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ESSAY

OF FLOGGING AND ELECTRIC SHOCK: A COMPARATIVE TALE OF COLONIALISM, COMMONWEALTHS, AND THE CAT-O'- NINE TAILS

HOLLY S. HARVEY*

I. INTRODUCTION

On November 5, 1991, the Criminal Law (Measures) Act of 1991 came into effect for the Bahamas. The Act reintroduces flogging for certain firearms violations, sexual offenses, and crimes against persons and property.¹

The Act is graphic in detail. For adults, the designated instrument of punishment is a cat-o'-nine tails² or a rod "approved by the Governor-General"; for juveniles, a light cane. The punishment shall be administered on the offender's back in the case of a cat; on the offender's buttocks in the case of a rod.³ The Act specifies the maximum number of lashes: twenty-four for an adult and twelve for a juvenile.⁴ It designates the prison in New Providence as the place of execution.⁵

The legislation also contains certain safeguards to prevent

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1. Criminal Law (Measures) Act, 1991, sched. 1 (Bah.). The Appendix to this Essay reprints the relevant portions of the Act.

2. The cat-o'-nine tails is a whip. It consists of "nine small hard twisted cords, each about eighteen inches long, fastened to a wooden handle." MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT 3 (1984). Hereinafter, this instrument will often be referred to as a "cat."

3. Criminal Law (Measures) Act § 4(2).

4. *Id.* § 5(1)-5(2).

5. *Id.* § 4(3).

abuse by officials. A judge must order the sentence.⁶ The sentencing order must specify the number of lashes, whether the sentence is to be carried out in installments, and if so, how many.⁷ A medical officer must examine the offender and be present during the flogging.⁸ Installments may not exceed twelve strokes at a time and must be spaced at least fourteen days apart.⁹ To prevent public humiliation of the condemned, flogging takes place in private.¹⁰ Finally, the law reserves the punishment exclusively for males. It subjects women, instead, to solitary confinement.¹¹

It is shocking that today a civilized Western society would officially resort to barbaric punishment such as flogging. Although flogging, along with the branding, dismemberment, and maiming of criminals was once common in Europe and the New World, the penal and criminal code reforms of the 1800s made imprisonment the primary means of punishment.¹² By the 1980s, most industrialized Western nations had abolished corporal punishment of adults.¹³

No Western penologist considers flogging humane.¹⁴ Even Graeme Newman, the last modern intellectual to seriously advocate corporal punishment, viewed lashing as violent and barbaric,¹⁵

6. *Id.* § 3(1).

7. *Id.* § 5(1).

8. *Id.* § 4(4).

9. *Id.* § 5(2).

10. *Id.* § 4(3).

11. *Id.* § 6.

12. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 73-82 (Alan Sheridan trans., 1977).

13. The British, upon whose legal system that of the Bahamas is based, outlawed judicially imposed corporal punishment of adults in 1948. Criminal Justice Act, 1948, 11 & 12 Geo. 6, ch. 58, § 2 (Eng.). In 1967, England also abolished corporal punishment as a disciplinary sanction for prisoners. Criminal Justice Act, 1967, ch. 80 (Eng.). Canada, Australia, and most of Europe have followed suit. See *S v. Ncube*, [1988] 2 S. Afr. L. Rep. 702, 710-13 (Zimb.) (surveying the law of corporal punishment in various nations). In the United States, the situation is less clear. The states have abolished corporal punishment, and although the U.S. Supreme Court has not recently addressed the issue, at least one federal circuit court has held that corporal punishment violates the Eighth Amendment's proscription against "cruel and unusual punishment." See, e.g., *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (holding disciplinary whipping of prisoners unconstitutional); see also Wallace J. Mlyniec, *Corporal Punishment in the United Kingdom and the United States: Violation of Human Rights or Legitimate State Action?*, 8 B.C. INT'L & COMP. L. REV. 39, 53-57 (1985); Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1229-32 (1990).

14. See, e.g., DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 241-44 (1990); PHILIP JENKINS, *CRIME AND JUSTICE: ISSUES AND IDEAS* 164-65 (1984).

15. GRAEME NEWMAN, *JUST AND PAINFUL* 32-40 (1983).

suggesting instead punishment of certain offenders by electric shock.¹⁶ Few took his proposal seriously; most found it repugnant.¹⁷

The 1991 reinstatement of flogging in the Bahamas raises several puzzling questions which are the subject of this Essay. First, the post-independence Commonwealth of the Bahamas abolished corporal punishment in 1984.¹⁸ How then, did it come to reinstate it seven years later? Second, assuming a legitimate aim in reintroducing corporal punishment, why is the law drafted as it is? Why does the law, specifically the cat-o'-nine tails with all its negative connotations rather than some other instrument?

The answers are both complex and simple. They involve an odd mixture of colonial history, political expediency, and the legacy of British law and interpretive methodology. Before going into them, a few caveats. First, no comprehensive or uniform system of legal reporting exists in the Commonwealth Caribbean for case law, legislation, or legislative history.¹⁹ This renders comparison of the laws of the different nations of the West Indies a hazardous endeavor at best.²⁰ Second, the difficulty in finding accurate, current statistical information for any Caribbean state compounds the problem. I tried to fill the gaps by researching the issues in the Bahamas in March 1992. Some of the information that follows is necessarily impressionistic.

Third, vast geographical, racial, cultural, and linguistic gulfs separate the countries of the Caribbean Commonwealth. Each has a unique pre-colonial, colonial, and post-colonial history, which makes generalization dangerous. Notwithstanding these differences, all share a legacy of colonialism and slavery under one or more regimes, the most recent being that of Great Britain.²¹

16. Newman viewed electric shock as swift, painful, controllable, and much less brutal than imprisonment. *Id.* at 41.

17. Franklin E. Zimring & Gordon Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481, 486 (1986); see also John P. Conrad, *News of the Future: Research and Development in Corrections*, FED. PROBATION, Sept. 1985, at 76; Jonathan Simon, *Back to the Future: Newman on Corporal Punishment*, 1985 AM. B. FOUND. RES. J. 927, 939.

18. Penal Code (Amendment) Act, 1984, sched. 2 (Bah.).

19. This wrecks havoc on a common law legal system, such as that of the Bahamas, which is fundamentally grounded in the English concept of precedent. 7 MODERN LEGAL SYSTEMS CYCLOPEDIA 70.8 (Kenneth Robert Redden ed., rev. ed. 1989).

20. 7 *Id.* at 80.72-80.84.

21. See Rosemary Brana-Shute and Gary Brana-Shute, *Introduction to CRIME AND PUNISHMENT IN THE CARIBBEAN*, at v, vii (Rosemary Brana-Shute & Gary Brana-Shute eds., 1980).

The balance of this Essay contains three parts. Part Two looks at the social, political, and economic aspects of the abolition and reintroduction of corporal punishment in the Bahamas. It concludes that the abolition in 1984 was more the result of political opportunism than a reflection of any real social change. Part Two also tentatively suggests that the return of corporal punishment in 1991 is part of a larger regional trend towards increased acceptance of institutionalized violence against criminal offenders, primarily the result of economic instability.

Part Three examines events from a legal perspective. This section reviews the proscriptions against inhuman and degrading punishment contained in the constitutions of almost every former British colony and how the Judicial Committee of the Privy Council and Commonwealth courts have interpreted these proscriptions. It concludes that the British tradition of legal formalism and the savings provisions built into the constitutions preclude the Caribbean courts from giving these fundamental rights provisions interpretations that are both reasoned and expansive.

Part Four proffers that the reintroduction of the cat-o'-nine tails into the Bahamas illustrates how the legal structure imparted by its constitution perpetuates a species of colonial rule.

II. THE ABOLITION AND REINSTATEMENT OF CORPORAL PUNISHMENT IN THE BAHAMAS: SOCIAL, ECONOMIC, AND POLITICAL DIMENSIONS

For almost two decades, the Progressive Liberal Party (PLP) ruled politics in the Bahamas. Blacks, who constitute 85% of the population, formed this party in 1953 to wrest political and economic control from a group of local white businessmen, the "Bay Street Boys."²² Led by Prime Minister Sir Lynden O. Pindling since independence in 1973,²³ the PLP turned the Bahamas into a Caribbean success story. A politically stable state, the Bahamas has avoided most of the poverty and unrest of other Commonwealth nations.²⁴

Beyond its financial success, the Bahamas is, by most stan-

22. 7 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 19, at 70.6-70.7.

