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Recent Constitutional Developments on Eminent Domain

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ableness of the assumption of jurisdiction. In all cases, even though the court determines that jurisdiction is reasonable, the separate doctrine of *forum non conveniens* may still apply.

VIRGINIA B. COWAN

RECENT CONSTITUTIONAL DEVELOPMENTS ON EMINENT DOMAIN

"[N]or shall private property be taken for public use, without just compensation."[1]

The key words in this clause of the Fifth Amendment—"private property," "public use," "just compensation," "taken"—provide an outline for the problems in eminent domain.[2] The decisions of the Supreme Court have produced more or less concrete definitions of "private property"[3] and "public use."[4] But they have not as clearly settled the problems of what constitutes a "taking" and what are the exact requirements of "just compensation."

WHEN IS PROPERTY "TAKEN"

Property is said to be "taken" when the owner is deprived of its use.[5] However, governmental activity resulting in extreme restriction of use, and perhaps involving substantial monetary loss to the owner, can occur without a "taking" in the eminent domain sense.[6] For example, a regulatory law may prohibit property from being used for the very purpose for which it was designed and apart from which it is of little value.[7] If the regulatory law is an otherwise valid exercise of legislative power, the resulting loss to the owner of the property is deemed indirect and incidental. Price and rent controls restrict the owner's freedom to deal with his property, but the losses that may occur because of such restrictions are not compensable because there has been no "taking."[8] In all of these cases the governmental

1. U.S. CONST. AMEND. V.

2. Eminent domain is the power inherent in the sovereign to take private property for public use. Kohl v. United States, 91 U.S. 367, 23 L. Ed. 449 (1876); 1 NICHOLS, EMINENT DOMAIN § 1.11 (3d ed. 1950).

3. Any interest having a monetary value which can be transferred from one owner to another. Kimball Laundry Co. v. United States, 338 U.S. 1, 69 Sup. Ct. 1434, 93 L. Ed. 1765 (1949).

4. If the end is within any of the constitutional powers of government, the public use requirement is met. See Notes, 21 N.Y.U.L.Q. REV. 285 (1946), 58 YALE L.J. 599 (1948).

5. United States v. Lynah, 188 U.S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539 (1903); Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931).

6. *E.g.*, Brown v. Winter, 50 F. Supp. 804 (W.D. Wis. 1943). Compensation for "damage" to property under certain constitutional and statutory requirement is outside the scope of this discussion. See note 32, *infra*.

7. Hadacheck v. Sebastian, 239 U.S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348 (1915); Mugler v. Kansas, 123 U.S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205 (1887).

8. Bowles v. Willingham, 321 U.S. 503, 64 Sup. Ct. 641, 88 L. Ed. 892 (1944) (rent control); Yakus v. United States, 321 U.S. 414, 64 Sup. Ct. 660, 88 L. Ed. 834 (1944) (price control).

agency is not seeking, itself, to use or appropriate property; it is concerned with reaching an objective deemed desirable in the public interest and unrelated to governmental use of, or appropriation of, the property affected by the law.

This does not mean that some agency of government must be intending to exercise the power of eminent domain in order for there to be a "taking." In *United States v. Causby*,[9] military planes flying at a low altitude, at frequent and regular intervals, over a poultry farm were causing direct and indirect losses to the owner, finally forcing him to give up the chicken business. The Supreme Court agreed with the Court of Claims that the flight of the planes resulted in the taking of an easement over claimant's property for which compensation was required. The case was remanded for more precise findings as to the extent of the easement, the court saying, "[A]n accurate description of the property taken is essential, since that interest vests in the United States."[10] Paradoxically, it may be noted, therefore, that regulatory laws purposing directly to limit or forbid the owner's use of his property do not result in a "taking," while governmental activity contemplating no restriction on use of property may nevertheless constitute a "taking." The power of eminent domain is always incidental to the exercise of some other governmental power. The key question appears to be whether or not the Government, in the course of reaching its objective, is itself occupying an interest of the property owner. The borderline between facts which meet this test, however, and those which constitute merely a restriction incidental to regulation may seem tenuous at times.[11]

Special problems with respect to "taking" are presented when the Federal Government embarks on a navigation or flood-control project. In the recent case of *United States v. Kansas City Life Ins. Co.*,[12] the company owned highly productive agricultural land located on a small stream. The stream emptied into the Mississippi River at a point approximately a mile and a half from the property. An agency of the United States built a dam on the Mississippi downstream from the property in question, constantly maintaining the river at its previous high water level. The company's property was above this level, but the underflow and percolation of water destroyed the agri-

9. 328 U.S. 256, 66 Sup. Ct. 1062, 90 L. Ed. 1206 (1946), 35 CALIF. L. REV. 110 (1947).

10. 328 U.S. at 267.

11. The state, in the exercise of police power, may also interfere with the use of private property without incurring liability. New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831 (1905); New York & N.E.R.R. v. Bristol, 151 U.S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269 (1894). The lack of a reasonable basis for a restrictive regulation has been deemed to result in the taking of property. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 Sup. Ct. 158, 67 L. Ed. 322 (1922); Rivera v. R. Cobian Chinea & Co., 181 F.2d 974 (1st Cir. 1950). But if it is borne in mind that some interest in property must, itself, be vested in the government, when there is a taking, these decisions appear to be questionable.

12. 339 U.S. 799, 70 Sup. Ct. 885, 94 L. Ed. 1277 (1950).

cultural value of the land. A majority of the Supreme Court held that this underflowing was analogous to the actual flooding of private property. Hence, there was a taking, and compensation was allowed to the extent of the damage.[13]

The power of Congress to legislate for the improvement of navigation is plenary and the Federal Government possesses sufficient interest in the bed of navigable streams to accomplish this purpose.[14] Therefore, riparian owners on navigable waters hold their property subject to a dominant servitude.[15] This extends to the high water mark, and Congress may authorize activity causing loss to riparian property below the high water level, even destroying its use completely; and no compensation will be required.[16] Riparian owners on nonnavigable streams are not subject to the same dominant servitude and, hence, have been afforded greater protection.[17] The decision in the *Kansas City Life* case apparently extends governmental liability to such owners even further, for the water did not actually invade the surface of the property. The right of the Government to maintain the Mississippi at high water level is unquestionable; and similar damage inflicted on owners riparian to the Mississippi would not have constituted a "taking," since the Government would merely be using an interest in land that it already possessed. Another riparian owner on the nonnavigable tributary, or perhaps even the State of Missouri, could have inflicted the same injury to the company without any liability.[18]

The importance of this decision can easily be ascertained when it is borne in mind that the back water from a dam which actually floods thousands of acres[19] may very well have adverse effect upon thousands of additional acres. Riparian owners on nonnavigable streams will not be injured,

13. Five Justices so held. Justice Minton dissented on the ground that the United States should not be required to pay for doing that which another riparian owner could have done without liability. 339 U.S. at 814. Justice Douglas, with Justices Black, Reed and Minton, dissented on the ground that the respondent was claiming a property right in the unfettered flow of the Mississippi in its natural state, an "inconceivable concept." *Id.* at 812.

