

NOTES

JUDICIAL LIMITATIONS ON THE CONSTITUTIONAL PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The United States Constitution¹ and the organic laws of almost all American states impose some limitation on the power of government to punish for criminal offenses.² Most states have constitutional clauses prohibiting cruel and unusual punishments and excessive fines³ which are fashioned, like the eighth amendment of the United States Constitution,⁴ after the English Declaration of Rights.⁵ Some states, in

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

2. Only Connecticut and Vermont do not have an express prohibition in some form prohibiting cruel punishment, but Connecticut does provide against imposition of excessive fines, Conn. Const. art. 1, § 13; and Vermont has said that the common law at the establishment of the state is applicable, especially referring to the English Declaration of Rights. See *State v. O'Brien*, 106 Vt. 97, 170 Atl. 98 (1934).

3. Thirty-six states have provisions of this type. See, e.g., Cal. Const. art. I, § 6; Mo. Const. art. I, § 21; N.Y. Const. art. I, § 5. Three states specifically direct the prohibition to the courts. Md. Dec. Rights art. 25; Mass. Dec. Rights art. 26; N.H. Const. art. I, § 33. The remainder of the states delineate the prohibition in slightly varying terms. E.g., Pa. Const. art. I, § 13 (cruel punishments not to be inflicted); Va. Const. art. I, § 9 (cruel and unusual punishments *ought* not to be inflicted); Wyo. Const. art. I, § 14 (cruel *or* unusual punishment not to be inflicted).

4. The eighth amendment of the United States Constitution has been held to apply exclusively to the exertion of national power and not to be a limitation on the powers of the states. *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1867); *Ex parte Garrison*, 297 Fed. 509 (S.D. Cal. 1924); *People v. Elliott*, 272 Ill. 592, 112 N.E. 300 (1916); *State v. Sharp*, 156 La. 531, 100 So. 707 (1924). However indications of an expanding conception of the due process clause of the fourteenth amendment to include certain of the Bill of Rights amendments has opened a way for the Supreme Court to include the cruel and unusual punishment protection as a part of fourteenth amendment due process. See Sutherland, *Due Process and Cruel Punishment*, 64 Harv. L. Rev. 271 (1950); 34 Minn. L. Rev. 134 (1950). As early as 1892, three justices of the Supreme Court thought the passage of the fourteenth amendment had extended the applicability of the eighth amendment to state actions. *O'Neil v. Vermont*, 144 U.S. 323, 360, 370 (1892) (dissenting opinions). More recently, in 1947, four dissenting justices felt that the prohibition was restrictive on state action through the due process clause. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 472 (1947) (dissenting opinion). The Court avoided a definite determination of the problem in 1949, when presented with a Third Circuit determination that the eighth amendment right was "basic" and "fundamental" to the rights of life and liberty and therefore the due process

addition, have constitutional provisions that the "punishment shall be proportioned to the character and degree of the offense."⁶ Although sentenced defendants have frequently based pleas for mitigation upon these limiting mandates, there are few instances in which an imposed punishment has been nullified or diminished on such basis.⁷ This note will examine the constitutional limitations which proscribe governmental infliction of cruel and unusual punishments, and will assess the reasons why the courts have been renitent against more actively applying them. Special consideration will be given to the question of whether pyramiding cumulative penalties for multiple offenses may be "cruel and unusual" when the aggregate punishment imposed seems unduly severe in view of the offenses committed.

The prohibition against cruel and unusual punishment finds its origin in early English history,⁸ having been brought forward into the Bill of Rights of the United States Constitution from the Magna Carta⁹ and the English Declaration of Rights of 1688.¹⁰ Its formal embodiment was induced by a widely felt need for protection against those modes of punishment, all too common in early days, which inflicted great pain and suffering on the prisoner.¹¹ Physical torture was the prohibited penalty, and because of this historical basis for the prohibition it has seldom been considered apposite for application in this country. Penalties imposed by our courts on convicted criminals undoubtedly are more humane than the stake, the rack, or the thumb-screw, which were commonplace in 1688. Therefore, when asked to apply the protection, numerous courts have held that it applies only to

clause of the fourteenth amendment prohibited a state abridgment. *Johnson v. Dye*, 175 F.2d 250 (3d Cir. 1949). In a per curiam opinion the Court reversed because of a flaw in the defendant's procedure in bringing the case to the Court. *Johnson v. Dye*, 338 U.S. 864 (1949).

