's works in the Italian edition in Paris in 1780, and it is among his books in the Boston Public Library. 1 ADAMS PAPERS 352-53 & n.2 (Butterfield ed. 1961).

In a July 20, 1786 entry in his diary while in London, Adams again copied a passage from Beccaria in both English and Italian. "Every Act of Authority, of one Man over another for which there is not an absolute Necessity, is tyrannical." 3 *id.* at 194.

149. See A. NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789*, at 455 (1969).

150. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 300 (N. Carolina Press 1969).

151. *Id.*

152. It was also popular after the revolution. See Comment, *The Origins of Law Reform: The Social Significance of the Nineteenth Century Codification Movement and Its Contribution to the Passage of the Early Married Women's Property Acts*, 24 *BUFFALO LAW REV.* 683 (1975).

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of parts of the common law. William Bradford, in a letter to James Madison, noted this trend when he wrote that the members of the Congress were making frequent use of the Philadelphia city library,

[b]y which we may conjecture that their measures will be wisely plan'd since they debate on them like philosophers; for by what I was told Vattel, Barlemaqui, Locke & Montesquie[u] seem to be the standar[d]s by which they refer either when settling the rights of the Colonies or when a dispute arise, on the Justice or propriety of a measure.<sup>153</sup>

David Rothman, in *The Discovery of the Asylum*,<sup>154</sup> after noting American acceptance at this time of general Enlightenment doctrines, turns specifically to Beccaria's influence. He mentions John Adams' use of a quotation from Beccaria in his defense of the British soldiers implicated in the Boston Massacre. Then, after quoting heavily from Beccaria's treatise *On Crimes and Punishments*, Rothman stated:

The young republic quickly took this message to heart, for it fit well with its own history and revolutionary ideals. Americans fully appreciated that the laws could be a tool of the passions of a handful of men. Did this not explain almost every piece of British colonial legislation after 1763? They believed that they had also witnessed the self-defeating quality of cruel punishments. . . . With the Revolution, declared Eddy, fitting Beccaria's doctrine into an American context, "the spirit of reform revived . . . strengthened by the general principles of freedom."<sup>155</sup>

Thus, a self-conscious effort at legal reformation, stimulated by the 18th century Enlightenment sources and the favorable circumstances of conflict and social change in the American colonies during the Revolutionary era, was initiated.

### C. *The Eighth Amendment's "Cruel and Unusual Punishments" Clause*

What the prohibition of cruel and unusual punishments was intended to forbid remains questionable. Acceptance of the clause as the

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153. Letter from William Bradford to James Madison, October 17, 1774, in 1 THE PAPERS OF JAMES MADISON 126 (W. Hutchinson & W. Rachal eds. 1962) [hereinafter cited as MADISON PAPERS].

154. D. ROTHMAN, *supra* note 143.

155. *Id.* at 60.

outcome of only 17th century English thought and history is to ignore nearly 100 years of American historical development. It is also a denial of 100 years of critical thinking by the philosophers who were widely read and influential in the new, as well as the old, world prior to the formulation of the bills of rights in the state constitutions and the Bill of Rights of the United States Constitution. Such an omission is clearly illogical, yet that is, in effect, the position of the Supreme Court. As a result, the *Weems* doctrine, which purports to control excessive penalties under the eighth amendment, is in danger of being forgotten, along with the historical precedents which should be perceived as its constitutional basis.

It is through Beccaria and his pervasive influence on prominent colonial leaders that the philosophical and historical basis for the *Weems* principle is provided. This mode of analysis is strengthened by the fact that the connection between Beccaria's treatise *On Crimes and Punishments*, and the formulation of certain constitutional provisions, particularly the eighth amendment, is not an entirely new idea.<sup>156</sup> While the permissible punishments for crime in 18th century England still included torture and mutilation, some of which were followed in America, in large part "a more enlightened [criminal] code was to be adopted as the limits of English law were abandoned in favor of the principles advocated by reformers such as Beccaria."<sup>157</sup> It will be demonstrated that the colonists not only set out to revise the criminal codes, but also intended to impose firm constitutional limits on permissible penalties.

1. *Jefferson and Criminal Law Reform.* Thomas Jefferson was a medium through which the Enlightenment ideas were put to practical use. He may also be regarded as a connecting link between Beccaria and what was to become the eighth amendment. Beccaria and

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156. "Beccaria[s] Essay *On Crimes and Punishments* helped shape our Fifth and Eighth Amendments . . ." I. BRANT, *supra* note 14, at 464. Professor Franklin traces the influence of Beccaria on the fifth amendment. Franklin, *supra* note 102, at 41. See also Franklin, *Romanist Infamy and the American Constitutional Conception of Impeachment*, 23 BUFFALO L. REV. 313 (1974).

157. R. RUTLAND, *supra* note 11, at 21. The concern with punishment for crimes in the colonies certainly antedated the English Declaration of Right. The Charter of Maryland of 1632 gives the power to execute the laws "by the Imposition of Fines, Imprisonment, and other Punishment whatsoever; even if it be necessary, and the Quality of the Offense require it, by Privation of Member, or Life . . ." SOURCES OF OUR LIBERTIES, *supra* note 8, at 107. And the Massachusetts Body of Liberties of 1641 provided: "For bodilie punishments we allow amongst us none that are inhumane, Barbarous or cruel." *Id.* at 153.

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Beccarian ideas were known to Jefferson and, in fact, played a part in the plan for the extensive reforms he and other Virginians had in mind for their state. In Jefferson's *Commonplace Book*,<sup>158</sup> several extracts from Montesquieu's works in French, and other more numerous passages from Beccaria in Italian, appear in his own handwriting.<sup>159</sup> These were written from 1774-1776 when Jefferson became a member of the Virginia Committee of Revisors for the reform of the legal system. While he was engaged in the project to revise the laws of his state, Jefferson showed that his concerns were much the same as Beccaria's and that he followed the Italian jurist in much of his thinking. In his correspondence with Edmund Pendleton in the summer of 1776, his preoccupation with the penal project was manifested. Pendleton wrote:

I don't know how far you may extend your reformation as to Our Criminal System of Laws. That is has hitherto been too Sanguinary, punishing too many crimes with death, I confess, and could wish to see that changed for some other mode of Punishment in most cases, but if you mean to relax on all Punishments and rely on Virtue and the Public good, as Sufficient to promote Obedience to the Laws, You must find a new race of Men to be Subjects of it, but this I dare say was not your meaning, however I have heard it insisted on by others.<sup>160</sup>

Jefferson, intending to implement material changes in the criminal law to coincide with Enlightenment theory, in an effort to explain his intention and quiet developing fears about the radicalness of his program, replied:

The fantastical idea of virtue and the public good being a sufficient security to the state against the commission of crimes, which you say you have heard insisted on by some, I assure you was never mine. It is only the sanguinary hue of our penal laws which I meant to object to. Punishments I know are necessary, and I would provide them, strict and inflexible, but *proportioned to the crime*. Death might be inflicted for murder and perhaps for treason if you would take out the description of treason all crimes which are not such in their nature. Rape, buggery & c. punish by castration, all

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158. THE COMMONPLACE BOOK OF THOMAS JEFFERSON (G. Chinard ed. 1926).  
159. P. SPURLIN, ROUSSEAU IN AMERICA 1760-1809 (1969).

