Constitutional Prohibitions of Cruel, Inhumane or Unnecessary Death, Injury or Suffering During Law Enforcement Process

By JORDAN J. PAUST*

Introduction

The primary question addressed in this commentary is whether conduct and measures that are proscribed under international law are also to be prohibited for use in law enforcement under domestic legal process. Restated, the question is whether actions that are impermissible under general human rights law or in time of war when used against armed enemies of the United States may be used against our own people in time of peace.

There are three interrelated aspects of domestic law that are of primary concern here: (1) Constitutional protections under the Fifth and Eighth Amendments to the United States Constitution, (2) the relationship between human rights law and the Ninth Amendment, and (3) the legal relevance of general international law to domestic decisionmaking. Also germane, are numerous criminal and tort law provisions which regulate excessive and/or cruel uses of force during the law enforcement processes by way of criminal prosecutions for murder, manslaughter, criminal negligence, assault with a deadly weapon, or other crimes and the civil sanctions intertwined with torts of assault and battery, false imprisonment, wrongful death and so forth.

Primary attention will be given to the first three aspects, since criminal prosecution for illegal law enforcement, in the overall context

* Associate Professor, University of Houston. This commentary substantially borrows from a forthcoming work on the illegality of "dum-dum" bullets in consultation with the A.C.L.U., entitled: *Does Your Police Force Use Illegal Weapons?—An Approach to Decision-Making About Weapons Regulation* [hereinafter cited as *Does Your Police Force Use Illegal Weapons?*].

of ongoing legal process, is often merely one form of sanction for rights deprivation and one aspect of the overall need for a policy serving decision in the public interest. These aspects of sanction also lie behind civil suits and the allowance of reparation for injuries sustained. Individual cases of past criminal prosecutions for excessive and cruel uses of force are merely the specific applications of the types of general legal policies that are at stake. Here we are more concerned with identification of general rights content and the interrelations between international human rights and United States constitutional norms than with particular sanction patterns. Trends of decision, and details of those decisions, are relevant. However, it is more useful and economic to focus on the general legal policies that lie behind such decisions, than upon details of each past decision about cruelty and excessive force. It is more useful because few court decisions have dealt specifically with the type of issues analyzed here, and the policies utilized in making prior decisions seem far more important.

Moreover, the legal problems that will occur, for example, with an actual criminal prosecution for use of a .357 magnum weapon system against a criminal suspect in an excessive, unreasonable and/or cruel manner resulting in death or serious injury to the suspect or to others will not present any unusual difficulties for legal decision-makers. Excessive and cruel force are already illegal under state, federal and constitutional law. The basic standards and approaches are relatively uniform and are well-known by public prosecutors and police alike. However, it should be noted that the use of criminal sanctions against police officers for an excessive, unreasonable or cruel use of force against others is relatively rare and by no means as frequent as civil suits for money damages under state tort law or the Federal Civil Rights Act. Thus, the seminal questions for this inquiry are whether or not there are identifiable legal policies that prohibit excessive and/or cruel injury, death or suffering under international law and how they relate to, and actually supplement, the domestic legal process. Nevertheless, we will consider some of the related aspects of criminal law and tort sanctions as we map out generally shared expectations of a constitutional import.

I. Constitutional Prohibitions Under the Fifth and Eighth Amendments Against Cruel and Inhumane Treatment, Injury, Killing or Punishment

A. General Policies and Trends in United States Decisions

As early as 1641, American settlers in the Massachusetts colony

enacted a Body of Liberties which prohibited bodily punishments "that are inhumane; Barbarous or cruel."[1] It was even added to the Massachusetts Body of Liberties and the law of the New Haven colony in the mid-1600's that "No Man shall exercise any Tirranny or crueltie towards any bruite Creature which are usuallie kept for man's use."[2] Furthermore, it was early recognized that the willful, killing of a fellow human being by means of cruelty which was "not in a mans necessarie and just defence" would be murder and, itself, punishable by death.[3] Thus, cruelty to animals and cruelty to man were proscribed early in the American colonies; and this basic prohibition of cruel treatment, injury, killing or punishment continued as a fundamental expectation of the Founding Fathers and of subsequent generations of Americans.

Moreover, the Declaration of Independence of 1776 had condemned "the works of death, desolation and tyranny" against men that were carried out "with circumstances of Cruelty & perfidy . . ." by the British, as well as the savage use of Indians against the American colonialists; and these expectations had also been proclaimed in the Declaration of Causes and Necessity of Taking Arms of 1775. During the Virginia debates on ratification of the United States Constitution, no less a defender of liberty and due process than Patrick Henry denounced "tortures, or cruel and barbarous punishment" and the pretrial tactic "of torturing, to extort a confession of the crime."[4] Actually, by this time the Constitution of Virginia of 1776 had already prohibited the infliction of "cruel and unusual punishments,"[5] and this basic expectation had been reflected in most of the state constitutions.[6] In fact, these prohibitions and the language adopted in Amendment VIII to the United States Constitution were reflections of a fundamental expectation evi-

1. *In re* Kemmler, 136 U.S. 436, 446 n.1 (1890); *see Massachusetts Body of Liberties,* in SOURCES OF OUR LIBERTIES 148, at 153 (R. Perrey & J. Cooper eds. 1959) [hereinafter cited as Perry & Cooper].

2. Perry & Cooper, *supra* note 1, at 158; S. ANDRUS, THE CODE OF 1650, at 42 (1972) [hereinafter cited as THE CODE OF 1650].

3. *See* Perry & Cooper, *supra* note 1, at 158; THE CODE OF 1650, *supra* note 2, at 28.

4. Weems v. United States, 217 U.S. 349, 396 (1910) (White, J., dissenting); *see* Furman v. Georgia, 408 U.S. 238, 320-21 (1972) (Marshall, J., concurring) *citing* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446-48 (J. Elliot ed. 1876).

5. *Constitution of Virginia of 1776,* § 9, in Perry & Cooper, *supra* note 1, at 312.

