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The Eighth Amendment Rediscovered

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THE EIGHTH AMENDMENT REDISCOVERED

*by Stanley Mosk**

Justice is often extremely unjust.
—Voltaire[1]

Constitutional amendments, like fashion modes, have their cycles, except for the first amendment, which, like basic black, is always in style. The fifth amendment became the center of controversy among the legal Diors a decade ago, when it was bitterly assailed by those who believed congressional committees had unrestrained power of inquiry, and it was defended by dedicated civil libertarians.[2] Next, the vogue shifted to the fourth amendment and emphasis upon unreasonable searches and seizures.[3] For a brief time, the sixth amendment was of interest in connection with the right to a speedy trial,[4] but in the past several years its right-to-counsel clause has approached the popularity of the miniskirt.[5] Then, there was a brief flurry when the Supreme Court discovered the ninth amendment and some fleeting discussion was stimulated.[6]

Today, there are straws in the wind to suggest the next section upon which legal fashions focus will be the eighth amendment.[7] The amendment consists of one sentence: "Excessive bail shall not be required, nor

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[1]VOLTAIRE, ALPHABET OF WIT 39 (Peter Pauper Press ed. 1945).

[2]*See, e.g.*, GRISWOLD, THE FIFTH AMENDMENT TODAY (1955). *But see* MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT (1959).

[3]California took the lead with People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), and the United States Supreme Court later reached its rule of Mapp v. Ohio, 367 U.S. 643 (1960); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 11 DUKE L.J. 319 (1962); Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 CALIF. L. REV. 103 (1965); *see also* Katz v. United States, 386 U.S. 954 (1967).

[4]Justice, it was conceded, was blind, "but why so slow?" *See* ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURT (1959).

[5]Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

[6]See Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[7]*See* McWilliams, *Use and Misuse of the Eighth Amendment*, 53 A.B.A.J. 451 (May 1967). For a discussion of whether *Robinson v. California* is "a bludgeon to strike down state criminal statutes where the court deems criminal statutes inappropriate," see note in 51 CALIF. L. REV. 219 (1963).

excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (emphasis supplied). It is the italicized clause with which this article is concerned.

The eighth amendment was attributable to apprehension by the colonials of the severity of English law as it had developed prior to the Norman Conquest, when medieval warring nobles were transformed into country squires and justices of the peace. While in thirteenth century England there were a small number of felonies entailing loss of life or limb and confiscation of goods,[8] by the time of the American Revolution there were over 200 capital offenses punishable either under the common law or by statute, including such crimes as felling a tree and associating with gypsies.[9] Indeed, English criminal law had been written in blood by the Tudors; during the reign of Henry VIII, no less than 72,000 executions took place. During the era of Elizabeth I, it became a capital offense to steal from a person property of value greater than twelve pence. The Stuarts developed the notorious Star Chamber, and although it was finally abolished by Parliament in 1641, the common law courts took cognizance of the offenses and punishments it had created.[10]

During this latter period, there was one other significant development. Mutilating or horrific punishment generally disappeared and were replaced by imprisonment, fine, or both.[11] When fines could not be paid, they were computed into days or years of imprisonment at hard labor. Yet, imprisonment as a penalty had been unknown in archaic societies, which employed it almost exclusively for the purpose of confining culprits awaiting execution. Only in the period of the Enlightenment did it emerge as the primary penalty because it was deemed "more humane."[12] A second rationale behind the evolution of imprisonment was its economic concept. The maxim *nulla poena sine lege* was another way of

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[8]II F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 464 (2d ed. 1923).

[9]CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY 4 (1936).

[10]SEAGLE, THE HISTORY OF LAW 239 (1946).

[11]Since 1948, by law whipping has ceased to be a penalty that can be ordered by a court in England. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 188, 205 (4th ed. 1964).

[12]George Bernard Shaw believed all punishment to be cruel, and "imprisonment is at once the most cruel of punishments." Indeed, "not only does society commit more frightful crimes than any individual, king or commoner: it legalizes its crimes and forges certificates of righteousness for them." Whenever judges, who "spend their lives consigning their fellow-creatures to prison" are told that prisons "are horribly cruel and destructive places, and that no creature fit to live should be sent there, they only remark calmly that prisons are not meant to be comfortable, which is no doubt the consideration that reconciled Pontius Pilate to the practice of crucifixion." G. B. SHAW, THE CRIME OF PUNISHMENT 14 (Philosophical Library ed. 1946).

saying that every penalty must have its fixed price. When the criminal paid his debt to society, he repurchased his freedom. The penal system camouflaged the terminology of the price system.[13]

Over many centuries past, scholars have attempted to ascertain the motivation of society for the infliction of barbarous punishment upon criminals. In primitive times, severe repressive measures were required to suppress the two crimes deemed universally heinous: homicide and incest. Fear, superstition and myth, resentment, and hatred for the malefactor who defied taboos combined to motivate tribes to commit excesses in the punitive area.[14] There has been little significant change in modern society. As Oliver Wendell Holmes noted, most people believe "suffering should follow wrong-doing."[15]

John Locke first developed the concept that there was human motivation other than fear of punishment, a state of nature in which men enjoyed complete liberty. Laws of nature were believed to be moral laws which every man knew intuitively, a ready-made knowledge of right and wrong which was interwoven in the constitution of the human mind. Though Locke was an effective influence in the colonies, Tom Paine wryly remarked that a man who had recourse to the laws of nature would seldom find himself worsted in arguments, and he quoted Aristotle, who advised lawyers to resort to them when they found themselves in a tight spot.[16]

The background of the specific clause in the eighth amendment can be traced as a principle to 1042 in the laws of Edward the Confessor, and it was carried forward in the text of the Magna Carta. The Declaration of Rights of 1688 first used the precise term "cruel and unusual punishment," and this language was embodied verbatim into our Bill of Rights.[17]

Long prior to the adoption of the Constitution, cruel and unusual punishments were forbidden in Massachusetts as early as 1641 in its Body of Liberties,[18] and this ban was given the force of law in the Laws and Liberties of 1648.[19] The prohibition was repeated in the colonial laws of Massachusetts of 1660 and 1672[20] and was also included in

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[13]SEAGLE, *supra* note 10, at 243.

