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EIGHTH AMENDMENT PROPORTIONALITY ANALYSIS AND THE COMPELLING CASE OF WILLIAM RUMMEL

CHARLES WALTER SCHWARTZ*

INTRODUCTION

Last term the Supreme Court decided what *Newsweek* called the "compelling case"¹ of William Rummel. In *Rummel v. Estelle*,² the Supreme Court upheld a life sentence imposed under a Texas habitual criminal statute. The statute mandates a life sentence upon conviction of a third felony.³ The petitioner in *Rummel* argued that the application of this statute to his three felony convictions—three relatively small thefts, which in the aggregate amounted to \$229.11—constituted cruel and unusual punishment in violation of the eighth amendment.

This article inquires into the history of the eighth amendment with an emphasis on the origins of the proportionality argument used in *Rummel*. The article also explores the other legal issues raised by the *Rummel* challenge in the Supreme Court. Finally, the article argues that the Supreme Court's rejection of Rummel's eighth amendment argument is fundamentally sound and that the cost of full review of the length of prison sentences far outweighs the "compelling" nature of cases such as *Rummel*.

CRUEL AND UNUSUAL PUNISHMENT IN HISTORY

The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."⁴ The wording is virtually identical to a provision found in the English Bill of Rights of 1689.⁵ Traditional history explains this provision as outlawing torture

and barbarous punishments such as those imposed during the "Bloody Assizes."⁶

In 1685, Catholic James II succeeded his brother, Anglican Charles II, as the King of England. Shortly thereafter, Charles' illegitimate son, James, the Duke of Monmouth, launched an unsuccessful invasion of England. This caused James II to cancel the autumn assize of 1685. In its place he created a special commission to try the rebels and appointed Chief Justice Jeffreys to lead it.

This special commission, now known as the "Bloody Assizes," conducted hundreds of trials for treason in which those found guilty were executed in the traditional English manner—the condemned man was drawn on a cart to the gallows where he was hanged by the neck, cut down while still alive, disemboweled and his bowels burnt before him, then beheaded and quartered.⁷

In 1688, William of Orange and his wife Mary, at the invitation of Parliament, replaced James II. William's first Parliament wrote what is now known as the English Bill of Rights of 1689. The cruel and unusual punishment provision of this document is thought to be a direct reaction to the "Bloody Assizes."

THE GRANUCCI THEORY OF AMERICAN MISINTERPRETATION

In an important article in the *California Law Review*,⁸ Anthony Granucci has suggested that the cruel and unusual punishment clause in the English Bill of Rights of 1689 was not intended to outlaw barbarous methods of punishment.⁹ He argues that it was intended to outlaw punishments "which were unauthorized by statute and outside the jurisdiction of the sentencing court,"¹⁰ as well

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¹ *The Court Comes Back*, NEWSWEEK, October 8, 1979, at 60.

² 100 S. Ct. 1133 (1980).

³ Rummel was convicted under TEX. PENAL CODE ANN. art. 63 (Vernon 1925) which provides: "whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

⁴ U.S. CONST. amend. VIII.

⁵ 1 W. & M., sess. 2, c. 2.

⁶ See, e.g., Note, 24 HARV. L. REV. 54 (1910); Note, *The Cruel and Unusual Punishment Clause and The Substantive Criminal Law*, 79 HARV. L. REV. 635, 636 (1966) [hereinafter cited as *Cruel and Unusual Punishment*].

⁷ A description of the various methods of English executions can be found in 4 W. BLACKSTONE, COMMENTARIES *377.

⁸ Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

⁹ *Id.* at 859.

¹⁰ *Id.* at 860.

as to forbid disproportionate penalties.¹¹ However, Granucci claims that the American framers misinterpreted the English meaning of cruel and unusual punishments, thinking that their own eighth amendment would outlaw only barbarous methods of punishments.¹²

GRANUCCI'S CASE AGAINST THE "BLOODY ASSIZE" THEORY

Granucci argues that there "is no evidence to connect the cruel and unusual punishments clause with the 'Bloody Assize.'" ¹³ First, Granucci notes that the method of punishment employed during the Bloody Assize continued to be acceptable long after passage of the Bill of Rights of 1689. Similar methods of execution were used even until the nineteenth century.¹⁴ Moreover, the Whigs, who wrote the clause, suppressed the two Jacobite rebellions with the same strong methods employed by the Stuarts.¹⁵ Second, Granucci observes that a leading member of the Bloody Assize, Sir Henry Pollfexen, participated in drafting the Bill of Rights. Surely, Granucci argues, Pollfexen would not have condemned his own participation in the assize as illegal.¹⁶ Finally, Granucci suggests that since there is little mention of the assize in the parliamentary debate concerning the Bill of Rights, the causal connection between the assize and the clause cannot be established.¹⁷

GRANUCCI'S THESIS AS TO THE ORIGINAL MEANING OF THE CLAUSE

Granucci finds evidence as to the original meaning of the clause in (a) the trial of Titus Oates and his "Popish Plot"¹⁸ and (b) the traditional English rule against disproportionate punishments.¹⁹

During the reign of protestant King Charles II, Titus Oates, a minister of the Church of England, announced that he had evidence of a plot to assassinate the King and thereby place Catholic James II on the throne.²⁰ Oates' story was a complete hoax, but as a result of his subsequent testimony,

at least fifteen Catholics were executed for treason.²¹

After James II succeeded to the throne in 1685, Oates was tried and convicted of perjury. Oates was sentenced to (1) a fine of 2,000 marks, (2) life imprisonment, (3) whippings, (4) pillorying four times a year, and (5) defrocking.²²

After William became the King of England in 1689, Oates petitioned Parliament for relief from his sentence. The House of Lords denied Oates' petition, but a minority report in the House of Lords and a majority in the House of Commons labeled Oates' punishment "cruel and unusual."²³

Granucci contends this was the only contemporary use of the phrase "cruel and unusual." He also argues that Oates' sentence was neither disproportionate for a person who had caused the death of many innocent persons, nor was it cruel and barbarous considering the contemporary standards.²⁴ Therefore, Granucci concludes that the phrase must prohibit a "severe punishment unauthorized by statute and not within the jurisdiction of the court to impose."²⁵

Granucci's second argument is that the phrase "cruel and unusual punishment" was meant to codify a long-standing English tradition against disproportionate sentences. Granucci begins his argument with the biblical injunction that punishment shall be "an eye for an eye, a tooth for a tooth."²⁶ Granucci argues that by the year 900, this injunction was codified in a sliding scale of fines.²⁷ After the Norman Conquest, however, the scheduled fine was replaced by a discretionary amercement. The discretionary nature of the amercement later became a cause for concern. Granucci points out that three separate chapters of the Magna Carta dealt with discretionary and excessive

²¹ *Id.*

²² *Id.* at 858.

²³ *Id.* at 858-59.

²⁴ *Id.* at 859.

²⁵ *Id.* (footnote omitted). In his John F. Sonnett Memorial Lecture, Judge Mulligan of the Second Circuit misreads Granucci on this score. Judge Mulligan has Granucci arguing that Oates' sentence was cruel and unusual because "a term of life imprisonment was disproportionate to the crime of perjury." Mulligan, *Cruel and Unusual Punishment: The Proportionality Rule*, 47 *FORDHAM L. REV.* 639, 641 (1979) (footnote omitted). In fact, Granucci specifically disavows this argument. "Life imprisonment is used widely today and probably would not be considered excessive in a case of perjury which had resulted in erroneous executions." Granucci, *supra* note 8, at 859.

²⁶ *Id.* at 844 (quoting *Exodus* 21:25).

²⁷ *Id.*

¹¹ *Id.*

¹² *Id.* at 860-65.

¹³ *Id.* at 855.

¹⁴ *Id.* at 856.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 857-58.

¹⁹ *Id.* at 844.

²⁰ Oates testified that "two Jesuit priests were to shoot the King with silver bullets, four 'Irish Ruffians' had been hired to stab him, and if all failed, the Queen's doctor . . . was to poison him." *Id.* at 857.

ameracements.²⁸ The most important of the three was that "[a] free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity."²⁹

Granucci concludes that by the year 1400, we have expression of "the long standing principle of English Law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length and severity, greatly disproportionate to the offense charged."³⁰

THE AMERICAN MISINTERPRETATION THEORY

Granucci asserts that by 1689, England prohibited punishments that were either excessive³¹ or outside of a court's jurisdiction to impose. Granucci also states that England had never prohibited cruel methods of punishment.³² Notwithstanding these assertions, Granucci contends that the American founders intended that the eighth amendment prohibit cruel methods of punishment.³³ Granucci argues that this anomaly was a result of American misinterpretation of English law.

Granucci contends that the prohibition against barbarous punishment is an American development largely invented by Nathaniel Ward.³⁴ Ward drafted an early Massachusetts law known as the *Body of Liberties*. Included in this law is the clause, "For bodily punishments we allow amongst us none that are inhumane, barbarous or cruel."³⁵

The American framers, according to Granucci, intended to prohibit cruel methods of punishment and erroneously thought that the English Bill of Rights already did so. Granucci traces the confusion to a passage in Blackstone's *Commentaries on the Laws of England* which states that "the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of King's Bench, in the reign of King James the second)."³⁶

Granucci argues that the Blackstone passage does not refer to the Bloody Assize because the

Bloody Assize was not a proceeding in the Court of King's Bench.³⁷ Instead, Granucci suggests that Blackstone refers to the trial of Titus Oates, discussed in a prior section. Granucci also notes that another passage in Blackstone contemplates cruel methods of punishment as legal without even mentioning the cruel and unusual punishment clause.³⁸

CRITICISMS OF THE GRANUCCI THEORIES

First, since Granucci admits that the American framers originally intended to prohibit cruel methods of punishment, one must question the relevance of his two proposed English meanings, even assuming they are correct. Was the American framers' desire to prohibit cruel methods of punishment any less legitimate because they misunderstood history? Similarly, should an English concept of proportionality have any force in causing an American court to alter an historically developed perception of the eighth amendment?

Second, Granucci's two English meanings can themselves be questioned. In his Sonnett Memorial Lecture, Judge Mulligan questioned Granucci's reliance on the trial of Titus Oates. Judge Mulligan argues that Oates' eventual release from prison was not attributable to concern that Oates had been subjected to cruel and unusual punishment but rather, was "an act of gratitude by William of Orange . . . who knew his friends and recognized the instruments which helped him attain the throne of England."³⁹

Granucci's contention that the English Bill of Rights of 1689 was meant to prohibit disproportionate punishments can also be criticized. The most obvious criticism is the fact that disproportionate punishment continued to occur with great frequency following enactment of the English Bill of Rights. According to Justice Marshall's concurring opinion in *Furman v. Georgia*,⁴⁰ in the year 1500 there were eight capital crimes. By the date of the English Bill of Rights, 1689, there were almost fifty capital crimes. By 1800, there were almost two hundred capital crimes, prohibiting a whole range of human activity.⁴¹ Certainly, this is a powerful indictment of Granucci's argument that the English law followed a belief in the proportionality

²⁸ *Id.* at 845.

²⁹ *Id.* at 846 (quoting J. HOLT, *MAGNA CARTA* 323 (1965)).

³⁰ *Id.* (quoting R. PERRY, *SOURCES OF OUR LIBERTIES* 236 (1959)).

³¹ *Id.* at 847.

³² *Id.* at 860.

³³ *Id.*

³⁴ *Id.* at 851.

³⁵ *Id.* (quoting R. PERRY, *supra* note 30, at 153).

³⁶ *Id.* at 864 (quoting 4 W. BLACKSTONE, *supra* note 7, at * 372-73).

³⁷ *Id.* at 865.

³⁸ *Id.* at 863-65.

³⁹ Mulligan, *supra* note 25, at 641 (quoting E. DAKERS, *TITUS OATES* 319 (1949)).

⁴⁰ 408 U.S. 238, 334 (1972) (Marshall, J., concurring).

⁴¹ See 3 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 24 (1883). See also D. Hay, Chapter 1 in *ALBION'S FATAL TREE* 18 (1975).

concept. Granucci's apparent answer to this is "[w]hether the principle was honored in practice or not is an open question."⁴²

Finally, there is no causal connection between belief in the proportionality principle and the adoption of the English Bill of Rights. On the one hand, Granucci discounts the Bloody Assize explanation of the Bill of Rights because the assize was mentioned only once during the debates in Parliament. On the other hand, Granucci is unable to point to even *one* mention of a proportionality concept during parliamentary debate.

A SECOND HISTORICAL JUSTIFICATION FOR THE PROPORTIONALITY CONCEPT IN THE EIGHTH AMENDMENT

In 1975, two student authors proposed an alternative historical justification for finding a proportionality requirement in the eighth amendment.⁴³ These authors accept the traditional historical explanation for the English Bill of Rights—that it prohibits cruel methods of punishment.⁴⁴ They also accept the notion that the American framers intended to prohibit barbarous punishments.⁴⁵ But the authors assert that the American framers were also influenced by certain enlightenment thinkers, particularly the Italian writer Cesare Beccaria, who advocated proportionate punishments.

In 1764, Cesare Beccaria authored *On Crimes and Punishments*.⁴⁶ Beccaria's central thesis was that a punishment should relate to the seriousness of the crime. Two years later, Voltaire authored a *Commentary* on Beccaria's treatise which was translated along with the treatise into all the primary European languages.⁴⁷

The student authors contend that Beccaria's proportionality ideas were adopted in the eighth amendment because (1) Beccaria's work was widely read in early America;⁴⁸ (2) John Adams once quoted Beccaria in a speech to a jury while defending soldiers accused of the Boston Massacre;⁴⁹ (3) Thomas Jefferson read Beccaria and adopted his

⁴² Granucci, *supra* note 8, at 847.

⁴³ Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975).

⁴⁴ *Id.* at 784.

⁴⁵ *Id.*

⁴⁶ *Id.* at 808.

⁴⁷ *Id.* at 812. Apparently, English was one language, as the authors state, "There were three American translations of Beccaria." *Id.* at 813.

⁴⁸ *Id.* at 813.

⁴⁹ *Id.* at 813-14.

ideas of proportionality.⁵⁰ Moreover, Jefferson attempted to introduce a more proportionate sentencing scheme in Virginia; (4) George Mason, the author of the Virginia Declaration of Rights, included a provision prohibiting cruel and unusual punishments.⁵¹ Mason, the authors assert, was aware of Beccaria and agreed with his ideas;⁵² (5) some states included provisions in their constitutions prohibiting disproportionate punishments;⁵³ and (6) the framers of the eighth amendment incorporated the state prohibitions against disproportionate punishments.⁵⁴

CRITICISM OF THE THESIS

Acceptance of the Beccaria thesis requires several giant assumptions of causal connection, all of which are contrary to historical evidence.

First, one cannot find a causal connection between Beccaria's work and the known history on the eighth amendment. Merely proving that Thomas Jefferson read and agreed with Beccaria proves nothing about the eighth amendment. Jefferson was a widely read man; certainly no one has seriously argued that all that he read was adopted by reference in the Constitution.

Second, the student authors' critical assumption is illogical. The authors assert that George Mason thought the eighth amendment meant to prohibit disproportionate punishments, and yet the authors admit that Mason used the exact words of the English Bill of Rights of 1689. The authors suggest that this "may have been merely [a] linguistic device."⁵⁵ Certainly, the authors' burden is to present a more powerful explanation than that the words with a fixed historical meaning may have been selected in error. The authors of the state constitutions knew precisely how to prohibit disproportionate punishments and clearly did so.⁵⁶

⁵⁰ *Id.* at 818: The authors call Jefferson the "medium through which the Enlightenment ideas were put to practical use . . . and . . . [the] connecting link between Beccaria and what was to become the eighth amendment." *Id.* at 816.

⁵¹ *Id.* at 819-20.

⁵² *Id.*

⁵³ *Id.* at 823-25.

⁵⁴ *Id.* at 830.

⁵⁵ *Id.* at 820.

⁵⁶ *Id.* at 820-25. See, e.g., N.H. CONST. pt. 1, art. 18, which directed that:

All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offenses, the people are led to forget the

Yet, the framers of the Bill of Rights did not adopt the language of these provisions.

Third, although the debates on the adoption of the eighth amendment are not detailed, what little evidence there is clearly centers around a concern to prevent the national government from initiating barbarous methods of punishment. In Virginia, George Mason⁵⁷ and Patrick Henry⁵⁸ both spoke of the necessity to prohibit the government from using torture. In Massachusetts, a delegate spoke of the same necessity.⁵⁹

Finally, one may accept the authors' historical

real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind.

While the student authors contend that the framers of the Bill of Rights intended to incorporate such proportionality concepts, they can show no causal connection in the relevant debates.

⁵⁷ George Mason stated:

For that one clause expressly provided that no man can give evidence against himself and that . . . in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided, that no cruel and unusual punishments shall be inflicted; therefore torture was included in the prohibition.

3 THE PAPERS OF GEORGE MASON 1085 (R. Rutland ed. 1970), cited in Comment, *supra* note 43, at 828.

⁵⁸ Patrick Henry said in opposition to the pre-Bill of Rights Constitution:

In this business of legislation, your members of Congress will loose the restriction of not imposing fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law in preference to that of the common law . . . of torturing to extort a confession of crime.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 447-48 (J. Elliott ed. 1901), cited in Comment, *supra* note 43, at 828-29 n.216.

⁵⁹ The delegate stated in the Massachusetts Convention:

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.

Massachusetts Convention Debates, Jan. 30, 1788, at 111, cited in Comment, *supra* note 43, at 828 n.214.

interpretation in total and still legitimately question the authors' conclusion that such proof justifies active judicial interference with legislatively selected punishments. This is an argument discussed in some detail later in this article.

HISTORICAL CONCLUSION

To the extent that we need to know "the discoverable intentions of those who wrote and ratified"⁶⁰ the eighth amendment, we can fairly doubt the conclusion of Granucci and the student authors. The traditional view that the eighth amendment was meant to prohibit only cruel methods of punishment retains its vitality. Of course, rejection of their thesis provides only a starting point for analysis. The next section traces the evolution of the eighth amendment in the Supreme Court.

THE EIGHTH AMENDMENT IN THE SUPREME COURT

Ironically, the first appearance of the eighth amendment in the United States Supreme Court was a proportionality challenge to a sentence imposed by a state. In *Pervear v. Massachusetts*,⁶¹ the defendant had been convicted of maintaining a tenement for the sale of liquors without a license. He was sentenced to pay a fifty-dollar fine and serve three months in a house of corrections.⁶² The Supreme Court rejected Pervear's proportionality argument by holding that the eighth amendment did not apply to the states. The Court added in dicta that it perceived nothing excessive or cruel in the sentence.⁶³

The eighth amendment did not command an important opinion in the Supreme Court until the territory of Utah decided to execute a condemned prisoner by public firing squad. In *Wilkerson v. Utah*,⁶⁴ the condemned prisoner argued that shooting as a mode of execution violated the cruel and unusual punishment provision of the eighth amendment.⁶⁵ The Supreme Court adopted the traditional meaning of the eighth amendment: "[I]t is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unrec-

⁶⁰ Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 1, 5 (1978).

⁶¹ 72 U.S. (5 Wall.) 608 (1867).

⁶² *Id.* at 609-10.

⁶³ *Id.*

⁶⁴ 99 U.S. 130 (1878).

⁶⁵ While not strictly an eighth amendment case, the Territory of Utah could make no law inconsistent with the Constitution and laws of the United States.

essary cruelty, are forbidden by that amendment to the Constitution."⁶⁶ Since death by firing squad was a common mode of military execution, the Court had no difficulty in upholding it as a constitutional method of punishment.

The third eighth amendment case to reach the Supreme Court involved a New York prisoner who argued that electrocution was an impermissible method of punishment.⁶⁷ Since the Supreme Court plainly held in *Pervear* that the eighth amendment applied only to the national government, it is difficult to understand why the Court found it necessary to address the eighth amendment argument in this state case. Nevertheless, the Court did address the eighth amendment question under the rubric of the fourteenth amendment due process clause.⁶⁸

In *In re Kemmler*, the Court again adopted the traditional rationale that the eighth amendment was meant to prohibit "burning at the stake, crucifixion, breaking on the wheel, or the like."⁶⁹ The Court held that a punishment is cruel and unusual if it involves "something inhuman and barbarous."⁷⁰ Although electrocution was unusual in the sense that it was not an historical punishment, the unquestioned good motive of the New York

⁶⁶ *Id.* at 136. The "commentator referred to" was Blackstone. Granucci makes a convincing argument that the court misread Blackstone on this score. The Supreme Court correctly described Blackstone, 4 W. BLACKSTONE, *supra* note 7, at * 377:

Such is the general statement of that commentator, but he admits that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was disembowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect.

99 U.S. at 135.

While the description of the Blackstone passage is accurate, it is important to note that Blackstone never states that these punishments were improper, nor does this section cite the English Bill of Rights of 1689. Granucci argues that the American founders misinterpreted this section of Blackstone as saying that cruel and unusual punishments were prohibited by the English Bill of Rights and by adoption, the eighth amendment.

⁶⁷ *In re Kemmler*, 136 U.S. 436 (1890).

⁶⁸ *Id.* at 445-46.

⁶⁹ *Id.* at 446.

⁷⁰ *Id.* at 447.

legislature in selecting that method of execution saved it from constitutional attack.