6. Perry & Cooper, *supra* n.1 339 (Delaware Declaration of Rights), 347-48 (Const. of Maryland), 355 (Const. of North Carolina), 377 (Const. of Massachusetts), 384-85 (Const. of New Hampshire), 395 (Northwest Ordinance). *See also id.* at 325 (Pennsylvania).

dent in the English legal process and that of the American colonies. The actual wording of the Eighth Amendment follows closely that of the English Bill of Rights of 1689 including a basic expectation that whatever coercion was to be utilized must be proportionate to the need (the principle of proportionality).[7]

Since then, it has become clear that cruel and inhumane treatment, injury, killing or punishment inflicted by police officers or other law enforcement officials is prohibited under the United States Constitution (Amendments V, VIII, IX and XIV), under state constitutions, under state penal law and under state tort law. When an impermissible or criminal use of force is exercised by a police officer, each of these types of conduct or outcome (inhumane treatment, injury, killing, punishment) and each of these kinds of law might well be involved. Each is certainly relevant for a rational and comprehensive approach to the serving of legal policy in actual context.

Professor Perkins has written, with regard to deadly use of force and the overall requirement of "necessity," that: "No matter how grave the felony, or how guilty the particular arrestee, no arrester is authorized by law to appoint himself an arbitrary executioner."[8] Such an execution or summary punishment would, of course, involve a denial of due process of law under the Fifth Amendment and a crime of murder under state law. If carried out in a cruel, inhumane or unusual manner, it would also violate the Eighth Amendment and, in states adopting it,

---

7. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947). On the principle of proportionality in domestic legal process, see E. CORWIN & J. PELTASON, UNDERSTANDING THE CONSTITUTION 137 (5th ed. 1970) [hereinafter cited as CORWIN & PELTASON]; Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969); Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966). This same basic principle of international and domestic law is often dressed in other clothing for criminal law purposes as the principle of reasonableness or reasonable necessity, see notes 20-29 and text accompanying.

8. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 278 (1940) [hereinafter cited as Perkins]; *see* United States v. Delerme, 457 F.2d 156, 161 (3d Cir. 1972) ("[W]hen a policeman takes it upon himself to adjudicate guilt and administer punishment . . . he has deprived that person of due process of law as guaranteed by the Fifth Amendment . . ."); 40 AM. JUR. 2D *Homicide* §§ 134 *et seq.* (1968); 40 C.J.S. *Homicide* §§ 100 *et seq.* (1944). *See also* Comment, "State Police Arms," The New Haven Chronicle, June 29, 1974, at 6, stating: "There is an entanglement here, not only with the policeman's proper right to defend himself, but with what seems to many to be a veiled extension of police power, a strong implication of extending the scope of police judgment—through the selection of other equipment—on the right to kill."

the further crime of a "cruel and unusual" killing.[9] There are clearly, then, possible interconnections in the prohibitions contained in the Fifth and Eighth Amendments.

B. Fifth Amendment Prohibitions of Excessive Force

Although the primary prohibitions of cruel, inhumane or unnecessary force are often intertwined, it may be useful to focus on Fifth Amendment prohibitions of excessive or unnecessary force and then explore the interrelated Eighth Amendment prohibitions. The Fifth Amendment requirements of "due process" do not merely address the illegality of excessive force but also address international legal requirements and prohibitions of cruelty.

With regard to excessive use of force, it is generally agreed that a police officer may use deadly force in self-defense or to prevent the commission of a felony involving an imminent use of deadly or serious force "if this is necessary, or reasonably appears to be necessary." But it "must be a case of necessity" and not merely a pretext or a case of useful police practice or beneficial effect (i.e., that which would make police work easier but which is not necessary).[10] It is also agreed that, whether

---

9. *See, e.g.*, State v. Knoll, 72 Kan. 237, 83 P. 622 (1905); Tanks v. State, 71 Ark. 459, 75 S.W. 851 (1903). The latter case decided that death caused by a common, ordinary pistol was not "cruel" or "unusual." *See also In re* Kemmler, 136 U.S. 436 (1890); State v. Cunningham, 173 Ore. 25, 144 P.2d 303 (1943) ("brutal").

10. *See* Perkins, *supra* note 8, at 278-80, 283 and cases cited. *See also* R. PERKINS, CRIMINAL LAW 977-86 (2d ed. 1969); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting), stating: "I wonder what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response *must relate* to the *gravity* and *need* . . . ." (emphasis added). State v. Cunningham, 107 Miss. 140, 65 So. 115 (1914), cited as U.S. Law in United Mexican States v. United States Mexican Claims Commission, 4 U.N.R.I.A.A. 119 (1926).

In international law, this would be expressed by the distinction between military necessity and military benefit. *See* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 520-30 (1961); Aldrich, Blix, Kalshoven, Paust & Rubin, panel discussion, 67 AM. J. INT'L L. 141-68 (1973); Harris, *Modern Weapons and the Law of Land Warfare*, 12 THE MILIT. L. & L. WAR REV. 141-68 (1973); Paust, *Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense "Practices" Inconsistent With Legal Norms?*, 4 DENVER J. OF INT'L L. & POL. 229 (1974); Paust, *The Nuclear Decision in World War II—Truman's Ending and Avoidance of War*, 8 INT'L L. 160 (1974); Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MILIT. L. REV. 99 (1972) [hereinafter cited as *My Lai and Vietnam*]. *See also* Sterling v. Constantin, 287 U.S. 378 (1932) which states: "What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case, are judicial questions . . . ." *Id.* at 401. "[Here the facts leave] no room for doubt that there was no military necessity . . . ." (*Id.* at 403);

in a criminal or civil proceeding involving the question of excessive use of force by a police officer, what "amounts to reasonable force depends upon the facts of each particular case . . . ."[11] As an illustration, Professor Perkins points out:

> [I]t may be necessary for [a police officer] to withhold his fire for the safety of innocent bystanders. If an officer shoots at a fleeing felon under such circumstances as obviously to create an unreasonable risk of death or great bodily harm to others, he will be liable for any injury he may inflict upon an innocent person.[12]

Paust, *The Seizure and Recovery of the Mayaguez: International Illegality Unfurled*, 85 YALE L.J. — (1975) (On judicial competence to determine what constitutes military necessity [hereinafter cited as *The Seizure and Recovery of the Mayaguez*].