5. 1 W. & M., 2d Sess., ch. 2 (1688).

6. See, e.g., W. Va. Const. art. III, § 5. Illinois has no provision prohibiting cruel and unusual punishment, but does have in its Bill of Rights a provision that "all penalties shall be proportioned to the nature of the offense." Ill. Const. art. II, § 11.

7. Sutherland, *Due Process and Cruel Punishment*, 64 Harv. L. Rev. 271 (1950).

8. Fellman, *The Defendant's Rights* 203 (1958); 34 Minn. L. Rev. 134, 135 (1950).

9. See ch. 14 of the Magna Carta, printed as confirmed by King Edward I in 1297, 4 Halsbury, *Statutes of England* 24 (2d ed. 1948).

10. 1 W. & M., 2d Sess., ch. 2 (1688).

11. *In re Kemmler*, 136 U.S. 436, 446 (1890); *State v. Woodward*, 68 W. Va. 66, 72, 69 S.E. 385, 389 (1910); Cooley, *Constitutional Limitations* 472 (7th ed. 1903).

the *form* of the punishment rather than to the *quantity* or *duration*;¹³ that "cruel" means inhuman or barbarous¹³ and "unusual" means unknown or fallen into disuse at the time of the adoption of the constitution,¹⁴ and that "cruel and unusual" punishment refers only to such things as drawing and quartering, burning alive, starvation, mutilation, or other "inhuman, barbarous or torturous punishment." These courts would say that the cruel and unusual protection has no applicability to a punishment which is in a conventionally permissible form, even though severe because disproportionate to the offense.

However, the federal and some state courts do hold that the protection applies to the quantity or duration of the punishment, as well as to the form,¹⁵ and will apply the protection just as do the states whose constitutions require that punishment be "proportional to the offense." The leading federal case so holding is *Weems v. United States*¹⁶ where the defendant was convicted in a Philippine court (under United States authority) for making false entries in public records regarding payments of 616 pesos. He was sentenced to fifteen years at hard labor in chains, a 4000 peso fine, deprivation of civil rights during imprisonment, and deprivation of political rights thereafter. The conviction was reversed, the Supreme Court establishing the principle that punishment is unconstitutionally cruel and unusual which is not graduated and proportional to the offense committed.¹⁷ This principle has been subsequently interpreted and applied,¹⁸ but the indefiniteness inherent

12. E.g., *Kistler v. State*, 190 Ind. 149, 129 N.E. 625 (1921); *People v. Morris*, 80 Mich. 634, 45 N.W. 591 (1890); *Territory v. Ketchum*, 10 N.M. 718, 65 Pac. 169 (1901).

13. See cases supra note 11.

14. *Cooley*, op. cit. supra note 11, at 472; *Puttkammer*, Administration of Criminal Law 231 (1953). Some forms of punishment may be unacceptable today even though common when the Constitution was adopted. For example, when the Constitution was adopted the sentence of death was carried out by means of hanging or beheading. The latter would be improper today, even though a traditional punishment, because it has so completely disappeared from use as to be "unusual." *Puttkammer*, op. cit. supra at 231. Yet the prohibition has not prevented the introduction of new or different means to achieve an old end, the term "unusual" being interpreted as an entirely different punishment. Therefore devices such as lethal gas or electrocution, while unknown in 1789, have been approved as constitutional, being merely new means to the achievement of the old and legitimate punishment of death. In *re Kemmler*, 136 U.S. 436 (1890) (electrocution); *Hernandez v. State*, 43 Ariz. 424, 32 P.2d 18 (1934) (lethal gas); *State v. Gee Jon*, 46 Nev. 418, 211 Pac. 676 (1923) (lethal gas).

15. E.g., *Hemans v. United States*, 163 F.2d 228 (6th Cir. 1947); *Sustar v. County Court*, 101 Ore. 657, 201 Pac. 445 (1921).