The next important mention of the eighth amendment in the Supreme Court came in Justice Field's dissenting opinion in *O'Neil v. Vermont*.⁷¹ O'Neil was a New York liquor merchant who had been convicted of 307 distinct offenses for selling liquor illegally in the state of Vermont. He was fined \$20.00 for each offense along with \$497.96 in prosecution expenses. If O'Neil would be unable to pay the fine, he was to serve out the fine at \$3.00 a day, over 54 years at hard labor. O'Neil argued that under the commerce clause, Vermont could not constitutionally make the sale of goods by a nonresident to residents a penal offense. The Supreme Court dismissed O'Neil's application for writ of error stating that no federal question had been properly presented.

In a twenty-nine-page dissent, Justice Field argued for twenty-four pages that a federal question had been properly presented and that Vermont had no constitutional power to make O'Neil's conduct criminal. Despite O'Neil's failure to argue to the Court that his punishment violated constitutional guarantees, Justice Field also argued that the fifty-four-year sentence violated the eighth amendment. Justice Field accepted the notion that the eighth amendment was designed to prohibit "punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like."⁷² However, he asserted that the eighth amendment also outlawed "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged."⁷³ Justice Field determined that the fifty-four-year sentence was unconstitutional for the underlying offense because it was extremely severe and it was greater than the punishment Vermont exacts for burglary or highway robbery and six times greater than Vermont's punishment for manslaughter, forgery, or perjury.⁷⁴ Justice Field rejected the argument that O'Neil's sentence was justified as a cumulative sentence for many separate offences, because the sentence was "greatly beyond anything required by any humane law for the offence."⁷⁵

⁷¹ 144 U.S. 323 (1892).

⁷² *Id.* at 339 (dissenting opinion).

⁷³ *Id.* at 339-40.

⁷⁴ *Id.* at 338-39.

⁷⁵ *Id.* at 340. In a separate dissenting opinion, Justice Harlan joined by Justice Brewer also argued that the sentence violated the eighth amendment. The majority of the Court did not reach this issue because no assignment of error was made. The majority, however, observed that the eighth amendment did not apply to the states.

The first attempt to test Justice Field's *O'Neil* dissent in the Supreme Court was *Howard v. North Carolina*.⁷⁶ In *Howard*, two defendants were given ten-year sentences and one defendant was given a seven-year sentence for conspiracy to defraud. The defendants argued that the sentences were unconstitutionally severe under the eighth amendment. In rejecting the argument, Justice Brewer stated, "[t]hat for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted, does not make this sentence cruel . . ." ⁷⁷ Justice Brewer did not set guidelines for determining what would be a cruel and unusual punishment. He merely stated that in light of the circumstances of this case, ten years was not cruel.

The most important early eighth amendment case was *Weems v. United States*.⁷⁸ In *Weems*, the defendant had been convicted of falsifying a public and official document. The crime required only that the defendant intended to pervert the truth; there was no requirement that the defendant have a fraudulent intent or intend personal gain.⁷⁹ Among other things, Weems received a fifteen-year sentence in *cadena temporal* and a four-thousand-peseta fine.⁸⁰

⁷⁶ 191 U.S. 126 (1903).

⁷⁷ *Id.* at 135-36. Justice Brewer's opinion perpetuated an unstated confusion about the eighth amendment's application to the states. Justice Brewer obviously thought that the states were subject to the eighth amendment since he joined Justice Harlan's dissent in *O'Neil*. However, in *O'Neil* a majority of the Court appeared to reject this position. Justice Brewer's opinion certainly does not purport to overrule *O'Neil*, but *Howard* clearly reached an issue not appropriately addressed if the eighth amendment did not apply to the states.

⁷⁸ 217 U.S. 349 (1910).

⁷⁹ *Id.* at 363.

⁸⁰ The Court described the specifics of the sentence as including:

A. Imprisonment for 15 years during which time the prisoner shall always carry a chain at the ankle and attached to the wrists. The prisoner shall be employed at hard and painful labor and shall receive no assistance whatsoever from outside the prison.

B. Accessory penalties:

1. Civil interdiction—Defendant has no rights of parental authority, guardianship of person or property, of participation in the family council, of marital authority, of administration of property, and to dispose of personal property by act *inter vivos*.
2. Perpetual absolute disqualifications. The defendant cannot vote or hold elected office, and is disqualified from acquiring honors. He loses all retirement pay.
3. Subjection to surveillance.

The Supreme Court held that this punishment violated the Philippine Bill of Rights.⁸¹ Justice McKenna, writing for the Court, held that it had ordinarily been thought that the eighth amendment protected against "inhuman and barbarous"⁸² punishments. However, Justice McKenna added that "punishment in the State prison for a long term of years might be so disproportionate to the offence as to constitute a cruel and unusual punishment."⁸³

Justice McKenna's analysis began with the proposition that the words of the English Bill of Rights were directed against the abuses of the Stuarts,⁸⁴ but he also asserted that the American framers conceived a broader prohibition than against mere torture. Justice McKenna also alluded to a meaning for the amendment that could change over time.⁸⁵ Applying this evolving standard, the Court held Weems' sentence impermissible. The Court did not precisely indicate its rationale, but there are a number of arguments which support the Court's position.

First, the Weems sentence may have been impermissibly long. This reading of *Weems*, albeit an extreme reading, suggests that a fifteen-year sentence for falsifying a public and official document is unconstitutional. Justice McKenna supported the position that a sentence may be unconstitu-

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- (a) Civil authorities allowed to fix the person's domicile and the person is not allowed to change domicile without the written permission of the authorities.
 - (b) Person must obey the rules of inspection.
 - (c) Person must adopt some trade, art, industry or profession if he does not have means of subsistence.

Id. at 364-65.

⁸¹ The Philippine Bill of Rights was held to have the same meaning as the eighth amendment. *Id.* at 367.

⁸² *Id.* at 368.

⁸³ *Id.* McKenna quoted directly from a Massachusetts case for this proposition. *McDonald v. Commonwealth*, 173 Mass. 322, 53 N.E. 874 (1899), *aff'd*, 180 U.S. 311 (1901).

⁸⁴ 217 U.S. at 372.

⁸⁵ They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation . . . [W]e cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history . . . Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.

Id. at 372-73.

⁸⁶ *Id.* at 368.

tional because of its disproportionate length.⁸⁶ Moreover, McKenna compared the Philippine punishment for the crime of false entry with the similar federal crime of embezzlement for which the maximum sentence was two years imprisonment and a fine of twice the amount embezzled.⁸⁷

Second, the condition of imprisonment may have been so poor as to render his sentence unconstitutional. During his imprisonment, Weems served under *cadena temporal*. He had his hands and feet chained and performed hard and painful labor. Additionally, Weems was allowed no outside contact.⁸⁸

Third, the post-imprisonment effects of the sentence may render it unconstitutional. The *Weems* Court describes the disabilities long attached to the punishment:

He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve in full from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted.⁸⁹

Fourth, the *Weems* Court may have viewed the punishment as a combination of the three factors mentioned above: (1) length of sentence; (2) condition of imprisonment; and (3) post-imprisonment (accessories of) punishment. This combination theory most logically explains *Weems* because the individual factors, judged by the standards of the day, did not amount to cruel and unusual punish-

ment. In *Howard v. North Carolina*,⁹⁰ a unanimous Supreme Court rejected an eighth amendment attack on a ten-year sentence for conspiracy to defraud. It is doubtful that the additional five-year sentence for the *Weems* offense accounts for the differing decisions in *Weems* and *Howard*.

The fact that at the time of *Weems* the federal courts had long maintained a hands-off policy in prison affairs,⁹¹ militates against the argument that *Weems* was strictly a condition-of-servitude case. There is no suggestion in the Court's opinion that the conditions imposed on Weems were per se unconstitutional. The Court's analysis proceeds from the proposition that the conditions imposed on Weems were improper, not that the conditions themselves were improper.

Finally, the post-imprisonment punishments differ only in degree from disabilities imposed today for conviction of a felony and conditions imposed for discretionary parole. Inability to hold public office and loss of franchise frequently accompany convictions of a felony.

These factors demonstrate that the most reasonable reading of *Weems* is that the various factors discussed coalesced in both condition and intensity of punishment to violate the eighth amendment's prohibition against cruel and unusual punishment. It would be unfair to characterize *Weems* as merely holding that the sentence selected by the Philippine Court was disproportionate as to length. It would be equally unfair to characterize the *Weems* result in terms of the conditions of punishment. Perhaps, the uncertainty surrounding *Weems* explains why the *Weems* case never became the foundation for a developed eighth amendment proportionality doctrine.

Another possible reason for the *Weems* failure to take hold is the exceptionally powerful dissent of Justice White.⁹² In his dissent, Justice White read the majority opinion as requiring proportional punishments.⁹³ His reading is, of course, a product of the dissenter's right of exaggeration, but it none-

⁸⁷ *Id.* at 380-81.

⁸⁸ *Id.* at 366. In speaking of this condition, the Court stated:

It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor, pressed to the point of pain. *Id.*

⁸⁹ *Id.* In addition to the vivid description of the "accessory" punishment, the Supreme Court discussed whether the accessory punishment could be severed from the imprisonment so as to make the punishment constitutional. The Court held that the postimprisonment punishment could not be severed. *Id.* at 381-82. Significantly, the Court would not have had to contemplate this possibility if the prison sentence standing alone had constituted cruel and unusual punishment. This discounts the mere length of sentence explanation of *Weems*.

⁹⁰ 191 U.S. 126.

⁹¹ See *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 139 (1971) (Brennan, J., dissenting) (quoting Ruffin v. Commonwealth, 62 Va. 790, 796 (1871): "[prisoners are] slave[s] of the State"). The "hands off doctrine" is described in Fox, *The First Amendment Rights of Prisoners*, 63 J. CRIM. L.C. & P.S. 162 (1972). See also Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & C. 211 (1980).

⁹² Mr. Justice White was joined by Mr. Justice Holmes.
⁹³ 217 U.S. at 385 (dissenting opinion). Mr. Justice White stated:

theless served as a vehicle for an historical view of the meaning of the eighth amendment. According to Justice White, the primary purpose of the eighth amendment in history was to prevent barbarous methods of punishment: "It may not be doubted, and indeed is not questioned by anyone, that the cruel punishments against which the [B]ill of [R]ights provided were the atrocious, sanguinary and inhuman punishments which had been inflicted in the past upon the persons of criminals."⁹⁴

Justice White also thought that the eighth amendment prohibited courts from ordering punishments that were beyond their jurisdiction. He agreed on this point with the Granucci thesis and, in fact, both Granucci and Justice White point to the trial of Titus Oates as an explanation for this second meaning of the eighth amendment.⁹⁵

In sharp disagreement with the Granucci thesis, however, Justice White argued that proportional punishments were not required by the English Bill of Rights. For proof of this proposition, Justice White relied on the English methods of punishment from the 1600s through the American Revolution.⁹⁶ Justice White quoted Stephen on the severity of English law: "there can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system."⁹⁷ Justice White argued that the American framers were fully aware of the harsh nature of prevailing English law. Even so, they chose to adopt the wording of the English Bill of Rights prohibiting cruel and unusual punishments.⁹⁸ The dissent argues that this fact demonstrates that the American framers intended to adopt the "well understood meaning"

of the English Bill of Rights.⁹⁹ Moreover, Justice White noted that the drafters of state constitutions were aware of the sanguinary nature of the criminal law and specifically addressed the problem.¹⁰⁰

In his final argument, Justice White pointed out that the same Congress that wrote the Bill of Rights also provided the death penalty for counterfeiting.¹⁰¹ This historical exegesis led Justice White to conclude that the eighth amendment had a specific and ascertainable meaning—the prohibition of barbarous punishment—and that to limit legislative discretion to select the punishment of crime violated "the elementary rules of construction."¹⁰²

It is one of the more curious phenomena in the history of the Supreme Court that the limits and ambiguities of the *Weems* case did not become the foundations for arguments in future cases. It is unlike lawyers to fail to exploit the uncertainties of a case. But, for whatever reason, the potential of the *Weems* case never came into fruition.¹⁰³ Apparently, the Supreme Court read *Weems* as limited to its special circumstances. In *Badders v. United States*,¹⁰⁴ the Supreme Court through Justice Holmes, a dissenter in *Weems*, rejected an eighth amendment attack on a five-year sentence for fraud. In rejecting the argument, the Court failed to cite *Weems* and mentioned only *Howard v. Fleming*.¹⁰⁵ Moreover, the lower federal courts never adopted an expansive reading of *Weems*. Among the circuit courts, the Second,¹⁰⁶ Fifth,¹⁰⁷

⁹⁹ *Id.*

¹⁰⁰ *Id.* See, e.g., the New Hampshire Declaration of Rights, found in note 56, *supra*.

¹⁰¹ *Id.* at 399-400. Justice White concluded that the caselaw in the Supreme Court and in the various state jurisdictions, supports the traditional view of the meaning of the eighth amendment. Among the state and territory cases relied on by Justice White were *State v. White*, 44 Kan. 514, 25 P. 33 (1890) (upholding a five-year sentence imposed on a 16-year-old boy for statutory rape); and *Territory v. Ketchum*, 10 N.M. 718, 721, 65 P. 169 (1901) (upholding a death penalty for attempted train robbery). *Id.* at 402-07.

¹⁰² *Id.* at 410.

¹⁰³ In Note, *Disproportionality In Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1119-20 (1979), the student author suggests that the lack of a fuller development of *Weems* is not surprising because the vast majority of challenges to length of sentences do not rise to a constitutional level.

¹⁰⁴ 240 U.S. 391 (1916).

¹⁰⁵ 191 U.S. 126.

¹⁰⁶ *United States v. Rosenberg*, 195 F.2d 583, 604 (2d Cir.), cert. denied, 344 U.S. 838 (1952).

¹⁰⁷ *Ginsberg v. United States*, 96 F.2d 433, 437 (5th Cir. 1938).

I find it impossible to fix with precision the meaning which the court gives [to the eighth amendment] . . . [T]he court interprets the inhibition against cruel and unusual punishment as imposing upon Congress the duty of proportioning punishment according to the nature of the crime, and casts upon the judiciary the duty of determining whether punishments have been properly apportioned in a particular statute, and if not to decline to enforce it.

Id.

⁹⁴ *Id.* at 390.

⁹⁵ *Id.* Justice White also believed that permissible corporal punishments could not legally be applied in an excessive manner.

⁹⁶ *Id.* at 393.

⁹⁷ *Id.* (quoting J. STEPHEN, *supra* note 41, at 470-71).

⁹⁸ *Id.* at 394-95.

Seventh,¹⁰⁸ Eighth,¹⁰⁹ and Tenth,¹¹⁰ all flatly rejected any power to review the length of a legislatively selected prison sentence.

Following the hostile reception *Weems* received in the lower federal courts, the eighth amendment did not make a significant reappearance in the Supreme Court until the State of Louisiana's traveling electric chair malfunctioned in an attempt to execute the convicted murderer, Willie Francis. In *Louisiana ex rel. Francis v. Resweber*,¹¹¹ Francis argued that Louisiana's second attempt to electrocute him violated the eighth amendment. The Supreme Court rejected Francis' argument because Louisiana did not have as its "purpose to inflict unnecessary pain."¹¹²

Eleven years later, in 1958, the eighth amendment made another unusual appearance in the Supreme Court. As punishment for wartime desertion, Congress provided for forfeiture of citizenship. In *Trop v. Dulles*,¹¹³ a four-member plurality of the Court struck down this penalty because "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."¹¹⁴ Moreover, the Court held that the selected punishment violated "the evolving standards of decency"¹¹⁵ implicit in the eighth amendment. In addition, by negative implication the *Trop* Court recognized the disproportionality principle: "Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime."¹¹⁶

In *Robinson v. California*,¹¹⁷ another nontraditional challenge arose under the eighth amendment. California had made it a crime to "be addicted to the use of narcotics."¹¹⁸ The Supreme Court held that as a matter of substantive criminal law, under the eighth amendment, a state may not punish the "status" of narcotic addiction.

Robinson was read as creating a potential revolu-

tion in substantive criminal law.¹¹⁹ Stretched to the limit, *Robinson* could be read as interdicting criminal punishments for any crime caused by illness or any criminal behavior caused by an uncontrolled impulse. Fortunately, in *Powell v. Texas*,¹²⁰ the Supreme Court ended speculation about an expansive meaning of *Robinson* and upheld a conviction for public intoxication and distinguished between that offense and the status of chronic alcoholism.¹²¹

While the Supreme Court seemed enamored with exotic eighth amendment claims for many years, three Justices returned to traditional issues in their dissent to the Court's denial of certiorari in *Rudolph v. Alabama*.¹²² In *Rudolph*, the defendant had been sentenced to death for rape and the Supreme Court denied certiorari. Justice Goldberg joined by Justices Douglas and Brennan dissented, arguing that the Court should "consider whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who had neither taken nor endangered a human life."¹²³

Justice Goldberg posed three questions he thought relevant under the eighth amendment.¹²⁴ First, he asked if the death penalty for rape violated the *Trop v. Dulles* "evolving standards of decency."¹²⁵ He pointed to the fact that few civilized nations currently punished rape with the death penalty.¹²⁶ Second, Justice Goldberg argued that the Court should determine if the death penalty was disproportionate to the crime of rape.¹²⁷ Finally, he suggested that the Court should ascertain if permissible societal interests could adequately be served by a penalty less severe than death.¹²⁸

The importance of this dissent is not limited to just death penalty litigation. The dissent is also important because three Justices of the Supreme Court were making certain operating assumptions about eighth amendment analysis which were by no means settled law. First, the *Trop v. Dulles* test,

¹⁰⁸ *United States v. Sorcey*, 151 F.2d 899, 902-03 (7th Cir. 1945), cert. denied, 327 U.S. 794 (1946).

¹⁰⁹ *Gurera v. United States*, 40 F.2d 338, 341 (8th Cir. 1930).

¹¹⁰ *Edwards v. United States*, 206 F.2d 855, 857 (10th Cir. 1953).

¹¹¹ 329 U.S. 459 (1947).

¹¹² *Id.* at 464.

¹¹³ 356 U.S. 86 (1958).

¹¹⁴ *Id.* at 102.

¹¹⁵ *Id.* at 101.

¹¹⁶ *Id.* at 99.

¹¹⁷ 370 U.S. 660 (1962).

¹¹⁸ CAL. HEALTH & SAFETY CODE § 11721 (West 1962).

¹¹⁹ See Note, *Cruel and Unusual Punishment*, *supra* note 6.

¹²⁰ 392 U.S. 514 (1968).

¹²¹ *Robinson* also held the eighth amendment enforceable against the states through the fourteenth amendment. 370 U.S. 660.

¹²² 375 U.S. 889 (1963) (denying cert.). See also Packer, *Making The Punishment Fit The Crime*, 77 HARV. L. REV. 1071 (1964).

¹²³ 375 U.S. 889.

¹²⁴ *Id.*

¹²⁵ *Id.* at 889-90.

¹²⁶ *Id.* at n.1.

¹²⁷ *Id.* at 891.

¹²⁸ *Id.*

subscribed to by four Justices, arose in a context far different than the one in *Rudolph*. Justice Goldberg's apparent willingness to test "evolving standards of decency" through the vehicle of a United Nations survey was not an unassailable doctrinal device. Second, Justice Goldberg read *Weems v. United States* as unambiguously adopting proportionality analysis, despite the confusion in the opinion itself and in the lower courts.¹²⁹ Finally, Justice Goldberg listed the permissible aims of punishment as deterrence, isolation, and rehabilitation. At the time of his writing, Justice Goldberg could point to no case holding that retribution was an impermissible goal of punishment.¹³⁰

The mounting public concern about the propriety of the death penalty in America resulted in numerous challenges to that penalty. The original challenges were grounded in procedural due process. For example, "death qualified" juries were challenged in *Witherspoon v. Illinois*¹³¹ and unguided sentencing discretion was challenged in *McGuatha v. California*.¹³² Inevitably, the challenge came under the rubric of the eighth amendment and after 1971 the proportionality principle was frequently developed within these cases.

In *Furman v. Georgia*,¹³³ the Supreme Court granted certiorari to determine if "the imposition and carrying out of the death penalty...constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"¹³⁴ In a *per curiam* opinion the Court answered this question in the affirmative without a statement of reasons. Each Justice, however, filed a separate opinion making it impossible to ascribe a single rationale for the Court's action.

In *Furman* and its two companion cases, *Jackson v. Georgia*¹³⁵ and *Branch v. Texas*,¹³⁶ each petitioner was a black sentenced to death. Petitioners Jackson and Branch had been convicted of rape and made a proportionality argument. Nonetheless, the Court focused on the constitutionality of the death pen-

alty under the eighth amendment generally. Consequently, this article describes the various opinions only to the extent that they advance eighth amendment theory or proportionality analysis.

Justice Douglas' concurring opinion suggested that since the death penalty was disproportionately applied to minorities and members of unpopular groups, the penalty violated "theme[s] of equal protection...implied in 'cruel and unusual' punishments."¹³⁷ According to this theory the death penalty is unconstitutional if it is administered arbitrarily or discriminatorily. Under the Douglas test a statistical imbalance would establish the impropriety of the penalty.¹³⁸

Justice Brennan's concurring opinion urged the Court to adopt a "less drastic means" test: "[A]lthough the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment."¹³⁹

In his concurrence, Justice Stewart found it unnecessary to consider whether the death penalty is per se unconstitutional. Instead, Justice Stewart determined that the death penalty as currently imposed was wantonly and freakishly applied and therefore violated the eighth amendment.¹⁴⁰

Similarly, Justice White believed the death penalty so infrequently imposed and the threat of execution too attenuated to constitutionally serve the criminal justice system.¹⁴¹

Justice Marshall wrote the final concurring opinion in *Furman*. He concluded that the death penalty was per se unconstitutional because it no longer comported with the moral choice of the American people.¹⁴²

¹³⁷ *Id.* at 249 (Douglas, J., concurring).