11. Colorado v. Hutchison, 9 F.2d 275, 276 (8th Cir. 1925). It is precisely at this point that a more comprehensive inquiry into permissibility is greatly facilitated by the use of a systematic reference to the various aspects of context or social process that are relevant for rational, policy-serving decision. The most useful systematic reference known to the author is contained in the McDougal-Lasswell methodology in the form of a seven facet phase analysis (considering: the participants, their objectives, arenas of interaction, base values or resources, strategies utilized, outcomes, effects), and an eight category value analysis (power, wealth, well-being, respect, rectitude, enlightenment, skill, affection) integrated into five intellectual tasks for decision. See Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971); McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1 (1966); McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968).

12. Perkins, *supra* note 8, at 280, *citing* Askay v. Maloney, 85 Ore. 333, 339, 166 P. 29 (1917), *rev'd on other grounds*, 92 Ore. 566, 179 P. 899 (1919). *See also* Lentine v. McAvoy, 105 Conn. 528, 532-33, 136 A. 76, 80-83 (1926); McGann v. Allen, 105 Conn. 177, 134 A. 810 (1926); Dyson v. Schmidt, 260 Minn. 129, 109 N.W.2d 262 (1961). In criminal law, this could also involve the unlawful risk to others, gross, cuplable disregard of the consequences and a reasonably foreseeable risk of death or injury to others. The question of "excessive" or "unnecessary" use of force if often intertwined; see People v. Sam, 71 Cal. 2d 194, 77 Cal. Rptr. 804, 454 P.2d 700 (1969); People v. Roe, 189 Cal. 548, 209 P. 560 (1922); People v. Campbell, 30 Cal. 312 (1866); People v. Herbert, 228 Cal. App. 2d 514, 39 Cal. Rptr. 539 (1964); People v. Lopez, 205 Cal. App. 2d 807, 23 Cal. Rptr. 532 (1962); State v. Jacowitz, 128 Conn. 40, 20 A.2d 470 (1941); People v. Gaines, 9 Ill. App. 3d 589, 292 N.E.2d 500 (1973); Commonwealth v. Atencio, 345 Mass. 627, 189 N.E.2d 223 (1963); People v. Gonsler, 251 Mich. 443, 232 N.W. 365 (1930); State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965); Commonwealth v. Malone, 354 Pa. 180, 47 A.2d 445 (1946); Trimble v. State, 132 Tex. Crim. 236, 104 S.W.2d 31 (1937); McDonald v. State, 22 S.W.2d 670 (Tex. 1929); Abell v. State, 109 Tex. Crim. 380, 5 S.W.2d 139 (1928); Thomas v. State, 53 Wis. 2d 483, 192 N.W.2d 864 (1972); McCluskey v. Steinhorst, 45 Wis. 2d 350, 173 N.W.2d 148 (1970); 40 AM. JUR. 2D *Homicide* §§ 134 *et seq.* (1968); 70 AM. JUR. 2D *Sheriffs, Police, and Constables* § 206 (1973); 40 *C.J.S. Homicide* §§ 100 *et seq.* (1944); 25 CAL. JUR. 2D *Homicide* § 281 (1955). Some recent articles, which only consider some of the above cases, include: McDonald, *Use of Force by Police to Effect Lawful Arrest*, 9 CRIM. L.Q. 435 (1966-67); Rummel, *The Right of Law Enforcement Officers to Use Deadly Force to Effect an Arrest*, 14 N.Y.L. FORUM 749 (1968); Safer, *Deadly Weapons in the Hands of Police Officers, On Duty and Off Duty*, 49 J. URBAN L. 565 (1971) (mem-

Thus, the use of force in any given context must be proportionate to the reasonably apparent necessity and must not unduly inflict a risk upon others under the circumstances. Excessive or unnecessary force is unlawful. Similarly, the use of weapon systems that are not proven to be necessary under the circumstances can result in criminal or civil liability. For example, the use of a .357 magnum hollowpoint bullet in a .357 magnum pistol can cause a kinetic energy transfer to the human body that is eight to ten times greater than the kinetic energy transfer that occurs with use of the standard police sidearm, the .38 with a .38 special round.[13] Since wound injury along the permanent wound tract, and from temporary cavitational effect, will increase in direct proportion to increased kinetic energy transfer to the human body, not to mention the increase in suffering and the greater potential for lethality, the overall wound injury will be eight to ten times as great in general with use of such a magnum weapon system.[14] When there is no demonstration that such a tremendous increase in wound injury and suffering is necessary to enforce the law, the use of such a weapon system is excessive. The same prohibitions of excessive force during law enforcement process should apply to proscribe the use of such a weapon system. This is so regardless of whether this use is also cruel and inhumane, or there is a significant increase in lethality, which makes use of such weapon systems suspect under norms prohibiting the summary execution of criminal suspects or other human beings.[15]

In addition to the Fifth Amendment prohibition of *excessive force*, there is significant evidence that court decisions have articulated an

orandum prepared for the A.C.L.U.); Tsimbinos, *The Justified Use of Deadly Force*, 4 CRIM. L. BULL. 3 (1968); Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566 (1961). Trends in expectation and decision for some two hundred years with regard to excessive use of force against civilian demonstrators, from the Boston Massacre (1770) to Kent State (1970) are also relevant. *See* N.Y. Times, July 31, 1975, at 8, col. 6, describing a recent federal decision addressing the illegality of excessive use of force by police officers in handling anti-war demonstrators in the capital from 1969 to present (Dellums v. Powell).

13. The argument and documentation of supportive evidence is more fully developed in *Does Your Police Force Use Illegal Weapons?*, *supra* note *.

14. *See* Di Maio, Jones & Petty, *Ammunition For Police: A Comparison of the Wounding Effects of Commercially Available Cartridges*, 1 J. POLICE SCI. & ADMIN. 269-70 (1973), adding: ". . . the severity of a wound is directly related to the amount of kinetic energy . . . expended by the bullet in the body. That is, the greater the loss of kinetic energy, the greater the damage to the tissues, and, therefore, the more severe the wound." *See also* L.A. Times, Dec. 5, 1974 at 6, pt. II (editorial); The National Observer, June 14, 1975, at 1; N.Y. Times, Nov. 11, 1974, at 28, col. 3 (editorial); Wash. Post, Dec. 8, 1974, at B4, reprinted at L.A. Times, Dec. 25, 1974; Wash. Post, Nov. 21, 1974 (editorial).