23. 7 *Id.*

24. See Ramesh Ramsaran, *The Bahamas: An Assessment of Post-Independence Economic Experience*, in MODERN BAHAMIAN SOCIETY 109 (Dean W. Collinsworth & Steve Dodge eds., 1989).

dards, a social success as well. Like any modern society, the Bahamas does have problems. However, its police do not carry guns; its state mental institutions are lovely, invigorating places by U.S. standards; and its penal system, which Bahamians claim is one of the most advanced in the West, places heavy emphasis on rehabilitation.²⁵

Because they inherited the codes of colonial Great Britain, most Commonwealth Caribbean nations still have laws permitting corporal punishment.²⁶ Eleven years after independence, the Bahamian legislature, unlike those in most other Commonwealth nations, removed corporal punishment from the arsenal of judicial sentencing options.²⁷

It is not difficult to understand why the Bahamas abolished corporal punishment when it did. In the first place, 1984 marked the 150th anniversary of the abolition of slavery in the Bahamas. That year, the Bahamian government sponsored an Archives Exhibition entitled "Aspects of Slavery" in commemoration of the 1834 Emancipation Act. The exhibition depicted the historical treatment of the slave with documents, pictures, and implements of oppression. The Ministry of Education published a booklet tracing the history of slavery in the Bahamas, complete with graphic accounts of slave cruelties, most of which involved flogging.²⁸

Other events also helped to speed the abolition of corporal punishment. For certain crimes, particularly those involving violence, flogging served as the favored punishment by Commonwealth Caribbean courts through the late 1950s,²⁹ but by the time the colonies gained independence in the 1960s and 1970s, flogging

25. 1988 BAHAMAS PRISON SERVICE ANN. REP. 6-13; 1987 BAHAMAS PRISON SERVICE ANN. REP. 26-32.

26. 7 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 19, at 80.31. See, e.g., Corporal Punishment Act, 1967 (Barb.); Corporal Punishment (Offenders Over Sixteen) Act, 1953 (Trin. & Tobago).

27. Penal Code (Amendment) Act, 1984, sched. 2 (Bah.).

28. COMMONWEALTH OF THE BAHAMAS, ASPECTS OF SLAVERY PART II 30-41 (1984). The most infamous of these was the case of "Poor Black Kate." As punishment for failing to perform her chores, Kate, a young slave, was confined in stocks for 17 days and repeatedly flogged. Red pepper was rubbed into her eyes to prevent her from sleeping. On her release, she was sent to the field and again flogged. As a result, she died. The state imprisoned Kate's owners for five months and fined them £30 for excessive cruelty. *Id.* at 30; see also D. Gail Saunders, *Slave Life, Slave Society and Cotton Production in the Bahamas*, 11 SLAVERY & ABOLITION 332, 337-38 (1990).

29. See Delroy Chuck, *The Role of the Sentencer in Dealing With Criminal Offenders in the Commonwealth Caribbean*, in CRIME AND PUNISHMENT IN THE CARIBBEAN, *supra* note 21, at 3.

had fallen into disrepute.³⁰ Additionally, in 1984 the Bahamas was engaged in revising its Penal Code. At the urging of women's groups, the legislature undertook to revise those laws dealing with sex crimes.³¹ The legislature added rape shield protection for victims, extended the definitional scope of sex-related crimes, and increased maximum and minimum prison terms for sex offenses.³²

The convergence of events gave Bahamian lawmakers a political opportunity. On one hand, in an important anniversary year, they could garner goodwill and enforce the PLP's image as the liberator of blacks from the oppression of white colonialists by officially eliminating from the law that obsolete, but nonetheless symbolic vestige of slavery, the cat-o'-nine tails. At the same time, by making prosecution easier and bolstering punitive sanctions for criminal conduct aimed primarily at women and children, the legislature could demonstrate its concern for emerging women's issues.

No chaos in the streets led to the 1984 Act. No public outcry or moral conviction propelled the abolition of corporal punishment. To the contrary, across the entire Caribbean Commonwealth, flogging simply subsided as a means of criminal punishment.³³ In the Bahamas, abolition served as an official burial of a defunct law, a costless political ceremony.

Predictably, Bahamian police statistics demonstrate no correlation between crime rates and the abolition of corporal punishment.³⁴ Overall, however, crime rates in the Bahamas have increased over the last decade.³⁵ Prison admission data also support

30. The last appellate cases dealing with sentences of corporal punishment imposed on adults in the Caribbean were reported in the 1960s. See *R. v. Purvis*, 13 W.I.R. 507 (Ct. App. Jam. 1968) (holding that even if the sentence of flogging was degrading, it was not unconstitutional); *R. v. Thomas*, 8 W.I.R. 407 (Ct. App. Trin. & Tobago 1965) (holding that a criminal offender could be sentenced to flogging more than one time); *Benjamin v. R.*, 7 W.I.R. 459 (Ct. App. Trin. & Tobago 1964) (finding a sentence of 30 years imprisonment and 20 lashes excessively punitive to a 50-year-old man, the court reduced the number of years).

31. See Mark Symonette, *Bostwick Calls for Return of "the Cat,"* THE TRIBUNE (Bah.), Oct. 10, 1991, at 14.

32. Penal Code (Amendment) Act (1984).

33. See Chuck, *supra* note 29.

34. Even assuming that flogging serves as a deterrent, the lack of a correlation is only logical. Because judges did not mete out corporal punishment during the two decades preceding its abolition, no rational actor would give it much weight in the cost-benefit calculation to determine whether to engage in criminal conduct.

35. According to the reported crime figures, some crimes previously punishable by flogging, such as robbery and burglary, decreased immediately after 1984. COMMONWEALTH OF

increases in both admissions and sentence lengths from 1985 through 1988.³⁶

Limited prison statistics and actual case disposition data make it difficult to ascertain the precise reasons for these increases, but the legislature's continuous lengthening of criminal sentences and criminalization of conduct appear partly responsible.³⁷ The Prison Service attributes the increase in admissions to greater numbers of individuals being charged with violations of drug, firearm, and immigration laws.³⁸

The 1990 preliminary census report puts the total Bahamian population at 254,685 in 1990, up from 209,505 in 1980.³⁹ In December 1990, the *IBC International Country Risk Guide* reported a surge in illegal Haitian immigrants, with estimates ranging from 40,000 to 75,000.⁴⁰ Increased social pressures from illegal immigration might partially account for an increase in the reporting of certain crimes. In March 1992, the ethnic tension between Bahamians and Haitians in Nassau was palpable. Under these conditions, an

THE BAHAMAS, STATISTICAL ABSTRACT 1968-1988, at 286-89 (1988) [hereinafter, STATISTICAL ABSTRACT]. Serious wounding experienced a sharp increase in 1985, then returned to normal levels, followed by incremental annual increases. *Id.* Housebreaking, on the other hand, decreased slightly in 1985, only to be followed by an explosive rise in the two following years. *Id.* at 289-90.

The tougher rape laws, however, may have had at least a temporary effect. Something—longer sentences, increased public awareness of the problem, or other factors—caused 1985 and 1986 reported rape figures to plunge from 1984 levels by 25% and 33%, respectively, and then slowly rise. *Id.* But not until 1990, when all violent crime rates jumped, did the rape figures suddenly exceed their previous 1981 to 1983 all-time highs. Compare STATISTICAL ABSTRACT, *supra*, at 286-87 with Recorded Crime figures for 1989 and 1990, supplied directly by the Bahamian Police Department in Nassau (on file with *University of Miami Inter-American Law Review*).

36. 1988 BAHAMAS PRISON SERVICE ANN. REP., *supra* note 25, at 36-37; 1987 BAHAMAS PRISON SERVICE ANN. REP., *supra* note 25, at 38-39.

37. See Delroy Chuck, *A Public Lecture on the Politics of Crime*, W. INDIAN L.J., Oct. 1986, at 79, 89 (discussing general Caribbean trend toward increasing legislation to control morality). Chuck has argued elsewhere that courts are widely disparate in their sentencing practices. See Delroy Chuck, *The Problem of Sentencing: A Sceptical Outlook*, W. INDIAN L.J., May 1987, at 97 (arguing for the adoption of sentencing guidelines).

38. *Introduction to 1988 BAHAMAS PRISON SERVICE ANN. REP.*, *supra* note 25. Significantly, over 32% of the total detentions in 1988 were for breaches of immigration laws. *Id.* at 3. In sheer volume, the number of immigration-related detentions in 1988 increased over 300% from 1987. *Id.* at 37.

39. DEPARTMENT OF STATISTICS, COMMONWEALTH OF THE BAHAMAS CENSUS OF POPULATION AND HOUSING, CENSUS 1990: PRELIMINARY RESULTS 2 (undated).

40. *Bahamas*, IBC INT'L COUNTRY RISK GUIDE, Dec. 1990, available in LEXIS, Report Library, IBCCRG File [hereinafter, IBC 1990]. See also STATISTICAL ABSTRACT, *supra* note 35, at 39 (noting that the flow of refugees has become a major problem for Bahamian immigration authorities).

increase in disputes, fights, injuries, and subsequent arrests is easy to imagine.