14. Jackson v. United States, 230 U.S. 1, 33 Sup. Ct. 1011, 57 L. Ed. 1363 (1913); *cf.* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 61 Sup. Ct. 291, 85 L. Ed. 243 (1940).

15. Bedford v. United States, 192 U.S. 217, 24 Sup. Ct. 238, 48 L. Ed. 414 (1904). Property here is used reservedly, it being doubtful whether or not an individual can have a property right in a navigable stream. *See* Monongahela Nav. Co. v. United States, 148 U.S. 312, 324, 341, 13 Sup. Ct. 622, 37 L. Ed. 463 (1893).

16. United States v. Chicago, M., St. P. & P.R.R., 312 U.S. 592, 61 Sup. Ct. 772, 85 L. Ed. 1064 (1941); United States v Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063 (1913). Compensation is required in all cases where the level is raised above high water mark. Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557 (1872).

17. *E.g.*, United States v. Cress, 243 U.S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746 (1917).

18. Dissent, Mr. Justice Minton, 339 U.S. at 814. It is interesting to note that government engineers advocated payment to the company from the outset.

19. Liability has always been imposed for the actual flooding of property. Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557 (1872).

moneywise, while owners on navigable streams will continue to bear the burden of a dominant servitude. But factually there seems little reason for making the nonnavigable riparian owner whole at the public's expense under these circumstances, while forcing the navigable riparian owner to benefit the public without compensation—when the damage to both is caused by the same act.

Besides the flooding of lands or underflow thereof, other types of injuries may be inflicted on property rights. The most usual type is the loss of power-heads at individually owned dams.[20] With few exceptions, compensation has been granted where the private dam is on a nonnavigable stream.[21] The distance from where the dam is situated to the navigable part of the stream apparently is of little importance.

JUST COMPENSATION

The problem of "just compensation," arising whenever it is established that property has been taken, presents even greater difficulties than those discussed above. The court must see that the individual is afforded his constitutional rights and at the same time must protect the public against exorbitant prices.[22] Various methods have been proposed and used in the carrying out of this dual obligation, with the "fair market value" generally regarded as the most satisfactory basis.[23] Fair market value, is theoretically, that which a willing seller would take and a willing buyer offer. In a condemnation proceeding, one of these factors (a willing seller) will almost always be absent. The court must, therefore, disregard any personal considerations and separate the incidental from the necessary elements, in arriving at a fair price. The trend at the present time is to extend the liability of the Government in pace with its steadily expanding activities.[24] Governmental activity involving just compensation under eminent domain has centered largely, in this century, in three fields which may be discussed separately.

(a) *Condemnation of Fees in River Projects*

Here, market value is usually deemed just compensation but is not always easily ascertained.[25] Clearly, peculiar value to the individual cannot be

20. United States v. Cress, 243 U.S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746 (1917).
21. *Ibid. But see* United States v. Willow River Power Co., 324 U.S. 499, 504, 506, 65 Sup. Ct. 761, 89 L. Ed. 1101 (1945). This latter decision would seem to be basically inconsistent with the *Kansas City Life* case.
22. Cubbins v. Mississippi River Comm'n, 241 U.S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041 (1916).
23. Dolan, *Present Day Court Practice in Condemnation Suits,* 31 VA. L. REV. 9 (1944).
24. The Supreme Court has never devised a rigid formula for determining just compensation. United States v. Cors, 337 U.S. 325, 69 Sup. Ct. 1086, 93 L. Ed. 1392 (1949); Olson v. United States, 292 U.S. 246, 54 Sup. Ct. 704, 78 L. Ed. 1236 (1934).
25. United States v. Miller, 317 U.S. 369, 63 Sup. Ct. 276, 87 L. Ed. 336 (1943).

considered.[26] But special adaptability to the use for which the property is condemned is an element, if there is a possibility that the property might be used by anyone other than the condemnor.[27] Evidence as to the most valuable use to which the land is adaptable is also admissible.[28] Enhanced value brought about by the project for which the land is condemned will be discounted if the land is situated within the area probably needed for the project, but the higher value is allowed if it is not within such area.[29] Often, only a portion of a given plot of land will be taken. Compensation is then allowed to the extent of the whole, minus the value of that remaining.[30] By this procedure compensation is given for loss of access to highways, damage to business, and other types of incidental injuries. This is true, however, only when that which is taken is part of one parcel and not where one owner holds several different parcels, with one separate parcel being condemned.[31]

Congress, when launching public projects in recent years, has recognized rights and authorized compensation for injuries which would be *damnum absque injuria* under eminent domain principles.[32] Relatively few cases have come before the Court as compared to the high number of condemnations. Most of the cases arising have involved peculiar facts presenting genuine legal questions.

(b) *Condemnation of Interests Less Than Fees*

During a national emergency the Government needs factories, floor space for expanding offices, and vast expanses of land for the military. This property, while indispensable during the emergency, would probably be of little value in normal times. If this property were acquired in fee, valuation would be at inflationary prices, while resale might very well be in a recessionary period, necessarily adding to the public expense. To avoid this the Government condemns for a period, definite or indefinite.

In *United States v. General Motors Corp.*,[33] the Secretary of War instituted proceedings to condemn a leasehold interest held by General

26. Kimball Laundry Co. v. United States, 338 U.S. 1, 69 Sup. Ct. 1434, 93 L. Ed. 1765 (1949); United States v. Powelson, 319 U.S. 266, 63 Sup. Ct. 1047, 87 L. Ed. 1390 (1943).

27. Olson v. United States, 292 U.S. 246, 54 Sup. Ct. 704, 78 L. Ed. 1236 (1934); Boom Co. v. Patterson, 98 U.S. 403, 25 L. Ed. 206 (1879).

28. McCandless v. United States, 298 U.S. 342, 56 Sup. Ct. 764, 80 L. Ed. 1205 (1936); Cameron Development Co. v. United States, 145 F.2d 209 (5th Cir. 1944) (additional compensation denied on the ground that there was no market available for the shell marl located on the land).