15. See notes 13-14 *supra.*

accompanying prohibition of cruelty or inhumane effects under the Fifth Amendment, although comprehensive exposition of relevant legal policies at stake requires integrated awareness of the concomitant Eighth Amendment prohibitions of cruelty and inhumane effect. The United States Supreme Court has, throughout our history, demonstrated sufficient concern over cruel and inhumane practices, if not with specific reference to these two general criteria, to alert constitutional scholars and practitioners to the fact that where consensus exists, that a particular practice produces cruel or inhumane effects, the Court is likely to declare the practice illegal and unconstitutional.[16]

Further, the general requirements of due process during lawful law enforcement have been recently supplemented by a federal appellate decision addressing violations of international law. In *United States v. Toscanino*, the court utilized the due process clause to sanction deliberate misconduct on the part of federal agents who abducted the defendant, an Italian national, in Uruguay and forcibly brought the accused to the United States.[17] Addressing what the court found to be a violation of the United Nations Charter, abduction by officials of one state of a person located within the territory of another state, the court stated that it could not "tolerate such an abuse without debasing the processes of justice."[18] The reasoning of the court is highly applicable to our inquiry into prohibitions against excessive use of force, since the court was concerned with law enforcement tactics that went beyond what international law permitted under the circumstances. The use of force in that case, in view of the United Nations Charter, can also be said to have been *excessive* in terms of the rational serving of all relevant legal policies at stake. In a sense, force is *excessive* if it is otherwise prohibited by law, regardless of whether or not the conduct would have been useful in apprehending a lawbreaker. As the court also stressed, law enforcement officials are bound, like the ordinary citizen, to follow the law.[19]

16. *See e.g.*, Furman v. Georgia, 408 U.S. 238, 270-71 ("human dignity," "uncivilized and inhuman" conduct), 279-81 ("excessive" or "unnecessary" punishment) (1972) (Brennan, J., concurring); Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring); Weems v. United States, 217 U.S. 349, 368 (1910). *See also* Spano v. New York, 360 U.S. 315, 320 (1959); Rochin v. California, 342 U.S. 165 (1952); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463-64 (1947); Brown v. Mississippi, 297 U.S. 278 (1936); Bram v. United States, 168 U.S. 532 (1897); *In re* Kemmler, 136 U.S. 436, 447 (1890).

17. 500 F.2d 267 (2d Cir. 1974).

18. *Id.* at 276.

19. The court also quoted with approval (*Id.* at 274) the dissenting opinion of Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 484-85 (1928): "Decency, security and liberty alike demand that government officials shall be subjected to the same

This case is also significant, of course, for its use of international law as a standard for decision.

C. Eighth Amendment Prohibitions of Cruelty and Inhumane Death, Injury or Suffering

The further question is whether excessive or unnecessary force that is impermissible under the Fifth Amendment can also be impermissible as *cruel, inhumane* or *unusual* force within the ambit of the Eighth Amendment to the Constitution. As already noted, excessive force, whether cruel, inhumane or not, can violate the Fifth Amendment guarantee of due process of law.[20] With regard to the Eighth Amendment, it also has been authoritatively declared that what constitutes a *cruel, inhumane,* or *unusual* punishment is nowhere laid out with precision. Actual content or meaning will vary with the generally shared expectations of the populace and the circumstances of each case.[21] Indeed, the United States Supreme Court has emphasized in at least two opinions that the scope of the Eighth Amendment is not static. In *Trop v. Dulles,* the Court stated: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[22] And in *Weems v. United States,* the Court declared:

> The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.[23]

Moreover, it does not seem to be the intent to limit applicability of the Eighth Amendment, which contains the word "punishment," to cases of post-trial criminal sanctioning, but to apply the basic policies behind the amendment to the pre-trial situations of criminal law enforcement. This not only appears as the logical outcome from inquiry into inherited expectation concerning the regulation of *cruel, inhumane*

---

rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . . Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

20. See note 16 *supra.*

21. *See* Weems v. United States, 217 U.S. 349, 368 (1910); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879).

22. 356 U.S. 86, 101 (1958).

23. 217 U.S. 349, 378 (1910).

and *excessive* force, but also as the rational approach to legal decision which attempts to effectively implement the interrelated policies behind the Fifth and Eighth Amendments throughout the criminal law enforcement process.[24]

The general policies to be served include:

(a) the protection of life and liberty,
(b) the due process of law application and sanctioning,
(c) freedom from tyranny or "coercive cruelty,"[25]
(d) prohibitions of cruelty, torture, wantonly inflicted or "excessive" pain or injury, barbarous acts, and man's inhumanity to his fellow man.[26]

As the Court declared in *Trop v. Dulles*: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[27] This concern for the dignity of man is also reflected in the specific concern for individual "human rights" in court opinions that have applied the Fifth or Eighth Amendments to the actions of police and correctional officers.[28] In fact, one federal appellate court has recently stated that "quite apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law."[29]

---

24. This is especially so when the Ninth Amendment guarantee of human rights against cruel or inhumane treatment, injury, killing or punishment exists. See notes 28-29 *infra*. *See also* Perkins, *supra* note 8; Spano v. New York, 360 U.S. 315, 320 (1959); Weems v. United States, 217 U.S. 349, 373 (1910); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States v. Archer, 486 F.2d 670 (2d Cir. 1973); *cf.* Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.), *cert. den.* 414 U.S. 1033 (1973), *citing* Rochin v. California, 342 U.S. 165 (1952).

25. Weems v. United States, 217 U.S. 349, 373 (1910). *See also* Furman v. Georgia, 408 U.S. 238, 253-55 (1971) (Douglas, J., concurring).

26. Cases cited note 16 *supra*.

27. 356 U.S. 86, 100 (1958). *See also* Furman v. Georgia, 408 U.S. 238, 270-71 (1971) (Brennan, J., concurring).

28. For evidence of the use of "human rights" criteria by Patrick Henry, see Furman v. Georgia, 408 U.S. 238, 320 (1971) (Marshall, J., concurring), *citing* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446-48 (J. Elliot ed. 1876). *See also, e.g.*, Rochin v. California, 342 U.S. 165, 169 (1952); Palmigiano v. Travisono, 317 F. Supp. 776, 785 (D.R.I. 1970) (First Amendment).

29. Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973). This reasoning is correct, for it does not matter that a "specific" of the Bill of Rights prohibits cruel or inhumane treatment, injury, killing or punishment when a rational maximization of legal policies contained in the Fifth, Eighth and Ninth Amendments will result in the same decisional outcome and when trends in decision also clearly support that outcome. *See also* Spano v. New York, 360 U.S. 315, 320 (1959), noting the important legal policy at stake which is based in "deep rooted feeling that the police must obey the law while enforcing the law . . . ." And "undue" force or excessive, unnecessary force can result in criminal or civil sanctions against the police officer. See notes 12 and 16 *supra*.

D. A Test of "Cruel" or "Inhumane" Outcomes and Effects

It has been demonstrated that the test of "cruelty"or "inhumanity" cannot be static, but must reflect changing needs and expectations.[30] Reference is often made to such broad criterial references or indicia of content as: standards of decency, humane justice, fundamental instincts of civilized man, or conduct that "shocks the conscience." There has also been reference to the traditions and collective conscience of our society,[31] to something "universally thought,"[32] to a dynamic and "universal sense of justice,"[33] to the unanimity of civilized nations of the world,[34] to the international "custom of war,"[35] and to the norms of "human rights" law.[36]

This utilization of international laws of war and human rights is not at all unusual, since a basic expectation of the Founding Fathers had been that the rights of man are to be protected under the Constitution.[37] It is a truism that universal rights must necessarily be our own. Moreover, there is often useful detail or specificity under these international standards. It is not unlikely that a court seeking guidance and a rational approach to the serving of inherited expectations and basic legal policies would utilize international legal standards to determine the generally shared community expectation about "cruelty" or "inhumanity" which can provide legal content to such phrases.[38] This seems especially so when the same word or phrase is used in both international law and domestic legal process, there is a long history of such a usage, and, as in this case, the uniform opinion of the world community is quite clear.

Specific examples of articulated international rights, though admit-

---

30. See notes 21-23 *supra.*

31. Griswold v. Connecticut, 381 U.S. 479, 487 (1965), *citing* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

32. *See* Robinson v. California, 370 U.S. 660, 666 (1962).

33. *See* Betts v. Brady, 316 U.S. 455, 462 (1942).

34. *See* Trop v. Dulles, 356 U.S. 86, 102 (1958).

35. *See* Wilkerson v. Utah, 99 U.S. 130, 134 (1879). *See also* Declaration of Independence (1776); Declaration of the Causes and Necessity of Taking Up Arms (1775), in Perry & Cooper, *supra* note 1, at 290.

36. See note 28 *supra.*

37. *See* Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee,* 60 CORNELL L. REV. 231 (1975) [hereinafter cited as *Human Rights and the Ninth Amendment*]. *See also* Z. CHAFEE, HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION (1952); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950).

38. *See also Human Rights and the Ninth Amendment, supra* note 37. On the need for "objective indicators" of "the conscience of mankind" and human dignity values, see Furman v. Georgia, 408 U.S. 238, 270-71, 277-78 (1971) (Brennan, J., concurring).

tedly of a general nature which, although not specifically enumerated in our Constitution, are of current interest to scholars and practitioners include: the right to privacy;[39] freedom from torture;[40] freedom from cruel, inhumane or degrading treatment;[41] rights to equal educational and cultural opportunities;[42] and, among others, rights to adequate "food, clothing, housing and medical care."[43]

---

39. *See, e.g.*, article 12 of the 1948 Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948) [hereinafter cited as Universal Declaration of Human Rights]. A 1968 meeting of private experts at Montreal, Canada, issued the "Montreal Statement" which referred to the 1948 Declaration as an authoritative interpretation of the U.N. Charter of the highest order and of customary international law. *See* J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS 13-14 (1970). *See also* Paust, *Human Rights, Human Relations and Overseas Command*, 3 ARMY LAW. 1 (Jan. 1973), in 14 THE MILIT. LAW & L. OF WAR REV. (Brussels 1974) [hereinafter cited as *Human Rights, Human Relations and Overseas Command*]; Paust & Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AM. J. INT'L L. 410 (1974), and references cited; *Human Rights and the Ninth Amendment, supra* note 37. On the right to privacy in California, see White v. Davis, 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222 (1975).

40. *See, e.g.*, article 5 of the Universal Declaration of Human Rights, *supra* note 39. The article states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." For a historic background on the prohibition of torture, see Coursier, *The Prohibition of Torture*, 126 INT'L REV. OF THE RED CROSS 475 (1971). Specific mention of an Eighth Amendment prohibition of torture appears in several United States cases. *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 473 (1947) (Burton, J., dissenting); Weems v. United States, 217 U.S. 349, 368 (1910); *In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 134 (1879).

41. *See* Universal Declaration of Human Rights, *supra* note 39, art. 5.

42. *See id.*, arts. 18-19, 26-27. Article 18 adds the important supplemental rights to freedom of thought: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Article 19 adds: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Along with a basic right to education, article 26 provides that "higher education shall be equally accessible to all on the basis of merit," adding: "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace." It is also significant that article 2 provides: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

43. *See id.*, art. 25, adding: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of liveli-

II. Human Rights and the Ninth Amendment

It is well-documented that international human rights law prohibits cruel or inhumane treatment, injury, killing or punishment, whether in time of public emergency, war or relative peace.[44] And it is as self-evident now as it was in 1776 that human rights must necessarily be our own. Indeed, to Jefferson, Paine, Madison and others, these rights were fundamental to the process of authority and "what the people are entitled to against every government on earth . . . ."[45] But if these rights of man (human rights) were not specified with particularity in the Constitution, how were they to be incorporated into the constitutional framework of powers, rights and fundamental policies? In another article,[46] this author concluded that human rights law is part of our law through specific enumerations of right or policy and through the explicit guarantee of retained rights in the Ninth Amendment, which states:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

As disclosed in the other article, documented human rights are sufficiently particularized to give more detailed and useful content to expressions that our courts do not hesitate to use, such as "the traditions and collective conscience of our people" or a "universal sense of justice." Human rights are not only perceived by many to be among the fundamental expectations that the courts should address, but they provide greater guidance for rational and policy-responsive decisionmaking. Moreover, our society arose under natural law expectations of the existence of universal rights of man—rights that could exist even though they were not printed somewhere with black and white particularity. Today, when there is greater articulation of the nature and content of the rights of man, it is far easier for our courts to make empirical inquiries into the actual boundaries of rights content and to identify the existence of general rights that are nowhere enumerated specifically

---

hood in circumstances beyond his control . . . ." *See also* Paust, *The Right to Food, 1975 Proceedings of the Am. Soc. of Int'l Law*, 69 AM. J. INT'L L. — (1975).