¹³⁸ Justice Douglas admitted that there was no intentional discrimination or improper motivation in the cases before him: "We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties." *Id.* at 253. Justice Douglas' test is flatly at odds with a later Supreme Court reading of the equal protection clause in *Washington v. Davis*, 423 U.S. 820 (1976). The Fifth Circuit has read the *Washington v. Davis* standards to apply to death penalty litigation. See *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

¹³⁹ 408 U.S. at 280 (Brennan, J., concurring). Mr. Justice Marshall suggested a similar test. *Id.* at 331 (Marshall, J., concurring).

¹⁴⁰ *Id.* at 310 (Stewart, J., concurring).

¹⁴¹ *Id.* at 311 (White, J., concurring).

¹⁴² *Id.* at 363 (Marshall, J., concurring). Compare Ely,

¹²⁹ *Id.* at n.4.

¹³⁰ The case that gives Justice Goldberg his strongest argument is *Williams v. New York*, 337 U.S. 241, 248 (1949): "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

¹³¹ 391 U.S. 510 (1968).

¹³² 402 U.S. 183 (1971).

¹³³ 408 U.S. 238 (1972).

¹³⁴ *Id.* at 239.

¹³⁵ *Id.* at 238.

¹³⁶ *Id.*

Four Justices dissented in *Furman*. The dissents of Justice Powell and Chief Justice Burger are relevant to the proportionality question. Justice Powell recognized a proportionality element in the eighth amendment and discussed the concept in the two death-for-rape cases pressed before the Court.¹⁴³

He described the *Weems* case in terms consistent with those argued here: "Finding the sentence grossly excessive in length and condition of imprisonment, the Court struck it down."¹⁴⁴ However, Justice Powell argued that the power to declare a legislatively selected punishment should be exercised in only extreme cases.¹⁴⁵

Consistent with this view, Justice Powell argued that the death penalty for rape was not per se disproportionate under the eighth amendment. Instead, he advocated a case-by-case adjudication to discern those penalties "factually falling outside the likely legislative intent"¹⁴⁶ but nonetheless technically appropriate. In reaching this position Justice Powell discussed *Ralph v. Warden*,¹⁴⁷ in which the Fourth Circuit declared the death penalty unconstitutional for rape where life is not endangered. A separate opinion by Chief Judge Haynsworth in *Ralph* argued that the death penalty for rape was constitutional only when the victim suffered "a grievous physical or psychological harm."¹⁴⁸ Justice Powell rejected the tests advanced by the Fourth Circuit and Chief Judge Haynsworth because "the threat of serious injury is implicit in the definition

of rape"¹⁴⁹ and the Haynsworth standard is "impossible to gauge."¹⁵⁰ Nevertheless, Justice Powell viewed these attempts at categorization as "groping toward"¹⁵¹ appropriate application of the eighth amendment proportionality concept.

Chief Justice Burger's dissent took issue with the test advanced by Justice Brennan that a punishment violates the eighth amendment if a less drastic punishment can satisfy the legislative purpose.¹⁵² The Chief Justice argued that it is empirically impossible¹⁵³ to prove this proposition. In addition, he stated that putting the burden of justifying a punishment on the state could result in destruction of the corrections system because no proof could show that the legislatively selected punishment is "a more effective deterrent"¹⁵⁴ than all other punishments.

One commentator has aptly described *Furman* as a remand to the states.¹⁵⁵ The reaction was decisive. Within four years of *Furman*, thirty-five states and the United States Congress passed laws providing for the death penalty.¹⁵⁶ This reaction undermined the "standards of decency" argument posited by Justices Marshall and Brennan.

In *Gregg v. Georgia*,¹⁵⁷ seven Justices approved the death penalty against an eighth amendment attack.¹⁵⁸ The plurality opinion for the Court recognized the proportionality principle, but it clearly held that the death penalty for murder was not

¹⁴⁹ 408 U.S. at 460 (Powell, J., dissenting).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 460-61.

¹⁵² 408 U.S. at 375 (Burger, C.J., dissenting).

¹⁵³ *Id.* at 395-96.

¹⁵⁴ *Id.* at 396. In *People v. Broadie*, 37 N.Y.2d 100, 128, 371 N.Y.S.2d 471, 491, 332 N.E.2d 338, 353, *cert. denied*, 423 U.S. 950 (1975), the New York Court of Appeals misread this section as having the Chief Justice "flatly reject[ing] disproportionality analysis," not just the "less drastic means" test as an aspect of the analysis. Moreover, in his dissent in *Coker v. Georgia*, 433 U.S. 584, 604 (1977), the Chief Justice stated, "I accept that the Eighth Amendment's concept of disproportionality bars the death penalty for minor crimes."

¹⁵⁵ Alschuler, *Burger's Failure: Trying Too Much to Lead*, Nat. L.J., Feb. 18, 1980, at 27 n.4.

¹⁵⁶ The reaction is catalogued in *Gregg v. Georgia*, 428 U.S. 153, 179-80 n.23 (1976).

¹⁵⁷ *Id.*

¹⁵⁸ The Justices did so through four separate opinions. The opinion of the Court was written by Justice Stewart and joined by Justices Powell and Stevens. Justice White authored a concurring opinion joined by Chief Justice Burger and Justice Rehnquist. Chief Justice Burger also wrote a concurring opinion joined by Justices White and Rehnquist. Justice Blackmun filed a separate concurring opinion.

supra note 60, at 51. ("Lenin used to claim this godlike gift of divination of the people's 'real interests'").

¹⁴³ 408 U.S. at 414 (Powell, J., dissenting).

¹⁴⁴ *Id.* at 457.

¹⁴⁵ *Id.* at 458.

These cases, while providing a rationale for gauging the constitutionality of capital sentences imposed for rape, also indicate the existence of necessary limitations on the judicial function. The use of limiting adjectives in the various expressions of this test found in the opinions *grossly excessive*, *greatly disproportionate* emphasizes that the court's power to strike down punishments as excessive must be exercised with the greatest circumspection . . . This Court is not empowered to sit as a court of sentencing review, implementing the personal views of its members on the proper role of penology. To do so is to usurp a function committed to the Legislative Branch and beyond the power and competency of this Court.

Id. (emphasis in original).

¹⁴⁶ *Id.* at 457-58.

¹⁴⁷ 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972). *Ralph* is discussed *infra* in the text accompanying notes 308-10.

¹⁴⁸ *Id.* at 794.

disproportionate: "[W]e cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."¹⁵⁹

Along with the Georgia statute in *Gregg*, the Supreme Court examined four other death penalty statutes in *Woodson v. North Carolina*,¹⁶⁰ *Roberts v. Louisiana*,¹⁶¹ *Proffitt v. Florida*,¹⁶² and *Jurek v. Texas*.¹⁶³ Generally stated, mandatory death penalties were declared unconstitutional and statutes that gave juries guidance were found constitutionally permissible. Thereafter, in *Lockett v. Ohio*,¹⁶⁴ a plurality of the Court found the Ohio death penalty statute unconstitutional because it did not allow the sentencing authority full discretion in determining whether the defendant should be executed.¹⁶⁵

¹⁵⁹ 428 U.S. at 187 & n.35.

¹⁶⁰ 428 U.S. 280 (1976).

¹⁶¹ 428 U.S. 325 (1976).

¹⁶² 428 U.S. 242 (1976).

¹⁶³ 428 U.S. 262 (1976).

¹⁶⁴ 438 U.S. 586 (1978).

¹⁶⁵ The *McGautha* to *Furman* to *Griggs* to *Lockett* development has aptly been described as a U-turn. See J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 174 (1980). The apparent contradictions in this result are explained by the voting behavior of Justices White and Stewart. See Alschuler, *supra* note 155, at 27 n.4. Very roughly stated, we may now say that the law of the death penalty is presently a rejection of *McGautha*.

In the last Term the Supreme Court decided three death penalty cases. Two of these cases are relatively unimportant. In *Beck v. Alabama*, 100 S. Ct. 2382 (1980), the Supreme Court held that Alabama could not constitutionally prohibit a jury from considering possible guilt to a lesser included offense raised by the evidence. Since Alabama juries were charged that they must either return a guilty verdict to the capital offense charged or set the defendant completely free, the similarity of Alabama procedure with the mandatory death penalties disapproved in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976), is striking. In *Adams v. Texas*, 100 S. Ct. 2521 (1980), the Court applied *Witherspoon v. Illinois*, 391 U.S. 510 (1968), to a Texas statute that excluded jurors because they were unable to take an oath that the mandatory penalty of death or life imprisonment would not "affect [their] deliberations on any issue of fact."

The important eighth amendment case in the Court involving the death penalty during the last term is *Godfrey v. Georgia*, 100 S. Ct. 1759 (1980). In *Godfrey*, a plurality opinion held that the Georgia Supreme Court adopted an overly broad and vague definition of the Georgia capital murder statute that makes "outrageous or wantonly vile, horrible or inhuman" murder punishable by death by affirming a death sentence imposed on a defendant who deliberately and methodically murdered his wife and mother-in-law with a shot gun. *Godfrey* raises the distressing spectre that the Supreme Court might individually determine the facts in every death penalty case. Also in that case, the Court refused an opportunity

Following the death penalty cases, the eighth amendment appeared in the Supreme Court in a more mundane posture. In *Ingraham v. Wright*,¹⁶⁶ a class of Florida students alleged that corporal punishment in state supported schools deprived them of their eighth amendment rights. Since it had become accepted that corporal punishment in prisons¹⁶⁷ violated the eighth amendment, it would seem a small step to outlaw corporal punishment in schools. The Supreme Court rejected the analogy, holding that the eighth amendment protected only those convicted of a crime.¹⁶⁸ *Ingraham* is also important for proportionality purposes because it is the first opinion with a clear majority of Justices¹⁶⁹ to unambiguously recognize a proportionality element under the eighth amendment.¹⁷⁰

Another important eighth amendment case in the Supreme Court involved the long-standing objection to the death penalty for rape. In *Coker v. Georgia*,¹⁷¹ a prisoner serving a life sentence for two rapes, kidnapping, aggravated assault, and murder escaped from confinement and raped a third woman. The prisoner was convicted of the third rape and sentenced to death under a Georgia statute that allowed the death penalty for rape under three specific aggravating circumstances:

- (1) that the rape was committed by a person with a prior record of conviction for a capital felony;

to find the death penalty a disproportionate punishment for a domestic slaying occurring under emotionally charged circumstances and ruled instead that the Georgia Statute was unconstitutionally vague. See generally Note, *Eighth Amendment—The Death Penalty*, 71 J. CRIM. L. & C. 538 (1980).

¹⁶⁶ 430 U.S. 651 (1977).

¹⁶⁷ See, e.g., *Jackson v. Bishop*, 404 F.2d 571, 580-81 (8th Cir. 1968).

¹⁶⁸ 430 U.S. at 664.

¹⁶⁹ Justice Powell, joined by Justices Stewart, Blackmun, Rehnquist, and Chief Justice Burger. A dissent written by Justice White and joined by Justices Brennan, Marshall, and Stevens took issue with the Court's central proposition—that the eighth amendment applies only to the criminal process.

¹⁷⁰ 430 U.S. at 667.

These decisions recognize that the cruel and unusual punishments clause circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes . . . ; second, it proscribes punishment grossly disproportionate to the severity of the crime, e.g., *Weems v. United States* . . . ; and third it imposes substantive limits on what can be made criminal and punished as such.

¹⁷¹ 433 U.S. 584. See also Note, *Coker v. Georgia: Disproportionate Punishment and the Death Penalty for Rape*, 78 COLUM. L. REV. 1714 (1978).

- (2) that the rape was committed while the offender was engaged in the commission of another capital felony, or aggravated battery; or
- (3) that the rape was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery of the victim.¹⁷²

In *Coker* the jury found the first two aggravating circumstances: that Coker had committed the rape after having been convicted of a capital felony, and that he had committed the rape in the course of another capital felony—armed robbery. The third possible aggravating circumstance, torture to the victim, was not charged because the Coker rape did not involve physical torture other than the agony of the rape itself.

When considering the question before the Court, the *Coker* plurality¹⁷³ refused to view Coker's crime as "rape plus." First, the plurality held that Coker's other convictions "do not change the fact that the instant crime being punished is a rape not involving the taking of a life."¹⁷⁴ Second, the Court discounted the second aggravating circumstance—rape accompanied by armed robbery—because the jury returned only a life sentence for the separate armed robbery offense.¹⁷⁵ Finally, the plurality stated that any uncharged aggravating circumstance also would fail to change the character of the rape because "it would seem that the defendant could very likely be convicted, tried, and appropriately punished for this additional conduct."¹⁷⁶

¹⁷² 433 U.S. at 598-99.

¹⁷³ Justice White authored the Court's opinion, joined by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall filed separate concurring opinions on per se grounds. Justice Powell filed a concurring and dissenting opinion. Chief Justice Burger, joined by Justice Rehnquist, filed a dissenting opinion.

¹⁷⁴ 433 U.S. at 599.

¹⁷⁵ *Id.* Coker was also tried for armed robbery. The aggravating circumstance of that felony was Coker's prior capital conviction. The jury returned a life sentence on the armed robbery count. Apparently the Court did not consider whether or not a jury could logically find that rape with a past conviction for murder was more serious than armed robbery with a prior conviction for murder.

Perhaps a more logical explanation for the Court's action is alluded to in a footnote. In *Gregg v. Georgia*, 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd*, 428 U.S. 153 (1976), the Supreme Court of Georgia refused to sustain a death sentence for armed robbery, apparently because it was excessive. Since the second aggravating circumstance in *Coker* was the capital offense of armed robbery, it is odd that armed robbery, while not a permissible capital offense, is a permissible aggravating circumstance under a death penalty law that requires rape plus another capital felony. See *Coker v. Georgia*, 433 U.S. at 599 n.15.

¹⁷⁶ 433 U.S. at 599-600 n.16.

Since the plurality of the Court was not willing to consider that the Coker rape affected societal interests different from a mere physical rape, the Supreme Court addressed the question of whether the death penalty for rape is per se unconstitutionally disproportionate under the eighth amendment.¹⁷⁷

Writing for the plurality, Justice White stated that according to *Gregg v. Georgia*, a punishment is excessively cruel under the eighth amendment if the punishment "is grossly out of proportion to the severity of the crime."¹⁷⁸ In deciding *Coker*, Justice White examined the incidence of the death penalty in jurisdictions throughout the United States to determine if the punishment was grossly disproportional. According to the opinion, in 1925 eighteen states, the District of Columbia, and the federal government authorized the death penalty for rape.¹⁷⁹ Just prior to the decision in *Furman v. Georgia*, the number of jurisdictions had declined to sixteen states and the federal government.¹⁸⁰ After *Furman* invalidated all the existing death penalty statutes, thirty-five states and the federal government re-enacted the death penalty for certain offenses. However, out of the thirty-six jurisdictions responding to *Furman*, only three included rape of an adult woman as a capital felony—Georgia, North Carolina, and Louisiana.¹⁸¹ After the entire death penalty apparatus of North Carolina and Louisiana was declared unconstitutional in *Woodson v. North Carolina* and *Robert v. Louisiana*, the legislatures of those states enacted death penalty statutes for crimes other than rape.¹⁸² After completing his survey, Justice White concluded that "Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman."¹⁸³ Since the legislative response to *Furman* was a "marked indication of society's endorsement of the death penalty for murder,"¹⁸⁴ Justice White concluded that the legislative failure to include

¹⁷⁷ In terms of the order of the actual opinion, Justice White addressed the death-for-rape question first and then added that the additional circumstance did not make a difference. I have reversed the order for discussion because it appears to be analytically more sound to address the individual circumstance before addressing the broad question.

¹⁷⁸ 433 U.S. at 592.

¹⁷⁹ *Id.* at 593.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 594.

¹⁸² *Id.*

¹⁸³ *Id.* at 595-96.

¹⁸⁴ *Id.* at 594 (quoting *Gregg v. Georgia*, 428 U.S. at 179-80).

death for rape was probative in determining that death is an inappropriate penalty for rape.¹⁸⁵

In addition to comparing the jurisdictional response to *Furman*, Justice White canvassed the willingness of Georgian juries to impose the death penalty for a rape.¹⁸⁶ According to the plurality opinion, Georgia juries returned the death sentence in only six of the sixty-three rape cases reviewed by the Georgia Supreme Court.¹⁸⁷

Justice White viewed this fact as evidence that juries, and therefore the community judgment, viewed the death penalty as disproportionate for rape. Finally, Justice White argued that the Court's "own judgment" determined that the death penalty was disproportionate for a rape conviction.¹⁸⁸

Justice Powell wrote a separate opinion in which he concurred in part and dissented in part.¹⁸⁹ Justice Powell agreed with the plurality opinion that the eighth amendment prohibited Coker's execution for the two aggravating circumstances present in the case, (1) rape committed by someone with a prior capital conviction, and (2) rape committed while the offender was engaged in another capital felony. Justice Powell disagreed, however, with the Court's conclusion that the death penalty could never be imposed for the third category—aggravated or physically abusive rape. Justice Powell argued that an "outrageous rape resulting in serious, lasting harm to the victim"¹⁹⁰ could be constitutionally punished by death. Justice Powell examined the character of the offense, but not the character of the offender.

Chief Justice Burger, in a dissent joined by Justice Rehnquist, took issue with the plurality's decision to limit consideration of Coker's death sentence to the rape charge rather than considering rape plus aggravating circumstances.¹⁹¹ The Chief Justice pointed to various recidivist statutes as examples of enhanced punishment not directed against the seriousness of an isolated offense but directed against a "well-documented propensity for life endangering behavior."¹⁹² To the Chief Justice the appropriate question was not whether

the state could execute an offender for a first-time rape but¹⁹³

Does the Eighth Amendment's ban against cruel and unusual punishment prohibit the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable life time, and who has not hesitated to escape confinement at the first available opportunity?

Next, the Chief Justice took issue with the reasoning used by the plurality in determining that Georgia was the only American jurisdiction to punish the rape of an adult woman with death.¹⁹⁴ The Chief Justice argued that the pre-*Furman* catalogue of states was a more accurate indicator of societal attitudes toward the appropriate punishment for rape than the frenzied post-*Furman* activity.¹⁹⁵ Since at least two Justices in *Furman* expressed the opinion that mandatory penalties were constitutionally appropriate, many legislatures believed their alternatives to be abolishing the death penalty for rape or making it mandatory. Given this choice, and the probable fact that most legislators would not favor a mandatory death penalty for all rapes, the reaction seems predictable.

Finally, the Chief Justice challenged the plurality's judgment that the death penalty is disproportionate to the crime of rape.¹⁹⁶ He argued that rape is, short of homicide, the ultimate violation of self¹⁹⁷ and that there is no eighth amendment requirement that a penalty be directly proportionate to the crime. Therefore, the Chief Justice concluded that a legislature might logically select a penalty one step "more severe than the criminal act it punishes."¹⁹⁸

HABITUAL CRIMINAL STATUTES IN THE UNITED STATES SUPREME COURT

When England had over one hundred capital offenses, recidivism was not a pressing concern

¹⁸⁵ *Id.* at 596.

¹⁸⁶ *Id.* at 596-97.

¹⁸⁷ *Id.* There is no mention of the total number of rape cases tried in the lower courts and not appealed to the Supreme Court of Georgia, nor of the number of guilty pleas tendered and thus without appeal.

¹⁸⁸ *Id.* at 597.

¹⁸⁹ *Id.* at 601.

¹⁹⁰ *Id.* at 604.

¹⁹¹ *Id.*

¹⁹² *Id.* at 610 (quoting *Gregg v. Georgia*, 428 U.S. at 183 n.28).

¹⁹³ *Id.* at 607.

¹⁹⁴ *Id.* at 614.

¹⁹⁵ Justice White's use of jury verdicts also constitutes an inappropriate indicator of sentiment regarding the capital punishment. He noted that only six out of 63 juries provided for the death penalty for rape in Georgia. Justice White takes this to mean that juries oppose the death penalty for mere rape. While this is an accurate inference, he overlooks an equally accurate inference that juries do not find the death penalty excessive for aggravated rape. 433 U.S. 596-97.

¹⁹⁶ *Id.* at 619.

¹⁹⁷ *Id.* at 620.

¹⁹⁸ *Id.* at 619.

because a single conviction frequently terminated the offender's opportunities to commit crime. The concept of habitual offender statutes in America, however, is quite old. New York, for example, has had an habitual offender statute since 1796.¹⁹⁹ Today, the vast majority of American jurisdictions have some sort of enhanced punishment provision for repeat offenders. These statutes often have been criticized by legal commentators as too harsh, too broad, or as failing in their essential purpose.²⁰⁰ However, as this section demonstrates, the habitual offender laws have been generously received by the Supreme Court. The numerous attacks on these statutes include (1) due process, (2) equal protection, (3) cruel and unusual punishment, (4) the procedure used in the enhancement of punishment, and (5) the use of these statutes in plea bargaining. Each attempt at the habitual offender statute has failed in the Supreme Court.