160. Letter from Edmund Pendleton to Thomas Jefferson, August 10, 1776, in  
1 THE PAPERS OF THOMAS JEFFERSON 490 (J. Boyd ed. 1950) [hereinafter cited as  
JEFFERSON PAPERS].

other crimes by working on high roads, rivers, gallies & c. a *certain time proportioned to the offense*. But as this would be no punishment or change of condition to slaves . . . let them be sent to other countries. By these means we should be freed from the wickedness of the latter, and the former would be living monuments of public vengeance. Laws thus *proportionate* and mild should never be dispensed with.<sup>161</sup>

Here we have an American reference which recognized that both the mode of the punishment and the duration of it must be proportioned to the crime in order that the penalty be just and legitimate. It is this strain of thought, obviously influenced by the powerful tradition of enlightened thought known to Jefferson from his readings of Montesquieu and Beccaria, which surfaced in *Weems* and which must be considered an integral part of eighth amendment jurisprudence.

By 1778, Jefferson, as part of the revision project, had written: "64. A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital."<sup>162</sup> Incorporating Beccaria's aversion to capital punishment, the bill provided that an offender be deprived by life only for a few particularly heinous offenses. The remainder of crimes were to be punished in accordance with a legislatively prescribed scale of penalties, carefully proportioned to the offense.<sup>163</sup> In this fully annotated bill, references to Beccaria's treatise appear four times in footnotes.<sup>164</sup> This effort to bring criminal law penalties into conformity with enlightened ideas was presented to and rejected by the Virginia Legislature in 1785. In 1796, however, it was given approval when it was again introduced. In his autobiography, Jefferson looked back on these events.

Beccaria, and other writers on crimes and punishments, had satisfied the reasonable world of the unrightfulness and inefficacy of [punishing] crimes by death; and hard labor on roads, canals and other public works, had been suggested as a proper substitute. The Revisors had adopted these opinions, but the general idea of our country had not yet advanced to that point. The Bill, therefore, for proportioning crimes and punishments was lost in the House of Delegates by a majority of a single vote. . . . In the meanwhile, the public opinion was ripening, by time, by reflection, and by the

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161. Letter from Thomas Jefferson to Edmund Pendleton, August 26, 1776, *Id.* at 505 (emphasis added).

162. 2 JEFFERSON PAPERS, *supra* note 160, at 492-507.

163. *Id.*

164. *Id.*

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example of Pennsylvania. . . . In 1796 our legislature resumed the subject, and passed the law for amending the penal laws of the Commonwealth.<sup>165</sup>

As Jefferson indicated, there was a transformation in the attitude of the people of Virginia which must necessarily have derived from governmental reforms begun in 1776 by almost every colony and brought to fruition during and after the Revolutionary years. The circumstances which precipitated the change in American attitudes was the call of the Continental Congress of May, 1776, to restructure the state governments.<sup>166</sup> This exigency provided the opportunity for the enlightened ideas of Beccaria and others, as utilized by Thomas Jefferson, Edmund Pendleton, George Mason, George Wythe, and Thomas Lee, the Virginia law revisors, to be applied to the formation of a new structure of government.<sup>167</sup>

2. *State Declarations and Constitutions.* In Virginia, another course of events was in progress which also was to greatly influence the rights and liberties which are the basis of our constitutional government. A general convention of delegates elected from the state's counties was called to discuss the question of colonial independence.<sup>168</sup> Contemporaneously with the declaration of their independence, a committee was set up to prepare a declaration of rights and a plan of government.<sup>169</sup> George Mason, a member of the Virginia Criminal Law Revision project with Thomas Jefferson, became the chief architect of the Virginia Declaration of Rights.<sup>170</sup> The document was to become one of the most influential in American history. It was republished throughout the American states, and was copied, in part, by Franklin in the Pennsylvania Declaration of Rights and by John Adams in the Massachusetts Declaration.<sup>171</sup>

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165. M. MAESTRO, *supra* note 125, at 141-42, citing 1 THE WRITINGS OF THOMAS JEFFERSON 67 (1903). A February 15, 1787 letter written by James Madison, however, suggests that "[t]he rage against Horse stealers had a great influence on the fate of the Bill." 11 JEFFERSON PAPERS, *supra* note 158, at 152. This seems to mean that the Bill was not rejected in principle, rather particular provisions were opposed, and this led to the one vote loss.

166. RUTLAND, *supra* note 11, at 38.

167. G. CHINARD, THOMAS JEFFERSON 90 (1929).

168. R. RUTLAND, *supra* note 11, at 39.

169. *Id.* at 40.

170. *Id.* at 47.

171. 1 MADISON PAPERS, *supra* note 153, at 171; C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 6-7 (1925).

As the official journal of the convention is composed merely of formal entries, and the record of the proceedings authored by Edmund Randolph was not written until 30 years after the fact, there remains little if any material from which to glean the committee's intent regarding particular provisions. What evidence we do have shows that Mason proposed the entire program which was ratified by the committee after much discussion.<sup>172</sup> Article II of the Committee Draft of the Declaration of Rights written on May 27, 1776, stated: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>173</sup> This provision was a committee edition which became Article IX in the final draft. It is thought that there may have been additional wording to this part when the Committee presented it, but that it may have been reduced to its persuasive brevity by Mason himself.<sup>174</sup> From such limited sources, the legal historian must draw a conclusion as to what was intended by Mason and his fellow drafters. While we admit that this article was taken almost word for word from the English Bill of Rights, this may have been merely the linguistic device through which Mason declared the universal principle clearly known to his fellow countrymen. Mason clearly was in agreement with the other leaders of Virginia in 1776 as indicated by a comparison of the preamble to this document and Jefferson's wording of the Declaration of Independence,<sup>175</sup> and it has been suggested previously that the ideas of enlightened criminal law reform were current throughout Virginia at this time.

Beccaria and Enlightenment influence were also strong in Pennsylvania, which itself had an impressive and unique tradition in the criminal law sphere. From the time Pennsylvania was granted its royal charter in 1681, it had led the way toward an enlightened approach

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172. R. RUTLAND, *supra* note 11, at 42.

173. 1 THE PAPERS OF GEORGE MASON 284 (R. Rutland ed. 1970) [hereinafter cited as MASON PAPERS].