[14]ABRAHAMSEN, WHO ARE THE GUILTY? 81 (1952).

[15]HOLMES, THE COMMON LAW 34 (1963).

[16]MILLER, ORIGINS OF THE AMERICAN REVOLUTION 171 (1943).

[17]4 VAND. L. REV. 680, 682 (1951); 34 MINN. L. REV. 134, 135 (1950).

[18]THE COLONIAL LAWS OF MASS. 43 (Whitmore 1890).

[19]THE LAWS AND LIBERTIES OF MASS. 46 (Farrand 1929).

[20]THE COLONIAL LAWS OF MASS. 129 (Whitmore 1887); THE COLONIAL LAWS OF MASS. 187 (Whitmore 1889).

the acts and laws of Connecticut of 1673, 1702, and 1715.[21] Five of the six original states which adopted declarations of rights prior to the adoption of the Federal Constitution included prohibitions against cruel and unusual punishments: Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia.[22] Pennsylvania adopted a similar provision in 1790.[23]

The constitutional debates in Congress on the Bill of Rights reflect very little discussion over the then proposed eighth amendment.

> We find from the Congressional Register, page 255, that Mr. Smith of South Carolina "objected to the words 'nor cruel and unusual punishments,' the import of them being too indefinite." Mr. Livermore also opposed adoption of the clause, saying:
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> "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. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel? 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."
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> The question was put on the clause, and it was passed by a considerable majority.[24]

As the United States expanded, the ban on inhuman treatment became embedded in the rubric of the new state and territorial governments. The ordinance creating the Northwest Territory included a similar prohibition,[25] and, by the time the fourteenth amendment was adopted, 35 of the 37 states then in the Union had some such provision in their constitutions. Only Connecticut and Vermont were omitted, and Vermont indicated by judicial determination that the common law of the English Declaration of Rights was applicable to cruel punishment.[26]

The concept has now received such common acceptance in principle that it is included in the Universal Declaration of Human Rights proclaimed by the United Nations. In that document, it is described as "cruel,

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[21]THE ACTS AND LAWS OF THE COLONY OF CONN. 98 (Acorn Club of Conn. 1901).

[22]34 MINN. L. REV., *supra* note 17, at 136.

[23]PENN. CONST. art. IX, § 13.

[24]This account was related by Justice McKenna in his opinion for the court in Weems v. United States, 217 U.S. 349, 369 (1909).

[25]Ordinance of 1787: The Northwest Territorial Government, art. II, 1 U.S.C. XXXVIII.

[26]State v. O'Brien, 106 Vt. 97, 170 A. 98 (1934).

inhuman or degrading treatment or punishment."[27]

In early cases, there was no question that the eighth amendment constituted no limitation on the states. Although Professor Crosskey has insisted that the Supreme Court, as early as 1855, held the fifth amendment due process clause related to guarantees of the eighth amendment, along with the fourth, sixth, and seventh,[28] I find his reasoning somewhat tenuous. Indeed, even after adoption of the fourteenth amendment, the Supreme Court in the *Slaughter House Cases*[29] rejected the contention that the entire Bill of Rights was incorporated into the privileges and immunities clause, and shortly thereafter, in *Davidson v. New Orleans*[30] a similar result was reached regarding non-inclusion within the due process clause. Again, the same conclusions were determined in the leading cases of *Barron v. Baltimore*[31] and *Collins v. Johnston*,[32] the latter having originated in northern California. As late as 1947, the matter still appeared to be in doubt due to a divided Court in *Francis v. Resweber*.[33]

The first case forthrightly holding that the states are bound by the eighth amendment, *Johnson v. Dye*,[34] was decided in 1949 by the Court of Appeals, Third Circuit. Numerous district courts quickly adhered to that interpretation.[35]

To date, the United States Supreme Court has never unequivocally held that the eighth amendment provision of cruel and unusual punishments applies to the states.[36] However, since *Robinson v. California*[37] appears to assume so throughout its opinion, and, indeed, a state statute was there involved, it no longer is open to doubt that the Court deems

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[27]6 U.N. BULLETIN 7 (1949); 7 U.N. BULLETIN 7, 8 (1949).

[28]Crosskey, *Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 6-7 (1955). Prof. Crosskey relies on Curtis' opinion in Murray's Lessee v. Hoboken Land & Improvement Company, 59 U.S. (18 How.) 272 (1855).

[29]83 U.S. (16 Wall.) 36 (1873).

[30]96 U.S. 97 (1878). *See also* Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56 (1931).

[31]32 U.S. (7 Pet.) 243 (1833).

[32]237 U.S. 502 (1915).

[33]329 U.S. 459 (1947).

[34]175 F.2d 250, 256 (3d Cir. 1949), *rev'd on other grounds*, 338 U.S. 864 (1949).

[35]Application of Middlebrooks, 88 F. Supp. 943 (S.D. Cal. 1950); Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949); Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949).

[36]The argument as to how far, if at all, the fourteenth amendment "incorporates" the first eight amendments continues, not only among the justices of the Supreme Court, but among scholars and commentators. There is evidence to support both sides. HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION 216 (1965).