The first appearance of an habitual offender statute in the Supreme Court was in *Moore v. Missouri*.²⁰¹ In *Moore*, the defendant had been convicted of grand larceny in 1887 and served a three-year sentence. After being released from the Missouri penitentiary, Moore was convicted of burglary in the second degree and sentenced to life imprisonment under the Missouri habitual criminal statute. Moore argued that the statute violated the constitutional provisions that prohibit double jeopardy and cruel and unusual punishments and guarantee equal protection of the laws.²⁰² The *Moore* Court clearly thought that the double jeopardy argument was the most substantial one. The Court determined that the punishment did not result in a second punishment for the first offense but resulted from an enhancement or aggravation of the punishment for the second offense.²⁰³ Along with this holding the Court merely said that "the increase of his punishment by reason of the commission of the first offense was not cruel and unusual."²⁰⁴

The above half-sentence addressing the cruel and unusual punishment argument can be read as stating that enhancement for a second offense does not violate the eighth amendment. The sentence need not be read as approving a life sentence under the habitual offender law against a disproportion-

ality attack. Despite this potential ambiguity, the Court continued to give the cruel and unusual punishment argument short shrift in the next two attacks on habitual criminal statutes. In *McDonald v. Massachusetts*,²⁰⁵ the defendant had been convicted under a Massachusetts habitual criminal statute which mandated a twenty-five-year sentence upon certain third convictions.²⁰⁶ The defendant's two prior convictions had been for perjury and obtaining property by false pretenses; the third conviction was a four-count conviction for forging and uttering money orders. The Supreme Court summarily rejected McDonald's constitutional arguments including one based on the eighth amendment.²⁰⁷

The procedure used by the State of West Vir-

²⁰⁵ 180 U.S. 311.

²⁰⁶ The first two convictions had to have resulted in a prison term of at least three years, and no pardon could have been given for either of these two prior convictions. 180 U.S. at 311.

²⁰⁷ *Id.* at 313. While the Supreme Court's summary treatment of the eighth amendment issues in *Moore* and *McDonald* might logically leave open the possibility that the Court had approved only the enhancement of a penalty under the eighth amendment and not the specific degree of enhancement, the Supreme Judicial Court's treatment of McDonald's argument allows no such room for misinterpretation:

The fifth assignment is to the effect that the punishment provided by the statute is cruel and unusual punishment, and is contrary to article 5 of the amendments to the constitution of the United States, and to article 26 of the declaration of rights. . . . Ordinarily, the terms "cruel and unusual" imply something inhuman and barbarous in the nature of the punishment. *In re Kemmler, supra*. But it is possible that imprisonment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment. However, that may be, it cannot be held, we think, that the punishment is "cruel and unusual," where the statute provides, as it does here [statute described]. The penalty was determined, no doubt, by the view that in such a case the criminal habit has become so fixed and the hope of reformation is so slight that the safety of society requires and justifies a long-continued imprisonment of the offender. The statute provides, however, that if it appears to the governor and council at any time that the convict has reformed, they may release him conditionally for the residue of the term.

173 Mass. at 328-29, 53 N.E. at 875. This state court opinion is important for two reasons: First, it was the first state court decision to unambiguously admit that a sentence can be disproportionate under the eighth amendment merely because of length; and second, for purposes of the court's analysis, the court was willing to mitigate the harshness of the statute by the possibility of discretionary release.

¹⁹⁹ See Note, *Don't Steal a Turkey in Arkansas—The Second Felony Offender in New York*, 45 *FORDHAM L. REV.* 76 (1976).

²⁰⁰ See, e.g., Katkin, *Habitual Offender Laws: A Reconsideration*, 21 *BUFFALO L. REV.* 99 (1971).

²⁰¹ 159 U.S. 673 (1895).

²⁰² *Id.* at 675-76.

²⁰³ *Id.* at 677.

²⁰⁴ *Id.*

ginia to enhance punishment under its habitual criminal statute was the primary issue in *Graham v. West Virginia*.²⁰⁸ In *Graham*, the defendant had been convicted of grand larceny and sentenced to five years imprisonment. While in prison, the prosecuting attorney brought an information against Graham alleging that he had been convicted of two prior felonies: grand larceny and burglary. In a separate proceeding, Graham's punishment was enhanced to life imprisonment. The Supreme Court upheld this separate enhancement procedure against constitutional attacks. For the third time the Supreme Court summarily rejected an eighth amendment argument.

The West Virginia habitual criminal act made its second appearance in the Supreme Court in *Oyler v. Boles*.²⁰⁹ The essential argument in *Oyler* was that the prosecuting authorities, by selective use of the enhancement statute, were denying the petitioners equal protection of the law. The petitioners could show statistically that not all defendants liable for the enhanced punishment were charged with a recidivist count.²¹⁰ The Supreme Court held that selective enforcement of the statute did not deny equal protection so long as the selection was not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."²¹¹

In 1967 the Texas recidivist procedure came before the Supreme Court in *Spencer v. Texas*.²¹² For years Texas juries knew that the defendant had prior convictions before the jury determined the defendant's innocence or guilt.²¹³ This procedure was narrowly upheld by the Court, but in the course of the opinion the Court gave this extraordinary broad approval to habitual criminal statutes:

No claim is made here that recidivist statutes are themselves unconstitutional, nor could there be under our cases. Such statutes and other enhanced-sentence laws, and procedures designed to imple-

²⁰⁸ 224 U.S. 616 (1912).

²⁰⁹ 368 U.S. 448 (1962).

²¹⁰ *Id.* at 455. The opinion does not give the precise statistic. It states: "The statistics merely show that according to penitentiary records a high percentage of those subject to the law have not been proceeded against." *Id.* at 456.

²¹¹ *Id.* at 456. Four Justices, Warren, Douglas, Black, and Brennan, dissented on an unrelated point concerning the notice given a defendant under the habitual offender proceeding. *Id.* at 460.

²¹² 385 U.S. 554 (1967).

²¹³ *Id.* at 556. The procedure has since changed. *Id.* at 556-57 n.2.

ment their underlying policies, have been enacted in all the States, and by the Federal Government as well. . . . Such statutes, though not in the precise procedural circumstances here involved, have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities.²¹⁴

A recent Supreme Court consideration of habitual criminal statutes involved the use of these statutes in plea bargaining. In *Bordenkircher v. Hayes*,²¹⁵ the defendant was indicted on a charge of uttering a forged instrument. During plea bargaining the defendant was offered a five-year prison term out of a possible ten years, if he would plead guilty to the charge. The prosecutor also told the defendant either to accept this plea offer or the prosecutor would return to the grand jury and seek an indictment under the Kentucky habitual criminal act. The defendant refused the offer and the prosecutor obtained the habitual criminal indictment. After conviction on the substantive count and a finding that the defendant had been convicted twice before, he received a mandatory life sentence. The Supreme Court approved this use of the habitual criminal statute to induce plea bargaining, calling the prosecutor's behavior merely the "unpleasant alternative of forgoing trial or facing charges on which he was plainly subject to prosecution."²¹⁶

Four Justices dissented in *Bordenkircher*. Three Justices characterized the prosecutor's action as impermissibly "vindictive."²¹⁷ Justice Powell characterized the plea bargain offer as less than "generous"²¹⁸ and thought it relevant to ask "whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place."²¹⁹ Apparently, Justice Powell, in some circumstances, is willing to weigh the reasonableness of the prosecutor's exercise of discretion to seek a habitual criminal indictment, despite the holding of *Oyler v. Boles*. Because Justice Powell viewed this particular use of the habitual criminal act as unreasonable, he concluded that the prosecutor could only have meant "to deter the exercise of constitutional rights."²²⁰ Although not explicit in the

²¹⁴ *Id.* at 559-60 (citations omitted).

²¹⁵ 434 U.S. 357 (1978).

²¹⁶ *Id.* at 365.

²¹⁷ *Id.* (Blackmun, J., dissenting).

²¹⁸ *Id.* at 369 (Powell, J., dissenting).

²¹⁹ *Id.* at 370.

²²⁰ *Id.* at 373.

opinion, one can infer that Justice Powell thought the application of the habitual criminal act disproportionate.

The habitual criminal cases make clear that in this area, unlike the death penalty, the Supreme Court has shown no special solicitude for the eighth amendment argument.

THE DISPROPORTIONALITY ARGUMENT IN THE LOWER COURTS

The disproportionality argument has been made in almost every American jurisdiction and has been met with near universal hostility. Only a few exceptional cases have interdicted prison sentences as impermissibly long under the eighth amendment, and a few cases have interfered with prison sentences under a theory akin to the disproportionality argument.

This section examines several early cases often called the first disproportionality cases. It will demonstrate that factors other than the proportionality argument influenced these cases. Next, it examines the handful of states that have accepted the proportionality argument and have actually found a prison term excessively long under the eighth amendment. The state experience under the disproportionality theory will then be examined. Finally, it analyzes contemporary developments in the federal courts under the proportionality argument.

EARLY CASES

*State v. Driver*²²¹ is frequently cited as the first instance of a court rejecting a prison sentence under a proportionality concept. *Driver* was convicted of the common law crime²²² of wifebeating and sentenced to five years in the county jail and was required to post a \$500 peace bond. The North Carolina Supreme Court found *Driver's* punishment excessive because his sentence was "greater than has ever been prescribed or known"²²³ and therefore must be "excessive, cruel and unusual"²²⁴ in violation of the North Carolina Constitution.²²⁵

While one reading of *Driver* supports the proportionality concept, a different meaning becomes

apparent when *Driver* is read in conjunction with a prior North Carolina case. In *State v. Miller*,²²⁶ the defendant had been convicted of assault with intent to kill and was sentenced to the county jail for five years. *Miller* argued that the five-year sentence was unconstitutionally excessive. Although the court reversed on other grounds, it did elaborate on the proportionality issue. In dicta the court remarked that "[I]n our case his Honor imprisoned the defendant for five years, not in the penitentiary, where one may live so long, but in the county jail, where it is strongly probable that confinement . . . would cause a lingering death."²²⁷

Read in conjunction with *Miller*, *State v. Driver* is logically explained as a condition of confinement case and not a proportionality case addressing only the length of punishment. This conclusion is buttressed by later cases from the North Carolina Supreme Court flatly refusing to recognize any power under the eighth amendment or the state constitution to review the lengths of prison sentences.²²⁸

Another early case frequently thought to support the proportionality concept is also inapposite. In *State ex rel. Garvey v. Whitaker*,²²⁹ three defendants were convicted in municipal court of seventy-two counts of destroying plants in a New Orleans public square. The trial judge sentenced the defendants to pay a \$10 fine for each offense or in lieu of the \$720 fine serve thirty days for each offense, about six years total. The Louisiana Supreme Court held that any punishment in excess of a \$25 fine or alternative imprisonment in excess of thirty days violated the state's constitution²³⁰ because the constitutional limits of punishment were coterminous with the jurisdictional limit of the municipal court. Viewed in this light, *Garvey* merely establishes the jurisdictional limits of the municipal court. At present, the Louisiana Supreme Court accepts the proportionality concept, but it has never reduced a sentence under this theory.²³¹

²²⁶ 75 N.C. 73 (1876).

²²⁷ *Id.* at 77.

²²⁸ *State v. Ford*, 297 N.C. 281, 252 S.E.2d 717 (1979) (life for burglary); *State v. Whaley*, 263 N.C. 824, 140 S.E.2d 305 (1965) (20 years for breaking and entering and larceny); *State v. Stansbury*, 230 N.C. 589, 55 S.E.2d 185 (1949) (five to six years for fraudulently obtaining \$15.90).

²²⁹ 48 La. Ann. 527, 19 So. 457 (1896).

²³⁰ Same text as the eighth amendment.

²³¹ *State v. Sykes*, 364 So. 2d 1293 (La. 1978) (mandatory life penalty for distribution of heroin upheld); *State v. Terrebonne*, 364 So. 2d 1290 (La. 1978) (same); *State v. Mallery*, 364 So. 2d 1283 (La. 1978) (same).

²²¹ 78 N.C. 423 (1878).

²²² An immediate distinction between *State v. Driver* and the present consideration of the proportionality argument is the fact that there was no legislatively selected punishment involved in *Driver*, since the defendant was convicted of a common law crime.

²²³ 78 N.C. at 426.

²²⁴ *Id.*

²²⁵ The text is identical to the eighth amendment.

A third case erroneously believed to support the proportionality concept is *Calhoun v. State*.²³² In *Calhoun*, a black man had been convicted of raping a white woman "who associated mainly with . . . negroes"²³³ and was sentenced to death. In reversing the conviction and ordering a new trial, the court said that the evidence was not sufficient for conviction and the emotions of the jury may have constituted the deciding factor.²³⁴

On petition for rehearing the state argued that it had presented all the evidence it could and asked the court to either hold that the evidence was insufficient or affirm the death penalty.²³⁵ In overruling the motion for rehearing, the court mentioned the state's prohibition against cruel and unusual punishments for the first time²³⁶ and reasoned that since the court has the power to rule on the sufficiency of the evidence, it must also have the power to assess the appropriateness of the punishment selected.²³⁷ The incredible nature of the *Calhoun* case can hardly support the proposition that *Calhoun* has a place in the orderly development

of the proportionality concept.²³⁸ Indeed, the Texas courts disavow any power under the eighth amendment to review the length of prison sentences.²³⁹

STATE EXPERIENCE WITH THE PROPORTIONALITY ARGUMENT

South Carolina

For many years South Carolina accepted the traditional view that there was no power to interfere with a legislatively selected punishment.²⁴⁰ In 1947, two dissenting judges in *State v. Brandon*²⁴¹ were willing to hold that an eighteen-month sentence, half-suspended, for unlawful possession of liquor in a place of business constituted cruel and unusual punishment. A year later in *State v. Kimbrough*,²⁴² the South Carolina Supreme Court became the first court to unambiguously hold that a sentence within the legislatively set limit constituted cruel and unusual punishment solely because of the sentence's excessive length.²⁴³

²³⁸ Shortly after *Calhoun*, another black defendant was sentenced to death for the murder of a white storekeeper. The storekeeper had obviously provoked the assault by beating the black with a stick. In affirming the conviction the Texas Court of Criminal Appeals stated in *Foley v. State*, 272 S.W. 799, 800 (Tex. Crim. 1925): "The evidence in the case is not such as would ordinarily lead one to expect a verdict assessing the death penalty. Possibly the fact that the appellant was a negro and the deceased a white man may have had some bearing." On petition for rehearing the court reviewed the testimony offered at trial and concluded that the conviction should be reversed on the authority of *Calhoun* because the "verdict does not reflect a fair, calm, deliberate judgment on the facts." *Id.* at 802. Later in *Burrows v. State*, 140 Tex. Crim. 22, 143 S.W.2d 609, 611 (1940), the Texas Court of Criminal Appeals described *Calhoun* as "more on account of the unsatisfactory condition of the facts rather than the excessiveness of the verdict." *Calhoun's* last appearance in the Texas Court of Appeals was in an individual opinion of one judge of that court in *Purcell v. State*, 167 Tex. Crim. 565, 322 S.W.2d 268, 279 (1959).

²³⁹ See cases noted in *Rummel v. Estelle*, 587 F.2d 651, 654 n.3 (5th Cir. 1978) (en banc).

²⁴⁰ See *Davis v. State*, 88 S.C. 229, 79 S.E. 811, 813 (1911).

²⁴¹ 43 S.E.2d 449, 451 (S.C. 1947) (Baker, C.J., concurring in part and dissenting in part).

²⁴² 46 S.E.2d 273 (S.C. 1948).

²⁴³ In *Kimbrough* the defendant was convicted of a burglary in which he stole a watch and chain. South Carolina law provided for a life sentence upon conviction of a burglary, or a penalty of not less than five years if the jury recommends mercy. The jury recommended mercy and the trial judge sentenced the defendant to thirty years imprisonment. The court could have found that the thirty-year sentence violated the spirit of the mercy recommendation but the court chose to review the sentence under the cruel and unusual punishment rubric.

Interestingly, the Louisiana legislature has now made the penalty for distribution of heroin a life sentence "without benefit of probation or suspension of sentence." 1977 La. Acts 631. See also *State v. Kemp*, 359 So. 2d 978 (La. 1978) (15 years without parole for armed robbery); *State v. Brooks*, 350 So. 2d 1174 (La. 1977) (life without parole for second degree murder).

²³² 214 S.W. 335 (Tex. Crim. 1919).

²³³ *Id.*

²³⁴ *Id.* at 336.

It is truly remarkable that a woman physically strong, weighing 120 pounds, and knowing herself to be in such easy calling distance of so many people, in the daytime, without apparently any tears or excitement, could be raped by a negro.

Appellant was without money or friends, and the trial court appointed counsel to defend him. He was given the death sentence, and the case had been pending in this court many months when the writer of the opinion came upon the bench. We have carefully considered the record in all its different aspects. We are fully aware of the feeling that exists in the breast of every white man for the sanctity of the home, and the virtue of woman, when he hears that a black man is charged with an offense of this character against a white woman. We believe that grave care should be exercised in such a case lest the judgment be swayed by passion. The character of prosecutrix, the peculiar circumstances surrounding the case, the severity of the penalty, are matters that appeal to us with such force as to cause us to deem it best to let another jury pass on the facts.

Id.

²³⁵ *Id.*

²³⁶ *Id.* at 338.

²³⁷ *Id.*

Following *Kimbrough*, the South Carolina Supreme Court never again interfered with a prison sentence under the disproportionality principle. Among the sentences upheld were twenty-five years for armed robbery,²⁴⁴ nine years and six months for grand larceny,²⁴⁵ both eighteen-month and two-year sentences for possession and manufacture of alcoholic liquors,²⁴⁶ six years for housebreaking,²⁴⁷ death for rape,²⁴⁸ five years for distributing one-seventh of an ounce of marijuana,²⁴⁹ and ten years for safecracking.²⁵⁰

In 1975, the South Carolina Supreme Court considered a proportionality attack made by a twenty-year-old defendant convicted of distributing one-seventh of an ounce of marijuana and sentenced to five years in prison.²⁵¹ Over the dissent of a single justice, the court made no mention of the disproportionality analysis and stated, "We have held that this Court has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by law."²⁵²

Two years later in *Stockton v. Leeke*,²⁵³ the South Carolina Supreme Court returned to disproportionality analysis in upholding a ten-year²⁵⁴ sentence for safecracking. The court explained that safecracking carries a greater minimum penalty than many violent crimes because safecracking is a crime that demonstrates great deliberation.²⁵⁵

The court reasoned that since the jury had recommended mercy and the burglary was not accompanied by any aggravating factors, the thirty-year sentence constituted a tyrannical punishment. *Id.* at 277.

²⁴⁴ *State v. Scates*, 46 S.E.2d 693 (S.C. 1948).

²⁴⁵ *State v. Hurt*, 48 S.E.2d 313, 321 (S.C. 1948).

²⁴⁶ *State v. Hall*, 80 S.E.2d 239 (S.C. 1954) (two years upheld); *State v. Goodall*, 69 S.E.2d 915 (S.C. 1952) (18 months upheld; two judges dissented on authority of *Kimbrough*); *State v. Phillips*, 54 S.E.2d 901 (S.C. 1949) (two years upheld); *State v. Bell*, 54 S.E.2d 900, 901 (S.C. 1948) (18 months upheld for defendant who had been in the illegal business for 20 years).

²⁴⁷ *State v. Alexander*, 95 S.E.2d 160 (S.C. 1956).

²⁴⁸ *State v. Gamble*, 155 S.E.2d 916 (S.C. 1967).

²⁴⁹ *State v. Queen*, 216 S.E.2d 182 (S.C. 1975).

²⁵⁰ *Stockton v. Leeke*, 237 S.E.2d 896 (S.C. 1977).

²⁵¹ *State v. Queen*, 216 S.E.2d 182. See also *Queen v. Leeke*, 457 F. Supp. 476 (D.S.C.), *appeal dismissed*, 584 F.2d 977 (4th Cir. 1978) (upholding sentence).

²⁵² 216 S.E.2d at 185.

²⁵³ 237 S.E.2d 896.

²⁵⁴ The ten-year sentence is the minimum sentence provided by South Carolina law.

²⁵⁵ 237 S.E.2d at 898. The court also stated that safecracking was a more serious crime than petty theft because one who steals the contents of a safe is more likely to pose a greater threat to society than the petty thief.

Michigan

For many years Michigan followed the traditional view that a sentence within the statutory limit was immune from attack.²⁵⁶ However, *People v. Lorentzen*²⁵⁷ represents a plain example of a court finding a legislatively mandated sentence unconstitutionally disproportionate.²⁵⁸ The Michigan Supreme Court determined that the mandatory minimum term for sale of marijuana offended the Michigan and federal prohibitions against cruel and unusual punishments.²⁵⁹ The court observed that the mandatory minimum was greater than the penalty for sale of marijuana in most other states²⁶⁰ and greater than the penalty imposed by Michigan for many other felonies.²⁶¹ Finally, the court noted that after Lorentzen's conviction the Michigan legislature drastically reduced the penalty for sale of marijuana.²⁶²

The *Lorentzen* opinion is not a model of clarity.²⁶³ In one portion of the opinion the court clearly states that the mandatory twenty-year penalty is itself unconstitutional.²⁶⁴ But in another part of the

²⁵⁶ The Michigan Supreme Court cited thirteen cases for this proposition. *People v. Lorentzen*, 387 Mich. 167, 173-74, 194 N.W.2d 827, 830 (1972).

²⁵⁷ 387 Mich. 167, 194 N.W.2d 827.

²⁵⁸ *Id.* at 178, 194 N.W.2d at 833. In *Lorentzen* the defendant was sentenced under a Michigan statute which required a minimum sentence of twenty years for sale of marijuana. *Id.* at 176, 194 N.W.2d at 831.

²⁵⁹ *Id.* at 181, 194 N.W.2d at 837.

²⁶⁰ *Id.* at 179, 194 N.W.2d at 832.

²⁶¹ *Id.*

²⁶² The court gave no effect to the provision of this law calling for a review of all sentences under the old law.