29. United States v. Cors, 337 U.S. 325, 69 Sup. Ct. 1086, 93 L. Ed. 1392 (1949); Note, *Recent Developments in the Federal Law of Valuation in Eminent Domain*, 26 TEXAS L. REV. 199 (1947).

30. United States v. Grizzard, 219 U.S. 180, 31 Sup. Ct. 162, 55 L. Ed. 165 (1911).

31. Sharp v. United States, 191 U.S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211 (1903).

32. See United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 Sup. Ct. 955, 94 L. Ed. 1231 (1950); International Paper Co. v. United States, 282 U.S. 399, 51 Sup. Ct. 176, 75 L. Ed. 410 (1931).

33. 323 U.S. 373, 65 Sup. Ct. 357, 89 L. Ed. 311 (1945), discussed in Note, 26 TEXAS L. REV. 199 (1947).

Motors for a twenty year term. The period condemned was less than the remaining time under the lease. The Government argued that the value of the property condemned ought to be computed in terms of the rental value of the full lease. The Supreme Court held that this would not be just compensation. Only the "market rental value" of the short term would provide that. Factors to be included would be the cost to the company of moving out machinery, preparing the property for the new tenant, labor, materials and transportation. A long term lessee would consider these factors in computing a short term sub-lease, and a short term lessee would expect to pay for them.

It is to be noted that the term condemned here was for a period less than that still held by the lessee. When the entire term is condemned, no compensation is allowed for the expense of moving out, on the theory that this is an expense which the lessee would ultimately have to bear in any event.[34] Where the lessee has an option to renew, the value of that must also be considered.[35]

When the Government leases land, it occupies the position of any other lessee. If there is nothing to the contrary in the lease, additions will inure to the benefit of the lessor.[36] Thus the Government may add value to land for which it may later have to pay, if it then takes the land by eminent domain proceedings.[37]

Disputes arising between labor and management may endanger public health and safety, as well as hamper the national effort in time of war. Sometimes it is necessary for the Government to take over a business so affected in order to put it back in operation. Labor may receive a wage increase as a result, thus adding to operating expenses. Two recent Court of Claims cases have held that when this occurs the Government must compensate the owner, not only for the fair rental value of the business, but also for the increased operational expenses, including wage increases.[38]

Just compensation in this field is difficult to determine. Loss of business opportunities, damage to trade routes, advantages gained by competitors—all are incidental damages as far as eminent domain is concerned. Actually, these things are quite real and may occasion a great loss, but the loss must be borne by the owner and not the public.

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34. United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 70 Sup. Ct. 644, 94 L. Ed. 816 (1950) (condemnation for a term, with an option to renew). A vigorous dissent urged that the Government should condemn for a definite period, in order that the rights of the parties might be readily ascertained. For a discussion of the decision of the Court of Appeals in this case, see 2 VAND. L. REV. 477 (1949).

35. United States v. Petty Motor Co., 327 U.S. 372, 66 Sup. Ct. 596, 90 L. Ed. 729 (1946).

36. United States v. Five Parcels of Land, 180 F.2d 75 (5th Cir. 1950), *cert. denied*, 340 U.S. 812 (1950).

37. 4 VAND. L. REV. 361 (1950).

38. Pewee Coal Co. v. United States, 88 F. Supp. 426 (Ct. Cl. 1950); Wheelock Bros., Inc. v. United States, 88 F. Supp. 278 (Ct. Cl. 1950).

(c) *Requisitions of Materials and Products*

This is the field in which the fundamental concepts of eminent domain are most difficult to reconcile with the constitutional limitations. It is well settled that the determination of just compensation is a judicial question.[39] Yet, one of the incidents of a national emergency is price control. Under a controlled system an administrative body sets a maximum price for which a given article may be legally sold but does not compel the vendor to offer his goods to the public.[40] The controlled price may be, and usually is, lower than it would be in a free market. This causes little trouble until the Government requisitions materials and products which are under control.

In *United States v. John J. Felin & Co.*,[41] the product requisitioned was cured pork. A ceiling price had been placed on the product, but live hogs and the price of labor were not controlled. Consequently, the replacement price of pork was much higher than the ceiling price. The Court of Claims held that replacement cost and not ceiling price represented just compensation.[42] This holding was reversed by the Supreme Court, although a majority did not concur on any of the grounds for the result. However, in *United States v. Commodities Trading Corp.*,[43] involving requisitions of pepper at ceiling prices which were far below the cost to the company, the court held unanimously that the ceiling price did not in itself represent the just compensation required by the Constitution. This offered little consolation to the company, for the Court also held that "retention" value could not be considered in determining what was just, and that all the owner lost was a potential profit for which compensation need not be paid. Thus, in both cases, the ceiling price was deemed just compensation.

Value is established as of the date of the taking.[44] The cost to the owner is not considered, as illustrated by the *Commodities* case. If the market value happens to be greater than cost, the owner gains; if it is lower, he must bear the loss; and this is true even though the market is controlled.[45] Conversely, where there is a ready market, the Government cannot show that the actual value to the owner—*i.e.*, cost of production plus a reasonable profit—is lower.[46] Where there is no market for the property, isolated sales of similar property may be considered in establishing value; but neither a

39. *E.g.*, United States v. 3.71 Acres of Land, 50 F. Supp. 110 (E.D.N.Y. 1943).
40. United States v. Commodities Trading Corp., 339 U.S. 121, 70 Sup. Ct. 547, 94 L. Ed. 707 (1950).
41. 334 U.S. 624, 68 Sup. Ct. 1238, 92 L. Ed. 1614 (1948).
42. John J. Felin & Co. v. United States, 67 F. Supp. 1017 (Ct. Cl. 1946).
43. 339 U.S. 121, 70 Sup. Ct. 547, 94 L. Ed. 707 (1950).
44. L. Vogelstein & Co. v. United States, 262 U.S. 337, 43 Sup. Ct. 564 67 L. Ed. 1012 (1923).
45. *Ibid.*
46. United States v. New River Collieries Co., 262 U.S. 341, 43 Sup. Ct. 565, 67 L. Ed. 1014 (1923).

unique use to which the owner claims he can put the property nor the reproduction cost where reproduction is unfeasible will be considered.[47]

It is possible, in the requisitioning of materials, that the greatest injury may be inflicted on one other than the owner, as shown by *Omnia Commercial Co. v. United States*.[48] During World War I the company owned a contract by which it acquired the right to purchase plate steel at a price far below market value. The Federal Government requisitioned the entire output of the steel company. The Court held that the contract rights of Omnia were private property within the meaning of the Fifth Amendment, but found that these rights had been injured only indirectly, stating that, "Frustration and appropriation are essentially different things."[49]

War does not dispense with the constitutional requirement that just compensation be made for property which is taken.[50] This is a principle to which the court has adhered through the years. At times it may be necessary to restrict the individual's freedom to deal with his property, while not actually taking it. Such a situation occurs under price controls. The loss to the individual, here, consists of loss of prospective profits. It is in the interest of the public that these profits are not allowed. While balancing the rights of the individual against the public good, within the constitutional limitations, is a delicate task, the Court has done a very creditable job. The ratio of the number of cases settled out of court to those brought to trial speaks well for the attitude of the administrative bodies toward the individual's property rights. The Court has wisely refused to reduce to a rigid formula the requirements of just compensation. Leeway is allowed for individual hardships and for peculiar circumstances. Each case may be determined on its own merits, with justice for the individual as well as protection of the public.