16. 217 U.S. 349 (1910).

17. *Id.* at 367.

18. See, e.g., *Kasper v. Brittain*, 245 F.2d 92, 96 (6th Cir. 1957) ("so greatly disproportionate to the offense committed as to be completely arbitrary and shock-

in the words "graduated" and "proportional" has left the courts free to uphold many seemingly severe and disproportionate sentences.¹⁹

Another limitation on use of the cruel and unusual punishment protection has emerged as a result of the courts' conclusion that the legislature has inherent discretion to decide what constitutes a crime against the state and how such crime shall be punished, and that this discretion is almost unlimited.²⁰ However, in spite of the courts' hesitancy to question legislative determinations of the seriousness of crimes and the severity of punishments, they have not renounced entirely their constitutional responsibility to review actions of the legislature in prescribing punishments for particular offenses.²¹ This responsibility has been articulated in varying styles to express the basic idea that there is some line over which the legislature cannot step in making the punishment fit the crime. Thus, courts have said that they will not interfere with the legislative determination unless the penalty imposed is clearly cruel and unusual;²² that they will not review the exercise of legislative discretion within constitutional limits;²³ or that they are not authorized to invalidate a law unless it "unmistakably and conclusively appears that it carries a punishment shockingly disproportioned to the offense charged."²⁴ Regardless of the language used it is apparent that these courts consider the legislature's prerogative to be virtually illimitable so long as punishments do not exceed the boundaries of reasonable propriety.²⁵

ing to the sense of justice"); *Hemans v. United States*, 163 F.2d 228, 237 (6th Cir. 1947) ("so disproportionate to the offense as to fall within the inhibition"); *Weber v. Commonwealth*, 303 Ky. 56, 64, 196 S.W.2d 465, 469 (1946) ("so proportioned to the offense committed that it shocks the moral sense of all reasonable men as to what is right and proper under the circumstances").

19. See, e.g., *Weber v. Commonwealth*, 303 Ky. 56, 196 S.W.2d 465 (1946) (imprisonment in jail for four years and fine of \$5,000 for assault and battery); *State ex rel. Nelson v. Smith*, 114 Neb. 653, 209 N.W. 328 (1926) (sixty days in jail, two on bread and water, for possession of intoxicating liquor). In *State v. Feilen*, 70 Wash. 65, 126 Pac. 75 (1912), the sterilization of a prisoner guilty of rape was upheld under a constitution prohibiting cruel punishments. But cf. *Mickle v. Henrichs*, 262 Fed. 687 (D. Nev. 1918), where a statute authorizing the sterilization of certain criminals was held unconstitutional, the constitutional clause stating that no cruel or unusual punishment shall be inflicted.

20. *Territory v. Ketchum*, 10 N.M. 718, 65 Pac. 169 (1901).

21. *Weems v. United States*, 217 U.S. 349, 378-79 (1910).

22. See, e.g., *Moore v. Aderhold*, 108 F.2d 729, 731 (10th Cir. 1939); *Schultz v. Zerbst*, 73 F.2d 668, 670 (10th Cir. 1934); *Crutchfield v. Commonwealth*, 248 Ky. 704, 59 S.W.2d 983 (1933).

23. See, e.g., *State ex rel. Nelson v. Smith*, 114 Neb. 653, 209 N.W. 328 (1926).

24. *Kistler v. State*, 190 Ind. 149, 158, 129 N.E. 625, 628 (1921).

25. *Brown v. State*, 152 Fla. 853, 13 So. 2d 458 (1943); *Shields v. State*, 149 Ind. 395, 49 N.E. 351 (1898); *Bradley v. Commonwealth*, 288 Ky. 416, 156 S.W.2d 469 (1941).