[37]370 U.S. 660 (1962); 51 CALIF. L. REV. 219 (1963); *see also* Hirons v. Director, 351 F.2d 613 (4th Cir. 1965).

the eighth amendment to apply to the states. The only academically debatable point is whether applicability arises through the due process clause, the equal protection clause, or some other basis.[38] Indeed, Justice Black, who has consistently advocated the proposition that the Bill of Rights is absolute, has nevertheless termed the eighth amendment "one of the less precise provisions" of the Constitution, since courts are required to determine the meaning of its terms.[39] That is not necessarily a vice. As Woodward wrote: "Though the Constitution is clumsily rigid in some of its provisions, it possesses on the whole, a remarkable flexibility."[40]

It is axiomatic that as society has advanced in all fields of endeavor, including jurisprudence, it has also progressed toward eliminating overt acts of brutality in punishment. Probably the last reported case which approved physical mistreatment was a Maryland case in 1883,[41] in which the court held that whipping is not cruel and unusual punishment and affirmed a judgment sentencing a husband to 60 days and "to be whipped seven lashes by the sheriff" for wifebeating. A Virginia court[42] approved a judgment condemning a free person of color to slavery, banishment, and 39 stripes on his bare back. At about the same time, the Indiana Supreme Court[43] expressed the opinion that its constitution did not apply to punishment by "fine or imprisonment, or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel, etc."[44]

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[38]In criminal law matters, the Supreme Court seems to be moving in the direction of applying to the states, under the fourteenth amendment, standards in many respects similar to those applied to the United States by the Bill of Rights. The change appears to be coming according to Justice Frankfurter's theory that the fourteenth amendment is a canon of reasoned tradition, not by the route of literal incorporation. MENDELSON, FELIX FRANKFURTER—THE JUDGE 151 (1964).

[39]Black, *The Bill of Rights,* 35 N.Y.U. L. REV. 865, 871 (1960).

[40]WOODWARD, A NEW AMERICAN HISTORY 234 (1936).

[41]Foote v. State, 59 Md. 264 (1883). *See also* Commonwealth v. Wyatt, 6 Rand. 694, where the court justified the whipping post; in comparison to the "barbarities of quartering, hanging in chains, castration, etc.," it was reduced to insignificance. Whipping was pronounced "odious but not unusual." Blackstone had admitted that "in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded . . . [such as] where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female." 4 BLACKSTONE, COMMENTARIES 377 (1765).

[42]Aldridge v. Commonwealth, 2 Va. Cas. 447 (1824).

[43]Hobbs v. State, 133 Ind. 404, 32 N.E. 1019 (1893).

[44]Today, 18 U.S.C. § 3564 (1966), provides "The punishment of whipping and of standing in the pillory shall not be inflicted." Pillory was discussed in *In re* Birdsong, 39 F. 599, 602 (S.D. Ga. 1889), Annot., 4 L.R.A. 628, in which the Circuit Court haled

The most significant advance toward elimination of brutality in penal administration was the landmark case of *Weems v. United States*,[45] in which Justice McKenna elaborated at great length on the philosophy and practice of punishment. The court outlawed the notorious *cadena*, which means "chain" in literal Spanish but considerably more in penal lore.[46] More importantly, the court recognized for the first time that there could be pervasive cruelty without infliction of physical torture. McKenna reached back to the wisdom of the Founding Fathers for his persuasive rationale:

> [Patrick] Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. 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. 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? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say "coercive cruelty," because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.[47]

McKenna's laudable rhetoric has not been universally persuasive. In-

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the jailer before it upon an allegation that a federal prisoner was chained by the neck to the grating of a cell; it was "in fact, punishment by the pillory, but a pillory where the links of the trace-chain and the padlock encircled the bare neck. . . ." This punishment, said the court, was "abolished in England in 1837. It was done away with in France in 1832, and in this land of humanity and lawful methods it was forbidden by the Act of Congress of February 28, 1839, and yet the jailer testified that this was his usual method for the punishment of refractory prisoners, a method which called imperatively for the ruling of the court, declaring it illegal."

[45]217 U.S. 349 (1910).

[46]In Spanish law, *cadena* was an afflictive penalty consisting of imprisonment at hard and laborious work, originally with a chain hanging from the waist to the ankle. It also carried with it civil interdiction, disqualification from office, and surveillance by authorities for life. 12 C.J.S. 876 (1938). *Cadena* became known to this country during military occupation of the Philippines by American troops.

[47]Weems v. United States, 217 U.S. 349, 372-73 (1910).

deed, cases have generally held that a judgment prescribing statutorily permissible punishment cannot itself be cruel and unusual within the constitutional prohibition, although some courts have attached a modest caveat to that rule. For example, the Minnesota Supreme Court in 1918 said:

> The term "cruel and unusual punishments" . . . has no special reference to the duration of the term of imprisonment for a particular crime, though it would operate to nullify the imposition by legislation of a term flagrantly in excess of what justice and common humanity would approve.[48]

What common humanity would approve is obviously a nebulous and ad hoc concept, depending upon the milieu, and to some extent upon the geography. Cases provide no guiding precedent and little enlightenment.

Fifty years for a "peculiarly outrageous" robbery was "exemplary" but not excessive in California in 1887.[49] Four years and a $5,000 fine was not improper for a brutal assault in Kentucky,[50] and one day to life was approved for assault in New York.[51] Seven years for manslaughter was upheld in Arkansas,[52] and fifty years for manslaughter was held neither cruel nor unusual in the Oklahoma Territory in 1896.[53] A four-year sentence imposed upon "a man of color" was not excessive for horse stealing in the Blue Grass State of Kentucky; indeed, the mere contention was "purely imaginary."[54] A fine of $1,000 and costs of $960, to be paid by imprisonment at the rate of $5 per day, was deemed appropriate punishment for criminal syndicalism in Idaho.[55] A maximum of ten years in prison and a $10,000 fine for bribery in a sporting event was upheld in Iowa.[56] An Alabama court undertook some editorializing when it held "the crime of arson is one of the most heinous in all the catalogue, and the statute, if anything, is too lenient."[57] The court sanctioned a penalty of two to twenty years in prison for arson in the first degree *and* death or imprisonment for life at the discretion of the jury.