CARL E. JENKINS

THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT—ITS PRESENT SIGNIFICANCE

THE CONSTITUTIONAL PROVISIONS

Although the phraseology of the prohibition may vary somewhat among the states,[1] the usual statement of the constitutional restriction with which this

47. United States v. Toronto, Hamilton & Buffalo Nav. Co., 338 U.S. 396, 70 Sup. Ct. 217, 94 L. Ed. 195 (1949).
48. 261 U.S. 502, 43 Sup. Ct. 437, 67 L. Ed. 773 (1923).
49. 261 U.S. at 513.
50. United States v. New River Collieries Co., 262 U.S. 341, 43 Sup. Ct. 565, 67 L. Ed. 1014 (1923); United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 Sup. Ct. 298, 65 L. Ed. 516 (1921).

1. The prohibitions for the most part assume one of two forms. The Michigan Constitution typifies one of these: "cruel or unusual punishment shall not be inflicted. . . ." MICH. CONST. Art. II, § 15. The other common statement is that set forth in the Tennessee Constitution: "nor cruel and unusual punishments inflicted." TENN. CONST. Art. I, § 16. In addition to these disjunctive and conjunctive wordings

note is concerned amounts to substantially the same as that set out in the Eighth Amendment to the Constitution of the United States—that "cruel and unusual punishments" shall not be "inflicted."[2] A minority of the states include also a provision that any punishment administered shall be proportioned to the gravity of the offense.[3] Even in the absence of a specific durational restriction, numerous courts[4] have held that the length of a sentence itself may be so great in proportion to the offense as to amount to cruel and unusual punishment. Included among them is the Supreme Court of the United States.[5] Conversely, other courts say that the limitation relates to mode of punishment only.[6]

Only Connecticut[7] and Vermont have no comparable provisions in their constitutions. However, the Supreme Court of Vermont has stated that the prohibition is a part of that state's common law[8] and has made specific reference to the English Declaration of Rights,[9] which included the prohibition. Thus, in 47 of the states, cruel and unusual punishments are forbidden either by express constitutional provision or by judicial decision. The early history of Connecticut, the remaining state, amply shows that the restriction was considered of vital importance there also; it appeared in the laws of 1673, 1702 and 1715.[10] A somewhat more comprehensive limitation is contained in the

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of the limitation, a third type appears occasionally: "nor cruel punishments inflicted." KY. CONST. *Bill of Rights* § 17. South Carolina, in addition to the conjunctive statement of the restriction, provides: "Corporal punishment shall not be inflicted." S.C. CONST. Art. I, § 19. Apparently, no significance attaches to these variations; *cruel* is the key word in all. See p. 685 *infra*.

2. U.S. CONST. AMEND. VIII.

3. ILL. CONST. Art. II, § 11; IND. CONST. Art. I, § 16; ME. CONST. Art. I, § 9; NEB. CONST. Art. I, § 16; N.H. CONST. Pt. I, Art. XVIII; ORE. CONST. Art. I, § 16; R.I. CONST. Art. I, § 8; W. VA. CONST. Art. III, § 5.

4. *E.g.*, State *ex rel.* Garvey v. Whitaker, 48 La. Ann. 527, 19 So. 457 (1896); State v. Ross, 55 Ore. 450, 104 Pac. 596, 42 L.R.A. (N.S.) 601 (1909), *rehearing*, 55 Ore. 474, 106 Pac. 1022, 42 L.R.A. (N.S.) 613 (1910), *writ of error dismissed*, 227 U.S. 150, 33 Sup. Ct. 220, 57 L. Ed. 458 (1913); State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948); *see* State v. Moilen, 140 Minn. 112, 167 N.W. 345, 347 (1918); Cason v. State, 160 Tenn. 267, 23 S.W.2d 665, 667 (1930); Fisher v. McDaniel, 9 Wyo. 457, 64 Pac. 1056, 1061 (1901). See 1 COOLEY, CONSTITUTIONAL LIMITATIONS 692 (8th ed. 1927).

5. See Weems v. United States, 217 U.S. 349, 368, 30 Sup. Ct. 544, 54 L. Ed. 793 (1910).

6. State v. Griffin, 84 N.J.L. 429, 87 Atl. 138 (Sup. Ct. 1913), *aff'd*, 85 N.J.L. 613, 90 Atl. 259 (1914); *see, e.g.*, People v. Morris, 80 Mich. 634, 45 N.W. 591, 592 (1890); Aldridge v. Commonwealth, 2 Va. Cas. 447, 450 (1824). *But see* Hart v. Commonwealth, 131 Va. 726, 109 S.E. 582, 588 (1921) (question said to be an open one in Virginia). See 48 W. VA. L.Q. 63 (1941) for a general discussion of duration of sentence as an aspect of cruel and unusual punishments.

7. "No person shall be arrested, detained or punished, except in cases clearly warranted by law." CONN. CONST. Art. I, § 10. This provision now is indexed as the "cruel and unusual" provision; but certainly a literal reading of the clause does not convey this impression; and apparently no case has even raised the contention that it is so applicable.

8. State v. O'Brien, 106 Vt. 97, 170 Atl. 98, 102 (1934).

9. 1 WM. & MARY, 2d Sess., c.2 (1689).

10. See 34 MINN. L. REV. 134 (1950).

Universal Declaration of Human Rights of the United Nations,[11] wherein cruel, inhuman or degrading treatment or punishment is prohibited.

The roots of this clause are laid in English history even prior to the Norman Conquest. Indeed, the principle is said to have appeared as early as 1042 in the laws of Edward the Confessor,[12] and it was carried forward in Magna Charta.[13] The Declaration of Rights of 1688[14] expressed the first specific prohibition against "cruel and unusual punishments." This clause was transferred verbatim to the Federal Bill of Rights and incorporated as the Eighth Amendment. Thus, the clause has a long and continuous background in both English and American development.