A further limitation upon application of the cruel and unusual punishment prohibition has been the interpretation that its restraint affects only the exercise of legislative discretion, and does not operate against the judiciary. Once it is determined that a statute itself does not violate the prohibition, then the penalty assessed by the trial court or jury within the statutory limits ordinarily will not be adjudged excessive, even though seemingly disproportionate to the offense committed.²⁶ Thus, the legislature makes the broad policy determination of maximum and minimum penalties, leaving triers of particular cases at liberty to fix the punishment within the limits prescribed. As long as the broad limits are observed, there is no constitutional violation and the sentence is not reviewable on appeal.²⁷ However, there are some decisions which have held that the cruel and unusual provisions act not only as a restriction on legislative discretion, but also on the judiciary, and that a sentence can be attacked even if within the maximum limits of a valid statute.²⁸ The punishment imposed by the trial court will particularly be subject to review when the maximum penalty is not fixed by statute but is left to the court.²⁹

With the history of cruel and unusual punishment prohibitions as protection principally against barbarous modes of punishment, with judicial reluctance to set aside legislative determinations that a penalty is proper for an offense, and with the further hesitancy to question the discretion of trial courts to sentence within statutory limits, our appellate courts have been similarly disinclined to invalidate cumulative penalties when urged to do so on grounds of cruelty, unusualness or disproportion. The problem of cumulative penalties is raised when a defendant has been convicted in one trial for more than one offense, which offenses usually arose out of the same criminal transaction or course of conduct. The penalties for each offense are aggregated to produce a heavier fine or a longer term of imprisonment than would be permissible as punishment for a single conviction for a single

26. *United States v. Sorcey*, 151 F.2d 899 (7th Cir. 1945); *Schultz v. Zerbst*, 73 F.2d 668 (10th Cir. 1934); *Apple v. State*, 190 Md. 661, 59 A.2d 509 (1948).

27. *Jackson v. United States*, 72 F.2d 764 (3d Cir. 1934). But cf. *Tincher v. United States*, 11 F.2d 18, 21 (4th Cir.), cert. denied, 271 U.S. 664 (1926), where the court indicated that sentences imposed within statutory limits could be reviewed on appeal "in case of gross or palpable abuse."

28. A sentence for embezzlement to five years in the penitentiary and a fine of \$577,000 was held to be a cruel and unusual punishment even though the sentence was in accordance with the governing statute. *State v. Ross*, 55 Ore. 450, 104 Pac. 596 (1909), modified on rehearing, 55 Ore. 474, 106 Pac. 1022 (1910). See also *Barber v. Gladden*, 210 Ore. 46, 309 P.2d 192 (1957); *Singletary v. Wilson*, 191 S.C. 153, 3 S.E.2d 802 (1939).

29. See, e.g., *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940); *Singletary v. Wilson*, *supra* note 28.

offense.³⁰ The case of *O'Neil v. Vermont*³¹ clearly indicates the potentially harsh results of such punishment. The defendant O'Neil conducted a wholesale and retail liquor business in New York, taking orders from Vermont customers and sending the liquor to them C.O.D. by an express company. He was found guilty of 307 offenses of illegal liquor sales committed over a three year period, and was fined \$20 for each offense, or a total of \$6140, and \$500 in court costs. If the fine and costs were not paid within twenty-four hours, he was to be committed to jail for three days per each dollar, a total of over fifty-four years. The Supreme Court of Vermont rejected the defendant's arguments that the statute was a regulation of interstate commerce and that the punishment imposed was unduly extreme and oppressive.³² The Supreme Court of the United States dismissed the writ of error, holding that the record did not present a federal question and that the question of excessive punishment raised by the defendant in the state supreme court had not been properly raised on appeal. Mr. Justice Field dissented, arguing that a federal question had been raised so as to confer jurisdiction of the appeal, and hence the Court could look to the whole record to correct any invasions of the defendant's rights, including excessive punishment. And, while the eighth amendment protection against cruel and unusual punishment was directed only against United States authorities, such protection was also available against state action as a federal privilege and immunity since the adoption of the fourteenth amendment.³³ He concluded that even though the penalty for each offense was reasonable, the cumulative punishment was cruel and unusual and grossly disproportionate to the offenses committed, and was therefore unconstitutional and void.³⁴

Field's argument against the validity of cumulative punishment,

30. 5 Wharton, Criminal Law and Procedure § 2214 (12th ed. 1957). Cumulative penalties which are within the subject of this note should be distinguished from cumulative punishment which is an increased punishment imposed for a second or third conviction under habitual criminal statutes. As to this latter punishing device, it has been held that statutes imposing additional punishment on persons previously convicted of crime do not violate prohibition against cruel and unusual punishment. *Graham v. West Virginia*, 224 U.S. 616 (1912); *McDonald v. Massachusetts*, 180 U.S. 311 (1901); *Beland v. United States*, 128 F.2d 795 (5th Cir. 1942); *State v. Dowden*, 137 Iowa 573, 115 N.W. 211 (1908).