174. *Id.* at 285-86. Mason described his own drafting style in his notes for the committee of Revisors: "General rules in drawing provisions & c., which would do only what the law would do without them, to be omitted. Bills to be short; not to include matters of different natures; not to insert an unnecessary word; nor omit a useful one." G. CHINARD, *supra* note 167, at 91. "The brevity of the first and second Constitutions, (i.e. the original Constitution and the Bill of Rights) due to Romanist influence, anticipates the succinctness of the 18th century French civil code and of all subsequent Romanist codification." Franklin, *supra* note 113, at 36.

175. R. RUTLAND, *supra* note 11, at 235 (Preamble to the Virginia Declaration of Rights).

to the administration of justice. By that charter, William Penn was given the power to make, with the consent of the assembly, any and all laws he deemed necessary.<sup>176</sup> Pursuant to that grant of power, Penn attempted to enact a humane and rational criminal code which provided for penalties less than death for all crimes except murder;<sup>177</sup> but the proposed code was subsequently halted under Queen Anne. As soon as independence had been proclaimed, however, Pennsylvania became, in the opinion of one writer, the site of the most "comprehensive examination of assumptions about government that elsewhere were generally taken for granted."<sup>178</sup>

The spearhead of this movement to create a new and more equal republic was a small group of Philadelphians who had formed "The Whig Society" a few months previously. This faction was led by such men as Thomas Paine, David Rittenhouse, James Cannon (a professor at what was soon to be the University of Pennsylvania), and Col. Timothy Matlock.<sup>179</sup> The group agitated for change, and managed to turn their movement for constitutional reform into an actual constitutional convention just one month after the Continental Congress had recommended that new governments be set up.<sup>180</sup> Admittedly influenced by the French philosophers like Voltaire, Rousseau, and Montesquieu,<sup>181</sup> the delegates prepared both "A Declaration of Rights" taken almost verbatim from the "Virginia Bill of Rights"<sup>182</sup> and a constitution which has been called the "closest approach to political perfection ever devised by mankind."<sup>183</sup> The provision in the body of the constitution with which this paper is concerned read as follows: "The penal laws, as heretofore used, shall be reformed by the future Legislature of this State, as soon as may be, and punishments made in some cases less sanguinary and in general more proportionate to the crimes."<sup>184</sup> It is interesting to note that the emphasis seems to be more

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176. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 760 (1949).

177. Roscoe, *Observations on Penal Jurisprudence and the Reformation of Criminals*, in REFORM OF CRIMINAL LAW IN PENNSYLVANIA 84 (M. Horwitz ed. 1972).

178. G. WOOD, *supra* note 150, at 226.

179. R. RUTLAND, *supra* note 11, at 53; Keedy, *supra* note 176, at 765.

180. R. RUTLAND, *supra* note 11, at 53.

181. Keedy, *supra* note 176, at 764.

182. R. RUTLAND, *supra* note 11, at 54, citing 3 WORKS OF JOHN ADAMS 220.

183. R. RUTLAND, *supra* note 11, at 55 (paraphrasing by Rutland of Brissot de Warville, a French Revolutionary leader and observer of America).

184. PA. CONST. § 38 (1776), cited in Keedy, *supra* note 176, at 766-67. Keedy



upon the proportionality between crime and punishment than on the sanguinary aspects. In other words, a limited use of torture or so-called inhuman or barbarous types of punishment for heinous offenses might be less objectionable than the imposition of excessive terms of imprisonment, a theoretically "humane" punishment. As will be demonstrated, the courts in the United States for the most part have moved forward vigorously to banish all forms of "torture" from the prisons, but, in contradistinction to the Pennsylvania constitutional mandate, have been reluctant to strike down sentences excessive in duration. As has been pointed out, this idea of a proper relationship between the crime and the offense was discussed by Montesquieu and popularized in the United States by the Voltaire edition of Beccaria's essay.<sup>185</sup>

The fact that condemnation of cruel and unusual punishments appeared in this constitution in the particular language was not an accident but was well within Pennsylvania tradition, as emphasized by subsequent events. The continued interest in criminal law reform was evidenced in a letter in 1785 from Benjamin Franklin, who had been the President of the Pennsylvania Constitutional Convention, to Benjamin Vaughan. Franklin objected to the lack of proportionality in English law which provided death for offenses ranging from theft to murder. He said "[t]o put a man to Death for an Offense which does not deserve Death, is it not Murder?"<sup>186</sup> This criticism of the failure of English law to recognize proportionality must naturally have arisen from the tendency during this transitional period from British to American rule to repudiate those things English in favor of ideas which were largely French. In the year following this correspondence a law was finally passed in Pennsylvania which abolished the death penalty for robbery, burglary, buggery, and sodomy.<sup>187</sup>

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notes that the requirement that punishments be more proportioned to the crimes was derived from Montesquieu. He quotes the latter's *The Spirit of the Laws*:

It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a lesser . . . . It is a great abuse amongst us to subject to the same punishment a person that only robs on the highway, and another that robs and murders.

*Id.* at 767 & n.67.

185. Keedy, *supra* note 176, at 767-68.

186. M. MAESTRO, *supra* note 117, at 129, quoting 9 WRITINGS OF BENJAMIN FRANKLIN 292 (Smyth ed. 1907).

187. Keedy, *supra* note 176, at 767 n.72.

In the preamble to the act of 1786, Keedy emphasizes an explicit paraphrase of Montesquieu. The preamble reads: "that the cause of human corruptions proceed

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Although in 1790 a reactionary constitution supplanted the constitution of 1776, the trend toward enlightened criminal reform persisted. In the same year that the new constitution was adopted, James Wilson gave a group of lectures at the College of Philadelphia on the "Necessity and Proportion of Punishments" in which he discussed the views of Montesquieu and Beccaria.<sup>188</sup> Just two years later, Dr. Benjamin Rush, a professor of medicine at the University of Pennsylvania, published an essay entitled: "Considerations of the Injustice and Impolicy of Punishing Murder by Death." He too stated that Beccaria and Voltaire were responsible for his thinking that even capital punishment for murder was not in the best interests of society.<sup>189</sup>

Similarly, William Bradford, later to be President George Washington's Attorney General, also referred in his writings on criminal law to the ideas of Montesquieu and Beccaria as having set forth the general principles upon which penal laws ought to be founded.<sup>190</sup> Finally, Robert J. Turnbull, in *A Visit to the Philadelphia Prison* which appeared in 1796, discussed the Pennsylvania experiment with penal law reform stating that "[s]everal circumstances combined to make the proposed alteration expedient, and among others the small and valuable gift of the immortal Beccaria to the world had its due influence."<sup>191</sup> This last publication appeared simultaneously with the passage of Jefferson's proportional criminal law bill. As Jefferson himself stated, these events in Pennsylvania, which kept the spirit of enlightened reform alive, may have provided the example needed to facilitate Virginia's action.<sup>192</sup> Thus, these two states which had strong and highly educated leaders, well aware of the Enlightenment ideas of Beccaria, Montesquieu and Voltaire, certainly incorporated these concepts into their own state constitutions.