INCLUSION IN DUE PROCESS

It has long been settled that the Eighth Amendment is, itself, no limitation upon state action and that the only express limitation upon a state in this matter is that imposed by its own law.[15] The prevailing view has been that the due process clause of the Fourteenth Amendment does not necessarily incorporate the Eighth *per se* so as to restrain state action.[16] The idea of many that the privileges and immunities clause of the Fourteenth incorporated the entire Bill of Rights was rejected in the *Slaughter-House Cases;*[17] a like result was reached in *Davidson v. New Orleans*[18] as to the operation of the due process clause.[19] The attitude of the Court rather has been that the abridgement of only those rights which are "implicit in the concept of ordered liberty" is a violation of due process where state action is involved.[20] Although the policy of the Court in resisting complete incorporation of the Bill of

11. See 6 U.N. BULL. 7 (1949). See also 7 U.N. BULL. 7, 8 (1949), where the insertion of the provision into the draft of the International Covenant on Human Rights is discussed.

12. See 34 MINN. L. REV. 134, 135 n.15 (1950).

13. HEN. III, cc. 14, 29 (1225).

14. 1 WM. & MARY, 2d Sess., c.2 (1689).

15. *E.g.*, Collins v. Johnston, 237 U.S. 502, 35 Sup. Ct. 649, 59 L. Ed. 1071 (1915); Pervear v. Massachusetts, 5 Wall. 475, 18 L. Ed. 608 (1866); Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946); *see* Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445, 447, 24 Sup. Ct. 703, 48 L. Ed. 1062 (1904).

16. This doctrine has not been established without dissent. See Note, 21 So. CALIF. L. REV. 47 (1947), for a discussion contending that all the rights of the first eight Amendments ought to have been applied to state action by virtue of the due process clause. For an argument against its inclusion, see Note, 2 STAN. L. REV. 174 (1949), based on the questionable theory that it relates neither to procedural nor to substantive due process. For an exhaustive analysis of the incorporation principle, see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding,* 2 STAN. L. REV. 5 (1949); and Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Judicial Interpretation,* 2 STAN. L. REV. 140 (1949).

17. 16 Wall. 36, 21 L. Ed. 394 (1873). See Grant, *The Natural Law Background of Due Process,* 21 COL. L. REV. 56 (1931); 22 ST. JOHN'S L. REV. 270 (1948).

18. 96 U.S. 97, 24 L. Ed. 616 (1877).

19. See Grant, *The Natural Law Background of Due Process,* 31 COL. L. REV. 56, 65-71 (1931); 22 ST. JOHN'S L. REV. 270 (1948).

20. *See* Palko v. Connecticut, 302 U.S. 319, 325, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937).

Rights[21] still meets with vigorous dissent on occassion,[22] the test of inclusion[23] seems to be whether the particular right is inherent in fundamental principles of justice and liberty.[24]

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21. Chambers v. Florida, 309 U.S. 227, 235-36, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940); Palko v. Connecticut, 302 U.S. 319, 323, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937). See Twining v. New Jersey, 211 U.S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908). But see note 16 *supra*. Although the complete Bill of Rights is not included in the Fourteenth Amendment, it would appear that the coverage of the Amendment is not limited to the rights specifically enumerated in the first eight Amendments. Tumey v. Ohio, 273 U.S. 510, 47 Sup. Ct. 437, 71 L. Ed. 749 (1927) (criminal trial by judge with adverse interest); see the dissenting opinion of Justice Murphy in Adamson v. California, 332 U.S. 46, 123, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947), and the concurring opinion of Justice Frankfurter in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466, 67 Sup. Ct. 374, 91 L. Ed. 422 (1947). See also Curtis, *A Modern Supreme Court in A Modern World, supra* p. —.

22. See Wolf v. Colorado, 338 U.S. 25, 26, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949). Contrast the view urged by Justice Black in his dissenting opinion in Adamson v. California, 332 U.S. 46, 68, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947), urging that the history of the Fourteenth Amendment dictates outright inclusion of the Bill of Rights, with the opposite contention advanced in Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding*, 2 STAN. L. REV. 5 (1949). See also 96 U. OF PA. L. REV. 272 (1947).

23. In the application of the test, the Court has considered various factors as controlling. *In re* Oliver, 333 U.S. 257, 266, 68 Sup. Ct. 499, 92 L. Ed. 682 (1948) (English background of the particular right); Powell v. Alabama, 287 U.S. 45, 61-5, 53 Sup. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527 (1932) (importance in early American history); Twining v. New Jersey, 211 U.S. 78, 101, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908) (extent of present-day necessity); Bute v. Illinois, 333 U.S. 640, 663-68, 68 Sup. Ct. 763, 92 L. Ed. 986 (1948) (lack of uniformity among states considered indicative of its non-recognition).

24. See, *e.g.*, Powell v. Alabama, 287 U.S. 45, 67, 53 Sup. Ct. 55, 77 L. Ed. 158 (1932); Herbert v. Louisiana, 272 U.S. 312, 316, 47 Sup. Ct. 103, 71 L. Ed. 270 (1926); Holden v. Hardy, 169 U.S. 366, 389, 18 Sup. Ct. 383, 42 L. Ed. 780 (1898). Illustrative of how the Court makes its determination is the case of Powell v. Alabama, *supra*, where ignorance and illiteracy of the defendants, their youth, public hostility, the fact that no friends or family were within distance of easy communication, the fact that defendants were in deadly peril, etc., were considered so vital that effective appointment of counsel was deemed essential to due process, the Court stating that to hold otherwise would violate fundamental principles of justice inherent in the idea of free government. See also Wade v. Mayo, 334 U.S. 672, 68 Sup. Ct. 1270, 92 L. Ed. 1647 (1948).

In this manner, several rights have been held to be within the protection of the due process clause. *E.g.*, De Jonge v. Oregon, 299 U.S. 353, 57 Sup. Ct. 255, 81 L. Ed. 278 (1937) (freedom of speech); Grosjean v. American Press Co., 297 U.S. 233, 56 Sup. Ct. 444, 80 L. Ed. 660 (1936) (freedom of press); Hamilton v. Regents, 293 U.S. 245, 55 Sup. Ct. 197, 79 L. Ed. 343 (1934) (freedom of religion); Near v. Minnesota, 283 U.S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357 (1931) (freedom of press). On the other hand, other rights have been specifically excluded. *E.g.*, Hurtado v. California, 110 U.S. 516, 4 Sup. Ct. 111 (majority), 292 (minority), 28 L. Ed. 232 (1884) (right to action by grand jury in capital cases); Walker v. Sauvinet, 92 U.S. 90, 23 L. Ed. 678 (1875) (right of trial by jury in civil controversies involving more than $20).