31. *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586 (1885), dismissed sub nom. *O'Neil v. Vermont*, 144 U.S. 323 (1892).

32. *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586 (1885).

33. *O'Neil v. Vermont*, 144 U.S. 323, 362-63 (1892) (dissenting opinion). This, of course, had been Mr. Justice Field's view of the fourteenth amendment privilege and immunities clause since the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1872). See discussion of this problem, supra note 4.

34. In a separate dissenting opinion Justices Harlan and Brewer essentially agreed with Mr. Justice Field. 144 U.S. at 366.

when it is so greatly increased as to be entirely out of proportion to the offenses committed, has not marshalled support among the courts and such penalties have been upheld in spite of their seeming severity.³⁵ There are several arguments and considerations to which the courts have directed their attention when presented with the plea that a particular cumulative punishment is unconstitutional. As in non-cumulative cases where the cruel and unusual punishment protection is sought, they have said the provision is directed against the *character* of the punishment rather than the quantity or degree.³⁶ Also, the courts have spoken of the cumulation of penalties as being primarily a matter within the trial judge's discretion, stating that his determination within statutory limits should be upheld because of his intimate knowledge and association with the facts and circumstances of the case.³⁷ It has been further said that it is the task of the legislature, not the courts, to establish the rules of our society and to decide how persons who break those rules shall be punished; and hence it is also within the discretion of the legislature to determine the degree of severity and whether or not penalties are to be cumulative.³⁸ The severity of a penalty which the legislature may properly impose depends in a large part upon the object sought to be accomplished by its imposition, and the courts have given wide latitude to the discretion and judgment of the legislature to determine the penalty felt necessary to accomplish that purpose.³⁹ Thus, in *State v. Lube*,⁴⁰ the statute provided a five dollar fine for each undersized lobster found in one's possession, and the defendant was fined for each of thirty-six lobsters so found. The court, in upholding this cumulative penalty, said the purpose of the enactment and the importance of the public interest sought to be protected must be considered when looking at the possible excessiveness of the penalty. Here the legislature's policy to preserve the fisheries as a food supply and source of employment warranted such punishment as was authorized for the violations.

Of special importance with regard to legislative determination of a proper penalty is the question of whether or not the threatened punishment will be a satisfactory deterrent against the commission of the proscribed activity.⁴¹ The courts have recognized and utilized the de-

35. See, e.g., *People v. Elliott*, 272 Ill. 592, 112 N.E. 300 (1916); *Dobson v. Warden, Md. Penitentiary*, 214 Md. 654, 135 A.2d 890 (1957) (dictum).

36. *State v. Rodman*, 58 Minn. 393, 59 N.W. 1098 (1894). See supra notes 11-19 and accompanying text.

37. See supra notes 26, 27 and accompanying text.

38. *Lapinski v. Copacino*, 131 Conn. 119, 38 A.2d 592 (1944).

39. *Id.* at 132, 38 A.2d at 598.

40. 93 Me. 418, 45 Atl. 520 (1899).

41. Puttkammer, *Administration of Criminal Law* 8 (1953). Compare discussion that deterrence theory has fallen into disrepute in academic area but not among legislators, 1 Wharton, *Criminal Law and Procedure* § 5 (12th ed. 1957).