Economic factors too, played a part in increased crime rates. Until recently, the Bahamas enjoyed prosperous economic conditions relative to most other states in the Commonwealth. Since the mid-1980s, however, the major Bahamian industries—banking and tourism—have suffered.⁴¹ One blow to banking occurred when, under U.S. pressure, the Bahamas relaxed its bank secrecy laws to allow U.S. authorities access to the accounts of suspected drug smugglers. Relaxation of bank secrecy laws, combined with the government's anti-drug smuggling efforts, stemmed the flow of drug money that had buoyed the Bahamian economy since it gained independence in 1973.⁴²

The Bahamas' tourism industry suffered its first big downturn when the U.S. stock market crashed in October of 1987.⁴³ The industry had not yet recovered when the 1990 Iraqi invasion of Kuwait further crippled tourism by inflating oil prices and keeping many fearful American tourists home.⁴⁴ The U.S. recession has continued to hurt the industry, as has the increased popularity of cruise ships whose passengers do not stop over in the Bahamas.⁴⁵

Unemployment, at 11.7% by the end of 1989, increased with the layoffs from the Crystal Palace and Resorts International.⁴⁶ The influx of Haitian immigrants has exacerbated the employment situation and stretched social services to the limit.⁴⁷

Ethnic tensions, unemployment, and other social ills spawned new waves of crime laws. According to the government, drug addiction and gun smuggling have become major problems leading to increased violence.⁴⁸ In 1988, the Bahamas passed the Dangerous Drug Act, which increased maximum prison terms for drug offenses and imposed a minimum mandatory life sentence for conviction of possessing more than ten pounds of marijuana, two

41. Bahamas, IBC INT'L COUNTRY RISK GUIDE, Dec. 1989, available in LEXIS, Reports Library, IBCCRG File [hereinafter, IBC 1989].

42. IBC 1990, *supra* note 40.

43. IBC 1989, *supra* note 41.

44. Peter D. Maynard, *The Bahamian Economy in 1992*, GOOMBAY, Jan.-Feb. 1992, at 115.

45. *Id.*

46. *Id.* at 116.

47. IBC 1990, *supra* note 40.

48. See generally 1988 ROYAL BAHAMAS POLICE ANN. REP.

pounds of cocaine, or twenty grams of heroin.⁴⁹ A 1989 amendment similarly increased penalties for crimes committed with firearms.⁵⁰

The AIDS crisis has also affected the Bahamas. Fear of AIDS⁵¹ and increasing concern over spousal and child abuse led to even tougher sex offense laws than those enacted in 1984. In July of 1991, the Sexual Offence and Domestic Violence Act created new indictable sexual offenses and imposed even longer maximum and, in some cases, minimum mandatory sentences on pre-existing sex crimes.⁵²

Religious views also played a part in the return of flogging. Beginning in 1783, freed slaves from the United States migrated to the Bahamas with the American Loyalists.⁵³ Their lasting contribution was the introduction of the Anabaptist religion. By 1800 the slave society of the Bahamas had built the first Baptist church on the islands.⁵⁴ As the majority religion,⁵⁵ the Baptist Church remains a powerful force in the Bahamas today. Much of the political discussion surrounding the reintroduction of corporal punishment was couched in religious rhetoric.⁵⁶

On October 9, 1991, Prime Minister Pindling—who had called for its abolishment in 1984—introduced in the House of Assembly the bill reinstating corporal punishment. His timing could not have been better. Facing an election in 1992, Pindling had come under fire for allowing crime to get out of control.⁵⁷ Additionally, 1992 marked an important tourist year, the Quincentennial Celebration

49. Dangerous Drug Act, 1988, § 2 (Bah.).

50. Criminal Law (Miscellaneous Amendments) Act, 1989, § 2(1) (Bah.).

51. See Maryanne Burrows, *Roberts Calls for Corporal Punishment, Prison Reforms*, THE TRIBUNE (Bah.), Oct. 17, 1991, at 50.

52. The Act even added a "host liability" provision, making homeowners liable for up to ten years imprisonment for knowingly allowing unlawful sexual intercourse to occur on their premises with any person under sixteen years of age. Sexual Offences and Domestic Violence Act, 1991, pt. 1, § 19 (Bah.).

53. COMMONWEALTH OF THE BAHAMAS, *supra* note 28, at 16.

54. *Id.*

55. *Kaleidoscope: Current World Data*, ABC-Clio, Inc. (1992), available in LEXIS, World Library, KCWD File (noting that 29% of the population is Baptist, 23% Anglican, and 22% Roman Catholic).

56. See, e.g., Lindsay Thompson, *Bill for Return of Corporal Punishment Passes House*, NASSAU GUARDIAN, Oct. 12, 1991, at 1 (Minister of National Security discussing punishment, Sunday school, and the Ten Commandments); Mark Symonette, "They Mistook My Good Nature," *Pindling explains at PLP Rally*, THE TRIBUNE (Bah.), Oct. 9, 1991, at 1 (Pindling discussing corporal punishment in terms of fatherly love, training, and respect for one's brothers and sisters).

57. IBC 1989, *supra* note 41; *Mixed Reaction to Move to Reintroduce "the Cat"*, THE TRIBUNE (Bah.), Oct. 10, 1991, at 15; Mark Symonette, *supra* note 31, at 14.

of the discovery of the Bahamas by Christopher Columbus.⁵⁸

Shaken by a burst of highly publicized crimes, including three gruesome murders,⁵⁹ and the attack and rape of a honeymoon couple in their hotel room,⁶⁰ the public strongly supported the proposal. One particularly influential rehabilitation specialist, Dr. Sandra Dean Patterson, a sentencing advisor for the courts, was ambivalent about the measure.⁶¹ Women's groups held rallies backing the proposal,⁶² and the religious element called for a return to retributive justice.⁶³ Politicians from both the PLP and the opposition party used the proposed legislation to advance their causes.

Newspaper accounts of speeches, rallies, and marches confirm that rational thought played no part in the return of corporal punishment to the Bahamas. Rather, public support mounted because political opportunists whipped the public into a frenzy of fear.⁶⁴ The bill unanimously passed the Senate on September 23, 1991.⁶⁵ On October 10th it passed in the House⁶⁶ and became law on November 5th.⁶⁷

It is uncertain whether the measure will actually serve as a deterrent. Even lawmakers who spoke out in favor of corporal punishment admitted doubts. One stated, "There is a justifiable fear of crime which has been developing for some time. That fear is a community fear and as legislators we have to deal with the fears of the community. The reintroduction of corporal punishment will assist in eliminating the fear of crime."⁶⁸

This statement goes to the heart of the matter. It explains how

58. IBC 1990, *supra* note 40, at 17-18.

59. Within one week, the Bahamian Health Minister's brother, a 61-year old nun, and an unidentified man were all found knifed to death in Nassau. See *Bahamian Minister's Brother Murdered*, Xinhua General Overseas News Service, Oct. 19, 1991, available in LEXIS, Nexis Library, Wires File.

60. Maryanne Burrows, *Crime Has Reached Epidemic Proportions, Ingraham Tells House*, THE TRIBUNE (Bah.), Oct. 1, 1991, at 1.

61. Dr. Patterson also heads the Women's Crisis Center. *Mixed Reaction to Move to Reintroduce "the Cat"*, *supra* note 57, at 15.

62. See Mark Symonette, *supra* note 31, at 14.

63. See *Janet Bostwick Supports "Cat" Punishment*, THE TRIBUNE (Bah.), Oct. 10, 1991, at 16.

64. Michelle Fox, *Corporal Punishment Will Put Some Minds at Ease*, NASSAU GUARDIAN, Oct. 10, 1991, at 1A, 4A.

65. *Parliament Votes "Cat" Back*, THE TRIBUNE (Bah.), Oct. 11, 1991, at 1.

66. OFFICIAL GAZETTE (Bah.), Nov. 11, 1991, at 8.

67. *Id.*

68. Michelle Fox, *supra* note 64, at 1A, 4A (quoting Finance Minister Paul Adderley).

legislators who voted to abolish an archaic, barbaric, and admittedly ineffective form of punishment in 1984, could claim to maintain the same view, yet still vote to bring the punishment back. The Criminal Law (Measures) Act of 1991 was not directed to criminals. Rather, just like the 1984 Act, the 1991 Act was a symbolic gesture for the benefit of voters. Its purpose was not to increase criminals' fear of punishment, but to decrease the public's fear of crime. Depending on one's philosophy, the reintroduction of corporal punishment to the Bahamas highlights representative democracy at its best—or at its worst.

Events in the Bahamas should be placed in perspective. Recent anecdotal evidence intimates a possible regional trend towards an increase in officially sanctioned violence. Though it may be an aberration, as of late, courts in the Commonwealth Caribbean appear more willing to resort to harsher measures to punish criminals.