Three other states in addition to Virginia and Pennsylvania had written and approved constitutions in 1776. The Maryland delegates

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more from the impunity of crimes than from the moderation of punishments . . . ." *Id.* at 768 & n.73. Montesquieu reads: "If we inquire into the cause of all human corruptions, we shall find that they proceed from the impunity of criminals, and not from the moderation of punishments." MONTESQUIEU, *supra* note 129, at 84.

188. Keady, *supra* note 176, at 768.

189. *Id.* at 769.

190. Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania*, in REFORM OF CRIMINAL LAW IN PENNSYLVANIA, *supra* note 177, at 3.

191. M. MAESTRO, *supra* note 125, at 138, quoting R. TURNBULL, *A VISIT TO THE PHILADELPHIA PRISON I* (1796).

192. See quotation accompanying note 165 *supra*.

met in Annapolis to formulate both a constitution and a declaration of rights. Since the journal of the convention does not record the debates when the committee draft was presented to the full body for approval,<sup>193</sup> there is little historical evidence from which to interpret the resulting provisions. There were, nevertheless, two articles, passed which relate to the question of permissible punishments. Article XXII was almost an exact repetition of the clause used in the Virginia Declaration.<sup>194</sup> However, an additional provision, Article XIV, went beyond a mere recitation of the accepted verbal formula: "That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter."<sup>195</sup> The concept of punishment consistent with the safety of the state was clearly Beccarian in origin, and was reiterated by Jefferson in his correspondence with Pendleton.<sup>196</sup> In addition, the language itself, using both "pains" and "penalties," seems to connote punishments which inflict corporal pain, such as torture, and other penalties, such as imprisonment, which might be excessively severe in their duration when compared with the offense committed. Delaware and North Carolina also produced constitutions in 1776, employing the already common expression of the Virginia Declaration to prohibit cruel punishments.<sup>197</sup>

In 1778, South Carolina adopted a comprehensive structure of government after almost two years under a temporary constitution. Although a separate bill of rights was not adopted, the same safeguards were incorporated into the body of the constitution as had been done in Georgia, New Jersey and New York. A group of articles at the end of the South Carolina Constitution contained those rights and included one looking toward a reform of penal laws that would

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193. R. RUTLAND, *supra* note 11, at 58.

194. MD. CONST. § XXII (1776), in 1 Schwartz, *supra* note 11, at 281, reads: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted; by the courts of law."

195. MD. CONST. § XIV (1776), *id.* at 281.

196. *See* text accompanying notes 160-161 *supra*.

197. DEL. CONST., Declaration of Rights, § 16 (1776), in Schwartz, *supra* note 11, at 278, provides: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted." N.C. CONST., Declaration of Rights, § 10 (1776), *id.* at 287, states: "That excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

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make punishments "more proportionate to the crime."<sup>198</sup> Two years later, Massachusetts too enacted a constitution and a bill of rights which largely "represented a collection of provisions from earlier bills of rights rather than an original work."<sup>199</sup> This copying process involved more than mere convenience for the state framers; it showed that they had developed a coherent idea of what human rights needed protection against government encroachment.<sup>200</sup>

The last of the states to write constitutions and bills of rights in this pre-federal period was New Hampshire. It is necessary to examine the pertinent provision of this bill because it was the most detailed and thus gives the best idea of what evils its framers intended to ameliorate. Further, because it is the last provision of the Revolutionary period, its drafters most likely benefited from their knowledge of previous attempts. As in the Maryland Constitution, there were two provisions. The first provision specified:

All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind.<sup>201</sup>

Later in the bill of rights, a provision identical to that in the Massachusetts Constitution appears.<sup>202</sup> The above-quoted section indicates that the framers of this state constitution also shared the Enlightenment concern with proportionality.

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198. S.C. CONST. § XL (1778), in 1 Schwartz, *supra* note 11, at 335.

199. R. RUTLAND, *supra* note 11, at 80. MASS. CONST. § XXVI (1780), in 1 Schwartz, *supra* note 11, at 343, reads: "No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." John Adams, who was well acquainted with Beccaria, was involved in the formulation of the Massachusetts Bill of Rights in 1780. C. WARREN, *supra* note 171, at 6-7.

200. R. RUTLAND, *supra* note 11, at 80.

201. N.H. CONST., Bill of Rights, § 18 (1783), in 1 Schwartz, *supra* note 11, at 377.

202. *Id.* § 33, at 379.

There is, therefore, an essential pattern formed by these state constitutional provisions running from the Virginia Declaration of Rights through the New Hampshire article. The pattern revealed is that of a tension between a desire to express the human rights to be guaranteed in a widely-known formula, and a desire to explicate the underlying assumption that penalties not only torturous but also disproportionate to the offense should be included in the proscription.<sup>203</sup>

3. *The Passage of the Eighth Amendment of the United States Constitution.* It was not until the last week of the Constitutional Convention in Philadelphia that George Mason proposed, almost as an afterthought, but "doubtless with his beloved Virginia bill of rights in mind,"<sup>204</sup> the idea that the Constitution should be prefaced with a Bill of Rights which he said would only take a few hours to prepare.<sup>205</sup> The motion he made was unanimously defeated along with subsequent attempts to get a bill of rights accepted piecemeal. A motion for a second convention was also defeated.<sup>206</sup> Dissatisfied with his failure, Mason wrote the *Objections to this Constitution of Government* in which he went into detailed criticism of the fact that there was "no declaration of any kind, preserving the liberty of the press, or the trial by jury in civil causes; nor against the danger of standing armies in time of peace."<sup>207</sup> Copies of the *Objections* were circulated throughout the states, precipitating an emotional dialogue between the Antifederalists and the Federalists. The latter believed that the movement for a bill of rights was just a vehicle for the Antifederalists' basic opposition to the strong central government which had been created.<sup>208</sup> An *Answer to Mason's Objections*, written by Iredell, later to be a delegate to the North Carolina convention which ratified the Constitution, was published in pamphlet form. The author argued that there was no necessity for limiting congressional power under the new Constitution so that cruel and unusual punishments would be

203. For a discussion of drafting style, see note 174 *supra*. See also note 205 *infra* and accompanying text.

204. M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 185 (1913).

205. 2 *RECORDS OF THE FEDERAL CONVENTION* 476 (Farrand ed. 1911) [hereinafter cited as *RECORDS*].