Federal courts have upheld a wide variety of punishments and crimes, such as ten days to an attorney for contempt;[58] forty years for narcotics

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[48]State v. Moilen, 140 Minn. 112, 117, 167 N.W. 345, 347 (1918).
[49]People v. Clary, 72 Cal. 59, 61, 13 P. 77, 78 (1887).
[50]Weber v. Commonwealth, 303 Ky. 56, 196 S.W. 2d 465 (1946).
[51]People v. Kaganovitch, 1 App. Div. 2d 680, 146 N.Y.S. 2d 565 (1955).
[52]Johnson v. State, 214 Ark. 902, 218 S.W. 2d 687 (1949).
[53]Jones v. Territory, 43 P. 1072 (Okla. 1896).
[54]Glisper v. Commonwealth, 186 Ky. 276, 217 S.W. 348 (1919).
[55]State v. Dingman, 37 Idaho 253, 219 P. 760 (1923).
[56]State v. DiPaglia, 247 Iowa 79, 71 N.W. 2d 601 (1955).
[57]Ayers v. State, 148 So. 875 (Ala. 1933).
[58]*In re* Osborne, 344 F.2d 611 (9th Cir. 1965).

sales—"severe" but not unconstitutional;[59] incarceration for possession of an unregistered weapon;[60] thirty-five years for narcotics violation;[61] deportation of aliens convicted of crimes having penalty of one year or more in prison;[62] failure to consider time on probation in fixing sentence;[63] deprivation of parole in a narcotics case;[64] fourteen years for perjury.[65]

Variations upon typical types of confinement have been challenged often, but invariably rejected. Although to some extent they may be deemed "unusual," courts have not held them to be "cruel and unusual."

Thus, punishment by fine *and* imprisonment has been upheld.[66] Assessment upon a traffic fine of an additional sum for driver education is valid in California.[67] In Washington, a vasectomy was required by court order on the rapist of a girl under ten.[68] Making a felony out of petty theft plus prior felonies was held not to be "unusual, cruel or excessive" in California.[69] Banishment from the jurisdiction was held valid punishment in Montana.[70] Forfeiture of double the sum won in illegal gambling was deemed an appropriate penalty in Massachusetts.[71] Imprisonment in default of payment of a fine has been approved in a variety of contexts, such as for selling liquor without a license in Arkansas,[72] contempt for failure to support a child in Montana,[73] and to compel obedience to a court order in South Dakota.[74]

Increasing punishment has been upheld for multiple offenses or because of the nature of the victim. Thus, in Arizona, greater punishment was imposed for a second offense of driving while intoxicated,[75] and, in California, more severe punishment was decreed for lewd and lasci-

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[59]Anthony v. United States, 331 F.2d 687 (9th Cir. 1964); the court, in finding the penalty "severe," suggested executive clemency as the only remedy.

[60]Frye v. United States, 315 F.2d 491 (9th Cir. 1963).

[61]Ramirez v. United States, 294 F.2d 277 (9th Cir. 1961).

[62]Burr v. Immigration & Naturalization Service, 350 F. 2d 87 (9th Cir. 1965).

[63]Cherry v. United States, 299 F.2d 325 (9th Cir. 1962).

[64]Halprin v. United States, 295 F.2d 458 (9th Cir. 1961).

[65]Collins v. Johnston, 237 U.S. 502 (1915).

[66]State v. Staub, 182 La. 1040, 162 So. 766 (1935).

[67]Sawyer v. Barbour, 142 Cal. App. 2d 827, 300 P.2d 187 (1956).

[68]State v. Feilen, 70 Wash. 65, 126 P. 75 (1912).

[69]People v. Quiel, 68 Cal. App. 2d 674, 680, 157 P.2d 446, 449 (1945).

[70]*Ex parte* Sheehan, 100 Mont. 244, 49 P.2d 438 (1935).

[71]Commonwealth v. Novak, 272 Mass. 113, 172 N.E. 84 (1930).

[72]*Ex parte* Brady, 70 Ark. 376, 68 S.W. 34 (1902).

[73]State *ex rel.* Lay v. District Court, 122 Mont. 59, 198 P.2d 761 (1948).

[74]Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175 (1925).

[75]State v. Harold, 74 Ariz. 210, 246 P.2d 178 (1952).

vious acts perpetrated upon a minor.[76] Furthermore, California's indeterminate sentence law has been upheld; indeed, it is deemed to be an exemplary type of penal administration.[77]

In 1892, the Supreme Court held deportation to be a penalty, not punishment, and therefore the eighth amendment prohibiting cruel punishment was inapplicable.[78] It is difficult to find any pragmatic distinction between penalty and punishment, since both are punitive in essence. Indeed, a more rational result was reached in *Dear Wing Jung v. United States* in 1962,[79] holding banishment from the country as a condition of probation to be cruel and unusual punishment.

California procedures for handling mentally disordered sex offenders have been held not to be punishment and, therefore, cannot be cruel and unusual punishment.[80] Similarly, juvenile court placement has been held not to be punishment "any more than is the wholesome restraint which a parent exercises over his child," and thus, under most circumstances it cannot be unconstitutional punishment.[81]

The length of sentence has been a perplexing problem for courts in attempting to apply constitutional tests. In *Black v. United States,*[82] it was found "possible for the length of the sentence to be so disproportionate to the offense as to fall within the [eighth amendment] inhibition" against cruel and unusual punishments. To the contrary is a California case[83] which held the prohibition relates not to length but only to the character of the punishment.