²⁶³ In *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972), a companion case to *Lorentzen*, the Michigan Supreme Court considered the constitutionality of a nine-and-one-half-year sentence for possession of marijuana. In a bizarre set of opinions, two judges of the Michigan Supreme Court held that categorizing marijuana as a narcotic violated equal protection; two judges held that the defendant was entrapped; two judges held that the nine-and-one-half-year minimum sentence was unconstitutionally harsh; and one judge held that the law prohibiting possession of marijuana violated "fundamental rights to liberty and the pursuit of happiness" as explained by John S. Mill in his *On Liberty*.

Given the two ambiguous cases in the Michigan Supreme Court, it immediately split the lower Michigan courts until the Michigan Supreme Court summarily adopted the view that the marijuana statute was unconstitutional on the questions of possession or attempted possession. Compare *People v. Griffin*, 39 Mich. App. 464, 198 N.W.2d 21 (1972), with *People v. Waxman*, 41 Mich. App. 277, 199 N.W.2d 884, *leave granted with summary reversal*, 388 Mich. 744, 200 N.W.2d 322 (1972).

²⁶⁴ 387 Mich. at 178, 194 N.W.2d at 832.

opinion the court states that the compulsory twenty-year penalty imposed on Eric Lorentzen was unconstitutionally excessive because of the defendant's individual personality and history.²⁶⁵ Furthermore, portions of the *Lorentzen* opinion apparently express opinions on cases far beyond the immediate case of marijuana possession. For example, one passage of the court's opinion might be read as requiring that all criminal sentences, save those for very serious crimes, be for less than five years.²⁶⁶ Another passage of the opinion might be read as striking down all long mandatory penalties for nonviolent offenses.²⁶⁷

Despite the apparent holding of *Lorentzen* that a mandatory penalty of twenty years for a nonviolent offense was unconstitutional, the lower Michigan courts were unanimous in refusing to strike down long sentences for other than marijuana offenses.²⁶⁸

²⁶⁵ *Id.*

²⁶⁶ *Id.* The court cited three law review articles for this proposition, without further explanation. "Experts on penology and criminal corrections tend to be of the opinion that, except for extremely serious crimes or unusually disturbed persons, the goal of rehabilitating offenders with maximum effectiveness can best be reached by short sentences of less than five years imprisonment." *Id.*

²⁶⁷ "A compulsory prison sentence of twenty years for a nonviolent crime imposed without consideration for defendant's individual personality and history is so excessive that it 'shocks the conscience.'" *Id.* at 181, 194 N.W.2d at 834.

²⁶⁸ In *People v. Osteen*, 46 Mich. App. 409, 208 N.W.2d 198 (1973), a Michigan appellate court upheld a 20- to 25-year sentence for a \$20 sale of heroin. The court explained *Lorentzen* as not extending to heroin. *Id.* at 416, 208 N.W.2d at 201. In *People v. Bersine*, 48 Mich. App. 295, 210 N.W.2d 501 (1973), the same court upheld a 20- to 30-year sentence for a \$10 sale of heroin.

The Michigan Supreme Court agreed with the lower court's reading of *Lorentzen* in *People v. Stewart*, 400 Mich. 540, 256 N.W.2d 31 (1977). In *Stewart* the court upheld the mandatory 20-year minimum for sale of heroin with the statement, "We are not prepared to extend our holding in *Lorentzen* to heroin." *Id.* at 554, 265 N.W.2d at 36. In *Stewart*, Justice Kavanagh did not explain why sale of heroin was not protected under the pursuit of happiness theory announced in his opinions in *Sinclair* and *Lorentzen*.

The proportionality argument met with similar hostility in other areas. In *People v. Bullock*, 48 Mich. App. 700, 211 N.W.2d 108 (1973), a Michigan appellate court upheld a three-and-one-half to four-year sentence for the theft of four sirloin steaks against proportionality attack. The same court upheld a statute that provided for up to a life sentence for "bank, safe and vault robbery" in *People v. Ferguson*, 60 Mich. App. 302, 230 N.W.2d 406 (1975). Another Michigan court upheld a mandatory life sentence for first degree felony murder against a proportionality attack in *People v. Moore*, 51 Mich. App. 48,

California

For many years California had an unusual sentencing system. For many crimes the punishment upon conviction was a sentence of "not less than one year."²⁶⁹ For other crimes, the sentence was indeterminate within a broad range. For example, the punishment for assault with intent to commit murder was imprisonment from one to fourteen years.²⁷⁰

Superimposed on the indeterminate sentencing scheme were various provisions of the California Code which denied parole for a selected period of time. For example, a second offender guilty of furnishing heroin would be sentenced to an indeterminate ten years to life, and in addition, would not be eligible for parole until ten years of the sentence was served.²⁷¹

The California Supreme Court has adopted proportionality analysis to test the various provisions against the strictures outlawing cruel and unusual punishment. The California courts have developed three distinct doctrines. The first doctrine tests the indeterminate sentence gauged by the maximum sentence permitted by the statute.²⁷² The second doctrine tests the sentences hierarchically. Because of the unusual sentencing scheme, it was sometimes possible for a defendant to be acquitted of a major offense which carried a maximum term of years but be convicted of a lesser included offense that carried an indeterminate lifetime sentence.²⁷³ The

214 N.W.2d 548 (1974). Finally, the Michigan Supreme Court upheld a 50- to 80-year sentence for second degree murder in *People v. Burton*, 396 Mich. 238, 240 N.W.2d 239 (1976), with the statements, "We appreciate that a strong case can be made for appellate review of sentencing. This court is not, however, yet prepared to take that step." *Id.* at 243, 240 N.W.2d at 242. "People v. Lorentzen . . . relied on by *Burton*, is not in point." *Id.* at 243 n.10, 240 N.W.2d at 242 n.10.

²⁶⁹ See, e.g., CAL. PENAL CODE § 314 (West 1954) (second conviction for indecent exposure).

²⁷⁰ CAL. PENAL CODE § 217 (West 1954). For a table of various California penalties, see *People v. Smith*, 42 Cal. App. 3d 706, 710 n.2, 117 Cal. Rptr. 88, 90 n.2 (1974).

²⁷¹ CAL. HEALTH & SAFETY CODE § 11352 (West 1954).

²⁷² See *In re Lynch* where the California Supreme Court assumed that the indeterminate sentence imposed for a second offense of indecent exposure was a sentence for life imprisonment and that sentence was unconstitutionally harsh. 8 Cal. 3d 410, 419, 503 P.2d 921, 926, 105 Cal. Rptr. 217, 222 (1973).

²⁷³ See, e.g., *People v. Schuren*, where the defendant was acquitted of the charge of assault with intent to murder, but convicted of the "lesser and necessarily included offense" of assault with a deadly weapon. The

third doctrine tests the legality of the "no parole" provision apart from the constitutionality of the underlying sentence.²⁷⁴ In the following sections, the California cases under the three doctrines are examined.

For many years California followed the traditional view that a sentence within the legislatively selected range did not constitute cruel and unusual punishment because of its length. In *Ex Parte Rosencrantz*²⁷⁵ the California Supreme Court upheld a mandatory life sentence, without the possibility of parole, that had been imposed on a woman convicted of passing fictitious checks on four occasions. The California view changed dramatically in *In re Lynch*.²⁷⁶

California punishes first offense indecent exposure as a simple misdemeanor. The second offense, however, is a felony carrying an indeterminate sentence of "not less than one year."²⁷⁷ In *Lynch*, a second offender under this statute argued that his sentence was unconstitutionally excessive. While the *Lynch* opinion is not the first proportionality case, it is the first case to develop a series of working propositions to test for a sentence's excessiveness. First, the court examined the nature of the offense and the offender with particular regard to the degree of danger each presents to society.²⁷⁸ Second, the *Lynch* court compared the punishments imposed in California for more serious offenses than

the questioned offense.²⁷⁹ Last, the court compared the challenged penalty with punishments prescribed in other jurisdictions for the same offense.²⁸⁰

The reaction to *Lynch* by the lower California appellate courts was less than consistent despite the efforts of the *Lynch* court to establish a set of predictable standards.²⁸¹

²⁷⁹ *Id.* at 426, 503 P.2d at 931, 105 Cal. Rptr. at 227.

²⁸⁰ *Id.* at 427, 503 P.2d at 932, 105 Cal. Rptr. at 228.

Since the *Lynch* court decided to gauge the penalty by the maximum penalty possible under the indeterminate sentencing law, it is not surprising that in his comparison, California had many prisoners serving life sentences for offenses that normally did not carry a life sentence in states with a more determinate sentencing scheme.

²⁸¹ Over a dissent, one California appellate court upheld a five-year to life sentence for sale of marijuana in *In re Jones*, 35 Cal. App. 3d 531, 110 Cal. Rptr. 765 (1973). In *People v. Smith*, 42 Cal. App. 3d 706, 117 Cal. Rptr. 88 (1974), a prison sentence up to a maximum of ten years was upheld for the theft of \$22.40 and a bus pass. Similarly, the same sentence was upheld for the theft of two newborn calves in *People v. Thomas*, 43 Cal. App. 3d 862, 118 Cal. Rptr. 226 (1974). In *People v. Adams*, 43 Cal. App. 3d 697, 117 Cal. Rptr. 905 (1974), a ten-year sentence was upheld for receiving \$26.27 worth of stolen property.

A life sentence without the possibility of parole for kidnapping was upheld in *In re Maston*, 33 Cal. App. 3d 559, 109 Cal. Rptr. 164 (1973) and *People v. Isitt*, 55 Cal. App. 3d 23, 127 Cal. Rptr. 279 (1976). The defendant in *Isitt* was seventeen years old at the time of the offense. Other sentences for violent crimes were upheld by the California appellate courts. In *People v. Wilson*, 50 Cal. App. 3d 811, 123 Cal. Rptr. 663 (1975), an indeterminate sentence of five to twenty years was upheld for attempt to commit second degree robbery and assault with intent to commit robbery. In *People v. Morgan*, 36 Cal. App. 3d 444, 111 Cal. Rptr. 548 (1973), an indeterminate ten years to life sentence was upheld for robbery using a firearm. In *People v. Kingston*, 44 Cal. App. 3d 629, 118 Cal. Rptr. 896 (1974), the statutory sentence of one year to life imprisonment for statutory rape was upheld against a defendant who had consensual sexual intercourse with a thirteen-year-old child. Finally, in *People v. Wingo*, 38 Cal. App. 3d 895, 113 Cal. Rptr. 695 (1974), *vacated*, 14 Cal. 3d 189, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975), a California appellate court upheld a six-month to life sentence for assault by means likely to cause bodily harm.

While a broad range of sentences were upheld under the *Lynch* rationale by the California appellate courts, some courts also struck penalties down. In *People v. Romo*, 39 Cal. App. 3d 326, 114 Cal. Rptr. 289 (1974), *vacated*, 14 Cal. 3d 189, 534 P.2d 1015, 121 Cal. Rptr. 111 (1975), an appellate court struck down an indeterminate sentence of six months to life for assault with a deadly weapon as disproportionately harsh. Another district of the California Court of Appeals reached the same conclusion in *People v. Thomas*, 41 Cal. App. 3d 861, 116 Cal. Rptr. 393 (1974).

principal charge carried a maximum term of fourteen years while the lesser charge carried the lifetime indeterminate sentence. In *Schuren*, the California Supreme Court ruled that any sentence in excess of the 14-year maximum sentence constituted cruel and unusual punishment. 10 Cal. 3d 553, 516 P.2d 833, 111 Cal. Rptr. 129 (1974). For a comprehensive treatment of the duplicative statute problem, see Comment, *Duplicative Statutes, Prosecutorial Discretion, and the Illinois Armed Violence Statute*, 71 J. CRIM. L. & C. 226 (1980).

²⁷⁴ For example, in *In re Ross*, the California Supreme Court upheld the ten-year to life sentence for distributing heroin but struck down the provision that precluded parole for ten years. 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).

²⁷⁵ 205 Cal. 534, 271 P. 902 (1928).

²⁷⁶ 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217.

²⁷⁷ The law is easily explained in historic terms. During the 1940s California was shocked when a minor sex offender committed a horrible murder. See *People v. Stroble*, 36 Cal. 2d 615, 226 P.2d 330 (1951), *aff'd*, 343 U.S. 181 (1952). Thereafter public outcry caused Governor Earl Warren to convene an extraordinary session of the legislature to enact tough sex offender legislation. See *In re Wells*, 46 Cal. App. 3d 592, 598, 121 Cal. Rptr. 23, 27 (1975).

²⁷⁸ 8 Cal. 3d at 425, 503 P.2d at 930, 105 Cal. Rptr. at 226.

The operating assumption of *Lynch* is that the severity of the sentence should be gauged by the maximum possible sentence.²⁸² In two cases the California Supreme Court severely limited the effect of this operating assumption. In vacating the appellate court determinations in *Wingo*²⁸³ and *Romo*,²⁸⁴ the California Supreme Court held that challenges under the disproportionality concept would be premature until the California adult authority set a date certain maximum term. Under the *Wingo* regime, the flood of proportionality cases ceased except for rare cases like *In re Rodriguez*²⁸⁵ in which the California Supreme Court ordered a defendant released after serving twenty-two years for lewd and lascivious acts on a child.

The second proportionality doctrine is represented by *People v. Schueren*²⁸⁶ in which the California Supreme Court held that the punishment for a lesser included offense could not constitutionally exceed the punishment provided for the greater principal offense. Although this is an unusual factual situation, there are similar cases from other jurisdictions.²⁸⁷

In *In re Wells*, 46 Cal. App. 3d 592, 121 Cal. Rptr. 23, an indeterminate life sentence was found unconstitutional for second offense child molestation. Finally, in *People v. Keogh*, 46 Cal. App. 3d 919, 120 Cal. Rptr. 817 (1975), four consecutive fourteen-year sentences for forgery were struck down as disproportionate.

As the review of the intermediate California appellate cases amply demonstrates, the lower court reaction to *Lynch* was anything but harmonious. Certainly *Wingo*, which upheld a life sentence for assault by means of force, could not be squared with *Thomas* and *Romo*, which struck down the indeterminate life sentence for assault with a deadly weapon.

²⁸² For a criticism of this standard, see *People v. Thomas*, 41 Cal. App. 3d 861, 116 Cal. Rptr. 393, 404 (Gardner, P.J., concurring in part and dissenting in part), and Note, *Indeterminate Sentence as Cruel or Unusual Punishment*, 61 CALIF. L. REV. 418, 422 (1973). The question of considering parole is considered in greater detail in the text accompanying notes 468-98 *infra*.

²⁸³ 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97.

²⁸⁴ 14 Cal. 3d 189, 534 P.2d 1015, 121 Cal. Rptr. 111.

²⁸⁵ 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975).

²⁸⁶ 10 Cal. 3d 553, 516 P.2d 833, 111 Cal. Rptr. 129.

²⁸⁷ For California, see *People v. Draper*, 29 Cal. App. 3d 465, 105 Cal. Rptr. 653 (1972). For Oregon, see *State v. Ross*, 55 Or. 450, 106 P. 1022 (1910) (fine imposed on individual of \$576,853.74 held excessive); Application of Cannon, 203 Or. 629, 281 P.2d 233 (1955) (en banc) (greater sentence on lesser included offense than possible for the greater offense unconstitutional). For Indiana, see also *Dembrowski v. State*, 251 Ind. 250, 240 N.E.2d 815 (1968) (same as Cannon). Also see, e.g., *Robert v. Collins*, 544 F.2d 168 (4th Cir. 1976) (same as Cannon).

Despite its insistence that an indeterminate sentence for life should be considered one for natural life, the California Supreme Court realistically considered that a restrictive parole date constituted a separate element apart from the underlying sentence in its third proportionality doctrine. In *In re Foss*²⁸⁸ the defendant was sentenced to ten years to life imprisonment for furnishing heroin. An additional provision of his sentence precluded parole for ten years. Without disturbing his life sentence the California Supreme Court determined under the *Lynch* factors that the parole limitation constituted cruel and unusual punishment.²⁸⁹

The reaction of the California appellate courts to *Foss* was no more consistent than the reaction to

²⁸⁸ 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649.

²⁸⁹ It would be an inaccurate statement to say that the California Supreme Court in *Foss* struck down parole preclusion in all cases. More precisely, the court described its holding as

precluding parole consideration for a minimum period of ten years imposed upon an offender with a prior drug conviction, without regard to the existence of such possible mitigating circumstances as the addict status of the offender, the quantity of narcotics involved, the nature of the purchaser, or the purposes of the sale, is [a] . . . violation of . . . the California Constitution.

Id. at 929, 519 P.2d at 1085, 112 Cal. Rptr. at 661.

Interestingly, the California Supreme Court read the Michigan Supreme Court's *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827, far more broadly than the Michigan Supreme Court did in *People v. Stewart*, 400 Mich. 540, 356 N.W.2d 31.

Earlier in this article, it was pointed out that the *Lorentzen* opinion contained passages much broader than the question presented in the *Lorentzen* case. In *Lorentzen*, the Michigan Supreme Court stated: "A compulsory prison sentence of twenty years for a non-violent crime imposed without consideration for defendant's individual personality and history is so excessive that it 'shocks the conscience.'" 387 Mich. at 181, 194 N.W.2d at 834.

The California Supreme Court added: "The provision precluding consideration for parole for the minimum term of ten years without consideration for either the offender or his offense is no less shocking." 10 Cal. 3d at 923, 519 P.2d at 1081, 112 Cal. Rptr. at 657.

Another passage of *Lorentzen* adds: "Experts on penology and criminal corrections tend to be of the opinion that, except for extremely serious crimes or unusually disturbed persons, the goal of rehabilitating offenders with maximum effectiveness can best be reached by short sentences of less than five years imprisonment." 387 Mich. at 181, 194 N.W.2d at 833.

The California Supreme Court held: "Thus, where rehabilitation of the offender is of primary importance, the mandatory provision precluding parole consideration for the ten-year minimum period as provided by section 11501 is clearly excessive." 10 Cal. 3d at 924, 519 P.2d at 1081, 112 Cal. Rptr. at 657.

Lynch.²⁹⁰ The California Supreme Court followed with another case. In *In re Grant*²⁹¹ the defendant was convicted of the sale of marijuana. He had twice before been convicted of narcotics violations and was sentenced to serve ten years to life without possibility of parole for ten years. Instead of reviewing the particularized sentence charged to Grant, the court reviewed the "entire scheme of . . . precluding parole consideration for recidivist narcotic offenders."²⁹² The court then determined that the California provisions which preclude parole considerations for a minimum of five or more years for recidivist narcotic offenders constituted cruel and unusual punishment.²⁹³

²⁹⁰ The intermediate appellate courts applied the *Lynch/Foss* criterion to a variety of situations.

In *People v. Serna*, 44 Cal. App. 3d 717, 118 Cal. Rptr. 904 (1975), a California appellate court upheld a three-year parole limitation imposed on a defendant for sale of heroin. The same limitation was upheld in *People v. Waters*, 52 Cal. App. 3d 323, 125 Cal. Rptr. 46 (1975), for sale of and conspiracy to sell amphetamines. In *In re Heredia*, 52 Cal. App. 3d 785, 125 Cal. Rptr. 182 (1975), a six-year preclusion of parole was upheld for possession of heroin for sale.

In *People v. Carbonic*, 48 Cal. App. 3d 679, 121 Cal. Rptr. 831 (1975), a five-year parole preclusion was upheld for a first offender who was convicted of using a minor to furnish a non-narcotic controlled substance. Finally, in *In re Flores*, 58 Cal. App. 3d 222, 128 Cal. Rptr. 847 (1976), a ten-year parole preclusion was upheld for conviction for sale of heroin to a minor.

In *People v. Vargas*, 53 Cal. App. 3d 516, 126 Cal. Rptr. 88 (1975), a California appellate court disagreed with the *Serna* and *Waters* result and struck down a three-year parole preclusion on a defendant who had been convicted of furnishing a dangerous drug. In *People v. Thomas*, 45 Cal. App. 3d 749, 119 Cal. Rptr. 739 (1975), a fifteen-year parole preclusion was found to be unconstitutionally harsh for a defendant who had been convicted of possession of heroin and had two prior drug convictions. Five-year parole preclusions were struck down as unconstitutionally harsh in *People v. Malloy*, 41 Cal. App. 3d 944, 116 Cal. Rptr. 592 (1974) (for second offense sale of LSD); *People v. Ruiz*, 49 Cal. App. 3d 739, 122 Cal. Rptr. 841 (1975) (for possession of marijuana by a defendant with two other narcotic offenses), and *In re Carter*, 125 Cal. Rptr. 177 (1975).

²⁹¹ 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976).

²⁹² *Id.* at 7, 553 P.2d at 594, 132 Cal. Rptr. at 434.

²⁹³ Interestingly, the court's opinion in *Grant* was joined by three justices of the California Supreme Court. Four justices, in concurring and dissenting opinions, purported not to decide the broad issue reached by the court. *Id.* at 18, 553 P.2d at 602, 132 Cal. Rptr. at 442 (Sullivan, J., joined by McComb and Richardson, J.J., concurring and dissenting, and Clark, J., concurring and dissenting).

