Freedom Forum

The Eighth Amendment

by David M. Wagner, Esq.

The Eighth Amendment protects citizens against "excessive bail," "excessive fines" and "cruel and unusual punishment." It is based on a similar clause in the English Bill of Rights, enacted by Parliament in 1689.

Bail refers to the right of a citizen accused of a crime to avoid pre-trial imprisonment by pledging a sum of money that he will forfeit if he does not appear for trial. Blackstone, the great 18th century English law professor whose works were well known to our Founding Fathers, traced the right to reasonable bail back to a statute in the reign of Edward I (13th century).

Several times in the last twenty years, the Supreme Court has considered whether the Eighth Amendment requires courts to decide whether a given punishment is proportional to the crime. In general, the Court has been more willing to get into the proportionality issue in cases involving fines than in cases involving prison terms: the Eighth Amendment bans any *fine* that is "excessive," but bans other types of sentences only if they are "cruel or unusual." Last June in *U.S. v. Bajakajian,* the Court overturned a judgment that had forced a defendant to forfeit over $370,000 in cash for violating a law against exporting more than $10,000 in currency. In an opinion by Justice Thomas, the Court held this to be an excessive fine.

Can prison terms be challenged as disproportionate under the "cruel or unusual punishment" clause of the Eighth Amendment? The Supreme Court has gone back and forth on this issue, and decided "No." In 1980 it said that length of sentences for repeat offenders were almost entirely "a matter of legislative prerogative;" in 1983 it rejected that approach, but in 1991, in *Harmelin v. Michigan,* it overruled the 1983 decision and returned to the older rule.

The Court said in *Harmelin:* "While there are relatively clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are 'cruel and unusual,' proportionality does not lend itself to such analysis." In other words, we can know from history that our Framers rejected punishments such as torture or annual floggings in perpetuity, but we cannot be sure what the Framers' idea of "proportional" prison terms would be. (The death penalty is a separate issue. In his *Harmelin* opinion, Justice Scalia endorsed proportionality analysis in death penalty cases – but only because "death is different," not because the Eighth Amendment requires it.)

In Hudson v. McMillan, the Court held that a brutal prison beating violated the "cruel and unusual punishment" clause. Justices Thomas and Scalia dissented, arguing that "Punishment" refers only to judicially imposed sentences. The beaten prisoner, they said, had a solid tort action against the government, but not a suit based on the Eighth Amendment. WW

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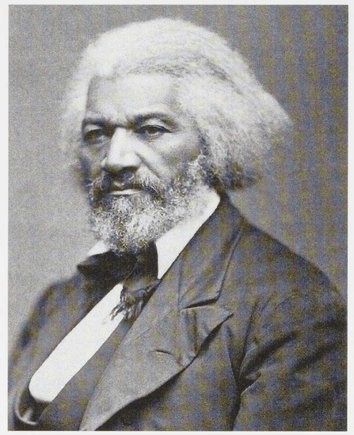

Courtesy of National Archives

Frederick Douglass

Frederick Douglass

(Continued from cover)

black Americans. It was Douglass, speaking and writing, exhorting and praising – Douglass doggedly making his way past White House guards to greet Lincoln after the delivery of his Second Inaugural – Douglass daring the criticism of his friend Lincoln, the criticisms that are the emblem of a truly great man – it was Douglass who held up to his time a mirror of truth without which our portrait of that era is woefully incomplete.

In 1876, speaking at the dedication of the Freedmen's Monument in this city, Douglass spoke of the light that shines through history. "Time, time," he said, "is impartial, just and certain in its action." And so it is with the man whose memory we hold today, a man who spoke uncomfortable truth, who broke his chains and aided a whole people in breaking theirs, a man who stood for justice and human brotherhood, biding his own time until all his country men and women could agree, "We are one nation, under God, with liberty and justice for all." WW

On February 12, Deanna Carlson, FRC's Director of Community Outreach, dedicated a wreath at Douglass' last home in Southeast Washington, D.C.

The Duty of Churches

(Continued from cover)

room. Often the consensus would have little to do with fact.

As the consensus was broadcast and published, it would grow and become more distorted. Sometimes, movies would be made about the consensus-born fiction, by historical revisionists like Oliver Stone. Propaganda would be embraced as reality.

While Christians complain about the influence of mass media, they forget that there is another "mass medium" in America – the Church. If the secular mass media inundate the nation with propaganda, the Church must counter with truth.

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The importance of the Church is seen when one considers how the colonial mind was formed in America's founding period. Harry S. Stout, Jonathan Edwards Professor of American Christianity at Yale University, writes concerning the shaping of the early American mind:

"Over the span of the colonial era, American ministers delivered approximately 8 million sermons... The average 70-year-old colonial churchgoer would have listened to some 7,000 sermons in his or her lifetime... The colonial sermon was prophet, newspaper, video, Internet, community college, and social therapist all wrapped in one. Such was the range of its influence on all aspects of life that even contemporary television and personal computers pale in comparison. Among other things, the colonial churchgoer would have heard pastors who were convinced that Devolution and a new republican government would enable Americans to realize their destiny as a 'redeemer nation.'"[i]

A familiar objection to political activity by churches is that such activity violates the "separation of church and state." This complaint overlooks the fact that the Founders were concerned there not be a state-controlled church. Their own actions, however, revealed their expectation that the church be an active participant in the public policy arena.

> *Church leaders must assume their responsibility for forming the Biblical mind... and confronting the national mind.*

Other critics cite examples from history where the Church has erred by attacking persons rather than addressing issues, and adopting the contentious and hurtful style of the culture. The fact that the Church has, at times, moved inappropriately in the political sphere is no reason to shut her out altogether.

Still others quote Jesus who said, "My Kingdom is not of this world." His heavenly kingdom, they argue, should avoid the public square. While Jesus was saying that His Kingdom was not a product of this fallen world and its cultures, He was not arguing that churches should stay out of earthly politics. If anything, He suggests that churches, especially, ought to be involved because they bring a heavenly perspective to the earthly realm.

There are several actions churches can take to influence politics. First, leaders must assume their responsibility for forming the Biblical mind. The shaping of the Biblical mind is as much a function of "equipping the saints" as preparing Sunday School teachers. Harry Blamires writes, "as a thinking being, the modem Christian has succumbed to secularization."[ii]

Second, churches must confront the national mind. Acquiescence to abortion on demand is neither a legal or political issue. Abortion, sexuality, and many other topics in the current national debate are moral and spiritual matters. Churches must find ways to assert Biblical values on these issues in the public square. It is appropriate for churches to inform parishioners of the Biblical perspective on such public policy concerns. Harry Stout says that in their preaching, colonial pulpiteers "taught not only the way to personal salvation in Christ but also the way to temporal and national prosperity for God's chosen people."

Churches must not act in a partisan way, but they should equip and send people into the political process at all levels who will represent the interests of the Kingdom of God. If Mark Twain is correct, this could result in the salvation of the nation itself.

Stout writes that colonial Americans, "with their backs against the wall, and precious little to take confidence in," found the words of preachers and the pamphleteers they influenced "their only hope." This is no less true in the present American crisis, and it is why churches must be politically involved. WW

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[i] *"How Preachers Incited Revolution," by Harry S. Stout,* Christian History Magazine, *May 6, 1996, Page 10.*

[ii] *Harry Blamires,* The Christian Mind, *Ann Arbor: Servant Books, 1963, page 3.*