For instance, while in Nassau in March 1992, I asked just about everyone I met, from cab drivers to executives to government workers, what they thought about the reinstatement of flogging as a punishment. Almost without exception, each wanted to discuss, not the cat, but the noose because a Bahamian judge had just sentenced a woman to death by hanging. Never in the history of the Bahamas has a woman been hanged.

The Jamaican public recently had a brush with the noose as well. Although it has not banned the death penalty, Jamaica has not executed anyone in over a decade.⁶⁹ Two death row inmates were scheduled to hang in the first week of March 1991. The surrounding controversy pitted human rights activists against the business community in a debate that continued even after the two condemned men received last minute stays of execution.⁷⁰

Barbados, which like the Bahamas is one of the most stable and prosperous of the Commonwealth nations,⁷¹ has suffered largely the same economic and social problems as the Bahamas, but to a greater degree.⁷² Like Jamaica—which also has drastic ec-

69. See Garry Steckles, *Getting Tough with Caribbean Criminals*, THE TORONTO STAR, Mar. 12, 1991, at A17. Jamaica, on the other hand, has legally abolished flogging. See Peter Kiernan, *Caribbean Countries Shake Out Cat-o'-Nine Tails to Fight Crime*, REUTERS, July 16, 1991, available in LEXIS, Nexis Library, Wires Files.

70. Steckles, *supra* note 69, at A17.

71. Maynard, *supra* note 44, at 118.

72. *Id.* at 116.

onomic problems—and the Bahamas, Barbados has suffered a recent rise in violent crime.⁷³ As in both other nations, Barbados has not used corporal punishment for decades.⁷⁴ Barbados, however, never took the law off the books.⁷⁵

In February 1991, a Barbados Supreme Court judge sentenced four convicted men—a rapist and three robbers—to flogging in addition to their prison terms.⁷⁶ Like Parliament's action in the Bahamas, these sentences in Barbados received widespread public support, although sparking a much deeper public debate.⁷⁷ One report described the prison superintendent as engaged in a frantic search. Apparently, the only cat-o'-nine tails on the island rested in a museum, and the superintendent could not locate one with which to carry out the sentences.⁷⁸ Undoubtedly, the story was eclipsed a few months later by the largest demonstration in Barbados history: 18,000 protestors called for the ousting of the government in the face of austerity measures imposed as a result of an economic freefall.⁷⁹

The suggestion is not that a causal relationship exists between brutal, retrogressive punishment and massive social unrest. Rather, a connection exists first, between economic decline and increased crime, and second, between the first two elements and increased social tolerance for state-sanctioned violence. Certainly this dynamic played a part in the reintroduction of corporal punishment to the Bahamas. Nonetheless, like all stories of crime and punishment, the return of the cat to the Bahamas is a bit more complex. Neither political opportunism, nor greater community tolerance for official violence towards criminal offenders sufficiently explains why, of all possible alternatives, the Bahamian Parliament specifi-

73. Garry Steckles, *Barbados Fights Crime with Cat-o'-Nine Tails*, SUNDAY TIMES (London), Mar. 17, 1991, at 1, 18.

74. *Id.*

75. The Corporal Punishment Act of Barbados, only three sentences long, limits the number of strokes that a court may order to 24 and provides that flogging "may be inflicted on one occasion only." Corporal Punishment Act, 1967, § 2(2) (Barb.).

76. Steckles, *supra* note 69, at A17.

77. See R.M.B. Antoine, *The Reintroduction of the Cat-o'-Nine Tails in Barbados: A Tale of Woe*, 1 CARIBBEAN L. REV. 26 (1992) (arguing that courts should incorporate international human rights principles into their interpretation of Barbados' inhuman and degrading treatment clause).

78. Steckles, *supra* note 69. A year and a half later, the Barbados Court of Appeal held that two of the sentences were unconstitutional in *Hobbs v. The Queen*, Nos. 91-9, 91-10 (criminal appeal) (Barb. Ct. App. Sept. 1, 1992). See *infra* text accompanying notes 141-57.

79. Maynard, *supra* note 44, at 118.

cally brought back the cat-o'-nine tails. The complete answer lies elsewhere.

III. BRITISH LEGAL FORMALISM AND THE CONSTITUTIONALITY OF THE CAT

One of the few organizations to voice opposition to the new law was the Bahamian Bar Council. The Bar Council objected that because Parliament had abolished corporal punishment in 1984, reinstating it would violate the Constitution.⁸⁰ In response, lawmakers specifically and deliberately drafted the 1991 Act to withstand a constitutional challenge. A brief foray into the basic legal structure of the Caribbean Commonwealth nations helps to clarify how the drafters evaded this objection.

One elementary feature common to the Caribbean Commonwealth states is the successful importation of the British legal system. Four commonwealths—the Bahamas, Trinidad and Tobago, Barbados, and Jamaica—all share certain features beyond a common form of government:⁸¹ each has a Governor-General (except Trinidad and Tobago), a bicameral legislature, a Prime Minister (in the case of Trinidad and Tobago, a President) and cabinet who hold the real power, and several levels of courts.⁸²

Unlike England, each of these commonwealths has a written constitution, which the British originally enacted. Similar in most respects, the constitutions are the most important source of law for each nation.⁸³ Each constitution contains a substantially similar Bill of Rights, modelled after the European Convention of Human Rights,⁸⁴ which sets forth fundamental rights and freedoms of the individual.⁸⁵

The important provisions for purposes of this Essay are those

80. See *Henry Bostwick Concerned About "Cat" Constitutionality*, THE TRIBUNE (Bah.), Oct. 10, 1991, at 1.

81. Trinidad and Tobago is actually a republic. Because this does not affect this analysis, no distinction will be made.

82. 7 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 19, at 80.18-80.19.

83. 7 *Id.* at 80.31.

84. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

85. See *Riley v. Attorney-General of Jamaica*, 35 W.I.R. 279, 286 (P.C. 1982) (appeal taken from Jam.) (Scarman, L., dissenting); INTERRIGHTS, INTERNATIONAL HUMAN RIGHTS LAW IN THE COMMONWEALTH CARIBBEAN app. at 371-92 (Angela D. Byre & Beverly Y. Byfield eds., 1987) (comparing fundamental rights provisions of various Commonwealth constitutions); LLOYD G. BARNETT, THE CONSTITUTIONAL LAW OF JAMAICA 377 (1977).

protecting individuals from inhuman and degrading treatment. Article 17 of the Bahamas Constitution is typical. Section 17(1), virtually a carbon copy of Article 3 of the European Convention on Human Rights,⁸⁶ provides:

- (1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment.⁸⁷

Unlike Article 3, this is immediately followed by a savings clause:

- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the Bahama Islands immediately before 10th July 1973.⁸⁸

Another critical point of commonality among the four countries is the hierarchal arrangement of their courts. Each has its own appellate court system, but each retained the Judicial Committee of the Privy Council—which sits in England and is made up of English judges—as its high court.⁸⁹ A person claiming a violation of a fundamental right under the Bahamian Constitution may appeal a decision of the Bahamas Court of Appeal to the Privy Council as a matter of right.⁹⁰

Additionally, because precedent is fundamental to the Baha-

86. Article 3 provides: "No one shall be subject to torture or to inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 84, art. 3, 213 U.N.T.S. at 224.

87. BAH. CONST. art. 17, § 1. Identical language appears in section 17(1) of the Jamaican Constitution and in section 15(1) of the Barbados Constitution.

88. BAH. CONST. art. 17, § 2. Section 15(2) of the Barbados Constitution is identical but for the substitution of the ending which reads: "lawful in Barbados immediately before 30th November 1966." BARB. CONST. § 15(2). Section 17(2) of the Jamaican Constitution is also identical except for its ending which reads: "lawful in Jamaica immediately before the appointed day[]" (referring to the effective date of the Constitution, August 6, 1962). JAM. CONST. § 17(2).

Trinidad and Tobago takes a slightly different approach to achieve the same effect. Chapter I, part I, section 5 declares:

"Except as otherwise provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared. (2) . . . Parliament may not . . . (b) impose or authorize the imposition of cruel and unusual treatment or punishment . . ."

TRIN. & TOBAGO CONST. ch. 1, pt. 1, §5. Section 6(1) then declares, "Nothing in section . . . 5 shall invalidate— (a) an existing law; (b) an enactment that repeals and re-enacts an existing law without alteration . . ." TRIN. & TOBAGO CONST. ch. 1, pt. 1, §§ 5-6 (1976).

89. 7 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 19, at 80.36.