206. R. RUTLAND, *supra* note 11, at 121-22.

207. Letter from James Madison to Thomas Jefferson, October 24, 1787, in *RECORDS*, *supra* note 205, at 135-36.

208. G. WOOD, *supra* note 150, at 537.

proscribed.<sup>209</sup> Iredell reasoned that incorporating this prohibition from the state constitutions into the Federal Constitution would be improper since, in his opinion, the provision was intended to constrict the abuse of power by the English crown and not to limit Parliament. He also stated that "the expression 'unusual and severe' or 'cruel and unusual' surely should have been too vague to have been of any consequence, since they admit of no clear and precise signification."<sup>210</sup> The fact that Iredell made a casual reference to alternate formulations of the critical phrase of the eighth amendment suggests that the ultimate choice may have been more a matter of convenience than a substantive choice incorporating English feudal content. Iredell saw the defect of indefiniteness as irremediable: if the prohibited punishments were enumerated, the government could use those not so listed; and if permissible punishments were listed, flexibility would be inhibited and the legislature led "into a labyrinth of detail" further confusing the situation.<sup>211</sup> If, as Iredell claimed, the rights of Americans were limited to their English content, there would have indeed been no reason for their retention for the circumstances in the new nation were certainly different from a monarchy. Furthermore, the lack of specificity of the provision does not diminish its constitutional importance. Rather, the inability to enumerate particulars is suggestive of the breadth, not the limits, of the cruel and unusual punishments clause.

The battle over ratification of the Constitution proceeded as the idea of a Bill of Rights gained increasing popularity. Thomas Jefferson, then serving as minister to France, soon took a firm position favoring addition of a Bill of Rights, and summarily dispatched letters to his friends in America which were circulated throughout the colonies.<sup>212</sup> Pennsylvania was the first to ratify the Constitution, having defeated a proposed Bill of Rights which included a provision, very similar to the original Virginia provision, prohibiting cruel and unusual punishments.<sup>213</sup> Shortly after the time Jefferson had become

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209. Iredell, *Answer to Mason's Objections*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 359 (P. Ford ed. 1888).

210. *Id.* at 360.

211. *Id.*

212. R. RUTLAND, *supra* note 11, at 134.

213. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 658 (J. Elliott ed. 1901) [hereinafter cited as DEBATES]. Proposed article 13 read: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

definite in his ideas favoring a Bill of Rights, Massachusetts met in convention. The debate was frenzied in its intensity with the Anti-federalist position strongly argued.<sup>214</sup> A compromise resulted which was implemented by sending recommended amendments along with the ratification of the Constitution—a proposal which set a precedent for the remaining states. While debate on whether to adopt a Federal Bill of Rights was, in every state, lengthy and acrimonious, the merits of any single provision were rarely discussed. For example, in New York, Alexander Hamilton recorded the passage of the cruel punishment provision succinctly: “—Bail—or unusual excessive punishht.—agreed.”<sup>215</sup>

In Virginia there was some debate recorded on the issue of whether the cruel and unusual punishment provision prohibited torture. George Mason, drafter of Virginia’s Declaration of Rights, asserted that the suggested Bill of Rights, which Virginia’s ratifying convention was adding to the Constitution in order to assure its passage, certainly did prohibit torture.

For that one clause expressly provided that no man can give evidence against himself and that . . . in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided, that no cruel and unusual punishments shall be inflicted; therefore torture was included in the prohibition.<sup>216</sup>

214. The only recorded debate on the subject of cruel punishment was a statement by Mr. Holmes as follows:

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheardof punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.

Massachusetts Convention Debates, January 30, 1788, *id.* at 111.

215. New York Ratifying Convention, in 2 Schwartz, *supra* note 11, at 897. The rarity of discussion could well be due to the fact that people knew what they meant.

216. 3 MASON PAPERS, *supra* note 173, at 1085. The only additional debate recorded was a statement by Patrick Henry arguing for a pre-ratification Bill of Rights. He saw problems for a constitution without one:

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and in-

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As this assertion by Mason is particularly directed against a statement by Mr. Nicholas, another delegate to the convention, that tortures were not included in this prohibition, there is no reason to infer that Mason was covering the entire content of the provision in his answer.

By the time the Constitution was ratified, the adoption of a Federal Bill of Rights was generally conceded. The Federalists, who had included a promise for a Bill of Rights in their campaigns for Congress,<sup>217</sup> formed the majority in favor of amending the Constitution. However, it soon became obvious that the amendments faced a coalition of opposition made up of those who wanted no changes and those who did not agree as to which specific guarantees should be written into the new Constitution.<sup>218</sup> With a clear recognition of the political dynamics of the situation in the Congress, James Madison began work on the project. He decided to confine his efforts to an enumeration of simple, acknowledged principles, the ratification of which would meet with the least opposition.<sup>219</sup> In framing his propositions, Madison, with much labor and research, "hunted up all the grievances and complaints of newspapers, all the articles of the state conventions, and the small talk of their debates."<sup>220</sup> This account of Madison's effort "points accurately to the tie between federal guarantees of freedom and those pronounced earlier in the states, either in their own constitutions or in the conventions that ratified the new federal charter."<sup>221</sup>

Madison himself had been a member of the committee which drew up the Virginia Declaration of Rights, so it is not surprising that he turned to the state provisions and particularly relied on the

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flicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law in preference to that of the common law . . . of torturing to extort a confession of the crime.

3 DEBATES, *supra* note 213, at 447-48.

217. R. RUTLAND, *supra* note 11, at 196.

218. 3 JAMES MADISON FATHER OF THE CONSTITUTION 264 (I. Brant ed. 1950).

219. 10 CONG. DEB. 433 (1834) [1824-1837].

220. Letter from Fisher Ames to Thomas Dwight, June 11, 1789, in I. BRANT, *supra* note 14, at 87.

221. *Id.* at 87.



amendments of Virginia and Massachusetts<sup>222</sup> for content.<sup>223</sup> But as the states themselves were only 13 years old, the real link must be drawn further back to the law reform movement in general and the particular abuses of European feudalism at which those reforms were aimed. Madison was a member of the group of educated Americans, well-versed in history and political theory. He had noted the the impact of the Enlightenment and specifically Beccaria on the Virginia Re-  
 vival of the Laws,<sup>224</sup> and, in fact, had included the treatise of Beccaria in the list of recommended books which he had reported as proper for the use of the Continental Congress.<sup>225</sup> In drawing his amendments from the state propositions, he necessarily incorporated both the specific phrases used and, also, the ideas of the Enlightenment—particularly those of Beccaria. These ideas were received first by the colonial leaders, Jefferson, Adams and Franklin, then transmitted into the state constitutions, and finally incorporated through Madison into the Bill of Rights—particularly the eighth amendment. Madison proposed: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>226</sup> There is very little recorded debate on what was to become the eighth amendment. It was passed on August 17, 1789, despite objections that it was too indefinite and too strict.<sup>227</sup>

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222. See Franklin, *supra* note 118, at 94.