The lack of a clear majority opinion did not go unnoticed by the lower California appellate courts. In *In re Williams*, 69 Cal. App. 3d 840, 138 Cal. Rptr. 384 (1977), a California appellate court considered the question of

Kentucky

In *Workman v. Commonwealth*²⁹⁴ the Kentucky Court of Appeals determined that a life sentence without the possibility of parole imposed on two fourteen-year-old boys for the rape of a seventy-one-year-old woman constituted cruel and unusual punishment. Three years later the same punishment imposed on a sixteen-year-old also was found to violate constitutional guarantees in *Anderson v. Commonwealth*.²⁹⁵

In 1972, two defendants aged eighteen and twenty-four argued that a life sentence without parole for rape also constituted cruel and unusual punishment. In the eighteen-year-old's case²⁹⁶ the entire court's opinion on the cruel and unusual punishment argument was that "We are not persuaded that the decision in *Workman v. Commonwealth* . . . , that life imprisonment without parole in the case of a juvenile constitutes 'cruel and unusual punishment' should be extended to this case."²⁹⁷ In the twenty-four-year-old's case, the same conclusion was stated.²⁹⁸ Finally, in *Fryrear v. Commonwealth*²⁹⁹ the Kentucky Court of Appeals stated that the operating distinction in these cases was the fact that *Workman* and *Anderson* involved juvenile offenders.³⁰⁰

THE DISPROPORTIONALITY ARGUMENT IN THE LOWER FEDERAL COURTS

For reasons suggested earlier in this article, the proportionality doctrine in *Weems v. United States* did not take hold. By 1952, the Second Circuit stated in the famous *Rosenberg* case,³⁰¹ "If there is

the constitutionality of a five-year parole preclusion to be an open question for a defendant who had been convicted of a second narcotics offense.

California adopted a determinate sentencing act in 1976. CAL. PENAL CODE § 1170 *et seq.* (West) (effective July 1, 1977). See also Palmer, *The Role of Appellate Courts in Mandatory Sentencing Schemes*, 26 U.C.L.A. L. REV. 753 (1979); Note, *Determinative Sentencing In California and Illinois: Its Effect on Sentence Disparity and Prisoner Rehabilitation*, 55 WASH. L. REV. 551 (1979).

²⁹⁴ 429 S.W.2d 374 (Ky. 1968).

²⁹⁵ 465 S.W.2d 70, 75 (Ky. 1971).

²⁹⁶ *Edwards v. Commonwealth*, 500 S.W.2d 396 (Ky. 1973).

²⁹⁷ *Id.* at 397.

²⁹⁸ *Martin v. Commonwealth*, 493 S.W.2d 714 (Ky. 1973).

²⁹⁹ 507 S.W.2d 144, 146 (Ky. 1974).

³⁰⁰ See also *Pennington v. Commonwealth*, 479 S.W.2d 618, 619 (Ky. 1972) (two years imprisonment upheld for assault and destroying personal property).

³⁰¹ *United States v. Rosenberg*, 195 F.2d at 604. In the petition for rehearing in the *Rosenberg* case, Justice Frankfurter filed a memorandum statement, *Rosenberg v.*

one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute."

In *Smith v. United States*³⁰² another attempt at review of the length of prison sentences was made. It was based on the First Judiciary Act, which states that the courts of the United States are empowered to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order . . . and direct the entry of such appropriate judgment . . . as may be just under the circumstances."³⁰³ In *Smith*, the defendant had been convicted of various narcotic offenses and had been sentenced to consecutive sentences totaling fifty-two years. Smith argued that 28 U.S.C. § 2106 allowed the circuit court to order a reduction of his sentence. The Tenth Circuit stated that the fifty-two-year sentence was "greater than should have been imposed,"³⁰⁴ but determined that 28 U.S.C. § 2106 did not allow for appellate reduction because of the long-standing policy against appellate review of sentencing.³⁰⁵

The first case in the federal courts³⁰⁶ to interfere

with a legislatively approved punishment is *Ralph v. Warden*.³⁰⁷ In *Ralph* the Fourth Circuit held that the death penalty imposed on a defendant guilty of a rape that did not take or endanger the life of his victim,³⁰⁸ constituted cruel and unusual punishment. The court employed two factors to determine that the death penalty for this particular rape constituted a disproportionate penalty. First, the court noted that most American jurisdictions have moved away from the death penalty for rape and those jurisdictions that do provide for the death penalty, have infrequently applied it.³⁰⁹ Second, the court stated that imposing the death penalty on a rapist who does not take or endanger the life of his victim is "anomalous" when compared to the large number of similar rapists sentenced to prison.³¹⁰

The Fourth Circuit was also the first federal court to interdict a legislatively mandated sentence less than death. In *Hart v. Coiner*³¹¹ the Fourth Circuit considered the application of a West Virginia recidivist statute which mandated a life sentence for a defendant convicted of a third felony. In *Hart* the petitioner had been convicted of three crimes, "punishable by confinement in a penitentiary": (1) in 1949 he was convicted of writing a check on insufficient funds in the amount of \$50; (2) in 1955 he was convicted of interstate transportation of forged checks worth \$140; and (3) in 1968 he was convicted of perjury at his son's murder

United States, 344 U.S. 889 (1952). In this statement Justice Frankfurter stated:

Numerous grounds were urged in support of this petition for certiorari; the petition for rehearing raised five additional questions. So far as these questions come within the power of this Court to adjudicate, I do not, of course, imply any opinion upon them. One of the questions, however, first raised in the petition for rehearing, is beyond the scope of the authority of this Court, and I deem it appropriate to say so. A sentence imposed by a United States district court, even though it be a death sentence, is not within the power of this Court to revise.

Id. at 890.

³⁰² 273 F.2d 462 (10th Cir. 1959) (en banc), cert. denied, 363 U.S. 846 (1960).

³⁰³ 28 U.S.C. § 2106 (1976).

³⁰⁴ 273 F.2d at 467.

³⁰⁵ Other American jurisdictions have implied a power to review the length of criminal sentencing under similar authorization. See Mueller, *Penology on Appeal: Appellate Review of Legal But Excessive Sentences*, 15 VAND. L. REV. 671, 679-81 (1962). Appellate review of sentences under doctrines other than the cruel and unusual punishment rubric is not unusual in America. A discussion of this phenomenon is beyond the scope of this article.

³⁰⁶ This statement is modified by the holding in *United States v. McKinney*, 427 F.2d 449 (6th Cir. 1970). In *McKinney* the Sixth Circuit upheld a conviction for knowingly refusing to submit to induction into the armed forces. The trial judge had sentenced McKinney to five years imprisonment. In a one-paragraph consideration of this sentence the court held that the five-year sentence

was excessive. The court did not cite the legions of cases in the federal courts denying such a power but did cite *Weems v. United States*, 217 U.S. 349, and the dissenting opinion in *Smith v. United States*, 273 F.2d at 468.

³⁰⁷ 438 F.2d 786.

³⁰⁸ On Petition for Rehearing, Chief Judge Haynsworth limited his concurrence to allow the death penalty for rape only if "the victim suffered grievous physical or psychological harm." *Ralph v. Warden*, 438 F.2d at 794. Two circuit judges filed a dissent from the majority's refusal to grant a rehearing en banc. *Id.* at 794-98.

³⁰⁹ *Id.* at 790-93.

³¹⁰ *Id.* at 793. When addressing the "infrequency argument" the court stated: "The reluctance to carry out death sentences, however, is symptomatic of a national and worldwide trend away from capital punishment." 438 F.2d at 792 n.21. The court presented no empirical evidence that suggested the infrequency of execution resulted from a loss of will as opposed to court interference. The court apparently did not consider that by eliminating the death penalty in *Ralph*, executions for rape would become even more infrequent and therefore, one can presume, unconstitutional for all rapes.

³¹¹ 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 983 (1974). See also Note, *Criminal Procedure—Eighth Amendment Proportionality Analysis In Its Infancy*, 52 N.C. L. REV. 442 (1973).

trial. Pursuant to the West Virginia habitual criminal statute, Hart was sentenced to a mandatory life sentence.

In holding that the life sentence was unconstitutionally disproportionate to the underlying offenses, the Fourth Circuit developed a series of inquiries to test for disproportionality. First, the court looked to the "nature of the offense itself"³¹² to determine the proportionality of the sentence. The court did not assess the nature of the offense in light of the state interest in determining habitual offenders, but rather considered the gravity of the underlying offenses. The court discounted the perjury conviction because the petitioner "faced a moral dilemma: to choose between his duty to tell the truth and family loyalty."³¹³ The gravity of the check drawn on insufficient funds was considered "very nearly trivial"³¹⁴ because "one penny less in the face amount of the check and the offense would have been a five to sixty-day petty misdemeanor."³¹⁵ The court never considered the relative seriousness of the second offense, but it noted that none of the offenses "involved violence or danger of violence toward persons or property."³¹⁶

Second, the court chose to look behind the legislative purpose in selecting the punishment.³¹⁷ The court dismissed the state's argument that the recidivist law deterred others from committing felonies and protected society from habitual criminals by stating:

Such an argument proves too much. Assuming the validity of the deterrent theory, and there is room for doubt, then if a life sentence is good for the purpose, surely a death sentence would be better. Putting Hart in prison for the remainder of his life for three offenses that rank relatively low in the hierarchy of crimes would presumably prevent him from passing bad checks but would not likely make him a truthful man.³¹⁸

Finally, the court added that "tradition, custom, and common sense reserve [the life sentence] . . . for those violent persons who are dangerous to others. It is not a practical solution to petty crime

in America. Aside from the proportionality principle, there aren't enough prisons in America to hold all the Harts that afflict us."³¹⁹

Third, the court compared Hart's life sentence with punishment he would have received in other jurisdictions.³²⁰ According to the Fourth Circuit, only four states would have punished Hart with the mandatory life sentence. The court did not canvass the actual practices of the various jurisdictions, but it did note that it would be unlikely that any of the states that provided for a discretionary life sentence would have sentenced the petitioner to a life term.³²¹

Last, the court determined that the proportionality analysis called for a comparison of the hierarchical rank of punishment within the jurisdiction.³²² Since West Virginia called for a life sentence for only three other crimes—murder, rape, kidnapping—the Fourth Circuit held it was irrational to punish Hart with a life sentence. While at one part of the opinion the court stated that the state could punish under a recidivist scheme,³²³ the court allowed the state to punish Hart "solely on the basis of his perjury conviction."³²⁴

The majority opinion in *Hart* drew a far-reaching dissenting opinion³²⁵ from the panel's third member, Judge Boreman. Boreman's dissent challenged the *Hart* majority on two fundamental premises. First, Judge Boreman argued that the majority had wrongly relied on *Yick Wo v. Hopkins*³²⁶ for the proposition that a valid recidivist statute could be applied in an unconstitutional way. Judge Boreman read *Yick Wo* as preventing the public authority from applying a valid statute with "an evil eye and an unequal hand."³²⁷ Since *Hart* was undisputably within the strictures of the West Virginia recidivist statute, Judge Boreman argued that the only discretion that could possibly be exercised was the choice to prosecute under the recidivist statute or merely charge a single offense. This discretion, the dissent argued, was explicitly approved by the Supreme Court in *Oyler v. Boles*.³²⁸ Since Hart could not show that the valid West Virginia recidivist statute was applied against him for improper rea-

³¹² 483 F.2d at 140.

³¹³ *Id.*

³¹⁴ *Id.* at 141.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.* Of course, every sentence would fall if a death sentence would be a better punishment. That a life sentence would not make Dewey Hart a truthful man simply misses the point, the life sentence certainly keeps him from society.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 142.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* at 143.

³²⁵ *Id.* at 145 (Boreman, J., dissenting).

³²⁶ 118 U.S. 356, 373-74 (1886).

³²⁷ 483 F.2d at 147 (Boreman, J., dissenting).

³²⁸ 368 U.S. 448.

sons, Judge Boreman argued that the majority wrongly relied on the *Yick Wo* principle.³²⁹

Second, Judge Boreman took issue with the majority's conclusion that the West Virginia recidivist statute was unconstitutionally applied to Hart. Judge Boreman suggested that the majority improperly considered Hart's \$50 check conviction "very nearly trivial"³³⁰ because a check for any other amount could be so characterized. The dissent also questioned the propriety of the majority's reasoning that the perjury conviction could be discounted by the "moral dilemma"³³¹ faced by Hart at his son's murder trial. Finally, Judge Boreman referred to another Fourth Circuit disproportionality case decided the same day as *Hart v. Coiner* by the same panel. In *Wood v. South Carolina*³³² a unanimous panel upheld a five-year sentence for making obscene telephone calls. The *per curiam* opinion expressed the view that the possible maximum for making an obscene telephone call was a "rather startling ten year"³³³ sentence but that the trial judge who sentenced Wood to five years imprisonment was "doubtless" and "properly" influenced by "Wood's prior criminal record."³³⁴

Judge Boreman argued that the *Hart* result was inconsistent with *Wood* and added an important footnote:

In our experience as practicing attorneys or, perhaps, trial judges, how many times have cases come to our attention where it was known to the prosecutor that an accused had issued a veritable flood of bad checks but the prosecutor was satisfied to accept a plea of guilty as to one and dismiss the other charges? Is this not true with reference to multiple offenses of other types and kinds such as breaking and entering, robberies, and the like? What can an appellate court possibly know of the circumstances surrounding every recorded conviction?³³⁵

The final Fourth Circuit proportionality case is *Davis v. Davis*,³³⁶ where the defendant was convicted of possession of marijuana with intent to distribute

and of distribution of marijuana. The two offenses involved less than nine ounces of marijuana and a jury sentenced the defendant to two twenty-year sentences and two \$10,000 fines, and the trial judge imposed the sentences consecutively. Applying the *Hart v. Coiner* standards, a federal district court held that the forty-year sentence and the \$20,000 fine constituted cruel and unusual punishment.³³⁷

A panel of the Fourth Circuit reversed and reasoned that when the challenged sentence is one for a term of years the analysis under the proportionality theory "need not be as broad as the inquiry used in *Hart* when a life sentence was imposed."³³⁸ According to the *Davis* panel, the lesser inquiry looks only to a "consideration of the seriousness of the offense committed."³³⁹ Since the *Davis* jury was aware that Davis was "a drug dealer by vocation"³⁴⁰ the twenty-year sentence was not excessive. The panel further reasoned that the trial judge was justified in assessing the sentences consecutively because Davis previously had been convicted of selling LSD and had committed the two marijuana offenses while he was on bail pending appeal on the LSD offense.³⁴¹ In a short *per curiam* opinion, four of the seven Fourth Circuit judges sitting *en banc*, vacated the panel opinion and held the forty-year sentence disproportionate under the eighth amendment.³⁴²

³³⁷ 432 F. Supp. at 452.

³³⁸ 585 F.2d at 1232.

³³⁹ *Id.*

³⁴⁰ *Id.* at 1233.

³⁴¹ *Id.*

³⁴² 601 F.2d at 153. There are no other Fourth Circuit cases finding punishments disproportionate. However, other cases merit special mention. In *Griffin v. Warden*, 517 F.2d 756 (4th Cir. 1975), the defendant had been sentenced to the mandatory life sentence under the West Virginia habitual criminal statute. The underlying offenses were burglary, breaking and entering, and grand larceny. The *Griffin* court upheld the life sentence and dismissed *Hart v. Coiner* as involving no "violence and danger to life as well as property." *Id.* at 757.

The Fourth Circuit has also upheld various sentences against proportionality attack. *See* *United States v. Williamson*, 567 F.2d 610, 616 (4th Cir. 1977) (eight years for possessing a firearm by a convicted felon); *United States v. Atkinson*, 513 F.2d 38, 42 (4th Cir. 1975) (12 years for possession and distribution of heroin); *United States v. Cowles*, 503 F.2d 65, 67 (4th Cir. 1974) (two years for unlawful possession of a firearm); *Robinson v. Warden*, 455 F.2d 1172 (4th Cir. 1972) (15 years for assault with intent to commit murder).

In *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978), a federal district court in the Fourth Circuit held that a 48- to 50-year sentence for safecracking was unconstitutionally excessive. The defendant had prior convictions for breaking and entering, larceny, loafing and loitering, and armed robbery, and an escape while he was serving the armed robbery sentence. *Id.* at 377.

³²⁹ 483 F.2d at 147. (Boreman, J., dissenting).

³³⁰ *Id.* at 148.

³³¹ *Id.*

³³² 483 F.2d 149 (4th Cir. 1973).

³³³ *Id.* at 150.

³³⁴ *Id.*

³³⁵ 483 F.2d at 149 n.2.

³³⁶ *Davis v. Zahradnick*, 432 F. Supp. 444 (W.D. Va. 1977), *rev'd sub nom. Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978), *opinion vacated and district court opinion adopted*, 601 F.2d 153 (4th Cir. 1979) (*en banc*), *vacated sub nom. Hutto v. Davis*, 100 S. Ct. 1593 (1980).

The proportionality principle also was employed by the Sixth Circuit to strike down an Ohio statute mandating a ten-year minimum sentence for possession of marijuana for sale and a twenty-year minimum for sale of marijuana in *Downey v. Perini*.³⁴³ *Downey* was vacated by the Supreme Court in light of an Ohio statutory change which mandated review of prior marijuana sentences.

In 1967 Governor Rockefeller of New York proposed a comprehensive revision of the state's drug laws. The Second Circuit considered the constitutionality of the mandatory penalties provided by the laws in *Carmona v. Ward*.³⁴⁴ The New York statute provided for indeterminate life sentences for conviction of all narcotic drug sales and for possession of narcotic drugs in quantities in excess of one ounce. Depending upon various factors the statute called for minimum sentences of fifteen, six, and one year. All convictions carried a mandatory life sentence. The New York Court of Appeals unanimously upheld the penalty scheme in *People v. Brodie*.³⁴⁵ The court accepted the proportionality concept under the eighth amendment and the typical analysis employed under that concept. However, the court thought that the gravity of the offense should be assessed more broadly than the individual offenses committed by the challenging defendants. To the New York court the offense was a part of the "pernicious phenomenon of drug distribution,"³⁴⁶ and not merely an isolated criminal offense.

After the state court failure, Brodie brought his case to the federal district court in a habeas corpus action. The challenge succeeded; the district court held the New York court's analysis flawed because "it is necessary to judge the proportionality of the punishment with relation to the actual offense committed."³⁴⁷

A divided Second Circuit panel reversed the district court. The challenge in the Second Circuit involved two separate defendants. One defendant, with a history of narcotic related offenses, was

convicted of possession of cocaine and sentenced to serve a term of six years to life. The other defendant was convicted of the sale of \$20 worth of cocaine and sentenced to serve a term of four years to life.³⁴⁸ The Second Circuit agreed with the New York Court of Appeals that the offense should be assessed in light of the total drug problem and not as two isolated, nonviolent offenses involving relatively small amounts of cocaine.³⁴⁹ The Second Circuit also disagreed with the district court's conclusion that eighth amendment proportionality analysis requires the court to judge the severity of punishment by the maximum possible term.³⁵⁰ The court determined that the term of imprisonment should be discounted by the recognized probability of parole. Using this standard, the court concluded that New York was justified in placing severe penalties for drug traffic because of the very serious New York drug problem.³⁵¹

One judge dissented from the panel opinion.³⁵² He argued that the New York sentences should be considered one for natural life and the petitioners' crimes should be viewed as part of "the very lowest level of the scale"³⁵³ of the drug traffic and that it is improper to place all drug offenders within a single category.

The petition for certiorari was denied by the United States Supreme Court, but Justice Marshall, joined by Justice Powell, filed a dissenting opinion.³⁵⁴ Justice Marshall termed the Second Circuit's view of the nature of the offense "problematic"³⁵⁵ and inconsistent with the "fundamental premise of the criminal justice system, that individuals are accountable only for their own criminal acts."³⁵⁶ Justice Marshall also questioned the Second Circuit's choice to discount the punishment by the probability of parole.³⁵⁷ Justice Marshall called this analysis "analytically unsatisfying."³⁵⁸ Finally, Justice Marshall challenged the Second Circuit's holding that a comparatively harsher drug law may be based on a finding³⁵⁹ that the problem is more acute locally than nationally.³⁶⁰

³⁴⁸ 576 F.2d at 407.

³⁴⁹ *Id.* at 412.

³⁵⁰ *Id.* at 413.

³⁵¹ The court termed the New York problem a "plague." *Id.* at 415.

³⁵² *Id.* at 417 (Oakes, J., dissenting).

³⁵³ *Id.* at 422.

³⁵⁴ 439 U.S. at 1091.

³⁵⁵ *Id.* at 1096.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at 1098.

³⁵⁸ *Id.*

³⁵⁹ Justice Marshall also questioned this factual premise. *Id.* at 1101.

³⁶⁰ *Id.*

³⁴³ 518 F.2d 1288 (6th Cir. 1975), *vacated on other grounds*, 423 U.S. 933 (1976). See also Note, *Constitutional Law—Cruel and Unusual Punishments—Eighth Amendment Prohibits Excessively Long Sentences*, 44 *FORDHAM L. REV.* 637 (1975); Note, *Constitutional Law—Eighth Amendment—Appellate Sentence Review*, 1976 *WIS. L. REV.* 655.

³⁴⁴ 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979).

³⁴⁵ 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338.

³⁴⁶ *Id.* at 112-13, 371 N.Y.S.2d at 476-77, 332 N.E.2d at 342.

³⁴⁷ *Carmona v. Ward*, 436 F. Supp. 1153, 1169 (S.D.N.Y. 1977), *rev'd*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979) (emphasis in original).

Justices Marshall and Powell were willing to consider that *Ward* indicated that in the future the full Court might consider the far-reaching questions raised by proportionality analysis.

THE RUMMEL OPINIONS

The proportionality issues raised by the state courts and the lower federal courts came to a head in *Rummel v. Estelle*.³⁶¹ The various court opinions in *Rummel* are particularly interesting: the panel opinion adopted the analysis developed in *Hart v. Coiner*³⁶² and applied the principles of *Hart* in a generous manner; the *en banc* opinion also adopted part of the *Hart* analysis, but deferred to legislative choice; the Supreme Court opinion apparently rejected the conceptual framework developed in *Hart* and emphasized the limited nature of the review under the eighth amendment.