Nevertheless, a number of other jurisdictions look to the length of confinement. In North Carolina,[84] five years and a $500 peace bond for an additional five years was held to be cruel punishment for assault upon a wife. A fine of $550 for castrating a yearling bull was reversed in Illinois, the court stating that "Under our Bill of Rights 'all penalties shall be proportioned to the nature of the offense.' We think this verdict was excessive."[85] Thirty years for burglary, after the jury recommended mercy, was stricken down in South Carolina, the court

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[76]People v. Camp, 42 Cal. App. 411, 183 P. 845 (1919).

[77]*Ex parte* Lee, 177 Cal. 690, 171 P. 958 (1918).

[78]Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[79]312 F.2d 73 (9th Cir. 1962).

[80]People v. Rancier, 240 Cal. App. 2d 579, 49 Cal. Rptr. 876 (1966).

[81]*In re* Bacon, 240 Cal. App. 2d 34, 62, 49 Cal. Rptr. 322, 339 (1966).

[82]269 F.2d 38, 43 (9th Cir. 1959).

[83]*Ex parte* Garner, 179 Cal. 409, 177 P. 162 (1918). Reasonable jail regulations were also upheld in Akamine v. Murphy, 108 Cal. App. 2d 294, 238 P.2d 606 (1951).

[84]State v. Driver, 78 N.C. 423 (1878).

[85]People v. Jones, 241 Ill. 482, 496, 89 N.E. 752, 756 (1909).

noting that "excessive penalties are tyrannical in the court, and abhorrent to the public."[86]

In Oregon, the court ordered a convicted embezzler to pay a fine of $576,853.74 or to be imprisoned in the county jail until the fine was paid, not exceeding 288,426 days. The state Supreme Court held that "There can be no question that a sentence may be excessive even though within the maximum of the statute,"[87] and modified the judgment by striking the alternative jail sentence. After the legislature abolished some minimum sentences in Idaho, only maximums remained; thus, a defendant convicted of lewd and lascivious conduct perpetrated upon a minor, "no matter how trivial," received a mandatory life sentence. The Idaho court noted that it need not be argued that a penalty greater than has ever before been imposed is at least unusual. The court concluded:

> It is now generally recognized that imprisonment for such a length of time as to be out of all proportion to the gravity of the offense committed, and such as to shock the conscience of reasonable men, is cruel and unusual within the meaning of the constitution.[88]

On the other hand, the Supreme Court of Washington[89] refused to invalidate a maximum twenty-year sentence for lewd conduct on the ground that the sentence would not necessarily be the maximum, since the board of prison terms and paroles had not as yet set the sentence.

Clearly, punishment for mere civil acts would run afoul of constitutional inhibitions. Thus, a commitment to jail growing out of a civil action for support of an illegitimate child was invalidated in Iowa.[90] Punishment for one physically unable to comply with an administrative regulation has been stricken as being cruel and unusual punishment.[91]

Punishment for violation of statutes which are themselves invalid has been deemed constitutionally forbidden. The cases in this field have generally arisen under the equal protection clause of the fourteenth amendment, but when punishment was inflicted pursuant to the invalid law, it was the eighth amendment that was offended.[92]

One of the earliest cases originating in California was *Ho Ah Kow v.*

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[86]State v. Kimbrough, 212 S.C. 348, 357, 46 S.E. 2d 273, 277 (1948).

[87]State v. Ross, 55 Or. 450, 474, 104 P. 596, 605 (1909).

[88]State v. Evans, 73 Idaho 50, 58, 245 P.2d 788, 792 (1952).

[89]State v. Fairbanks, 25 Wash. 686, 171 P.2d 845 (1946).

[90]State *ex rel.* Bissell v. Devore, 225 Iowa 815, 281 N.W. 740 (1938).

[91]Ashcraft v. State, 140 Ark. 505, 215 S.W. 688 (1919).

[92]Mayor and City Council v. Bauer, 137 N.J.L. 327, 59 A.2d 809 (1948); Edwards & Browne Coal Co. v. Sioux City, 213 Iowa 1027, 240 N.W. 711 (1932).

Nunan,[93] in which the Circuit Court held invalid as cruel a rule compelling Chinese prisoners to cut short their hair, which traditionally was braided in long queues.[94] Justice Field declared that:

> Treatment to which disgrace is attached, and which is not adopted as a means of security against the escape of the prisoner, but merely to aggravate the severity of his confinement, can only be regarded as a punishment additional to that fixed by the sentence. If adopted in consequence of the sentence it is punishment in addition to that imposed by the Court; if adopted without regard to the sentence it is wanton cruelty.[95]

Perhaps the most significant advance in eighth amendment interpretation came in 1962, when the Supreme Court suggested that cruel and unusual punishment may result not merely from confinement, but from the very nature of the conviction itself. This was the thrust of the concurring opinion by Justice Douglas in *Robinson v. California,*[96] which involved a narcotic conviction. The majority opinion by Justice Stewart also found an eighth amendment violation in the punishment of mere status. To find a crime in narcotic addiction, a state was committing the equivalent of punishing a mentally ill person, a leper, or one afflicted with a venereal disease. As Justice Stewart noted:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a cold.[97]

Again it had been status—this time a stateless status—that impelled the Supreme Court to invoke the eighth amendment in *Trop v. Dulles* in 1958.[98] The power to deprive a native-born American of his citizenship because of wartime desertion from the armed services would leave him denationalized, a "fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment,"[99] wrote Chief Justice Warren. To the contention that if the death penalty is permitted,

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[93]12 F. Cas. 252 (No. 6546) (C.C.D. Cal. 1879).