223. R. RUTLAND, *supra* note 11, at 206.

224. 8 MADISON PAPERS, *supra* note 153, at 393.

225. I. BRANT, *supra* note 14, at 38-39.

226. U.S. CONST. amend. VIII.

227. The debate reads as follows:

Mon. Aug. 17, 1789

Mr. Smith of South Carolina, objected to the words “nor cruel and unusual punishments,” the import of them being too indefinite.

Mr. Livermore—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; . . . If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind. Vote taken and measure passed.

1 ANNALS OF CONG. 782-83 (1789) [1789-1824].

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### IV. STATE AND FEDERAL COURTS: INCREASING JUDICIAL ACTIVISM UNDER WEEMS

The theoretical importance of the *Weems* decision has not been matched by its practical application:

[T]he courts have been largely unwilling to second guess the legislature as to what is an adequate penalty for any particular offense. Therefore, although the prohibition in theory serves to prevent disproportionate punishments, it is a rare defendant who can get relief by means of a claim of this nature. The principle, however, is there, awaiting a broadened use in the future.<sup>228</sup>

It is indeed unfortunate that the above commentary written in 1961 still presents, with only minor exceptions, an accurate assessment of the vitality of the *Weems* doctrine. However, the courts have not hesitated to find that punishments that may be termed "inherently cruel" violate the eighth amendment's "cruel and unusual punishments" clause.<sup>229</sup> It has been suggested that the principle reason for the failure of the Supreme Court to utilize the *Weems* doctrine has been its institutional need for an historical justification for its decisions.<sup>230</sup> This should no longer be an obstacle in enforcing the constitutional mandate of *Weems* prohibiting excessive or disproportionate punishments. As this Comment demonstrates, the *Weems* doctrine is historically justified by the influence of Beccaria and the Enlightenment writers on the colonial leaders, and in turn on the texts of the state constitutions, and ultimately on the content underlying the eighth amendment itself. In fact, after *Robinson*, which generally has been regarded as having applied the eighth amendment to the states, some of the federal and state courts have employed the excessiveness concept with increasing vigor. These courts have left the Supreme Court lagging behind<sup>231</sup> in the implementation of the prohibition against excessive penalties because they have not felt constrained by the institutional considerations so important to the Supreme Court; instead, they have seized upon the Supreme Court's language in *Weems* and attempted to give substance to its promise.

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228. Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 848-49 (1961).

229. See text accompanying note 20 *supra*.

230. See C. MILLER, *supra* note 7, at 4.

231. *Accord*, Turkington, *supra* note 50, at 155.

In the federal courts there have been a considerable number of instances in which the excessiveness principle has been used to invalidate certain punishments.<sup>232</sup> For example, in *Ralph v. Warden*,<sup>233</sup> the court answered the question of the constitutionality of the death sentence for a rapist who had neither taken or endangered the life of his victim in the negative. In holding that the eighth amendment forbids such punishment, the court assumed the viability of the *Weems* proportionality concept as determined through a comparative law test.<sup>234</sup> The *Ralph* court stated that

two factors coalesce to establish that the death sentence is so disproportionate to the crime of rape when the victim's life is neither taken nor endangered that it violates the Eighth Amendment. First, in most jurisdictions, death is now considered an excessive penalty for rape. . . . Second, when a rapist does not take or endanger the life of his victim, the selection of the death penalty from the range of punishment authorized by statute is anomalous when compared to the large number of rapists who are sentenced to prison.<sup>235</sup>

The state courts also have found increasing use for the *Weems* principle.<sup>236</sup> In *People v. Lorentzen*<sup>237</sup> a mandatory minimum sentence of 20 years imprisonment for selling marijuana was held to violate both the United States and the Michigan constitutional provisions against cruel and unusual punishment because it was in excess of any penalty that would be suitable to fit the crime. The court assumed that *Weems* was controlling and employed the comparative approach—in view of the punishments for the same crime in other jurisdictions

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232. *E.g.*, *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973) (mandatory life sentence imposed under recidivist statute was so disproportionate to the crimes of writing a check for \$50 on insufficient funds, transporting forged checks across state lines and paying, that it amounted to cruel and unusual punishment); *Adams v. Carlson*, 368 F. Supp. 1050 (E.D. Ill. 1973) (confinement of prisoners in solitary for 16 months because of their participation in a prison work stoppage was disproportionate to the offense committed and, therefore, cruel and unusual punishment); *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970) (solitary confinement for more than 15 days was so disproportionate to the offense of refusing to answer warden's questions fully and truthfully that it amounted to cruel and unusual punishment).

233. 438 F.2d 786 (4th Cir. 1970). *See* Note, 40 GEO. WASH. L. REV. 161 (1971).

234. 438 F.2d 786 at 789-90.

235. *Id.* at 793.

236. *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952); *Dembowski v. State*, 251 Ind. 250, 240 N.E.2d 815 (1968); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968); *Cannon v. Gladden*, 203 Ore. 629, 281 P.2d 233 (1951); *State v. Kimbrough*, 212 S.C. 348, 46 S.E.2d 273 (1948).

237. 387 Mich. 167, 194 N.W.2d 817 (1972).

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and the likelihood of the rehabilitation of the offender, the sentence was found so excessive that it "shocks the conscience."<sup>238</sup>

In recent years, it has been the California courts which have been most active in the area of invalidating punishments because of their disproportionality. In the opinion in *In re Lynch*,<sup>239</sup> the California Supreme Court ruled for the first time that a punishment could violate the state constitution if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."<sup>240</sup> This decision interpreted the state constitution as providing the same protection against excessive punishment as the *Weems* court found in the federal provision.<sup>241</sup> In determining whether the petitioner's sentence was unconstitutionally severe, the court viewed the indeterminate sentence as having the effect of a sentence to the maximum term possible. Thus, Lynch, who was sentenced to not less than one year for a second indecent exposure offense was, in effect, serving a life term for the purpose of this constitutional attack. In order to determine what would be a gross disproportion, the court adopted the tests that had been used in other jurisdictions. The court looked first at the nature of the offense and the offender, then at the penalty as compared with other penalties in the same jurisdiction, and finally at the penalty for the same offense in other jurisdictions. Thus, the court attempted to establish some standards which would take into account the individual offender. The factors to be weighed included a consideration of any possible mitigating circumstances in a particular case, the penological purposes of punishment as applied to the particular defendant, and a general ap-

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238. *Id.* at 181, 194 N.W.2d at 834. The addition of the "shock to conscience" element of *Palko v. Connecticut* raises the question of whether a court must first be shocked before it will consider a punishment excessive. *See also* *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972). The defendant's conviction on the charge of the illegal possession of marijuana was reversed. Two judges held that the statutory categorization of marijuana with narcotics denied equal protection. Two other judges were of the opinion that a minimum sentence of 9½ years constituted cruel and inhuman punishment because it was excessive in relation to the offense.

239. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

240. *Id.* at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226. Prior to *Lynch*, the California Supreme Court had recognized that punishments of excessive severity for ordinary offenses may be cruel and unusual. *People v. Anderson*, 6 Cal. 3d 628, 654, 493 P.2d 880, 897, 100 Cal. Rptr. 152, 169 (1972).

241. *See* Comment, *California's Cruelty Criteria: Evaluating Sentences After In re Lynch*, 25 HASTINGS L.J. 636, 637 (1974); Note, 6 LOYOLA OF LOS ANGELES L. REV. 416, 419 (1973).

proach toward the usual punishment imposed both within and without the jurisdiction for this and other more serious crimes.<sup>242</sup>

In New York there is some evidence of the existence of the *Weems* principle in the interpretation of both the state and the federal constitutional guarantees against the imposition of cruel and unusual punishments. In *Politano v. Politano*,<sup>243</sup> the Supreme Court of New York, Kings County, held that a 31 month prison term for failure to pay alimony was unconstitutionally excessive. Recently, in *People v. Mosely*,<sup>244</sup> a sentence under the recently enacted New York Drug Law, which provides lengthy mandatory sentences, was held to be cruel and unusual under both the federal and state constitutions because it was greatly disproportional to the offense. The defendant was convicted of criminal sale of a controlled substance in the third degree. The statutory penalty provided for a mandatory minimum of 1 to 8½ years,<sup>245</sup> a maximum of life imprisonment,<sup>246</sup> lifetime parole,<sup>247</sup> no possibility of probation,<sup>248</sup> no plea bargaining,<sup>249</sup> and no possibility for commitment to the Drug Abuse Control Commission.<sup>250</sup> The Court believed that *Weems*, as refined by *Lynch*, provided the tests for determining the constitutionality of the punishment. The standards used were: (1) the nature of the offense, (2) the nature of the offender, (3) the punishment compared to that of other crimes in the jurisdiction, (4) the punishment for the same offense in other jurisdictions, (5) the recommendation of model legislation, and (6) the conscience of the court.<sup>251</sup>

The *Mosely* decision was reversed by the New York Supreme Court, Appellate Division, Fourth Department, in *People v. McNair*.<sup>252</sup> The

242. *In re Foss*, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974) where a defendant convicted as a repeat offender for furnishing heroin under a statute precluding parole for a minimum of 10 years without regard to mitigating circumstances was denied habeas corpus relief although the presumption part of the statute was held cruel and unusual because it could be severed from the prescribed penalty. *See also* Comment, *Marijuana Possession and the California Constitutional Prohibition of Cruel or Unusual Punishment*, 21 U.C.L.A.L. REV. 1136 (1974).

243. 146 Misc. 792, 262 N.Y.S. 802 (Sup. Ct. 1933).

244. 78 Misc. 2d 763, 358 N.Y.S.2d 1004 (Monroe County Ct. 1974).

245. N.Y. PENAL LAW § 70.00(3)(a)(iii) (McKinney Supp. 1974).

246. *Id.* § 70.00(2)(a).

247. *Id.* § 60.05(1).

248. *Id.* § 70.40(1).

249. N.Y. CRIM. PRO. LAW § 220.10(6)(a) (McKinney Supp. 1974).

250. N.Y. MENTAL HYGIENE LAW § 81.25(b)(3) (McKinney Supp. 1974).

251. 78 Misc. 2d at 766, 358 N.Y.S.2d at 1007.

252. 46 App. Div. 2d 476, 363 N.Y.S.2d 151 (4th Dep't 1975).

very disagreement on the constitutionality of the draconian New York Drug Law is evidence of the tension that exists between those courts that have been willing to actively apply the *Weems* doctrine to prison sentences and those other courts which feel compelled to adhere to a more circumscribed approach grounded in the tentative Supreme Court adherence to the excessiveness principle.<sup>253</sup> The *McNair* court, citing *In re Kemmler*, acknowledged that the Supreme Court had initially "adopted a 'historical' interpretation of the Cruel and Unusual Punishments Clause." However, the court then noted that, "the 'looking backwards' approach was decisively repudiated in *Weems*."<sup>254</sup> In this manner, the *McNair* court has explicitly stated the assumption that has been implicit in all other eighth amendment decisions—the *Weems* excessive punishment doctrine is not historically justified and, therefore, to be sparingly employed.

#### CONCLUSION

The strands of progressive adjudication which have appeared in the state court and lower federal court decisions have thus far failed to influence the Supreme Court to move forward with the *Weems* doctrine against excessive prison sentences. Terms of imprisonment, however, must be seen as an historically novel form of punishment<sup>255</sup> because

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253. The disagreement is manifested by the various holdings of these cases. *People v. Broadie*, 45 App. Div. 2d 649, 360 N.Y.S.2d 906 (2d Dep't 1974) (declaring section 70(3) of the New York Penal Law not to be cruel and unusual, although harsh and in many cases unjust, because narcotic offenses are particularly destructive to society); *People v. Venable*, 46 App. Div. 2d 73, 361 N.Y.S.2d 398 (3d Dep't 1974) (declaring section 70(2) of the New York Penal Law not to be cruel and unusual); *People v. McNair*, 46 App. Div. 2d 476, 363 N.Y.S.2d 151 (4th Dep't 1974) (declaring sections 70(2) (a) and 70(3) (a) not to be cruel and unusual).

It is interesting to note that newly-elected Governor Carey of New York has appointed two panels which are "studying the entire question of drug abuse with an eye toward a major re-vamping of the state's stringent narcotic laws, which went into effect in 1973." *N.Y. Times*, Jan. 29, 1975, § 1, at 1, col. 2 (city ed.). Governor Carey is properly attempting to check the legislative excesses championed by former Governor, now Vice President, Nelson Rockefeller, as part of a law and order campaign. The courts also have a clear duty under *Weems*, as justified by the Beccarian influence, to hold as violative of the eighth amendment legislative abuses in establishing sentencing standards.

254. 46 App. Div. 2d at 480, 363 N.Y.S.2d at 156.