44. See notes 10, 13, 37 and 40-41 *supra*.

45. *See* IV WRITINGS OF THOMAS JEFFERSON 477 (Ford ed. 1894). *See also* Corwin & Peltason, *supra* note 7, at 4 and 132; D. MALONE, JEFFERSON AND THE RIGHTS OF MAN (1951); T. PAINE, THE RIGHTS OF MAN (1961); Perry & Cooper, *supra* note 1; McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions vs. Rational Action*, 59 YALE L. REV. 60, 110-15 (1949), in M. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 335 (1960) [hereinafter cited as McDougal & Leighton]. The Declaration of Independence (1776). See also notes 28 & 37 *supra*.

46. *See Human Rights and the Ninth Amendment, supra* note 37.

within the United States Constitution. With the development of human rights law, then, there is a rich field of basic human legal expectation which is ripe for judicial discovery and use.

Furthermore, when utilizing basic human rights law to supplement retained rights of our people under the Ninth Amendment the courts will not only be performing a more rational, objective decisional task than the use of phrases such as "traditions and collective conscience" or a "universal sense of justice" seems to suggest, but the courts will be performing a proper judicial function—the discovery and interpretation of fundamental rights of man which already exist and are retained by the people under the Ninth Amendment.[47]

III. General Norms of International Law And the Constitution

Human rights are guaranteed in international law under the United Nations Charter which, itself, is a part of the treaty law of the United States.[48] Since the United Nations Charter contains the express pledge of the United States to establish respect for an observance of human rights, this obligation is itself a part of the supreme law of the land through Article VI, section 2, of the United States Constitution.[49] Thus, whether through the Ninth and other amendments to the United States Constitution or through the United Nations Charter and Article VI, section 2, the United States governmental bodies must respect and ensure respect for fundamental human rights whether or not specific human rights treaty provisions or specific human rights implementary legislation exist.[50] Since these constitutional amendments and relevant treaty provi-

47. *See id.* at 234-37 and 259-60. *See also* note 57 *infra.*

48. 59 Stat. 1035 (1945).

49. *See* U.N. CHARTER, preamble and arts. 1, 2, 55(c) and 56. *See also* McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S. DAK. L. REV. 25 (1959), in M. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 157 (1960) [hereinafter cited as *The Impact of International Law Upon National Law*]. McDougal & Leighton, *supra* note 45; *Human Rights and the Ninth Amendment, supra* note 37; *Human Rights, Human Relations and Overseas Command, supra* note 39; The President's Commission for the Observance of Human Rights Year 1968, "A Report in Support of the Treaty-making Power of the United States in Human Rights Matters," in HEARINGS ON INTERNATIONAL HUMAN RIGHTS BEFORE THE SUBCOMM. ON INTERNATIONAL ORGANIZATIONS AND MOVEMENTS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 93d Cong., 1st Sess., at 731-50 (1973) [hereinafter cited as The Fraser Report].

50. It should be noted, however, that protection under the constitutional amendments is more secure than protection by treaty alone, since under domestic legal process the treaty obligation can be overridden by subsequent federal legislation. *See, e.g.*, Reid

sions are also binding on state and local governmental bodies,[51] it is evident that state and local police decisionmaking must address the need for rational decision that seeks to serve the general legal policies at stake and considers all of the related community and individual interests. Not only must state and local decisionmakers address and yield to the policy or provisions of "a treaty or of an international compact or agreement" when a national interest is demonstrated and the policies at stake do not impair fundamental constitutional rights or powers,[52] but

v. Covert, 354 U.S. 1 (1957); Edye v. Robertson, 112 U.S. 580 (1884). And constitutional amendment protection avoids the hazards of the evil doctrine and myopic judicial complicity in rights deprivation contained in the notion of self-executing versus non-self-executing treaties. *Compare* Sei Fujii v. State 38 Cal. 2d 718, 242 P.2d 617 (1952) *with* Oyama v. California, 332 U.S. 633, 649-50 and 673 (1948) (Black, Douglas, Murphy & Rutledge, JJ., concurring); Asakura v. Seattle, 265 U.S. 332 (1924); Maiorano v. B.&O. R.R., 213 U.S. 268, 272-73 (1909); The Paquete Habana, 175 U.S. 677, 700 (1900); Namba v. McCourt, 185 Ore. 579, 604, 204 P.2d 569, 579 (1949). The *Sei Fujii* court ignored the binding pledge of joint and *unilateral* action for implementation (and this would include judicial action) contained in article 56 of the U.N. Charter, and stated that the Charter obligation was not "mandatory." *Contra* Hudson, *Charter Provisions on Human Rights in American Law*, 44 AM. J. INT'L L. 543 (1950); Wright, *National Courts and Human Rights—The Fujii Case*, 45 AM. J. INT'L L. 62 (1951); Wright, *Conflicts of International Law with National Laws and Ordinances*, 11 AM. J. INT'L L. 1 (1917). *See* Oyama v. California, 332 U.S. 633, 649-50 and 673 (1948) (Black, Douglas, Murphy & Rutledge, JJ., concurring); Namba v. McCourt, 185 Ore. 579, 604, 204 P.2d 569, 579 (1949); P. JESSUP, A MODERN LAW OF NATIONS 91 (1952); Bitker, *The Constitutionality of International Agreements on Human Rights*, 12 SANTA CLARA LAW. 279 (1972); Henkin, *The Constitution, Treaties, and International Human Rights*, 116 PA. L. REV. 1012 (1968); McDougal & Leighton, *supra* note 45; Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis*, 1 YALE STUDIES IN WORLD PUBLIC ORDER 148 (1974); Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971), in IV THE VIETNAM WAR AND INTERNATIONAL LAW (A.S.I.L. R. Falk ed. 1975) [hereinafter cited as *After My Lai*]; Does Your Police Force Use Illegal Weapons?, *supra* note *; Sayre, *Shelley v. Kraemer and United Nations Law*, 34 IOWA L. REV. 1 (1948); Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932). *See also* United States v. Toscanino, 500 F.2d 267, 276-78 (2d Cir. 1974), using the U.N. Charter and U.N. Security Council action to find federal law enforcement practices illegal. It should also be noted, however, that part of the relevant international law in this case, the law of war, has already been implemented by Congressional legislation. 10 U.S.C. §§ 818 and 821; Ex parte Quirin, 317 U.S. 1 (1942); After My Lai, *supra*. It is also arguable that the 1964 Civil Rights Act, *infra* note 63, has already implemented general human rights law by Congressional act, since human rights *are* part of the law of the United States under U.S. Const., art. VI, sec. 2, and are civil rights under the Ninth Amendment.