90. BAH. CONST. art. 104(2).

mian legal system, a judgment of a court at each level in the judicial hierarchy is binding on all those below it on the same point of law.⁹¹ Decisions of the Privy Council on appeals from the Bahamas are binding on all Bahamian courts. Furthermore, although the Privy Council's rulings on appeals from other Commonwealth nations probably do not bind Bahamian courts, such decisions do serve as persuasive authority.⁹²

The difficulty with flogging is that by the time most Commonwealth nations gained their independence, very few courts imposed corporal punishment. Consequently, the Privy Council has not ruled on whether corporal punishment is "inhuman or degrading" within the meaning of Article 17 of the Bahamian Constitution or the parallel constitutional provision of any other Caribbean Commonwealth. However, in death penalty cases, the Privy Council has interpreted the "inhuman or degrading punishment" clauses of the Jamaican and Trinidad and Tobago constitutions, including their savings clauses. The Privy Council has consistently held that the savings clauses trump fundamental rights.

Probably the most significant decision is *Riley v. Attorney-General of Jamaica*.⁹³ In that case, several appellants had been convicted of murder and sentenced to death by hanging in 1975 and 1976. In the interim, a massive controversy over capital punishment erupted in Jamaica.⁹⁴ As a result, the condemned men's death sentences were held in abeyance until the Jamaican Parliament finally resolved the debate in 1979 by suspending capital punishment for eighteen months to study its psychological and sociological effects.⁹⁵ The suspension was prospective only, and thus, execution warrants were subsequently issued for the appellants.⁹⁶ On appeal they argued that to execute them on 1979 warrants where their sentences had been issued in 1975 and 1976 constituted "inhuman or degrading punishment" under section 17(1) of the Jamaican Constitution.⁹⁷ The court dismissed the appeals.

In a triumph of formalism, the majority of the court held that it need not consider whether a delay in execution, regardless of the

91. 7 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 19, at 70.8.

92. 7 *Id.* at 70.9, 80.29-80.30.

93. 35 W.I.R. 279 (P.C. 1982) (appeal taken from Jam.).

94. *Id.* at 281-82.

95. *Id.* at 282.

96. *Id.*

97. *Id.* at 281.

circumstances, fell under section 17(1)'s proscription unless the punishment or treatment violated the savings clause of section 17(2).⁹⁸ The court gleaned from the language of section 17(2) three conditions that, if met, would bring an act within the savings clause, and thus exempt it from consideration under section 17(1): (1) The act must be done under the authority of law; (2) the act must involve "the infliction of punishment of a description authorised by the law in question, being a description of punishment which was lawful in Jamaica immediately before the appointed day;" and (3) the act must not "exceed in extent the punishment so authorized."⁹⁹

The court reasoned that the conduct in this case satisfied all three conditions. Because the delayed executions were ordered under authority of law, they passed the first part of the test. Because execution by hanging was the mandatory sentence for murder immediately prior to the effective date of the Jamaican Constitution—"the appointed day"—the punishment met the second condition. Finally, the court declared that, because the "legality of a delayed execution by hanging of a sentence of death lawfully imposed" under the law in effect prior to the effective date of the constitution "could never have been questioned before independence,"¹⁰⁰ it satisfied the third part of the test.

The court offered execution by burning at the stake as an example of a punishment that would exceed the boundaries of authorized punishment.¹⁰¹ Were the legislature to pass a law providing that murderers be burned to death rather than merely hanged, the new law would fail to meet the third condition, and hence, the law would fall outside the savings clause and be subject to scrutiny under section 17(1).¹⁰²

The ruling followed the *Nasralla* principle, which presumes that the laws in effect at the time of independence already secured to individuals the fundamental rights articulated in the constitution.¹⁰³ The principle exempts from judicial scrutiny laws related

98. *Id.* at 283.

99. *Id.* at 284. Lord Scarman, dissenting, would have reached the opposite result, primarily on the grounds that the majority did not address the correct issue, which he said was "not the [death] sentence of the court but its execution after prolonged delay." *Id.* at 285 (Scarman, L., dissenting).

100. *Id.* at 284.

101. *Id.*

102. *Id.*

103. *Director of Public Prosecutions v. Nasralla*, 10 W.I.R. 299, 303 (P.C. 1967) (appeal

to criminal punishment that were in force at the time the constitutions of Jamaica, Barbados, and the Bahamas came into force; the constitutions of all three nations have virtually identical "inhuman punishment" and savings clauses.

The *Riley* court's use of pre-constitutional legal standards to determine the legality of post-constitutional acts, appears to be a non-sequitur, but the *Nasralla* principle avoids that dispute by creating an irrebutable presumption. In addition, one could argue that by resolving the case of constitutionality on the third condition, the court achieved one of two things: The court either reduced its third condition to a redundancy, or rendered the first two conditions irrelevant. This is so because on the reasoning of *Riley*, using the majority's example, a law providing for execution by burning at the stake would not only fail to meet the third condition, as the court suggests, but the second one as well: no Jamaican law in existence immediately before the appointed day provided for execution by burning at the stake.

Nevertheless, that apparent tautology reveals the doctrinal importance of the court's third condition—that the act must not exceed in extent the description of the punishment so authorized. The second condition simply re-states the savings provision with the *Nasralla* gloss: the constitutional "grant" of a fundamental right is subject to existing law at the time the right was "granted." Rather than a redundancy, therefore, the third condition expands the scope of the savings clause beyond a narrow reading of its language. Thus interpreted by the Privy Council, the savings clause reserves to parliament the right to amend the law to expand the *types* of offenses to which the punishment applies. In the Bahamas, Parliament has so acted. The Criminal Law (Measures) Act expanded the list of offenses punishable by flogging by adding conduct that the 1991 Sexual Offenses and Domestic Violence Act and the Firearms Act had criminalized.¹⁰⁴

Courts could also interpret the clause to mean that amendment and re-enactment of a punishment, such as happened in the Bahamas with the cat, have the same protection, so long as the *description* of the punishment does not exceed that in the original law. This reading appears to be precisely what the Bahamian legislature had in mind when it reinstated flogging in 1991. The com-

taken from Jam.).

104. Criminal Law (Measures) Act, 1991, sched. 1 (Bah.).

plete title of the Act is:

An Act to make provision for the re-introduction of that form of corporal punishment which was of that description of punishment that was lawful in The Bahamas immediately before 10th July, 1973 as an additional punishment to be inflicted upon certain offenders and to enhance the powers of law enforcement officers.¹⁰⁵

To ensure constitutional validity, the language of the Act tracks, verbatim, the language of the corporal punishment provision in existence immediately prior to July 10, 1973. Hence, the Act explicitly references the cat-o'-nine tails.

During the public furor that preceded the 1991 Act, several politicians felt compelled to point out that the people should not be ashamed of reintroducing flogging. One went so far as to tell the public that the use of the term "cat" in the law did not necessarily mean that the courts would have to actually impose flogging by cat. He suggested that they could devise other measures.¹⁰⁶ Under *Riley's* three-part test, however, this assertion appears incorrect. By implication, flogging with a less severe tool than a cat would not exceed "in extent" the description in the law. Presumably, the court could order "flogging" with a wet towel and still meet the third condition. The Privy Council, however, explicitly stated that in order to fall under the protection of the savings clause, an official act of punishment must satisfy all three conditions.¹⁰⁷ This includes the first requirement—that it be done under "authority of law." By necessity, the 1991 Act, exactly like its predecessor, prescribes the implement of punishment in the form of a command: "Flogging shall be administered with a cat or a rod of a pattern approved by the Governor-General."¹⁰⁸ Thus, the sentencing court has no discretion to fashion its own instrument of punishment. To order flogging by anything other than a cat-o'-nine tails would be extra-statutory and therefore, would violate the first condition of the *Riley* test.

In cases where it interpreted the parallel fundamental rights provision of the Constitution of Trinidad and Tobago prohibiting

105. Criminal Law (Measures) Act, 1991 (Bah.). As the last clause of the title suggests, the Act extended the power of police officials to search vehicles at road checks. *Id.* §§ 7-11.

106. See Lindsay Thompson, *Bill for Return of Corporal Punishment Passes the House*, NASSAU GUARDIAN, Oct. 12, 1991, at 1.

107. *Riley*, 35 W.I.R. at 284.

108. Criminal Law (Measures) Act § 4(2).

"cruel and unusual punishment," the Privy Council reached the same result as in *Riley* by similarly giving a broad reading to that constitution's savings clause.¹⁰⁹ Given the rigid principles of constitutional interpretation that the Privy Council has developed and given the court's consistent application of these principles in capital punishment cases, little reason exists to believe that the court would depart from this path for less severe corporal punishment.

That the Judicial Committee of the Privy Council sits in England and is comprised of members of the House of Lords lends further support to this conclusion. The Privy Council decided the line of Commonwealth capital punishment cases, beginning with *Nasralla* in 1967, after England abolished capital punishment in 1965.¹¹⁰ This suggests a deeply entrenched institutional non-intervention policy regarding the legislative and executive acts of the British Commonwealths.

Normally, such a policy would not be objectionable, for it is fully consistent with the autonomy that independence purports to impart. However, the English left the Caribbean Commonwealth states with an imported body of almost entirely British colonial statutory and common law, a formidable tradition of legal formalism, and constitutions containing self-abnegating fundamental rights clauses. Together, these form a powerful barrier to judicial independence in the Bahamas.