THE RUMMEL FACTS

For at least one hundred and twenty years, Texas law has provided for a mandatory life sentence upon conviction of a third felony. In 1973 Rummel was convicted of obtaining \$120 by false pretenses.³⁶³ At the punishment stage of Rummel's

³⁶¹ *Rummel v. Estelle*, 568 F.2d 1193, *vacated*, 587 F.2d 651 (5th Cir. 1978) (*en banc*), *aff'd*, 100 S. Ct. 1133 (1980).

³⁶² 483 F.2d 136. See text accompanying notes 311-35 *supra*.

³⁶³ Rummel was convicted under TEX. PENAL CODE ANN. art. 63 (Vernon 1925), which provides: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." As a matter of state law, the Texas Court of Criminal Appeals has interpreted this statute to provide for a mandatory life sentence only when each successive felony conviction is preceded by a final felony conviction. *Tyra v. State*, 534 S.W.2d 695, 698 (Tex. Crim. App. 1976). Under Texas law, a criminal conviction is not final until the defendant is imprisoned. No final conviction can result if the defendant successfully fulfills a probationary period.

The *en banc* court compared the Texas procedure with states that activate habitual offender laws upon proof of any previous conviction or simultaneous, multiple convictions. 587 F.2d at 656-59. State procedures under habitual offender laws are explored in Note, *supra* note 199, at 78-79; Note, *Recidivist Procedures*, 40 N.Y.U. L. Rev. 332 (1965).

In 1974, the Texas legislature apparently approved the Court of Criminal Appeals' reading of the statute since the requirements were made more explicit:

If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of the felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement

trial,³⁶⁴ the state proved that Rummel had been convicted in 1969 of forging a \$28 check.³⁶⁵ The state also established that Rummel had been convicted of presenting a credit card for an \$80 bill with intent to defraud in 1964.³⁶⁶ The aggregate amount stolen was \$229. Finding that Rummel had been convicted of two prior felonies and that the felonies qualified under the Texas procedure for enhancement, the trial judge sentenced Rummel to a life term as required by the statute. The Texas Court of Criminal Appeals affirmed Rummel's conviction.³⁶⁷

After an unsuccessful attempt to obtain post-conviction relief in the state courts, Rummel sought federal habeas corpus relief in the Western District of Texas. The district court denied relief without a hearing and Rummel took an appeal to the Fifth Circuit. By a divided vote, the panel reversed the district court. The Fifth Circuit, *en banc*, then vacated the panel decision and affirmed the district court. Ultimately, the Supreme Court affirmed the *en banc* decision.³⁶⁸

THE PANEL OPINION

A divided Fifth Circuit panel reversed the district court, reasoning that under the criteria of *Hart v. Coiner*,³⁶⁹ the life sentence violated the eighth amendment. In *Hart* the Fourth Circuit set out four factors to use in considering whether a punishment violates the eighth amendment: (1) the nature of the offense; (2) the legislative purpose behind the punishment; (3) the punishment the defendant would have received in other jurisdictions, and (4)

in the Texas Department of Corrections for life. TEXAS PENAL CODE ANN. tit. 3, art. 12.42(d) (Vernon 1974).

³⁶⁴ Texas has bifurcated criminal trials. The jury must first determine the defendant's guilt beyond a reasonable doubt, then the jury returns for further argument in the punishment stage and the jury retires for a second time to decide punishment. If the jury unanimously determines the guilt but is unable to agree on punishment, a mistrial must be declared and the state must again prove guilt at the second trial. See *Bray v. State*, 531 S.W. 2d 633 (Tex. Crim. App. 1976).

³⁶⁵ TEXAS PENAL CODE ANN. tit. 14, art. 996 (Vernon 1925).

³⁶⁶ TEXAS PENAL CODE ANN. tit. 17, art. 1555b, § 1 (Vernon 1925).

³⁶⁷ *Rummel v. State*, 509 S.W.2d 630 (Tex. Crim. App. 1974). The Texas court disavowed any power under the eighth amendment to adjust a legislatively prescribed sentence.

³⁶⁸ *Rummel v. Estelle*, 568 F.2d 1193. The panel majority consisted of Judges Clark and Goldberg. The dissent was registered by Judge Thornberry.

³⁶⁹ 483 F.2d 136. See text accompanying notes 311-35 *supra*.

the punishments meted out for other offenses in the same jurisdiction.

Under the first prong of the *Hart* test, the panel looked to the nature of the offense.³⁷⁰ The panel apparently thought that if any one of the underlying offenses involved "violence, a potential for violence, or a strong social interest," a life sentence would be constitutional.³⁷¹ Although the panel did not indicate which crimes involve a potential for violence, it did suggest that laws involving narcotics possess a strong social interest.³⁷² Addressing the question of the seriousness of Rummel's crimes the panel stated:

None of Rummel's offenses present exacerbating factors justifying a severe penalty. Considered in combination, Rummel's crimes, although felonies under Texas law, lack those indicia of depravity generally associated with felonies and the heinousness of the offenses for which life imprisonment is a common punishment. They were substantially separated in time. None involved violence or the potential for violence. Each was solely a property crime and the amounts taken were not substantial.³⁷³

Second, the panel sought to determine the legislative objective in making conduct a punishable offense.³⁷⁴ According to the panel this "inquiry seeks to determine whether a *significantly* less severe punishment could achieve the purposes for which the challenged punishment is inflicted."³⁷⁵ The panel recognized that an habitual offender law has as its objective "protecting citizens from incorrigible repeat offenders."³⁷⁶ However, the panel determined that this legislative interest could be achieved by a lesser punishment. The panel reached this conclusion by looking to the punishment given recidivists in other jurisdictions and

punishments given for other offenders in Texas, the last two *Hart* factors.

Next, the panel compared Rummel's sentence with the punishment accorded other crimes in Texas. To this end the panel noted that Texas imposes a mandatory life sentence only for capital murder³⁷⁷ and punishes a single felony such as murder, aggravated rape or arson with as little as five years.³⁷⁸ The panel determined that these other sentences demonstrate that Texas singles out the habitual criminal for irrationally severe punishment.

Last, the panel considered Rummel's sentence in comparison with punishment accorded recidivists in other jurisdictions.³⁷⁹ Central to the panel's analysis is its determination that Rummel's life sentence is one for his natural life, regardless of considerations of parole and pardon. The panel so reasoned because to consider parole is to interject the federal courts into the parole process.³⁸⁰ In a canvass of American jurisdictions, the panel discovered that in addition to Texas, only Indiana, Washington, and West Virginia require a mandatory life sentence upon conviction of a third felony.³⁸¹ However, the panel discounted the similar statutes for various reasons: the West Virginia statute is limited by *Hart v. Coiner*; the Indiana statute was recently modified; and the Washington Supreme Court would as a matter of state law honor the *Hart* standards.³⁸² The panel then concluded that "the state of Texas now stands virtually alone in its unqualified demand for life imprisonment for a three time felon."³⁸³

The panel concluded that Rummel's life sentence violated each of the *Hart v. Coiner* factors and as such violated the eighth amendment. The court concluded that the legislature had selected a punishment grossly disproportionate to the offense.³⁸⁴

In dissent, Judge Thornberry suggested that the majority had assumed a legislative function. While

³⁷⁷ *Id.* at 1199. Under TEXAS PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974), capital murder is punishable by death or life imprisonment.

³⁷⁸ All three crimes are punished with prison terms from five to 99 years. TEXAS PENAL CODE ANN. tit. 5, § 19.02 (murder); § 21.03 (aggravated rape); § 28.02 (arson).

³⁷⁹ 568 F.2d at 1196.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 1199.

³⁸² The Court drew this conclusion from a citation to *Hart* in a footnote in *State v. Lee*, 87 Wash. 2d 932, 558 P.2d 236, 240 n.4 (1977) (en banc), *appeal dismissed*, 432 U.S. 901 (1977).

³⁸³ 568 F.2d at 1200.

³⁸⁴ *Id.*

³⁷⁰ *Rummel v. Estelle*, 568 F.2d at 1197.

³⁷¹ *Id.*

³⁷² *Id.* at 1198. Interestingly, the author of the panel opinion, Judge Clark, upheld a 30-year sentence for possession of a single marijuana cigarette in *Renner v. Beto*, 447 F.2d 20 (5th Cir. 1971), *cert. denied*, 405 U.S. 1051 (1972). In *Renner*, Judge Clark wrote:

This Circuit has long followed the principle that a sentence within the statutory limits set by a legislature is not to be considered cruel or unusual [citations omitted]. A sentence of thirty years is within the range of punishment prescribed by the Texas Penal Code for a second offense of possession of marijuana.

Id. at 23.

³⁷³ 568 F.2d at 1198.

³⁷⁴ *Id.*

³⁷⁵ *Id.* (emphasis in original).

³⁷⁶ *Id.*

he expressed sympathy with Rummel's plight, he stated that eighth amendment analysis cannot be guided by personal "feelings of compassion and justice."³⁸⁵ He attacked the majority's practice of examining the underlying offenses to establish the unconstitutionality of the punishment. He stated that the offenses, as felonies, were the prerequisites of the enhanced punishment, not the amounts involved.³⁸⁶

THE *EN BANC* OPINION

The panel opinion provoked sufficient interest to warrant a full court hearing by the Fifth Circuit. On rehearing the panel's decision was narrowly overturned.³⁸⁷ Although the new majority opinion substantially accepted the conceptual framework posited by the panel opinion, the emphasis was markedly dissimilar.

The *en banc* court rejected the state's argument that there is no power under the eighth amendment to find a legislatively selected prison sentence unconstitutional under a disproportionality theory.³⁸⁸ The court canvassed a mass of ill-defined and conflicting cases.³⁸⁹ While many American jurisdic-

³⁸⁵ *Id.* at 1201.

³⁸⁶ *Id.* at 1201-02.

[T]he majority focuses on the small amount of money involved and the asserted triviality of all of Rummel's offenses. But Rummel was not sentenced to life imprisonment for stealing \$230.00; the life sentence resulted from his having committed three separate and distinct felonies under the laws of Texas. If the state is entitled to characterize a particular criminal act as a felony, and to enforce its constitutional habitual criminal statute, I cannot understand how these two constitutional statutes coalesce to produce an unconstitutional result . . . I know of no stopping point for today's decision.

Id.

³⁸⁷ *Rummel v. Estelle*, 587 F.2d 651.

³⁸⁸ *Id.* at 654-55.

³⁸⁹ The court divided its research into four groups of cases. The first group consisted of Fifth Circuit cases denying any power under the eighth amendment to test the length of prison sentences. *Id.* at 654 n.3. The second group catalogued cases from other jurisdictions claiming no power under the eighth amendment for disproportionality analysis. *Id.* at 654 n.4. The third group of cases from the Fifth Circuit admitted power under the eighth amendment to test the length of prison sentences. *Id.* at 654 n.5. Typical of these cases was *Rogers v. United States*, 304 F.2d 520, 521 (5th Cir. 1962), in which the court said a punishment could be cruel and unusual if "it is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice." No case, however, interdicted a prison term under this theory. The last group consisted of cases from other jurisdictions claiming to review the length of prison sentences. 587 F.2d at 655 n.6. Several of these cases

spoke of a power in the eighth amendment to review the constitutionality of prison sentences, at the time of the court's writing, only and litigant had been relieved of a prison term through habeas corpus litigation in federal court,³⁹⁰ and only a handful had been relieved of prison terms in state court.³⁹¹ Moreover, the court also was able to discover many cases which flatly rejected any power to review the length of sentences under the eighth amendment.³⁹²

While expressing doubts as to the historical foundation of disproportionality theory, the court concluded that such analysis was contained in the eighth amendment. An apparent dispositive factor in the court's choice was the recognition of disproportionality analysis by individual members of the Supreme Court in death cases.³⁹³ Furthermore, the court was aware that the Supreme Court had invalidated a death sentence for rape in *Coker v. Georgia*³⁹⁴ under disproportionality theory.

Since the *en banc* court accepted the validity of disproportionality analysis, it was forced to articulate a set of standards. To this end, the court accepted three of the four *Hart v. Coiner* standards used by the panel opinion; however, the *en banc* court concluded the panel erred by failing to uphold a sentence "if there is any rational basis for so doing."³⁹⁵ The court started with the proposition that the Texas habitual criminal law is constitutional.³⁹⁶ The court then turned to a discussion of the *Hart* standards emphasized in the panel opinion.

First, the *en banc* court agreed with the panel's

actually found a prison sentence unconstitutionally excessive, some on explicit eighth amendment grounds and others on an uncertain theoretical basis.

³⁹⁰ At the time of the court's writing, Dewey Hart was the only litigant relieved of a prison sentence in a circuit court under a disproportionality theory. *Hart v. Coiner*, 483 F.2d 136. Six months after the *en banc Rummel* opinion, the Fourth Circuit *en banc* by a four-to-three vote released a petitioner who was serving a 40-year sentence for possession and distribution of marijuana. *Davis v. Davis*, 601 F.2d 153.

³⁹¹ Litigants have been relieved of prison sentences in several state courts. These cases are discussed in the text accompanying notes 221-359 *supra*.

³⁹² 587 F.2d at 654 nn.3, 4.

³⁹³ *Id.* at 655.

³⁹⁴ 433 U.S. 584.

³⁹⁵ 587 F.2d at 656.

³⁹⁶ *Id.* The court relied on *Spencer v. Texas*, 385 U.S. 554. See text accompanying note 214 for the Court's language.

For a criticism that the Court's language in *Spencer* was too broad, see Katkin, *supra* note 200, at 113-15.

conclusion to look to the nature of the offense.³⁹⁷ The *en banc* court, however, took a radically different approach from the panel's inquiry. The panel had looked to the underlying offenses, in this case three relatively minor thefts, but the *en banc* court concluded that the three separate and distinct convictions comprised the proper focus of inquiry.³⁹⁸ In short, the court treated the status of habitual criminal as a distinct offense, apart from the underlying offenses. The court said that it arrived at this conclusion via the "first principle of . . . analysis—that every inference is to be made in favor of the selected punishment."³⁹⁹

Moreover, the *en banc* court stressed its conclusion that the probability of parole should be taken into account.⁴⁰⁰ To the majority, the enhanced recidivist punishment was not a sentence for natural life, but a sentence for between ten and twelve years, with further incarceration conditioned on good behavior.⁴⁰¹ The court concluded that a sentence of at least ten years did not violate the eighth amendment.⁴⁰² For this proposition the court relied on two Fourth Circuit cases: one upholding a five-year sentence for making an obscene phone call,⁴⁰³ the other upholding a forty-year sentence for possession and distribution of marijuana.⁴⁰⁴

³⁹⁷ 587 F.2d at 659.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 658-59.

⁴⁰¹ *Id.* at 657-58. Under Texas law, every prisoner is eligible for parole after serving 20 years or one-third of his sentence, whichever is less. TEXAS CODE CRIM. PRO. ANN. art. 42.12 § 15(a) (Vernon 1974). The 20-year maximum is not calendar years, but is further reduced by "good time credits." The good time system in Texas is generous and well developed. All prisoners earn 50 days credit for every 30 served during periods of good behavior. There are also two disciplinary classes; one class earns 40 days for 30 days and the harshest disciplinary class earns day-for-day time. There is a super-class of state approved trustees, the best of the prisoners, who earn 60 days for 30 calendar days. Therefore, under the Texas system, a life sentence can be served in between ten and twelve years, depending upon status and assuming appropriate prison behavior. The *en banc* court noted that Rummel has been serving time as a state approved trusty since March 1, 1977. 587 F.2d at 660 n.16. The Texas good time system is explained more fully in Jackson, *Hard Times*, TEXAS MONTHLY, December 1978, at 138, 258.

⁴⁰² 587 F.2d at 659.

⁴⁰³ *Wood v. South Carolina*, 483 F.2d 149. *Wood* was decided by the same Fourth Circuit panel that decided *Harat v. Coiner*.

⁴⁰⁴ *Davis v. Davis*, 585 F.2d 1226. The 40-year sentence in *Davis* was a jury determination and not a mandatory sentence. The panel decision in *Davis* was later reversed by the Fourth Circuit *en banc*, which, in turn, was reversed by the Supreme Court. *Davis v. Davis*, 601 F.2d 153 (4th

Second, the court agreed with the panel that under eighth amendment disproportionality analysis, the court should compare Rummel's Texas sentence with those imposed in other jurisdictions.⁴⁰⁵ The court admitted that if it is necessary to consider Rummel's Texas sentence as one for natural life, then Texas punishes habitual criminals who are guilty of property crimes more severely than other states.⁴⁰⁶ Furthermore, one reading of the majority opinion supports the view that a sentence for natural life would be unconstitutionally disproportionate.⁴⁰⁷ The majority, however, thought actual jail time measured by rational expectations was a better gauge for this comparison than the actual judgment of conviction.⁴⁰⁸ Using this standard the court determined that Rummel's actual jail time would "not be significantly longer in Texas than his jail time in many other states."⁴⁰⁹

In making this review the court was careful to note that the appellate record developed in *Rummel* was a product of the unique Texas procedure in habitual criminal cases. Eleven states,⁴¹⁰ according to the court, provide for a discretionary life sentence for a person in Rummel's position. In noting

Cir. 1979) (*en banc*), *vacated sub nom. Hutto v. Davis*, 100 5. Ct. 1593 (1980). The *en banc* court in *Davis* made no mention of the Fifth Circuit's rejection of a differing standard between life sentences and sentences for a term of years. See *Rummel v. Estelle*, 587 F.2d at 656 n.8.

⁴⁰⁵ 587 F.2d at 659.

⁴⁰⁶ *Id.*

⁴⁰⁷ The majority opinion states:

The panel majority argued that comparison of Rummel's sentence with the sentences imposed in other jurisdictions confirms the gross disproportionality of Rummel's sentence. 587 F.2d at 1199. . . . We believe that the evidence on this point is, at best inconclusive. Of course, if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the majority's assertion is probably accurate. 587 F.2d at 659.

If one reads the "majority's assertion" to refer to "confirms the gross disproportionality of Rummel's sentence," then the *en banc* opinion can be read to hold a sentence for natural life without possibility of parole unconstitutional. The *en banc* dissent takes this reading. *Id.* at 665-66.

The other reading would read the majority's assertion to refer to a comparison made by the panel opinion without comment as to the legal effect of such comparison.

⁴⁰⁸ 587 F.2d at 659-60.

⁴⁰⁹ *Id.* at 659. The court reached this conclusion by surveying other jurisdictions.

⁴¹⁰ The court noted that three states punish a four-time felon with a mandatory life sentence and eight states give discretionary power to punish a three-time felon with a life sentence. The states are canvassed at *Id.* at 660 nn.22, 23.

this, the court said that at first glance it appeared that none of the other eleven states would sentence Rummel to the maximum life term. However, taking into account the peculiar Texas system and the fact that the court did not examine Rummel's entire record, it was possible that he would have received the same sentence in the other states.⁴¹¹

The limitation inherent in the Texas enhancement procedure moved the District Attorney of Bexar County, Texas, to file an amicus brief in which he contended that Rummel had been convicted of at least twelve separate crimes over his criminal career,⁴¹² but because of the peculiarities of the Texas system only the minor property convictions could be used for enhancement. Consequently, the court, while bound by the appellate

⁴¹¹ *Id.* at 660.

⁴¹² According to the Amicus Brief filed by the District Attorney of Bexar County, Texas, Rummel's full record is:

1. Convicted October 20, 1959 of Misdemeanor Theft in cause no. 68554.
2. Convicted October 20, 1959 of Unlawful Possession of Alcoholic Beverages, cause no. 68553.
3. Convicted January 21, 1960 of Unlawfully Carrying a Deadly Weapon in County Court No. 1, Bexar County, Texas.
4. Convicted May 17, 1960 of Burglary in cause no. 3357 in the 81st District of Karnes County, Texas. Granted three years probation.
5. Convicted March 6, 1964 of Swindling by Check in cause no. 144938 in County Court, Bexar County, Texas.
6. Convicted March 6, 1964 of Swindling by Check in cause no. 144864 in County Court, Bexar County, Texas.
7. Convicted December 15, 1964 of Presentation of Credit Card With Intent to Defraud in cause no. 64306 in the 144th District Court, Bexar County, Texas.
8. Violated parole on July 21, 1966. Returned to the Texas Dept. of Corrections on August 25, 1966.
9. Convicted February 21, 1968 of Aggravated Assault on a Female in cause no. 157124 in County Court No. 3, Bexar County, Texas.
10. Convicted April 3, 1968 of Swindling by Check in cause no. 167599 in County Court, Bexar County, Texas.
11. Convicted March 11, 1969 of Forgery in cause no. 68977, in the 144th District Court, Bexar County, Texas.
12. Convicted April 10, 1973 of Swindling by Check Over \$50 in cause no. 72-2721 in the 187th District Court, Bexar County, Texas.
13. Convicted April 10, 1973 of Theft of Property Over the Value of \$50 (Habitual) in cause no. 73-CR-214 in the 187th District Court of Bexar County, Texas.

Brief for the Amicus Curiae at 3, District Attorney of Bexar County, Texas, *Rummel v. Estelle*, 100 S. Ct. 1133.

record developed in the case, apparently believed that factors other than those apparent under the state procedural system were relevant to the proportionality analysis.