51. *See also, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Robinson v. California, 370 U.S. 660 (1962); Rochin v. California, 342 U.S. 165 (1952); Missouri v. Holland, 252 U.S. 416 (1920).

52. *See* United States v. Pink, 315 U.S. 203 (1942); Missouri v. Holland, 252 U.S. 416 (1920).

state decisions which stand as a barrier to the fulfillment of our national pledge in the United Nations Charter to promote respect for and observance of human rights and fundamental freedoms for all must be condemned and struck down by the courts.[53] Moreover, as declared in *Asakura v. Seattle*, the Supreme Court will strike down any state laws or municipal ordinances which conflict with international treaty law.[54] The Supreme Court also held that international treaty law "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."[55]

Additionally, human rights norms and international expectations necessarily supplement the traditions and collective conscience of our own people.[56] They are useful for the discovery of the generally shared content of constitutional norms whether or not international norms are directly "binding" on the Court or other governmental entities. This is especially so in this age of noted interdependence with cross-national patterns of subjectivity and more detailed manifestation of uniform expectacy about human rights content. International trends in decision can provide useful criteria for decisional guidance on the prohibition or actual use in varied circumstances of different types of weapon systems. For, as we have seen, often the same fundamental policies are at stake, if not through the same language of legal proscription (e.g., "cruel," "inhumane"). Each of these policies seeks to regulate the use of force in

53. Oyama v. California, 332 U.S. 633, 673 (1948) (Murphy & Rutledge, JJ., concurring). *See also id.* at 649-50 (Black & Douglas, JJ., concurring); *cf.* Nielson v. Johnson, 279 U.S. 47 (1929); Asakura v. Seattle, 265 U.S. 332 (1924); Missouri v. Holland, 252 U.S. 416 (1920); Maiorano v. B.&O. R.R., 213 U.S. 268, 272-73 (1909); The Paquete Habana, 175 U.S. 677 (1900); Hauenstein v. Lynham, 100 U.S. 483 (1879); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). The only case to the contrary was a California decision made in an aura of noted racial hysteria. Sei Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952). The *Sei Fujii* decision is not only contrary to every relevant United States Supreme Court decision, but is highly controversial and, in the opinion of this author, incorrect. See *Human Rights and the Ninth Amendment, supra* note 37, at 233. Further, in direct conflict with the statement in *Sei Fujii* that certain treaty provisions are not "self-executing" and require implementing legislation at the federal level before they become part of the supreme law of the land was the holding in *Asakura v. Seattle.* See note 55 *infra* and text accompanying. See also note 57 *infra.*

54. 265 U.S. 332 (1924).

55. *Id.* at 341. See also cases cited note 53 *supra.*

56. *See, e.g., The Impact of International Law Upon National Law, supra* note 49; *Does Your Police Force Use Illegal Weapons, supra* note *; *Human Rights and the Ninth Amendment, supra* note 37.

social process against other human beings—to assure the humane treatment of all persons and the serving of other aspects of the basic goal of human dignity. This was undoubtedly recognized by the United States Supreme Court in *The Paquete Habana* when it declared:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[57]

The growing controversy over the adoption of cruel weapons; the continuous questioning of the humaneness of city, county and state pretrial or post-conviction detention or penal processes; the alarming increase in sophisticated surveillance techniques and cases of invasions of privacy and violence in the home and office; the budding use of police dossiers in cities such as Houston and Philadelphia to amass data on those suspect not of crime but of political opposition or, what is worse, nonconformity; and the significant questions raised increasingly about assassination and the intentional subversion of the political processes at home and abroad, all present such "questions of right." Conduct that would be violative of international standards should be no less proscribed in domestic legal process by the courts and legislatures.

One can only begin to imagine the danger to our society from such misuses of public trust and power, not to mention the international effects our society and others might suffer from the domestic adoption of conduct or weapons that are illegal under international law because of the cruel and inhumane impacts which result from their use against other human beings. Domestic use of prohibited conduct or weapons can only make United States governmental functioning on the international level far more difficult. It would open the United States up to

57. 175 U.S. 677, 700 (1900). *See also In re* Yamashita, 327 U.S. 1, 8 (1946); Ex Parte Quirin, 317 U.S. 1, 27-28 *passim* (1942); Maiorano v. B.&O. R.R., 213 U.S. 268, 272-73 (1909); Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 160 (1795) (Iredell, J., concurring); Res Publica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784); Henfield's Case, 11 F. Cas. 1099, 1107-08, 1120 n.6 (No. 6,360) (Pa. 1793); Triquet v. Bath, 96 Eng. Rep. 273 (K.B. 1764) (necessarily familiar to the framers of the United States Constitution); 11 OPS. ATT'Y GEN. 297, 299-300 (1865); *After My Lai, supra* note 59; *My Lai and Vietnam, supra* note 10.

criticism and protest before international polictical and judicial bodies and would provide an easy pretext for propaganda attacks by enemies of the United States. Additionally, international problems would be exacerbated by widespread domestic police conduct or usage of weapons that are illegal under international law if any foreign diplomat, businessman, tourist or other person were involved in a shooting incident or other situation either as the target, as an innocent bystander or as a hostage of an accused criminal.