By pedigree and practice, the Caribbean courts are truly English; the law they apply, and the formalism with which they apply the law is English.¹¹¹ *R. v. Purvis*¹¹² is a good example. In that case, the Jamaican Court of Appeal considered whether sentences for car theft and aggravated robbery, which totalled fifteen years imprisonment at hard labor and twelve lashes, were inhuman and degrading under section 17 of the Jamaican Constitution. The court dismissed as dicta a statement in one of its earlier opinions¹¹³ that

109. *Abbott v. Attorney General of Trinidad and Tobago*, 32 W.I.R. 347 (P.C. 1979) (appeal taken from Trin. and Tobago); *De Freitas v. Benny*, 27 W.I.R. 318 (P.C. 1975) (appeal taken from Trin. and Tobago) (sentence for murder of death by hanging was not "cruel and unusual punishment" where it was specified in the death warrant and was the same punishment in force in Trinidad and Tobago at the commencement of its constitution). In *De Freitas*, the Privy Council also held that an appellant could not invoke the English Bill of Rights as protection from the legislative acts of a dependency. 27 W.I.R. at 323.

110. *Murder (Abolition of Death Penalty) Act*, 1965, ch. 71 (Eng.).

111. *Delroy Chuck*, *supra* note 37, at 86.

112. 13 W.I.R. 507 (Ct. App. Jam. 1968).

113. *R. v. Brown*, 7 W.I.R. 47, 49 (Ct. App. Jam. 1964).

"degrading forms of punishment" included long prison terms and flogging.¹¹⁴ It further rejected the appellants' argument that the sentence was not "a type or description of punishment" that fell under the savings clause of section 17(2) because the law under which the offenders were sentenced had been amended after the effective date of the constitution to make mandatory the imposition of the previously discretionary flogging component.¹¹⁵ The court held that even if the sentences were degrading, section 17(2) saved them from unconstitutionality.¹¹⁶

The stingy fundamental rights jurisprudence of both the Privy Council and the Jamaican Court of Appeal stands in stark contrast to that of the Supreme Court of the African Republic of Zimbabwe. Over the past decade, the Supreme Court of Zimbabwe has earned a reputation as a strong, sophisticated, and independent judiciary.¹¹⁷ Its treatment of fundamental rights is best characterized as expansive.

The colonial history of Zimbabwe differs from that of the Caribbean Commonwealth nations in several important respects. First, the period of British colonial rule was much shorter in Zimbabwe than in the Caribbean.¹¹⁸ Second, Zimbabwe, formerly Southern Rhodesia, historically enjoyed a greater degree of autonomy than other British colonies.¹¹⁹ Both of these factors would seem to mitigate wholesale entrenchment of British legal formalism.

Additionally, although the British installed a legal system in a fashion similar to those of the Caribbean colonies, with the Privy Council as the court of last resort, the Rhodesian courts administered Roman-Dutch law already developed in South Africa, rather than purely imported British law.¹²⁰ Although the form and method of legal administration were British, the content of the law

114. *Purvis*, 13 W.I.R. at 512.

115. *Id.*

116. *Id.* at 512-13.

117. William E. Kovacic, *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 ANTITRUST L.J. 253, 263 (1992).

118. Great Britain did not become seriously involved in the area now called Zimbabwe until the late 1800s, although it had acquired all of the present-day Caribbean Commonwealth territory by 1815. Compare *Zimbabwe Chronology*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 2 (Albert P. Blaustein and Gisbert H. Flanz, eds., 1987), with 7 MODERN LEGAL SYSTEMS CYCLOPEDIA, *supra* note 19, at 80.10. The first British colonists arrived in the Bahamas in 1648. BAHAMAS HANDBOOK AND BUSINESSMAN'S ANNUAL 331 (1992).

119. *Zimbabwe Chronology*, *supra* note 118, at 6-9.

120. *Id.* at 5.

itself varied. Last, unlike in the Caribbean, where the original island inhabitants were killed off and slaves were imported to take their place,¹²¹ Europeans who came to Southern Rhodesia tussled with its natives over land and political control, which altered that country's course to independence.¹²²

In 1968, the High Court for what is now Zimbabwe held that a 1965 constitution unilaterally adopted without British assent was valid.¹²³ The 1965 Constitution diverged only slightly from the one that the British had approved in 1961.¹²⁴ One significant change eliminated appeals to the Privy Council.¹²⁵ Consequently, the court no longer considered itself bound by decisions of the Privy Council.¹²⁶ Still, Zimbabwe came late to full independence. Several years, and several constitutions later, it officially became a republic in the Commonwealth in 1980.¹²⁷

Beginning in 1961, each of Zimbabwe's constitutions, in the model of those of the Caribbean Commonwealths, contained a Declaration of Rights, complete with the familiar prohibition against inhuman or degrading punishment and its concomitant savings clause. Section 15(1) of the 1980 Constitution stated: "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment." Section 26(2)(b) was a savings clause virtually identical to those in constitutions of the Bahamas, Jamaica, and Barbados, with one significant difference: Section 26(2)(b) had a time limit. The 1980 Constitution specifically provided for the savings clause to lapse on April 18, 1985, five years after the effective date of the Constitution¹²⁸.

The criminal code of Zimbabwe also contained numerous statutes prescribing "whipping"—synonymous with flogging—as punishment for certain offenses,¹²⁹ plus detailed regulations for its administration.¹³⁰ And, unlike in the Caribbean, where flogging lost

121. BAHAMAS HANDBOOK AND BUSINESSMAN'S ANNUAL, *supra* note 118, at 45-6.

122. *Zimbabwe Chronology*, *supra* note 118, at 9-17.

123. *Madzimbamuto v. Lardner-Burke*, [1968] 2 S. Afr. L. Rep. 284 (Rhodesia App. Div.).

124. *Zimbabwe Chronology*, *supra* note 118, at 13.

125. *Id.*

126. *Id.* at 14.

127. *Id.* at 18.

128. ZIMB. CONST. § 26(3)(b).

129. See *S v. Ncube*, [1988] 2 S. Afr. L. Rep. 702, 704-05 (Zimb.) (detailing various flogging laws).

130. *Id.* at 713-14.

viability decades ago, whipping was and remains commonplace in much of Central and Southern Africa.¹³¹ The Supreme Court of Zimbabwe, however, declared corporal punishment unconstitutional in the 1988 case of *S v. Ncube*.¹³²

The *Ncube* court surveyed the status of corporal punishment in various countries, including England, Canada, and the United States.¹³³ The court found that while whipping may be permissible in certain parts of the world, "modern conceptions of justice and humanity have led most European and Scandinavian countries to totally deny the utility of corporal punishment."¹³⁴ Placing particular emphasis on the 1978 European Court of Human Rights decision in *Tyrer v. United Kingdom*,¹³⁵ which held that judicially imposed "birching" of juveniles, as practiced on the Isle of Man, was degrading and therefore violated article 3 of the European Convention on Human Rights. The Supreme Court of Zimbabwe unanimously held that judicially imposed corporal punishment of adults, regardless of the severity of the crime, is inherently inhuman and degrading, thereby violating the Zimbabwe Constitution.¹³⁶

The court frankly admitted that the savings clause of Zimbabwe's previous constitution had rendered nugatory similar prohibitions against inhuman or degrading punishment by exempting pre-existing law from review.¹³⁷ The framers of the 1980 constitution, however, specifically limited the effect of its savings clause to a period of five years. Since the five year period had passed, the court reasoned that it was now free to examine the punishment to determine if it was inhuman or degrading.¹³⁸ The *Ncube* court's reading of the savings clause comports with the case law and the bulk of legal scholarship on the question.¹³⁹

Unlike their treatment of the courts of Zimbabwe, commentators criticize the post-constitutional Caribbean courts for "consist-

131. *Id.* at 707, 716; see also James O. Midgley, *Corporal Punishment and Penal Policy: Notes on the Continued Use of Corporal Punishment with Reference to South Africa*, 73 J. CRIM. L. & CRIMINOLOGY 388 (1982); Ross Dunn, *Canings Leave Scars of Rough Justice*, THE INDEPENDENT (S. Afr.), Mar. 31, 1991, at 15 (discussing whipping in South Africa).

132. [1988] 2 S. Afr. L. Rep. at 721.

133. *Id.* at 705-13 (correctly noting that the United States still permits corporal punishment of juveniles).

134. *Id.* at 713.

135. 2 Eur. Ct. H.R. (ser. A) (1978).

136. *Ncube*, [1988] 2 S. Afr. L. Rep. at 719-22.

137. *Id.* at 714.