State action in this area is less narrowly restricted by the due process clause than is federal action as measured by the Bill of Rights. *Compare* Twining v. New Jersey, 211 U.S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908) (mere violation by state of right against self-incrimination not violative of due process, although similar action by federal government would violate Fifth Amendment), *with* Brown v. Mississippi, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936) (excessiveness of state action in coercion of confession violative of due process). See also Adamson v. California, 332 U.S. 46, 50, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947). Concerning the right of an accused to the aid of counsel in a criminal case, contrast the standards applied in a federal criminal action in Johnson v. Zerbst, 304 U.S. 458, 58 Sup. Ct. 1019, 82 L. Ed. 1461 (1938), with those applied in a state criminal action in Bute v. Illinois, 333 U.S. 640, 68 Sup. Ct. 763, 92 L. Ed. 986 (1948).

On the basis of this criterion, it seems reasonably certain that the cruel-and-unusual-punishment prohibition would be held to be within the purview of the due process clause, thus binding upon the states, were the issue to be presented squarely to the present Court. Surely the right possesses many of the attributes of others held to be basic and fundamental. Furthermore, there are indications that this result would be forthcoming. In *Louisiana* ex rel. *Francis v. Resweber*,[25] the majority refused to state whether cruel and unusual punishments were prohibited by due process, assuming without deciding that this would be the case;[26] but the language indicates that they would consider it included if the facts required a determination of the point.[27] The four dissenters were expressly of the opinion that cruel and unusual punishment may be a denial of due process.[28] Also, in the recent case of *Johnson v. Dye*,[29] the Court of Appeals, Third Circuit, specifically held that the cruel-and-unusual-punishment provision is incorporated into the due process clause. The court relied upon the *Palko* case[30] and the *Resweber* case[31] in reaching this result. In light of these developments, there can be little doubt that, when the necessity arises, the due process clause of the Fourteenth will be held to proscribe cruel and unusual punishments inflicted by a state.

SCOPE OF THE PROHIBITION

The apparent prospective importance of a federal constitutional prohibition against state infliction of cruel and unusual punishments, together with the continuing vitality of the expressed restrictions of state law,[32] makes worthwhile a re-examination of the substantive aspect of these provisions. Two related problems, beyond the scope of this discussion, are (1) the method of invoking the restriction, and (2) the effect of a determination that a given punishment is cruel and unusual.[33] In brief, the point has been raised by

25. 329 U.S. 459, 67 Sup. Ct. 374, 91 L. Ed. 422 (1947).
26. *Id.* at 462.
27. *Id.* at 463-64.
28. *Id.* at 472. Since that time, Justice Black, of the former majority, has indicated that he would include all of the Bill of Rights. *See* Adamson v. California, 332 U.S. 46, 70-72, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947) (dissenting opinion). He, with the others, would have constituted a majority of five who favored inclusion of the Eighth. The recent deaths of two justices (Mr. Justice Murphy, July 19, 1949, and Mr. Justice Rutledge, September 10, 1949), however, again make the question uncertain.
29. 175 F.2d 250 (3d Cir. 1949), *rev'd on other grounds,* 338 U.S. 864, 70 Sup. Ct. 146, 94 L. Ed. 67 (1949); *accord,* Application of Middlebrooks, 88 F. Supp. 943 (S.D. Cal. 1950); Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949); see Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949), *aff'd,* 180 F.2d 785 (7th Cir. 1950), *cert. denied,* 339 U.S. 990 (1950).
30. Palko v. Connecticut, 302 U.S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937).
31. 329 U.S. 459, 67 Sup. Ct. 374, 91 L. Ed. 422 (1947).
32. Of course, the Eighth Amendment remains prohibitive of federal infliction of cruel and unusual punishment.
33. For a general discussion of these two problems, see Horowitz and Steinberg, *The Fourteenth Amendment—Its Newely Recognized Impact on the "Scope" of Habeas Corpus in Extradition,* 23 So. CALIF. L. REV. 441 (1950); Sutherland, *Due Process and Cruel Punishment,* 64 HARV. L. REV. 271 (1950); Note, 2 STAN. L. REV. 174 (1949); 62 HARV. L. REV. 136 (1948); 23 So. CALIF. L. REV. 86 (1949).

habeas corpus proceedings,[34] by suit for injunction,[35] by demurrer,[36] by appeal,[37] as a defense to mandamus proceedings,[38] as a basis for tort action[39] and as a ground for executive clemency.[40] A finding that a punishment is cruel and unusual may result in discharge from custody,[41] dismissal of proceedings,[42] nonenforcement of a statute,[43] injunction against enforcement,[44] reversal[45] or modification,[46] or award of damages.[47]

That the torturous and barbarous punishments which apparently induced the first bans against cruel and unusual punishments are included within their scope is too evident to require extended discussion.[48] Such punishments as drawing and quartering, disembowelling, stretching on the rack, breaking on the wheel and burning alive are illustrative.[49] However, the theory of many authorities that whipping is included[50] has been weakened by a number of cases which have upheld this form of punishment.[51] The thesis has been

34. See, *e.g.,* Davis v. O'Connell, 185 F.2d 513 (8th Cir. 1950); Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd on other grounds,* 338 U.S. 864, 70 Sup. Ct. 146, 94 L. Ed. 67 (1949); Application of Middlebrooks, 88 F. Supp. 943 (S.D. Cal. 1950); Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949); *Ex parte* Hibbs, 86 Okla. Cr. 113, 190 P.2d 156 (1948), *cert. denied,* 335 U.S. 835 (1948).

35. See, *e.g.,* Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918); Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914), *rev'd on ground question moot,* 242 U.S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441 (1917).

36. See, *e.g.,* Kirschgessner v. State, 174 Md. 195, 198 Atl. 271 (1938).

37. See, *e.g.,* Hemans v. United States, 163 F.2d 228 (6th Cir. 1947), *cert. denied,* 332 U.S. 801 (1947); Garcia v. Territory, 1 N.M. 415 (1869).

38. See People *ex rel.* Robison v. Haug, 68 Mich. 549, 37 N.W. 21 (1888).

39. See, *e.g.,* Ely v. Thompson, 10 Ky. 70 (1820).

40. *See* Gingerich v. State, 226 Ind. 678, 83 N.E.2d 47, 50 (1948).