It could even happen that the adoption of cruel or inhumane conduct or weapon systems within the United States would trigger an escalation of the use of such methods or weapons by police forces or others abroad and, thus, increase the risk of cruel and inhumane suffering for United States diplomats, soldiers, businessmen and tourists in foreign countries.[58] Because of the fundamental policies and the interrelated national and international interests at stake, this matter is clearly one of national concern.[59]

Conclusion

In this commentary there has been inquiry into the types of rights and the boundaries of content which prohibit cruelty, inhumane effects, and unnecessary death, injury or suffering. It is clear that an integration of human rights law with basic provisions of the Fifth, Eighth and Ninth Amendments to the United States Constitution provides sufficiently detailed exposition of relevant rights and content. If the Supreme Court has found abhorrent the use of "the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering . . . ,"[60] then it should be apparent that the Court will condemn the type of torture of political detainees allegedly occuring in most of the other countries of the world, especially in those under a declared state of emergency by executive elites;[61] the type of psychological and more sophisticated cruelty that too often occurs in pre-trial or post-conviction institutions; or the type of increased pain and suffering that occurs with a tremendous increase in kinetic energy transfer to the human body, and proportionate increase in wound injury, caused by bullets that are illegal under international law.

58. And this interchange of people across our national borders must number in the millions each year.

59. *See, e.g.*, Missouri v. Holland, 252 U.S. 416 (1920).

60. *See, e.g.*, O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting).

61. *See, e.g.*, The Fraser Report, *supra* note 49; AMNESTY INTERNATIONAL, REPORT ON TORTURE (1974).

Adoption of illegal practices or weapon systems will only increase the risks of civil and criminal liability to the police officer using them. In addition to the criminal sanctions disclosed above, there are criminal sanctions for certain violations of the free exercise or enjoyment of any right or privilege secured to another "by the Constitution or laws of the United States."[62] Such rights, as disclosed above, include the freedom from cruel or inhumane treatment, injury, killing or punishment, and the deprivation of life or liberty without due process of law. Civil suits can also be brought for money damages against police officers who exercise an excessive amount or type of force and deprive a person of basic civil and human rights under the Fifth, Eighth or Ninth Amendments.[63] Alternatively, they can be brought under state tort law.[64]

---

62. 18 U.S.C. §§ 241 *et seq.* (1948). *See also* 10 U.S.C. §§ 818, 821 (1970); *After My Lai, supra* note 50. For cases under 18 U.S.C. §§ 241-42, *see, e.g.*, United States v. Guest, 383 U.S. 745, 753-54 (1966); United States v. Price, 383 U.S. 787, 805-06 (1966); Williams v. United States, 341 U.S. 97 (1951); United States v. Delerme, 457 F.2d 156 (3d Cir. 1972); Pool v. United States, 260 F.2d 57 (9th Cir. 1958); Lynch v. United States, 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951); Crews v. United States, 160 F.2d 746 (5th Cir. 1947).

63. Civil Rights Act, 42 U.S.C. § 1981 *et seq.* *See also* Parker v. McKeithen, 488 F.2d 553, 556 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974); Clark v. Ziedonis, 368 F. Supp. 544 (E.D. Wis. 1973), and cases cited; Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972); Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972); Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969) (denying relief under the federal act for a police officer's violation of state law, refusing to decide the issue of deprivation of due process under the United States Constitution because the claim was "pretermitted," but affirming relief to the mother under state wrongful death statute for wrongful death of her son, who had been shot in the back), discussed in Rubin & Miller, *The Law Enforcement Officer's Use of Deadly Force: Two Approaches*, 8 AM. CRIM. L.Q. 27 (1969). Injunctive relief is also possible. Gomez v. Layton, 394 F.2d 764, 766 (D.C. Cir. 1968), *citing* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966).

64. See note 12 *supra*; Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969); Wall v. Zeeb, 153 N.W.2d 779 (N.D. 1967); 6 AM. JUR. 2D *Assault and Battery* §§ 125, 158 *et seq.* (1963); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Greenstone, *Liability of Police Officers for Misuse of their Weapons, Symposium, Police Tort Liability*, 16 CLEV. MAR. L. REV. 397, 400-07 (1967), and cases cited; Note, *The Civil Liability of Police Officers for Wounding or Killing*, 28 U. CINC. L. REV. 488 (1959); Comment, *Tort Liability of Law Enforcement Officers: State Remedies*, 29 LA. L. REV. 130 (1968). It should also be noted that a lawsuit has already been brought for the wrongful death of a black man by two police officers when one of the officers used "unauthorized dumdum style bullets" to kill the victim. L.A. TIMES, July 13, 1974, pt. 2, at 12, col. 1. The bullets actually used were 158 grain .357 magnums, semi-jacketed, "hollow point or soft point," and possibly some .38 specials. The weapon was a .357 magnum Smith and Wesson. And a portion of the jacket and a portion of the lead core of the same bullet shattered off of the bullet

It is significant to recall the United States Supreme Court's realization of the fact that, with the Eighth Amendment, there is "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."[65] There is more to be considered indeed, for can a free society long endure with cruel and inhumane conduct or weapons in wide and uncontrolled use? Can we afford to allow excessive use of force during otherwise lawful law enforcement? Hopefully, the author is only one of many who feel that we cannot.

In this year, nearly two hundred years after the Declaration of Independence, it would seem most appropriate to re-read that declaration and to rededicate ourselves to principles of freedom under law and human dignity which our forefathers shared and understood as comprising the rights of man.

---

within the body. See Los Angeles Grand Jury transcript, Mar. 21, 1974, 2:25 P.M., at 79, 81-86 and 230. Some of the bullets also appeared to have been "home-loaded" as opposed to factory loaded. Other suits brought by the A.C.L.U. or the N.A.A.C.P. are pending in federal courts in Boston and Memphis: Evans v. Heggblod (Mass.); Garner v. Memphis Police Dept. (Memphis). In the case of an injury to a foreign national, the same basic remedies are available to foreign plaintiffs. And it should be noted that the Fourteenth Amendment applies to aliens as well as United States citizens. Yick Wo v. Hopkins, 118 U.S. 356 (1886). It is even possible that claims might be brought against the United States government for violations of international law with respect to the injury or death of a foreign national (i.e., diplomat, soldier, businessman, tourist) from an illegal weapon. See also 28 U.S.C. § 1350 (1970); Asakura v. Seattle, 265 U.S. 332 (1924); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

65. Weems v. United States, 217 U.S. 349, 373 (1910).