138. *Id.*

139. See BARNETT, *supra* note 85, at 391-93.

ently and unapologetically" demonstrating a "preference for traditional common-law standards, perhaps as much out of a concern for not being seen as to have engaged in judicial activism," or perhaps for "lack of agility to justify deviations from accepted standards and a cryptic respect for institutional norms."¹⁴⁰ In general, this criticism may be well founded. On the other hand, if formalism is objectionable, result-oriented justice goes too far in the other direction. Judicial activism does not necessarily make for good law, as the very latest Caribbean development shows.

The Barbados Court of Appeal broke from the formalistic mold and overturned the flogging sentences of two convicted robbers in *Hobbs v. The Queen*.¹⁴¹ Citing to the *Ncube* and *Tyrer* decisions extensively, the court first declared that judicially imposed flogging was inhuman and degrading within the meaning of section 15(1) of the Barbados Constitution.¹⁴² The court then had to navigate around the savings provision of section 15(2).

The court prefaced the remainder of its decision by stating that it must be guided by the Privy Council's decision in *Riley v. Attorney-General of Jamaica*.¹⁴³ It then proceeded to turn the law on itself.

The larceny statute under which the trial court convicted the two robbers authorized the imposition of flogging in addition to imprisonment.¹⁴⁴ In 1961, however, the Barbados legislature had passed the Prison Act, which went into effect in 1964.¹⁴⁵ Section 40(1) of the Prison Act states: "Except as provided by this section, corporal punishment shall not be imposed in any prison."¹⁴⁶ The legislation went on to permit corporal punishment in cases of "mutiny, incitement to mutiny, or gross personal violence to a prison officer,"¹⁴⁷ but only after compliance with a hearing and other procedural safeguards.¹⁴⁸

The court concluded that section 40 worked "fundamental

140. Maurice O. Ginton, *The Right to Life and Physical Integrity of the Person (Torture and Other Cruel or Degrading Punishment, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty)*, W. INDIAN L.J., May 1991, at 45, 48.

141. Nos. 91-9, 91-10 (criminal appeal), slip op. at 30 (Barb. Ct. App. Sept. 1, 1992).

142. *Id.* at 22.

143. *Id.*; see *supra* text accompanying notes 93-102.

144. *Hobbs*, Nos. 91-9, 91-10, slip op. at 23.

145. *Id.* at 24.

146. Prison Act, 1961, § 40(1) (Barb.); *Hobbs*, Nos. 91-9, 91-10, slip op. at 24.

147. Prison Act § 40(2); *Hobbs*, Nos. 91-9, 91-10, slip op. at 24.

148. Prison Act § 40(3)-(6).

changes" in the law of corporal punishment.¹⁴⁹ Its effect, wrote the court, was to restrict "the circumstances in which corporal punishment can be inflicted in prison so as to exclude the infliction of corporal punishment ordered by the Courts but to retain the provisions which enable Courts to order such punishment."¹⁵⁰ In other words, the law explicitly gave the courts power to sentence offenders to be flogged, but section 40 prohibited execution of the sentence in prison.

The court then asked, "[W]hy can't [the sentence] be carried out at some other place than in prison?"¹⁵¹ It answered that the law made no provision to remove a prisoner to another place to be flogged.¹⁵² Flogging failed the first condition of the *Riley* test because even though the judge could sentence the convicted men to be flogged, no one could carry out the sentence under "authority of law."¹⁵³

Flogging also failed *Riley's* second condition. Section 40 of the Prison Act came into effect in 1964, and flogging, reasoned the court, could not have been imposed consistently with the Act.¹⁵⁴ Consequently, the prohibition against flogging was part of the law immediately before the effective date of the 1966 Constitution.¹⁵⁵ Because it failed the test in *Riley*, judicially imposed corporal punishment fell outside the protection of the savings clause; because it was cruel and degrading, corporal punishment violated the constitution.¹⁵⁶

The reasoning in *Hobbs* is objectionable on several grounds. First, the court achieves its result only by blatantly misconstruing a statute after removing it from its proper context. On its face, the Prison Act of 1961 was remedial in nature. The law's prohibition was directed to prison officials. Its purpose was to prevent the arbitrary infliction of corporal punishment as a disciplinary measure in prison administration. Nothing in the Act implicated judicial sentencing.¹⁵⁷

149. *Hobbs*, Nos. 91-9, 91-10, slip op. at 24.

150. *Id.* at 29.

151. *Id.*

152. *Id.*

153. *Id.* at 30.

154. *Id.* This is a highly questionable proposition, given the state of Caribbean corporal punishment law in the 1960s. See *supra* note 30.

155. *Hobbs*, Nos. 91-9, 91-10, slip op. at 30.

156. *Id.*

157. The court did not dispute this point. Instead, it chided the legislature for adopting

Second, the court ignored post-1961 legislative action that undermined its premise. In 1967, the Barbados Parliament amended the 1899 Regulation of Whipping Act by renaming it as the Corporal Punishment Act, which provided:

2. (1) Whenever any person may be ordered to be whipped or flogged by any court or person authorised by the law of this Island to order such whipping or flogging, the number of strokes to be inflicted shall not exceed twelve, if the age of the offender does not exceed sixteen years, or twenty-four, if the age of the offender exceeds sixteen years.

(2) Such whipping or flogging may be inflicted on one occasion only.¹⁵⁸

Surely the legislature would not have amended the Act if it had intended that judicial sentences of corporal punishment not be executed, which leads to a third objection.

The court's assertion that the effect of the Prisons Act was to leave intact the court's authority to order corporal punishment, but to remove the legal means by which to carry out punishment so ordered is incoherent. It echoes Robert Cover's "crisis of credibility,"¹⁵⁹ for the law as we understand it—in this case, the court's authority to impose a particular form of criminal punishment—no longer exists when it lacks the capacity to transform legal understanding into action. The court, thus, engaged in linguistic fancy.

Finally, the court's attempt to abolish corporal punishment is incomplete, marking the limits of judicial activism. Under *Hobbs*, flogging prisoners in cases of mutiny, incitement to mutiny, and personal injury to a prison official remains perfectly permissible. But corporal punishment under judicial sentence is no less inhuman and degrading than judicially approved corporal punishment that prison officials inflict as an administrative measure.

Although it has not yet happened, the Bahamian Court of Appeal will likely be called upon to adjudicate the constitutionality of

a section of the Prisons Act of 1952 "without an appreciation of the background against which the English [Act of] 1952 had been enacted." *Id.* at 27.

158. Corporal Punishment Act (1967) (Bah.) (amending the Regulation of Whipping Act (1899)).

159. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1616 (1986). Cover argues that the judicial act of sentencing transcends an understanding of the word or the social context alone. To be effective, a judicial sentence must carry a credible threat of violence that is capable of transforming itself into action. Otherwise, a dichotomy may arise between the law and the "institutionally implemented deeds it authorizes." *Id.* at 1617.

the Criminal Law (Measures) Act of 1991. The court presently appears to have two rather dismal choices. It can either follow the formalistic decisions of the Privy Council and the Jamaican Court of Appeal, or assuming the existence of a statute similar to the Barbados Prison Act of 1961, it can apply the same indefensible reasoning as the Barbados Court of Appeal. The Zimbabwe Supreme Court's ruling in *Ncube* suggests that a better solution is to amend the constitution by eliminating the savings clause from section 17. If the claim of *Nasralla* is correct, that the law existing at independence already secured the fundamental rights granted by the constitution, retaining this principle as a savings clause in the constitution seems entirely superfluous.

IV. THE CROWN AND THE COMMONWEALTH: VESTIGES OF COLONIALISM

The reintroduction of the cat-o'-nine tails to the Bahamas brims with little ironies. First, the very lawmakers who officially abolished the cat as ineffective and barbaric brought it back seven years later. Second, both the Caribbean Commonwealth courts and legislatures seem frozen in a backwards glance.

Some optimistically believed that after it lost the *Tyrer* case in the European Court of Human Rights, the United Kingdom might incorporate into its domestic law dealing with colonies the humanitarian principles underlying the constitutions bequeathed to them—namely, the same respect for fundamental human rights as reserved to other subjects of the Crown. But no “seepage” of international into domestic law occurred. Instead, when it renewed the right of its citizens to make individual petitions to the European Commission on Human Rights in 1981, the United Kingdom simply excluded the Isle of Man from the application.¹⁶⁰

England, the *Tyrer* experience suggests, will continue to avoid interfering in the affairs of her former Caribbean colonies. This accords with the general principle of international law that even newly independent states are free to be the “absolute master[s]” of

160. 1981 Y.B. EUR. CONV. ON H.R. (Council of Eur.) 8, 12 (United Nations Kingdom Declaration); *id.* at 14; *see also* 1986 Y.B. EUR. CONV. ON H.R. 7 (United Kingdom Declaration renewing on similar terms its recognition of the competence of the European Commission of Human Rights to hear individual applications); J.A. Andrews, *The European Jurisprudence of Human Rights*, 43 Md. L. Rev. 463, 502 (1984).

their own houses.¹⁶¹ All would be fine and good, had she not left them with a deck quite so imperfectly stacked.