41. See, *e.g.,* Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd on other grounds,* 338 U.S. 864, 70 Sup. Ct. 146, 94 L. Ed. 67 (1949); Application of Middlebrooks, 88 F. Supp. 943 (S.D. Cal. 1950); Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949); State *ex rel.* Garvey v. Whitaker, 48 La. Ann. 527, 19 So. 457 (1896); People v. Betts, 142 Misc. 240, 254 N.Y. Supp. 786 (Co. Ct. 1931).

42. See, *e.g.,* Weems v. United States, 217 U.S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793 (1910).

43. See, *e.g.,* People *ex rel.* Robison v. Haug, 68 Mich. 549, 37 N.W. 21 (1888).

44. See, *e.g.,* Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918); Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914), *rev'd on ground question moot,* 242 U.S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441 (1917).

45. See, *e.g.,* State v. Driver, 78 N.C. 423 (1878); State v. Ross, 55 Ore. 450, 104 Pac. 596, 42 L.R.A. (N.S.) 601 (1909), *rehearing,* 55 Ore. 474, 106 Pac. 1022, 42 L.R.A. (N.S.) 613 (1910), *writ of error dismissed,* 227 U.S. 150, 33 Sup. Ct. 220, 57 L. Ed. 458 (1913); State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948).

46. See, *e.g.,* Stephens v. State, 73 Okla. Cr. 349, 121 P.2d 326 (1942).

47. See, *e.g.,* Ely v. Thompson, 10 Ky. 70 (1820).

48. *See In re* Kemmler, 136, 436, 446, 10 Sup. Ct. 930, 34 L. Ed. 519 (1890); Wilkerson v. Utah, 99 U.S. 130, 135, 25 L. Ed. 345 (1878); Hemans v. United States, 163 F.2d 228, 237 (6th Cir. 1947), *cert. denied,* 332 U.S. 801 (1947); Hobbs v. State, 133 Ind. 404, 32 N.S. 1019, 1021 (1893); Garcia v. Territory of New Mexico, 1 N.M. 415, 418 (1869); State v. Woodward, 68 W. Va. 66, 69 S.E. 385, 387 (1910); see 1 COOLEY, CONSTITUTIONAL LIMITATIONS 694 (8th ed. 1927); 30 COL. L. REV. 1057 (1930); 35 GEO. L.J. 567 (1947).

49. See note 48 *supra.*

50. *See, e.g.,* Hobbs v. State, 133 Ind. 404, 32 N.E. 1019, 1021 (1893); see 1 COOLEY, CONSTITUTIONAL LIMITATIONS 694 (8th ed. 1927). S.C. CONST. Art. I, § 19 provides: "Corporal punishment shall not be inflicted."

51. *In re* Candido, 31 Hawaii 982 (1931); Foote v. Maryland, 59 Md. 264 (1883); Garcia v. Territory of New Mexico, 1 N.M. 415 (1869); Commonwealth v. Wyatt, 6 Rand. 694 (Va. 1828). The present statutory law of Delaware contemplates the use of

advanced, and given some credence, that "degrading" punishments are prohibited;[52] but it is questionable that any punishment would be rejected on this basis alone. Again, it has been said that a new punishment is "unusual,"[53] but executions by use of electricity[54] and lethal gas,[55] both of recent origin, have been upheld.

Death *per se,* certainly when befitting the offense, is not a cruel and unusual punishment.[56] In addition to infliction of the death penalty by the methods of electrocution and lethal gas, shooting[57] and hanging[58] have been permitted. An interesting question arises with regard to the permissibility of infliction of death after a previous, abortive attempt at execution. The Supreme Court of the United States has held such a punishment by a state to be permissible,[59] but not without a vigorous dissent[60] which considered the analogy to the torture of a lingering death.

Probaby the most timely items with regard to which the prohibition may be invoked are four in number: (1) habitual-criminal statutes, (2) sterilization of criminals, (3) chain-gang incarceration, and (4) disproportionate punishments.

Little need be said with regard to habitual-criminal statutes. Of course, the punishments inflicted under these may be of such type or proportion as to render them unconstitutional.[61] However, the mere imposition on the multiple offender of a penalty heavier than that placed upon the novice lawbreaker has uniformly been held not cruel and unusual.[62]

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whipping as a punishment. See DEL. REV. CODE c.155, §§ 5301, 5328 (1935). For a recent treatment of whipping, see Elliott, *Coercion in Penal Treatment: Past and Present,* Fed. Probation, June, 1949, p. 22, 24.

52. Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918); see Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914), *rev'd on ground question moot,* 242 U.S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441 (1917); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 694 (8th ed. 1927).

53. *See* Mickle v. Henrichs, 262 Fed. 687, 690 (D. Nev. 1918).

54. *In re* Storti, 178 Mass. 549, 60 N.E. 210, 52 L.R.A. 520 (1901); People *ex rel.* Kemmler v. Durston, 119 N.Y. 569, 24 N.E. (1890), 6 *aff'd,* 136 U.S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519 (1890).

55. Hernandez v. State, 43 Ariz. 424, 32 P.2d 18 (1934); State v. Gee Jon, 46 Nev. 418, 211 Pac. 676, 30 A.L.R. 1443 (1923).

56. Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914); *see In re* Storti, 178 Mass. 549, 60 N.E. 210, 52 L.R.A. 520 (1901); State v. Gee Jon, 46 Nev. 418, 211 Pac. 676, 681, 30 A.L.R. 1443 (1923); People *ex rel.* Kemmler v. Durston, 119 N.Y. 569, 24 N.E. 6, 7 (1890), *aff'd,* 136 U.S. 436, 447, 18 Sup. Ct. 930, 34 L. Ed. 519 (1890).

57. *See* Wilkerson v. Utah, 99 U.S. 130, 134, 25 L. Ed. 345 (1878).

58. State v. Burris, 194 Iowa 628, 190 N.W. 38 (1922); State v. Butchek, 121 Ore. 141, 253 Pac. 367 (1927).

59. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 67 Sup. Ct. 374, 91 L. Ed. 422 (1947), 35 GEO. L.J. 567, 31 MARQ. L. REV. 108, 19 MISS. L.J. 99, 22 ST. JOHN'S L. REV. 270 (1948), 20 TEMP. L.Q. 584, 21 TULANE L. REV. 480.

60. Louisiana *ex rel.* Francis v. Resweber, *supra* note 59 at 472.

61. *E.g.,* Stephens v. State, 73 Okla. Cr. 349, 121 P.2d 326 (1942).

62. *E.g.,* State *ex rel.* Drexel v. Alvis, 153 Ohio St. 244, 91 N.E.2d 22 (1950); *Ex parte* Hibbs, 86 Okla. Cr. 113, 190 P.2d 156 (1948), *cert. denied,* 335 U.S. 835 (1948). For a discussion of the present situation regarding habitual criminal acts, see Tappan, *Habitual Offender Laws in the United States,* Fed. Probation, Mar., 1949, p. 28.