255. Under the fourth amendment, the Supreme Court had felt it was ill-equipped to deal with electronic eavesdropping with traditional common-law doctrine and con-

[i]n earlier eras imprisonment was mainly a period of limbo, a waystation in the legal process where the suspected offender looked forward to the hangman's noose or lash. As late as 1771 the French jurist Jousse could claim that imprisonment was simply a means of holding the suspected criminal before trial and not a method of punishment; and not until the 19th century did imprisonment achieve its present eminence as a major penal sanction.<sup>256</sup>

Due to that novelty, it is no surprise that prison systems and prison sentences did not directly concern the framers. Nevertheless, there is no reason to permit a narrow reading of the amendment to exempt the imposition of prison sentences from constitutional scrutiny under the *Weems* excessive punishment doctrine under the eighth amendment.<sup>257</sup>

It is important to note the ironic results that follow when the courts view their primary and only clearly defined role under the eighth amendment's "cruel and unusual punishments" clause to be to prevent tortures and other inherently barbarous pains and penalties. The courts have, in effect, been properly concerned with the arbitrary and admittedly cruel actions of prison administrators in subjecting prisoners, even for one night or one week, to exceedingly

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cepts. In *Olmstead v. United States*, 277 U.S. 438 (1928), the Court stated that the fourth amendment extended protection only against searches wherein there had been a physical trespass on the premises of the suspect. The historically novel method of searching with electronic instruments was held not to offend the fourth amendment. However, in *Katz v. United States*, 398 U.S. 347 (1967), the Court abandoned the limited common-law concept of "trespass" and "physical penetration" to approach the problem in terms of justifiable expectations of privacy. It is evident therefore, that if the language and meaning of the Bill of Rights were confined to its purported common law or English feudal content, the amendments—the eighth amendment included—would merely exist as a historical curiosity, with no constitutional impact or force in 20th-century America. Since this is manifestly not so, it is apparent that the content of the amendments is not determined solely by its English feudal meaning.

256. G. SYKES, *THE SOCIETY OF CAPTIVES* xi (1958) (footnotes omitted). It was not until the 19th century that the penitentiary system began to be organized. In the 1820's, in New York, the first state prison at Auburn was established and followed shortly thereafter by Sing-Sing in Ossining, New York. In Pennsylvania, at this time, the prison system began to take hold, resulting in facilities at Philadelphia and Pittsburgh. Connecticut built its first prison in 1827, Massachusetts and Maryland in 1829, New Jersey in 1830, Ohio and Michigan in the 1830's, and Minnesota, Indiana and Wisconsin in the 1840's. D. ROTHMAN, *supra* note 143 at 79-81. See also *THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA* at 6-9 (1972).

257. This does not, of course, preclude the possibility that at times, prison or prison conditions can in themselves constitute cruel and unusual punishment as has been traditionally understood as barbarous or torturous penalties. G. SYKES, *supra* note 256, at 63-83.

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revolting and appalling conditions.<sup>258</sup> However, lengthy prison sentences of 10, 20, 30 or more years, in conditions which may be only marginally better, are routinely upheld.<sup>259</sup> Such practices not only present an unfortunate and absurd contrast, they are also incorrect.

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258. These punishments have been found cruel and unusual. *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) (corporal punishment administered in medium correctional institution for boys 12 to 18 consisting of beatings causing painful injuries); *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973) (administration of drug which induces vomiting as part of treatment of mental institution inmate for violating an institutional rule); *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972) (confining inmate naked in strip cell without bedding, deprived of toilet paper, towels, soap, and his eyeglasses); *Anderson v. Nossner*, 438 F.2d 183 (5th Cir. 1971) (detaining civil rights protestors naked in unhygienic facilities, without bedding and heating); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (use of strap on prisoners); *Berch v. Stahl*, 373 F. Supp. 412 (W.D.N.C. 1974) (solitary confinement of inmate for more than 30 days without any clothing in 5 by 7 cell); *Aikens v. Lash*, 371 F. Supp. 482 (N.D. Ind. 1974) (Stripcells with inadequate lighting and ventilation); *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y. 1974) (level of noise which constituted a threat to hearing and mental health); *Osborn v. Manson*, 359 F. Supp. 1107 (D. Conn. 1973) (confinement of prisoners in segregation cells which had no running water); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971) (denial of physical necessities including imposition of a bread and water diet); *Lollis v. Department of Social Serv.*, 322 F. Supp. 473 (S.D.N.Y. 1970) (confinement of 14 year-old inmate of training school for girls in stripped room in night clothes with no recreation or reading matter); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969) (confinement of inmates in isolation cells which were overcrowded, dirty, unsanitary, and pervaded by bad odors from toilets); *Hancock v. Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969) (confinement of prisoner naked, forcing him to sleep on bare concrete floor, deprived of adequate light and ventilation); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) (confinement of prisoner in cell with no light, no furnishings except a toilet, and containing no means for the prisoner to clean himself); *People v. Bland*, 52 Mich. App. 539, 218 N.W.2d 56 (1974) (convicted criminal who is denied medical treatment); *Bryant v. Hendrick*, 444 Pa. 83, 280 A.2d 110 (1971) (county prison conditions which were so degrading and disgusting that personal safety of inmates was in danger).

259. These are cases where excessive sentences were approved by the courts because they were within the extreme limits established by the legislature. *E.g.*, *Wood v. South Carolina*, 483 F.2d 149 (4th Cir. 1973) (concurrent terms of five years imprisonment for making obscene telephone calls were within ten year maximum); *Yeager v. Estelle*, 489 F.2d 276 (5th Cir. 1973) (500 year sentence for murder); *Johnson v. Beto*, 337 F. Supp. 1371 (S.D. Tex. 1972); *Parker v. Bounds*, 329 F. Supp. 1400 (E.D.N.C. 1971) (sentence within statutory limits is not cruel and unusual); *Ormento v. United States*, 328 F. Supp. 246 (S.D.N.Y. 1971) (sentence imposed within limit of statute cannot amount to cruel and unusual punishment, here, 40 years for conspiracy to import drugs); *Crow v. Coiner*, 323 F. Supp. 555 (N.D.W.Va. 1971) (sentencing juvenile to a maximum of 10 years for larceny was within statute); *Garner v. State*, 16 Md. App. 353, 297 A.2d 304 (1972) (10 years for attempt to obtain money by false pretense); *Clanton v. State*, 279 So. 2d 599 (Miss. 1973) (10 year sentence for possession of marijuana); *State v. Edwards*, 282 N.C. 578, 193 S.E.2d 736 (1973) (sentence of 30 years to life for burglary and escape); *Jones v. State*, 504 S.W.2d 906 (Tex. Crim. App. 1974) (999 years for murder); *Albro v. State*, 502 S.W.2d 715 (Tex. Crim. App. 1973) (sentence of 100 years for offense of possession of marijuana); *Williams v. State*, 476 S.W.2d 674 (Tex. Crim. App. 1972) (20 years for possession of marijuana).



The courts, and the Supreme Court in particular, should proceed, then, in a more affirmative manner to strike down legislatively prescribed prison sentences by utilizing the *Weems* excessive punishment doctrine under the eighth amendment. In so doing, the courts will be acting consistently with the influence of Beccaria and other Enlightenment writers. Such progressive action is historically justified.

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