vice of cumulating penalties as a means of discouraging repeated or multiple offenses where the penalty for each violation is relatively insignificant. Since the penalties are increased according to the number of the offenses, it is to the lawbreaker's disadvantage to begin and continue his course of unlawful conduct.⁴² With crimes such as burglary or robbery, the punishment for a single offense is considered sufficiently severe to deter their commission, so that although a criminal convicted of several separate offenses can be sentenced for each offense, the sentences may be made to run concurrently.⁴³ But for an offense such as unlawful killing of wild game, a small fine would not discourage the conduct if each animal unlawfully killed were not considered a separate offense, punishable as such, and the penalties were not cumulated. For example, in *State v. Poole*,⁴⁴ the defendant was caught with 2,000 illegally obtained wild ducks. A fine of \$50 or even \$200 would not be sufficient to discourage him from again seeking to acquire as many birds as he could in order to gain the large profit possible from their sale. But with a statute providing for a fine of \$10 to \$25 or 10 to 30 days imprisonment for possession of *each* bird, so that there might be imposed a \$20,000 fine or, if not paid, an imprisonment of 200 days, the profit would be taken out of the unlawful dealings and the prohibition made effective.⁴⁵ Moreover, by making the possession of each wild duck a separate offense punishable with a separate fine, the law retains enough flexibility to deal with both the hunter who kills more than the legal limit and the commercial poacher who hopes to profit from his unlawful conduct.

Even those courts which suggest that they would invalidate a sentence which was excessive and disproportionate to the offense have in fact continually determined that the cumulative sentence actually imposed was *not* excessive. The standard against which they have measured the sentence or fine is not the total penalty but rather the penalty for each individual offense.⁴⁶ If the penalty prescribed for each offense is not constitutionally excessive, then the fact that more than one offense was committed and the defendant was convicted and punished

42. See, e.g., *Ex parte Brady*, 70 Ark. 376, 68 S.W. 34 (1902); *State v. Craig*, 80 Me. 85, 13 Atl. 129 (1888); *State v. Rodman*, 58 Minn. 393, 59 N.W. 1098 (1894).

43. Where more than one sentence is imposed under different counts they will be presumed to run concurrently. See Annot., 70 A.L.R. 1511 (1931).

44. 93 Minn. 148, 100 N.W. 647 (1904).

45. *Id.* at 150, 100 N.W. at 647.

46. *People v. Elliott*, 272 Ill. 592, 112 N.E. 300 (1916). See also *Manley v. Fisher*, 63 F.2d 256 (4th Cir. 1933); *Scala v. United States*, 54 F.2d 608 (7th Cir. 1931); *Ex parte Brady*, 70 Ark. 376, 68 S.W. 34 (1902); *State v. Sharp*, 156 La. 531, 100 So. 707 (1924); *State v. Pohlman*, 40 N.J. Super. 416, 123 A.2d 391 (1956); *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586 (1885); *Fletcher v. Commonwealth*, 106 Va. 840, 56 S.E. 149 (1907).

for each offense, with a severe total punishment, will not act to place the defendant in a better position than if he had committed only one offense.⁴⁷ In *Fletcher v. Commonwealth*,⁴⁸ where the defendant was convicted of sixteen distinct liquor violations and fined \$200 for each offense, the court answered the argument that the penalty was excessive by saying:

We are unable to say that \$200 is an unreasonable and excessive punishment for each of the offenses charged. The aggregate is large because plaintiff in error was an habitual lawbreaker; and, if the penalty imposed for each offense was proper, plaintiff in error cannot be heard to complain of the aggregate which resulted from his continued and flagrant criminal misconduct.⁴⁹

An appeal based on the excessiveness of the punishment is under the further handicap that the appellant has been tried and found guilty as charged, and it is not the finding of guilt that is being attacked but the sentence based on that finding. An appellate court may be asked to review a cumulative punishment either because it is outside the statutory limits or because it is excessive, even though within the statutory limits.⁵⁰ It is generally conceded today that the court can correct the sentence under the former circumstance,⁵¹ although the earlier view was that the court could only reverse the conviction and remand for a new trial.⁵² The alternatives open to the appellate court in the latter situation are either to (1) affirm the sentence because it is within the limits of the statute, (2) modify it to what the court considers reasonable, or (3) reverse and remand for resentencing because the punishment assessed is unconstitutionally severe and cannot be sustained by the appellate court regardless of the certainty of the defendant's guilt and the fact the penalty comes within the statutory limits. But in the absence of a specific statutory authorization, an appellate court itself will not reduce a sentence which is within the statutory limits,⁵³ nor is it inclined to reverse a valid and proper conviction because the penalty is improper. Therefore the court is most likely to sustain the conviction, even though it feels that the penalty was unnecessarily severe.⁵⁴

The courts have declared cumulative penalties unconstitutional in only two instances, neither of which essentially involved cruel and

47. See, e.g., *State v. Sharp*, supra note 46; *State v. O'Neil*, supra note 46.

48. 106 Va. 840, 56 S.E. 149 (1907).