[94]The background of this case is fascinating early California history. *See* SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 216-17 (1930). The loss of a queue to a Chinese subjected him to disgrace and ostracism and was presumed to bring penalties in the life to come. Justice Field pointed out in his opinion that "the defendant [sheriff] knew of this custom and religious faith of the Chinese, and knew also that the plaintiff venerated the custom and held the faith." Yet, the practice of cutting hair short was undertaken solely to strike terror into the hearts of the local Chinese so they would be induced to pay fines when assessed rather than to accept jail sentences in lieu of payment.

[95]Ho Ah Kow v. Nunan, 12 F. Cas. 252, 254 (No. 6546) (C.C.D. Cal. 1879).

[96]370 U.S. 660 (1962).

[97]*Id.* at 677.

[98]356 U.S. 86 (1958).

[99]*Id.* at 99.

any lesser punitive measure must be sanctioned, the Chief Justice responded that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."[100]

Denationalization, while it involves no physical mistreatment, was found in *Trop* to be "a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . . In short, the expatriate has lost the right to have rights."[101] A similar result was reached when an effort was made to deprive an American national of citizenship for staying abroad to avoid military service.[102]

It should be observed that in *Trop,* the Supreme Court did not reach the question of whether the death penalty is cruel and unusual punishment, but the court found it "plain" that statelessness, which it suggested was a punishment *short* of death, was cruel and unusual punishment.[103]

Whereas *Trop* discussed punishment short of death, *In re Kemmler*[104] held that cruelty, within the meaning of that word as used in the Constitution, "implies there is something inhuman and barbarous, and something *more* than the mere extinguishment of life."

The conflict between *Kemmler* and *Trop* again suggests an ad hoc constitutional application, which Professor Packer of Stanford University sees as a question "whether a legislatively prescribed proportion between crime and punishment is rationally sustainable."[105] Yet, we cannot be oblivious to the observation of Justice Harlan in a recent dissent that it is all wrong for courts "to adopt the political doctrines properly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people. . . ."[106]

The common impression is that advances in civilization and enhancement in cultural attainment have led to this "moment of our history" and, inexorably, to a lessening of severity of punishment.[107] It is true that there has been a marked diminution in the number of capital offenses

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[100]*Id.*

[101]*Id.* at 101-2.

[102]Cort v. Herter, 187 F. Supp. 683 (D.D.C. 1960).

[103]Trop v. Dulles, 356 U.S. 86 (1958).

[104]136 U.S. 436, 447 (1890). *Kemmler* is also authority for the proposition that the nature of punishment "peculiarly" belongs to the several states. *Id.* at 448.

[105]Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071, 1074 (1964).

[106]Harper v. Board of Educ., 383 U.S. 663, 686 (1966).

[107]Gottlieb, *Testing the Death Penalty,* 34 S. CAL. L. REV. 268, 281 (1961).

from medieval days; from an almost limitless number of capital crimes in early periods, the average number is about six in countries retaining the death penalty.[108] In criminal law generally, however, the modern tendency has not been to reduce punitive provisions. Indeed, the history of modern America is laced with public outrage at authorities who are "soft on criminals" and with demands for ever more severe penalties. For reasons which do not bear analysis, the average citizen whose source of current knowledge is his daily newspaper and the six o'clock television news believes that doubling, tripling, or quadrupling penalties for crimes will reduce crime incidence and assure his family's security. As a result, during the last 30 years, most changes in statutory punishment provisions have been in the direction of increased severity. Almost forgotten has been our vaunted humanitarianism. In a study reported by Murrah and Rubin, 68.9 percent of all alterations in penal code provisions were designed to make fines greater and imprisonment longer.[109]

There is another aspect of the problem which we penultimately reach, a phase commonly overlooked in California. While the eighth amendment prohibits cruel *and* unusual punishment, Article I, Section 6, of the California Constitution provides: ". . . nor shall cruel *or* unusual punishments be inflicted." (emphasis supplied). Since cases in some jurisdictions have noted that punishment which is merely unusual does no violence to the Federal Constitution because it is not also cruel *and* unusual, the adoption of provisions in the alternative in the state constitution may be of significance. Although no decisions have so held, it would seem that punishment which was cruel, though common and usual, would run afoul of the California Constitution. And similarly, punishment which was not cruel, but merely unusual, would also be invalid. Our problem thus becomes one of definition.

Few cases seem to have been aware of that distinction, most decisions referring only to "cruel and unusual" in the conjunctive. Of decisions which have employed the disjunctive,[110] these have held the following

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[108]Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L.C. & P. S. 397, 405 (1965).

[109]Murrah and Rubin, *Penal Reform*, 65 COLUM. L. REV. 1167, 1169 (1965).

In the 1967 session of the California legislature, the following new punitive measures were added: Penal Code sections 148.3, 171d, 499c, 653g, 12031, 12304, 1716; Civil Code section 1716. Penal Code section 136 was amended to increase a mere misdemeanor to a possible felony.

[110]*See, e.g.*, People v. Conness, 150 Cal. 114, 88 P. 821 (1906) (6 years in state prison for allowing wife to remain in house of prostitution); People v. Bowens, 229 Cal. App. 2d 590, 40 Cal. Rptr. 435 (1964) (narcotics conviction); People v. Zapata, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (1963).

to be neither cruel nor unusual: life imprisonment in state prison;[111] a greater penalty for assault with a deadly weapon than for manslaughter;[112] imprisonment of certain persons carrying concealed weapons;[113] depriving a habitual criminal of prison credits for good behavior and the right to parole;[114] three years' probation for bookmaking;[115] $500 fine, or jail at the rate of $2 per day in lieu thereof, for violating fishing laws;[116] state prison for burglary;[117] and life imprisonment without possibility of parole.[118]

As indicated, most definitions combine the terms cruel and unusual. But since the California Constitution employs the disjunctive, we must assume each word has a distinct meaning.