The British Privy Council's rigid constitutional interpretation¹⁶² required that the Bahamian Parliament resurrect a law exactly as it stood in 1951 simply to enact a constitutionally valid statute.¹⁶³ Yet England herself had abolished judicially imposed flogging in 1948. The Criminal Law (Measures) Act of 1991 offers a glimpse of the Bahamas trapped in a colonial time warp by virtue of its constitution and its morganatic marriage to the Judicial Committee of the Privy Council.

The Barbados Court of Appeal fared no better under the same constitutional regime. The savings clause of the Barbados constitution forced its court to resort to a strained and twisted interpretation of a pre-independence penal law enacted in 1961 in a partly successful attempt to prevent violence to criminal offenders. In so doing, the court worked violence on the law itself.

Hence, one final irony. There are few more evocative symbols of human bondage, oppression, and slavery than flogging with a cat-o'-nine tails. And yet, the good people of the Bahamas, who appeared to have at last escaped the brutal past, also seem determined to repeat it.

In 1984, the Jamaican government, like that of the Bahamas, commemorated the 150th Anniversary of the abolition of slavery. It sponsored the *Symposium on Law and Society: Abolition and After*, an international round table of scholars and officials from throughout the Caribbean Commonwealth. One speaker recounted the history of slavery in the West Indies. Noting that independent countries "do not come into being like a collection of travellers without baggage,"¹⁶⁴ he explained that the very thing that made slavery possible was a certain psychology of its subjects. They learned to "accept with gratitude the imperial teaching of colonial self-contempt which crowned the destruction of self-confidence

161. GERHARD VON GLAHN, *LAW AMONG NATIONS* 125 (6th ed. 1992).

162. One cannot help but question the qualifications of a court for such a task in a land that has no written constitution. See Ginton, *supra* note 140, at 47.

163. The Penal Code Act of 1951 repealed the 1929 corporal punishment statute. It would certainly be an embarrassment for the legislators to reinstate a punishment, which even they believed ineffective, only to have the courts declare the punishment unconstitutionally inhuman and degrading.

164. Dr. M. Shahabuddeem, *Slavery and Historiographical Rectification*, W. INDIAN L.J., Oct. 1985, at 29, 40.

perpetrated by a smug and arrogant paternalism and displaced the natural self-reliance, innovativeness, and initiative of entire peoples the world over."¹⁶⁵ It is a psychology whose roots run deep, enduring long after abolition. He urged vigilance: fight against complacency or risk becoming prisoners of the past. Slavery, he said, is truly "a state of mind."¹⁶⁶

In 1992, while in Nassau, I asked a native Bahamian, a law student soon to become an attorney, "Why flogging? Why the cat-o'-nine tails? If the demand was for corporal punishment, why not something else, anything else, even Graeme Newman's electric shock?" She visibly shuddered as she answered, "Because that is what the people are accustomed to."

165. *Id.* at 35.

166. *Id.* at 41.

APPENDIX

Criminal Law Measures Act, 1991 (Bah.)

An Act to make provision for the re-introduction of that form of corporal punishment which was of that description of punishment that was lawful in The Bahamas immediately before 10th July, 1973 as an additional punishment to be inflicted upon certain offenders and to enhance the powers of law enforcement officers.

[Date of Assent: 5th November, 1991]

Enacted by the Parliament of The Bahamas

PART I

PRELIMINARY

1. This Act may be cited as the Criminal Law (Measures) Act, 1991.

2. In this Act —

“child” means a person under the age of fourteen years;

“court” means the Supreme Court, a Magistrate’s or Juvenile Court presided over by a stipendiary and circuit magistrate and includes any appellate court exercising on appeal the powers of any such lower court;

“gazetted police officer” means any police officer of or above the rank of assistant superintendent,

“serious offence” means any offence specified in the Second Schedule and which the Governor-General may by Order amend;

“young person” means a person who has attained the age of fourteen years and is under the age of eighteen years.

PART II

CORPORAL PUNISHMENT

3.—(1) Subject to the provisions of this Act, any offender on being convicted by a court of any of the offenses mentioned in the First Schedule may be ordered by the court to undergo corporal punishment in addition to any other punishment to which the offender is liable.

(2) Nothing in subsection (1) shall be construed as having the effect of authorising the infliction of corporal punishment for an offence mentioned in the First Schedule committed prior to the coming into operation of this Act.

(3) The Governor-General may by Order, amend the First Schedule.

4.—(1) Whenever an offender is sentenced to undergo corporal punishment, such punishment shall be inflicted privately either by flogging or whipping in accordance with the provisions of this section.

(2) Flogging shall be administered with a cat or rod of a pattern approved by the Governor-General and, when with a cat, on the back of the offender and when with a rod on his buttocks, and in either case only after an examination by and in the presence of a medical officer.

(3) A sentence of flogging shall be inflicted only on a male adult, and which sentence shall be carried out in the prison in New Providence.

(4) A child or young person shall not be sentenced to flogging, but in lieu thereof he may be sentenced to be whipped. Whipping shall be administered with a light cane of a pattern approved by the Governor-General on the buttocks, by or in the presence of a

parent or guardian (if he desires to be present) or by such other person as the court may approve. In New Providence a sentence of whipping shall be administered only after an examination by and in the presence of a medical officer.

(5) Notwithstanding anything to the contrary in subsections (2) and (4) the type of instruments used in The Bahamas prior to 10th July, 1973 for the purpose of administering any sentence of corporal punishment shall be deemed to be the respective instruments approved by the Governor-General under those subsections until otherwise notified by the Governor-General by notice in the Gazette.

5.—(1) A sentence of corporal punishment shall specify the number of strokes which shall be administered, which in the case of flogging shall not exceed twenty-four and in the case of whipping twelve, and shall specify whether the prisoner shall receive the whole sentence at one time or by instalments, and in the case of instalments, the number of strokes at each instalment.

(2) The maximum number of strokes which may be administered at any one time shall be twelve in the case of a flogging and six in the case of a whipping and no person who has been flogged or whipped shall be again flogged or whipped within fourteen days.

(3) Every magistrate's or juvenile court which awards any sentence of corporal punishment shall as soon as possible after the imposition of such sentence report the fact to the Supreme Court.

6. No sentence of flogging or whipping shall be passed upon a female of any age; but in lieu of such sentence, where a female is convicted of an offence for which corporal punishment may be inflicted on a male, the court may sentence her to solitary confinement or to any other such additional punishment as the law for the time being permits to be inflicted on a female for an offence against the rules of the prison in New Providence.

FIRST SCHEDULE

1. Offences under the following sections of the Penal Code:-

ss. 270 (causing wound); 271 (causing grievous harm); 277 (garotting); 360(2) (robbery being armed with an offensive weapon); 361(4) - (7) (stealing in certain cases on second or subsequent conviction); 383 (housebreaking); and 384 (burglary).

2. Offences under the following sections of the Sexual Offences and Domestic Violence Act 1991:-

ss. 6(1) (rape); 6(2) (attempt or assault with intent to commit rape upon second or subsequent conviction); 10(1) (sexual intercourse with person under fourteen years); 10(2) (attempt to have sexual intercourse with person under fourteen years on second or subsequent conviction); 12(1) (unlawful sexual intercourse with a person suffering from a mental disorder); 12(2) (attempt to have unlawful sexual intercourse with a person suffering from a mental disorder on second or subsequent conviction); 13(1)(a) (act of incest by adult with a minor); 13(2)(a) (attempted act of incest by adult with a minor on second or subsequent conviction); 14(1) (adult unlawful sexual intercourse with dependent child); and 14(2) (adult attempted unlawful sexual intercourse with dependent child on second or subsequent conviction).

3. Offences under the following sections of the Firearms Act:

ss. 33 (possession of firearms with intent to injure); 34 (use or possession of firearm or imitation firearm in certain cases)

SECOND SCHEDULE (Sections 2 and 7(4))

1. Offences under the following sections of the Penal Code:

ss. 291 (kidnapping) 312 (murder); 314 (manslaughter); 344 and 345 (arson); 347-348 (use of explosive); 360 (robbery); 383 (housebreaking); 384 (burglary); 386 (possession

of instrument for burglary); 410 (treason); 464 (resist or prevent the execution of the law); 465 (escape).

2. Offences under the following sections of the Sexual Offences and Domestic Violence Act 1991:

ss. 6 (rape); 10 to 14 (sexual intercourse with certain persons); 17 (indecent assault); and 20 to 23 (detention of persons with certain intent and abduction).

3. Offences under the Firearms Act.

4. Offences under the Explosives Act.

5. Offences under section 22 of the Dangerous Drugs Act.
Act passed the House of Assembly on the October 10, 1991.
Act passed the Senate on September 23, 1991.