49. Id. at 848, 56 S.E. at 151.

50. Orfield, *Criminal Appeals in America* 101 (1939).

51. 5 Wharton, *Criminal Law and Procedure* § 2215 (12th ed. 1957).

52. Orfield, op. cit. supra note 50, at 101.

53. *United States v. Rosenberg*, 195 F.2d 583, 604-06 (2d Cir. 1952); Comment, 36 Mich. L. Rev. 106 (1937). See supra notes 25-29 and accompanying text.

54. See, e.g., *People v. Elliott*, 272 Ill. 592, 112 N.E. 300 (1916).

unusual punishment or excessive fines provisions. In a railroad rate regulation case,⁵⁵ the Supreme Court said it was unconstitutional to provide for fines against a railroad in such large amounts through cumulative penalties so as to discourage resort to the courts to test the validity of an imposed rate regulation. This is more a matter of equal protection and of due process than of cruel and unusual punishment.⁵⁶ In the other case,⁵⁷ the defendants violated a city ordinance forbidding the destruction of plants in public parks. They were accused and convicted of seventy-two distinct violations within a period of one hour and forty minutes. The statutory punishment for each offense was a ten dollar fine or, in default, thirty days imprisonment. Defendants were fined \$720, or six years in jail. The Supreme Court of Louisiana discharged the defendants, holding that the cumulative punishment was severe and unusual and therefore violative of the constitution. However, the court appears to have been concerned essentially with the distinction between the criminal conduct being one continuous act and it being seventy-two distinct offenses, and felt that the conduct here could not be split up into a multiplicity of offenses to avoid the limitations on the punishing power of a court of limited jurisdiction. The case is thus not one reversing a cumulative penalty but one in which the statutory limits of punishment were exceeded.⁵⁸

The conclusion to be reached after surveying the cases in which severity of punishment prohibitions have been invoked is that there has been a reluctance on the part of the appellate courts to review a decree of punishment once imposed, and to reverse a conviction on the basis of that review. This reluctance, and the fact that so few penalties have in fact been struck down as constitutionally invalid, actually reflect the humane moderation of American punishment. Gone are the days of physical brutality and torturous punishment which initially were the motivating factors for cruel and unusual punishment provisions. Today the defendant urging the invalidity of a "cruel and unusual" punishment is arguing that the punishment is disproportionate to the offense committed. But the courts have refused to determine that *this* punishment is not just for *this* crime, reasoning that this determination is strictly a matter for the political branch of the government, the legislature. This is rightly so, for it is the legislature that determines what constitutes a crime and it must be the legislature that determines how unlawful action will be punished. It should be noted that

55. *Ex parte Young*, 209 U.S. 123 (1908).

56. *Id.* at 147-48. See also *Edwards & Browne Coal Co. v. City of Sioux City*, 213 Iowa 1027, 240 N.W. 711 (1932).

57. *State v. Whitaker*, 48 La. Ann. 527, 19 So. 457 (1896).

58. This interpretation of the Whitaker decision is expressed in *In re Schwartz*, 119 La. 290, 44 So. 20 (1907).

practically all cases in which the prohibition against cruel and unusual punishment or excessive fines is raised because of cumulative penalties, involve fines rather than imprisonment. From this fact it can be inferred that the legislature has not seen fit to provide cumulative penalties of imprisonment, and even where there is statutory authority, there are few instances when the trial courts have thought it necessary to make sentences consecutive rather than concurrent, although they have been willing to cumulate fines. Yet, however little the protection against severity of punishment might be successfully invoked by defendants, it stands always as a potential shield against arbitrary governmental action and as a warning that in extreme cases appellate courts can interfere.