Approaching a definition of "cruel" is relatively uncomplicated. Chief Judge Harris of the Northern District of California, in *Jordan v. Fitzharris,*[119] though noting that what constitutes cruel punishment has not been "exactly decided" from *Weems v. United States*[120] in 1910 to date, proceeded to develop a trifurcated test which seems pragmatically sound. Judge Harris' three queries are: (1) under all the circumstances, is the punishment of such character as to shock general conscience or to be intolerable to fundamental fairness,[121] such judgment to be made in the light of developing concepts of elemental decency; (2) is the punishment greatly disproportionate to the offense for which it is imposed;[122] (3) does the punishment, although applied in pursuit of a legitimate aim, go beyond what is necessary to achieve that aim.[123]

The Penal Code of California, in translating the constitutional pro-

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111*In re* Rosencrantz, 205 Cal. 534, 271 P. 902 (1928).

112*Ex parte* Mitchell, 70 Cal. 1, 11 P. 488 (1886).

113People v. Cruz, 113 Cal. App. 519, 298 P. 556 (1931).

114*In re* Rosencrantz, 205 Cal. 534, 271 P. 902 (1928); *In re* Boatwright, 119 Cal. App. 420, 6 P.2d 972 (1931); People v. Vaille, 112 Cal. App. 258, 296 P. 901 (1931).

115People v. Lopez, 103 Cal. App. 2d 291, 229 P.2d 404 (1951).

116People v. Anderson, 30 Cal. App. 542, 159 P. 211 (1916).

117Although the court spoke of cruel *and* unusual punishment in People v. Candelaria, 153 Cal. App. 2d 879, 886, 315 P.2d 386, 390 (1957), it continued its discussion thus: "It would seem, therefore, as a practical matter, on the face of the record, that the punishment imposed upon this defendant is anything but cruel, and if there is anything unusual about the case, it is not the severity of the sentence."

118Green v. Teets, 244 F.2d 401 (9th Cir. 1957).

119257 F. Supp. 674, 679 (N.D. Cal. 1966). The court found confinement in a 6 by 8 cell with no source of light and no means for the prisoner to clean himself to be cruel and unusual punishment.

120217 U.S. 349, 368 (1910).

121Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965).

122Robinson v. California, 370 U.S. 660, 676 (1962).

123Weems v. United States, 217 U.S. 349, 370 (1910).

hibition against cruelty, makes it a criminal offense, punishable by fine and removal from office, for any officer to treat a prisoner with "willful inhumanity or oppression,"[124] which suggests another definition.

Cruelty was originally related to the whipping post, pillory, burning at the stake, breaking on the wheel, quartering or maiming the culprit, all colorfully described in a 1909 California case as being such severe "punishments as disgraced the civilization of former ages, and made one shudder with horror to read of them."[125] It has been held that a penalty today cannot be declared cruel unless it shocks the moral sense and outrages those innate principles of humanity which have been broadened and expanded by civilized enlightenment.[126] I would define cruel punishment as that which is barbarous, degrading, or so disproportionate to the offense as to shock the moral sense of the community. While this suggests an ad hoc approach, that appears most appropriate in view of the obvious inability of case or text writers to anticipate all conceivable developments in the macabre art of punition.

The term "unusual" is more difficult to understand. Further, it is a vague word which is not easy to define,[127] but is commonly thought to mean "not usual," "uncommon," "rare," "infrequent," or "not anticipated."[128] It has been said that "unusual" is used in reference to frequency.[129] However, if the federal or state constitutional authors had frequency in mind, then any felony conviction hereafter in Alpine County, California, would be unusual and ergo invalid, for there was not a single felony judgment in that county in the entire year of 1966.[130] And for that same year, in the 58 counties of the entire state, only one woman was convicted of statutory rape.[131] A literal interpretation of "unusual" would compel freeing every lustful female who hereafter seduces an underage youth in violation of statute.[132]

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[124]CAL. PEN. CODE § 147 (West 1955). *See also* CAL. PEN. CODE § 361 (West 1955), prohibiting "harsh, cruel or unkind" treatment of idiots, lunatics, or insane persons.

[125]*In re* O'Shea, 11 Cal. App. 568, 575-76, 105 P. 776, 779 (1909).

[126]*In re* Finley, 1 Cal. App. 198, 81 P. 1041 (1905).

[127]Hooey's Case, 258 Mass. 515, 155 N.E. 419 (1927).

[128]39 CYCL. LAW & PROC. 843; Thompson v. Anderson, 107 Utah 331, 334, 153 P.2d 665, 666 (1944); State v. Malone, 168 S.W.2d 292, 300 (Tex. 1943); Western Well Drilling Co. v. United States, 96 F. Supp. 377, 379 (N.D. Cal. 1951); Broadway Mfg. Co. v. Leavenworth Terminal Ry. & B. Co., 81 Kan. 616, 620, 106 P. 1034, 1035 (1910).

[129]State v. Jochim, 55 N.D. 313, 321, 213 N.W. 485, 488 (1927).

[130]U.S. DEPT. OF STATE, BUREAU OF CRIMINAL STATISTICS ANNUAL REPORT: CRIME AND DELINQUENCY IN CALIFORNIA 87 (1966).

[131]*Id.* at 117.

[132]Indeed, a defendant was freed on a third degree murder charge (defined as taking life in the heat of passion in a cruel and unusual manner) because, said the court, killing by

Some early cases have defined unusual punishments as that class which, if ever employed at all, has become altogether obsolete.[133] Some commentators have suggested new punishments to be unusual,[134] but on the other hand, cases have upheld new "scientific" methods of achieving old objectives, such as use of electricity[135] and lethal gas[136] for executions.