The courts are not in agreement whether sterilization amounts to a cruel and unusual punishment. Many statutes providing for this treatment may fall on other grounds—*e.g.*, denial of equal protection.[63] Others, especially those providing for sterilization of mental defectives, may escape scrutiny under the prohibition on the ground that they are eugenic rather than punitive in nature.[64] However, where such provisions have been penal in nature, some have been held bad, emphasis being placed on the degrading character of the punishment.[65] Other courts have seen nothing cruel and unusual about sterilization.[66] Actually, the authorities are too few to permit a prediction of the future of sterilization of criminals as affected by prohibitions against cruel and unusual punishments.

Enough courts have held the treatment imposed upon members of a chain gang to be cruel and unusual[67] to suggest the generalization that the use of chains is, in and of itself, prohibited. However, these cases involve abusive treatment to such an extent, in addition to the use of chains,[68] that they cannot be considered authority against mere incarceration in chains. Apparently, the question is open;[69] and it is arguable that a reasonable use of chains could be prohibited logically only if the ideal prevails that degrading punishment is cruel and unusual.

The objection that a punishment is cruel and unusual is raised most frequently on the grounds that the punishment is excessive.[70] While it has been held that the cruel-and-unusual constitutional provision is no limitation upon the severity of a punishment,[71] it seems that the real vitality of the provision depends upon those cases which do include excessive penalties within the limitation.[72] The point is memorably illustrated by the Oregon case of

63. Skinner v. Oklahoma, 316 U.S. 535, 62 Sup. Ct. 1110, 86 L. Ed. 1655 (1942), 2 BILL OF RIGHTS REV. 296.

64. State v. Troutman, 50 Idaho 673, 299 Pac. 668 (1931); Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925).

65. Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918); see Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914), *rev'd on ground question moot*, 242 U.S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441 (1917).

66. State v. Feilen, 70 Wash. 65, 126 Pac. 75, 41 L.R.A. (N.S.) 418, Ann. Cas. 1914B, 512 (1912); see *In re* Opinion of the Justices, 230 Ala. 543, 162 So. 123 (1935).

67. Weems v. United States, 217 U.S. 349, 30 Sup. Ct. 544, 54 L. Ed. 703 (1910); Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd on other grounds*, 338 U.S. 864, 70 Sup. Ct. 146, 94 L. Ed. 67 (1949), 23 So. CALIF. L. REV. 86, 23 TEMP. L.Q. 234 (1950); Application of Middlebrooks, 88 F. Supp. 943 (S.D. Cal. 1950); Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949); *cf. Ex parte* Marshall, 85 F. Supp. 771 (D.N.J. 1949); see Note, 2 STAN. L. REV. 174 (1949).

68. See note 67 *supra*.

69. *See* Johnson v. Matthews, 182 F.2d 677, 684 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 828 (1950).

70. Of course, some constitutions expressly prohibit disproportionate punishments wholly apart from the cruel and unusual provision. *E.g.*, ILL. CONST. Art. II, § 11.

71. State v. Griffin, 84 N.J.L. 429, 87 Atl. 138 (Sup. Ct. 1913), *aff'd*, 85 N.J.L. 613, 90 Atl. 259 (1914); *see* People v. Morris, 80 Mich. 634, 45 N.W. 591, 592 (1890).

72. *E.g.*, State v. Ross, 55 Ore. 450, 104 Pac. 596, 42 L.R.A. (N.S.) 601 (1909), *rehearing*, 55 Ore. 474, 106 Pac. 1022, 42 L.R.A. (N.S.) 613 (1910), *writ of error dis-*

State v. Ross,[73] where directors of a trust company, convicted of larceny of $288,426.87, were fined more than a half million dollars and sentenced to imprisonment not exceeding some 790 years in case of failure to pay the fine. The Supreme Court of Oregon reversed this life imprisonment and, on rehearing, reversed the imposition of the fine, because it was apparently beyond the power of the defendants to pay in their lifetime. A number of less impressive decisions have overturned sentences on the sole basis that the duration of imprisonment was excessive.[74] Certainly, there is enough authority available to merit consideration of the possibility that a given punishment may be so excessive as to violate a constitutional proscription of cruel and unusual punishment.

CONCLUSION

Although the provisions of both state and federal law that cruel and unusual punishments shall not be imposed are considered popularly to relate only to those punishments which exist solely in the books, the provisions are not useless today. Recent cases have shown a tendency to expand the scope of the prohibition, especially with regard to excessive punishment, and to incorporate the proscription within the Fourteenth Amendment to the Federal Constitution. As respects that which likely will be deemed cruel and unusual, little can be done beyond noting those situations in which the limitation has been applied. If a generalization is required, it must be as uncertain as any other definition of a constitutional term: "[I]n order to justify a court in declaring any punishment to be cruel and unusual . . . it must be so proportioned to the offsense committed that it shocks the moral sense of all reasonable men as to what is right and proper under the circumstances."[75]

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missed, 227 U.S 150, 33 Sup. Ct. 220, 57 L. Ed. 458 (1913); State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948); see 1 COOLEY, CONSTITUTIONAL LIMITATIONS 692 (8th ed. 1927).

73. 55 Ore. 450, 104 Pac. 596, 42 L.R.A. (N.S.) 601 (1909), *rehearing*, 55 Ore. 474, 106 Pac. 1022, 42 L.R.A. (N.S.) 613 (1910), *writ of error dismissed*, 227 U.S. 150, 33 Sup. Ct. 220, 57 L. Ed. 458 (1913); *cf.* State *ex rel.* Garvey v. Whitaker, 48 La. Ann. 527, 19 So. 457 (1896); Mayor v. Bauer, 26 N.J. Misc. 1, 55 A.2d 883 (Rec. Ct. 1947), *aff'd*, 137 N.J.L. 327, 59 A.2d 809 (Sup. Ct. 1948).

74. *E.g.*, Nowling v. State, 151 Fla. 584, 10 So.2d 130 (1942); People v. Betts, 142 Misc. 240, 254 N.Y. Supp. 786 (Co. Ct. 1931); State v. Driver, 78 N.C. 423 (1878); Stephens v. State, 73 Okla. Cr. 349, 121 P.2d 326 (1942); State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1948). Of course, a few state statutes authorize an appellate court to reduce the length of even an admittedly legal sentence. See ORFIELD, CRIMINAL APPEALS 104 (1939).

75. Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465, 469 (1946).