Cooley is as confused as lesser commentators, conceding that "it is certainly difficult to determine precisely what is meant by cruel and unusual punishments."[137] Basically, however, he concludes that the usual punishment is that which the law provides, not more, and, strangely, not even less.[138] Perhaps then, by process of elimination we reach the air of resignation adopted by a North Carolina civil court, in 1895, when it held the words "not usual" as well as "extraordinary," often to be an exaggeration of speech, "and in many cases, if properly inquired into and explained, would be found not to be synonymous with 'unusual' or 'unexpected.' "[139]

At least one California case has interpreted "unusual" to mean "wrong,"[140] in the sense that it represents deviation from normal conduct. Other synonyms employed, not necessarily in cases, are: unique, novel, peculiar, remarkable, extraordinary, unaccustomed, uncustomary, unconventional, unprevalent, unhabituated, and unconversant.[141] There is some merit to each.

My preference, however, is to describe unusual punishment as that which is atypical of and not endemic to the mores of the current social order, irregular and unwonted in the administration of criminal justice, and unfamiliar to the individual defendant. Though perhaps somewhat prolix, this definition of "unusual" is one way to dissociate "cruel and unusual" and to complement the term "cruel," as we must because of its use in the disjunctive in the California Constitution.

Finally, inexorably, we reach the death penalty. The earliest case on this subject was *Wilkerson v. Utah*,[142] involving a Utah statute that

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shots from a Colt revolver was not unusual, circa 1887 in New Mexico Territory. Territory v. Pridemore, 4 N.M. 275, 13 P. 96 (1887).

[133]Hobbs v. State, 133 Ind. 404, 32 N.E. 1019 (1893).

[134]4 VAND. L. REV. 680, 686 (1951).

[135]*In re* Storti, 178 Mass. 549, 60 N.E. 210 (1901).

[136]State v. Gee Jon, 46 Nev. 418, 211 P. 676 (1923).

[137]COOLEY, CONSTITUTIONAL LIMITATIONS 403 (5th ed. 1883).

[138]*Id.* at 404.

[139]Blue v. Aberdeen & W.E.R. Co., 116 N.C. 955, 960, 21 S.E. 299, 300 (1895).

[140]4 CAL. WORDS & PHRASES 467, *citing* Hatfield v. Levy Bros., 18 Cal. 2d 798, 117 P.2d 841 (1941).

[141]WEBSTER'S DICTIONARY OF SYNONYMS 864-65 (1st ed. 1951).

[142]99 U.S. 130 (1878).

provided a person convicted of a capital offense should "suffer death by being shot, hanged or beheaded." The statute was sustained. The court held the constitution prohibited circumstances of terror, pain, or disgrace, but that death was a usual punishment for murder.

The modern case of most significance is *Trop,* in which, in 1958, Chief Justice Warren, for himself and Justices Black, Douglas, and Whittaker, offered this dictum:

> [L]et us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.[143]

Abolitionists draw some comfort, however minimal, from such possibly equivocal phrases as "put to one side" (does that mean "consider in the future?"), the arguments against capital punishment "are forceful" (rarely used in total rejection of a concept), and "in a day" when the death penalty is still widely accepted (suggests there may be another day). On the other hand, advocates of abolition must accept the grim fact that no American court has yet found the death penalty offensive to current constitutional standards.

The most recent case was *Rudolph v. Alabama,* in 1963,[144] in which certiorari was denied. But there, three justices—Goldberg, Douglas, and Brennan—dissented from the denial and urged that three questions were worthy of consideration in that and a companion case, where there was "imposition of the death penalty on a convicted rapist who has neither taken or endangered human life."[145]

Is their concern over the death penalty a straw in the wind for the

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[143]Trop v. Dulles, 356 U.S. 86, 99 (1958). See also the following California cases reaching a similar result: People v. Love, 56 Cal. 2d 720, 17 Cal. Rptr. 481, 366 P.2d 809 (1961); People v. Bashor, 48 Cal. 2d 763, 312 P.2d 255 (1957); *In re* Wells, 35 Cal. 2d 889, 221 P.2d 947 (1950); People v. Lazarus, 207 Cal. 507, 279 P. 145 (1929); People v. Oppenheimer, 156 Cal. 733, 106 P. 74 (1909); *In re* Finley, 1 Cal. App. 198, 81 P. 1041 (1950). Also note Jackson v. Dickson, 325 F.2d 573 (9th Cir. 1963), *cert. denied,* 377 U.S. 957 (1964).

The language in *Oppenheimer* has apparently never been disapproved:

> We are not warranted in saying as a matter of law that the punishment of death for an assault with a deadly weapon with malice aforethought by one undergoing a life sentence in a state prison is either "cruel" or "unusual" within the meaning of those terms as used in our constitution. The infliction of the death penalty by any of the methods ordinarily adopted by civilized people, such as hanging, shooting, or electricity, is neither cruel nor unusual punishment.

People v. Oppenheimer, 156 Cal. 733, 737, 106 P. 74, 77 (1909).

[144]375 U.S. 889 (1963).

[145]*Id.*

future? Were they suggesting a result that might be reached in a future *Chessman* case? Or were they conceding the death penalty is sustainable for one who has taken or endangered human life? Or, finally, does one reach the conclusion of Professor Packer that "sympathy with the legislative goal of limiting or abolishing the death penalty should not be allowed to obscure the difficulties of taking a judicial step toward that goal?"[146]

The answers may be known before many more issues of the Loyola University Law Review are published.

Regardless of court conclusions relating to particular penalties provided by law, the *Trop* case put constitutional inhibitions in proper focus:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this right be exercised within the limits of civilized standards.[147]

The test, then, in every case is whether the punishment ordered or administered, by the federal government or by the state, is within the limits of civilized standards.

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[146]Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1072 (1964).
[147]Trop v. Dulles, 356 U.S. 86, 100 (1958).