Next, the *en banc* court held that while it considered the internal ranking of punishments a state selects as relevant to the proportionality analysis, it felt that in Rummel's case it was inappropriate to compare the punishment given for one crime with the punishment given under the recidivist statute.⁴¹³ Finally, the court rejected the panel's attempt to determine if the state's purpose in selecting a sentence could be served by a significantly lesser punishment.⁴¹⁴ The court refused to make this inquiry because it was not convinced that a majority of the Supreme Court had embraced this test in death cases, and it was convinced that for penalties less than death, a state would never be able to justify the particular penalty selected by the legislature.⁴¹⁵

The *en banc* majority concluded that while much could be said against the Texas habitual criminal statute, the judicial function did not include reweighing of the choices made by the Texas legislature. Throughout the litigation Rummel had argued that all three of his crimes were nonviolent and that the Texas recidivist statute should be applied only when one of the crimes was violent. The court answered that while Rummel may have suggested a rational system perhaps better than the one selected by Texas, his burden under the eighth amendment was to prove that Texas' system was irrational, not to posit a better system.⁴¹⁶

Six members of the fourteen-member court dissented from the majority opinion. The dissent took issue with the majority's inclusion of the probability of parole into the eighth amendment calculus. The dissent argued that a defendant has no constitutional right to parole and that since the parole process was largely immune from judicial review, parole gave the prisoner no protectable expectation of release.⁴¹⁷

RUMMEL IN THE SUPREME COURT

The Supreme Court affirmed the Fifth Circuit's *en banc* decision by a five-to-four vote.⁴¹⁸ Justice

⁴¹³ 587 F.2d at 660.

⁴¹⁴ *Id.* at 660-61.

⁴¹⁵ *Id.* at 661.

⁴¹⁶ *Id.* at 662.

⁴¹⁷ *Id.* at 666-67.

⁴¹⁸ 100 S. Ct. 1133. The opinion for the Court was written by Justice Rehnquist. His opinion was joined by Chief Justice Burger, and Justices Stewart, White and Blackmun. Justice Stewart also filed a concurring opin-

Rehnquist's majority opinion carefully noted that *Rummel* did not involve a challenge to recidivist statutes generally, nor did the case question the state's authority to make any of Rummel's three crimes a felony.⁴¹⁹

The Court's analysis proceeded from the proposition that the proportionality language in the capital punishment line of cases is "of limited assistance"⁴²⁰ when determining the constitutionality of a sentence less than death. Moreover, the Court read *Weems v. United States* as limited to "the extreme facts of that case."⁴²¹ To the Court, the *Weems* holding resulted from a combination of factors: the triviality of the offense, the length of the minimum term sentence, and the extraordinary nature of the post-imprisonment punishment included within *cadena temporal*.⁴²² Therefore, the Court concluded that the existing caselaw in the Supreme Court allowed the state to punish any behavior properly classified as a felony with any length of imprisonment "purely [as] a matter of legislative grace."⁴²³

The Court read *Coker v. Georgia* and *Weems v. United States* as providing a set of objective standards for assessing the proportionality of punishments: *Coker* because of the uniqueness of the death penalty⁴²⁴ and *Weems* because of the unusual nature of *cadena temporal*.⁴²⁵ Justice Rehnquist then suggested that when the challenge to a punishment goes merely to its length, as compared to the seriousness of the offense, the choice becomes a subjective one.⁴²⁶

Starting with *Hart v. Coiner*, and followed by the panel and *en banc* opinions in *Rummel*, the lower federal courts obviously recognized the difficulty in establishing a set of objective standards for determining proportionality. The Supreme Court, however, rejected the *Hart* and *Rummel* panel determinations that the presence or absence of violence is an objective standard upon which to base a proportionality determination.⁴²⁷ Justice Rehnquist suggested that a high official in a large cor-

poration can commit "undeniably serious"⁴²⁸ crimes without the violence. Moreover, Justice Rehnquist discounted the relatively small amounts of money taken by Rummel's various criminal enterprises.⁴²⁹ Indeed, the Court points out that had Rummel stolen no money, this fact would prove only lack of success as a thief, not the petty nature of the crime.⁴³⁰

While a different question might be presented were Rummel imprisoned for life for the single criminal theft of \$120, the Court determined that in Rummel's case, the dispositive factor was Rummel's failure to conform his behavior "to the norms of society as established by its criminal law."⁴³¹ Therefore, the social interest involved much more than deterring a single theft.

In *Hart* and *Rummel*, the lower federal courts frequently looked to the punishments accorded the offender in other jurisdictions as factors to employ in proportionality analysis. While the Supreme Court did not specifically endorse this practice, it appears that the *Rummel* opinion adopted this approach since the Court engaged in an extended analysis to rebut Rummel's proposition that "no jurisdiction in the United States or the Free World punishes habitual criminals as harshly as Texas."⁴³² However, the Court suggests that comparison between jurisdictions takes more than an interjurisdictional comparison from the pages of a statute book. For example, the Court notes Texas' strict rules for the application of its habitual criminal statute⁴³³ and the subtle differences between the habitual criminal acts of various states such as the application of a life sentence upon the fourth felony.⁴³⁴ Moreover, the Court, while agreeing that the life sentence should not be considered a twelve-year sentence because of the goodtime provisions of the Texas law,⁴³⁵ determined that the proper assessment of the sentences includes a recognition of the good time and parole process.⁴³⁶ Finally, the Court suggested that even if Rummel could demonstrate that his punishment is more severe than that of any other jurisdiction, Rummel would have

ion. *Id.* at 1145. Justice Powell, joined by Justices Brennan, Marshall, and Stevens, filed a dissenting opinion. *Id.*

⁴¹⁹ *Id.* at 1136.

⁴²⁰ *Id.* at 1138.

⁴²¹ *Id.*

⁴²² *Id.* at 1139.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 1139-40.

⁴²⁶ *Id.* at 1140.

⁴²⁷ *Id.* See also *id.* at 1143 n.27.

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.* The same opinion is expressed at the conclusion of Justice Rehnquist's opinion. *Id.* at 1144-45.

⁴³² *Id.* at 1141.

⁴³³ *Id.* See note 262 *supra* for a description of the workings of the Texas habitual criminal statute.

⁴³⁴ 100 S. Ct. at 1142.

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 1142-43.

failed to prove his case for disproportionality.⁴³⁷

The Court's opinion apparently rejects the *Hart* approach of an intrajurisdictional analysis of the seriousness of crimes because such a ranking is "inherently speculative."⁴³⁸ Moreover, the Court does not mention the *Hart* test which asks whether a lesser punishment would fulfill the legislative purpose behind a punishment.

Finally, Justice Rehnquist observed that under the concept of federalism, the states have long enjoyed great leeway in establishing the relative harshness of punishments. Therefore Texas, in finding Rummel a repeat offender, had a legitimate interest in isolating him from society, apart from the interest in deterring the commission of a single crime.⁴³⁹

Justice Powell dissented. Like the Fifth Circuit *en banc* minority, he took issue with the majority's consideration of a state's practices concerning parole and discretionary release.⁴⁴⁰ Justice Powell argued that a prisoner has no liberty interest in parole and that consideration of parole was unduly speculative.⁴⁴¹ Justice Powell argued for the adoption of three of the four *Hart v. Coiner* standards.⁴⁴² After a review of these standards, Justice Powell concluded that Rummel's crimes were relatively insignificant⁴⁴³ and that Texas punishes a person in Rummel's position more harshly than most other American jurisdictions⁴⁴⁴ and more harshly than it punishes others who commit more serious crimes.⁴⁴⁵

Justice Powell recognized the difficulty inherent in the subjective nature of the proportionality inquiry.⁴⁴⁶ However, he concluded that this difficulty does not prohibit the Court from developing ascertainable standards.⁴⁴⁷ Justice Powell called the "flood gates" argument "easy to make and difficult to rebut."⁴⁴⁸ To him the Fourth Circuit experience

with the proportionality question demonstrated that the lines were not impossible to draw.⁴⁴⁹ Justice Powell concluded by observing that Rummel's sentence "would be viewed as grossly unjust by virtually every layman and lawyer."⁴⁵⁰

THE ARGUMENTS

This article has reviewed the original meaning of the eighth amendment and its development in the Supreme Court, the lower federal courts, and the state courts. This article will now attempt to apply the learning gained from the prior review to *Rummel v. Estelle*. This section will address the questions unique to *Rummel* and problems raised by proportionality analysis generally. Despite what *Newsweek* calls the compelling case of William Rummel, this article argues that the Supreme Court has reached a fair resolution of this difficult constitutional problem.

THE PROBLEM OF AN "AS APPLIED" ATTACK

Given the extraordinarily broad approval of the Texas habitual criminal statute in *Spencer v. Texas*, Rummel did not challenge the constitutionality of the Texas statute. Instead, Rummel argued that the constitutional habitual criminal statute was being applied in an unconstitutional manner. This argument was accepted by the Fourth Circuit in *Hart v. Coiner* and the Fifth Circuit panel in *Rummel*. Both courts relied primarily on *Yick Wo v. Hopkins*⁴⁵¹ for this proposition. In *Yick Wo* the Supreme Court struck down the application of an otherwise neutral law because it was "applied and administered by public authority with an evil eye and an unequal hand."⁴⁵²

It must be clear that the "as applied" attack in *Rummel* is not within this principle. Rummel does not argue that the Texas authorities applied the recidivist statute on the basis of some impermissible motivation. Indeed, if this were his attack, it would clearly be within the ambit of *Oyler v. Boles*.⁴⁵³ Answering the problem raised by an as applied attack involves far more than a citation to an inappropriate case. Logically, an acceptance of the as applied attack should lead to the requirement that a criminal sentence be individualized both as to the character of the offender and the relative gravity of a specific act within the universe of the offense.

⁴³⁷ *Id.* at 1143.

⁴³⁸ *Id.* at 1143 n.27. *But see* *Terrebonne v. Blackburn*, 624 F.2d 1363, (5th Cir. 1980) (holding that the Supreme Court's affirmation of *Rummel* leaves intact the proportionality analysis adopted by the *en banc* court).

⁴³⁹ 100 S. Ct. at 1144-45.

⁴⁴⁰ *Id.* at 1150.

⁴⁴¹ *Id.*

⁴⁴² *Id.* The inquiries are (1) looking to the nature of the offense; (2) comparing the selected punishment with the punishment accorded in other jurisdictions; and (3) comparing the sentence imposed for the offense with other sentences imposed by the same state for other offenses.

⁴⁴³ *Id.* at 1150.

⁴⁴⁴ *Id.* at 1150-53.

⁴⁴⁵ *Id.* at 1153.

⁴⁴⁶ *Id.* at 1154.

⁴⁴⁷ *Id.* at 1156.

⁴⁴⁸ *Id.* at 1154.

⁴⁴⁹ *Id.* at 1154-56.

⁴⁵⁰ *Id.* at 1156.

⁴⁵¹ 118 U.S. 356.

⁴⁵² *Id.* at 373, 374.

⁴⁵³ 368 U.S. 448.

Most courts to accept the proportionality concept examine only the nature of the offense to determine its place in the hierarchy of criminal behavior. Other courts have added the requirement that the court inquire into the nature of the offender as well. For example, in *Anderson v. Commonwealth*⁴⁵⁴ and *Edwards v. Commonwealth*⁴⁵⁵ both offenders were guilty of rape under approximately equal conditions, the only difference being that the offender in *Anderson* was sixteen years old and the offender in *Edwards* was eighteen years old. The Kentucky court struck down the punishment in *Anderson* while upholding the life sentence without possibility of parole in *Edwards*. Similarly, the Michigan Supreme Court in *People v. Lorentzen*⁴⁵⁶ noted that the defendant convicted of a small-scale sale of marijuana was a first offender gainfully employed. In *Wood v. South Carolina*,⁴⁵⁷ the Fourth Circuit upheld a five-year sentence for making an obscene telephone call. In so doing the court noted, "The sentencing judge was doubtless influenced and properly so, by Wood's prior criminal record."⁴⁵⁸ If these courts are correct, the eighth amendment must also require that the punishment be proportioned to the offender as well as to the offense. This raises the difficult problem of how the courts, and more troubling, the appellate courts, are to know the character of the offender.

In *Rummel*, the petitioner evades this conclusion and demands that the court look only to the nature of the three property offenses. As this article has previously mentioned, the indictment upon which Rummel was convicted alleges only the three property crimes because of the requirements of Texas law. The state is anxious to show that Rummel, in fact, has been convicted of many other crimes and has been to prison on at least three prior occasions.

Rummel argues that the state's offer of proof is immaterial because "by mandating life sentences for those convicted of a third felony the Texas Legislature foreclosed proof of mitigating circumstances and pleas for mercy and compassion."⁴⁵⁹ This position is analytically sound, yet troubling. On the one hand, Rummel insists that he is entitled to an as-applied attack upon a constitutionally proper statute, but, on the other hand, the state is

not entitled to show that Rummel received an appropriate sentence. Perhaps the mandatory nature of the sentence makes Rummel's argument correct. But if this is so, then Rummel is not arguing that his sentence is disproportionate, but that the mandatory nature of the sentence is unfair and unconstitutional.

The *Rummel* Court did not specifically address the problems generated by an as-applied attack but it did mention the complexities inherent in selecting a constitutionally appropriate sentence.⁴⁶⁰ Rhetorically, the Court asked if the state could re-sentence Rummel to life imprisonment, based on his full record in the event that the life sentence for the three charged felonies was unconstitutional.⁴⁶¹ The Court does not answer this question, but the question illustrates the difficulty in the as-applied attack.

Additional evidence of this position can be gained from Rummel's admission that, if a judge or jury had independently assessed Rummel's life sentence, his objections would lose their force.⁴⁶² This position is analytically unsound. If Rummel's life sentence is disproportionate under the eighth amendment, it can be no less so simply because a judge or jury assessed the punishment. In fact, the Fourth Circuit flatly rejected Rummel's argument in *Davis v. Davis*⁴⁶³ in which the *en banc* court found a sentence selected by a judge and jury, disproportionately severe for the sale of marijuana.

The most difficult case, and the case that must follow *Rummel*, is an attack on a sentence selected by a jury for aggravating circumstances for which the defendant was not convicted. In *Cobern v. State*⁴⁶⁴ the state of Alabama exacted the death penalty for robbery of a 1957 Chevrolet. By any standard, one must agree that this penalty is disproportionate in the abstract. However, the court's description of the robbery may lead to a different conclusion:

The circumstantial evidence, aside from appellant's confession, shows rather conclusively that he murdered Mamie Belle Walker, took some of her jewelry and her automobile, and left the state. The body was in a deplorable condition, her skull practically beaten into pieces, a 22 caliber rifle bullet wound in the chest which penetrated the body. The doctor testified that these two wounds were sufficient to

⁴⁵⁴ 465 S.W.2d at 75.

⁴⁵⁵ 500 S.W.2d 396.

⁴⁵⁶ 387 Mich. 167, 194 N.W.2d 827.

⁴⁵⁷ 483 F.2d 149.

⁴⁵⁸ *Id.* at 150.

⁴⁵⁹ Reply Brief for Petitioner at 5, 6, *Rummel v. Estelle*, 100 S. Ct. 1133.

⁴⁶⁰ 100 S. Ct. at 1143.

⁴⁶¹ *Id.*

⁴⁶² Brief for Petitioner at 13, *Rummel v. Estelle*, 100 S. Ct. 1133.

⁴⁶³ 601 F.2d 153.

⁴⁶⁴ 273 Ala. 547, 142 So. 2d 869 (1962).

cause death. Her body was otherwise bruised and mutilated, including the puncturing of her vaginal area, evidently with a poker found in the room, on which were vaginal hairs similar to those of the victim.⁴⁶⁵

Cobern was not convicted of rape and murder, but if Cobern were to argue that his death sentence is disproportionate to his offense, is the court bound to look only at the face of the conviction?

Another example concerns the story broadcast on the popular CBS Show, *Sixty Minutes*, of a Florida woman who received a fifteen-year prison sentence for a five dollar theft. In the abstract, this penalty also seems disproportionately severe. However, the sentence was the product of plea bargaining. The woman could have been charged with auto theft, kidnapping, and armed robbery. In exchange for dropping the other charges, the woman pleaded guilty to taking a five dollar bill from a purse during the kidnapping. If this woman were to argue that her sentence is disproportionate, is the state allowed to justify the sentence with information outside the record and outside the formal proof of trial?⁴⁶⁶

While this problem was avoidable in *Rummel* because of the mandatory nature of the penalty, the problem will arise under other sentencing schemes. In *Williams v. New York*⁴⁶⁷ the Supreme Court upheld the use of a presentence report in the sentencing decision even though the report had not formally been admitted into evidence. In *Williams*, the defendant had been convicted of murder, and the trial judge sentenced the defendant to death. In doing so, the trial judge relied on the presentence report which accused the defendant of thirty burglaries even though the defendant had never been convicted of any of the burglaries. *Williams* strongly suggests that the state ought to be able to justify a defendant's sentence with information concerning the nature of plea bargaining, and the nature of other offenses committed by the defendant.

THE QUESTION OF PAROLE

Simply stated, the problem here is whether the probability of parole ought to be counted in the eighth amendment proportionality calculus. The

⁴⁶⁵ *Id.* at 549, 142 So. 2d at 869-70.

⁴⁶⁶ *Five Dollar Mistake*, *Sixty Minutes*, (CBS), Oct. 7, 1979.

⁴⁶⁷ 337 U.S. 241. See also *Roberts v. United States*, 100 S. Ct. 1358 (1980) (court may properly consider that a defendant failed to cooperate with government by failing to name coconspirators in assessing sentence.).

arguments on both sides are good ones and, oddly, the question is as old as proportionality analysis itself.

The first case to clearly admit to the proportionality concept, *McDonald v. Commonwealth*,⁴⁶⁸ discounted a mandatory twenty-five year sentence by the possibility of parole and discretionary release. The first case to unambiguously find a prison sentence disproportionate reached the opposite conclusion in *State v. Kimbrough*,⁴⁶⁹ because "[p]ardon, parole or commutation is an act of grace and another of discretion, and may be refused."⁴⁷⁰

In *People v. Lorentzen*⁴⁷¹ the Michigan Supreme Court apparently followed *McDonald* and noted that an offender serving a twenty-year sentence could be released from prison after serving less than eleven years. In *In re Lynch*⁴⁷² the California Supreme Court held that a sentence under the California indeterminate sentencing law should be treated, for proportionality purposes, as one for life. Finally in *Carmona v. Ward*⁴⁷³ the Second Circuit held that the possibility of parole should be considered when assessing the gravity of a punishment under the eighth amendment.⁴⁷⁴

The Maximum Sentence Argument

The first court to engage in an extensive analysis of the parole probability in proportionality analysis was the Supreme Court of California in *In re Lynch*.⁴⁷⁵ The California court's analysis was heavily influenced by local conditions. According to the *Lynch* court, three factors directed that the California indeterminate sentence be treated as a sentence for the maximum possible term. Two of the factors—the California view of the theory behind the indeterminate sentencing law⁴⁷⁶ and the prior judicial treatment of the law by the California courts⁴⁷⁷—are not directly relevant to the constitutional question under the eighth amendment. The third factor given by the California court—

⁴⁶⁸ 173 Mass. at 328, 53 N.E. at 875.

⁴⁶⁹ 46 S.E.2d 273 (S.C. 1948).

⁴⁷⁰ *Id.* at 277.

⁴⁷¹ 387 Mich. at 181, 194 N.W.2d at 833.

⁴⁷² 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217.

⁴⁷³ 576 F.2d 405.

⁴⁷⁴ More specifically, this view can take two concepts. First, the sentence can be viewed as simply less severe than it first appears. Second, the discount can be applied when the sentence is compared to sentences in other jurisdictions.

⁴⁷⁵ 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217.

⁴⁷⁶ *Id.* at 416, 503 P.2d at 924-25, 105 Cal. Rptr. at 220-21.

⁴⁷⁷ *Id.* at 417-18, 503 P.2d at 925-26, 105 Cal. Rptr. at 221-22.

that the defendant has no vested right to parole or release prior to the expiration of the sentence⁴⁷⁸— is directly relevant to the constitutional argument. There is, of course, an allure to this argument. Parole and discretionary release are only a “mere hope.” In *Greenholtz v. Inmates*⁴⁷⁹ the Supreme Court held that the possibility of parole creates no liberty interest protected by due process. A second argument supporting this position is that if the possibility of parole is considered, no defendant will ever again have the opportunity to argue to a court that his sentence is excessive as the executive authorities will become the “ultimate arbiters in eighth amendment analysis.”⁴⁸⁰ The third argument advanced for not considering parole is that the “added ‘crime’ of a ‘bad attitude’ in prison”⁴⁸¹ would probably prohibit parole and could make a sentence excessive. The final argument made in favor of the no parole consideration position is that even after the defendant is released from incarceration, he would be subject to rules and conditions adopted by the relevant state authorities with the concomitant threat of prison hanging over him for minor, noncriminal violations.⁴⁸²

The Possibility of Parole Argument

The Second Circuit was the first court to explicitly conclude that the possibility of parole should be considered in the eighth amendment formula. In *Carmona v. Ward*⁴⁸³ that court argued that it is unrealistic to assume that on one hand the court should consider all the mitigating circumstances of the crime but on the other hand assume that the offender will be so incorrigible that he will never

⁴⁷⁸ *Id.* at 417, 503 P.2d at 925, 105 Cal. Rptr. at 221.

⁴⁷⁹ 442 U.S. 1 (1979). *But see* Dumschat v. Board of Pardons, 593 F.2d 165 (2d Cir.), *vacated*, 442 U.S. 926 (1979), *on remand*, 618 F.2d 216 (2d Cir. 1980). In *Dumschat*, the Second District held that inmates serving life sentences in Connecticut were entitled to a written statement from the Board of Pardons explaining the denial of their application for pardon. The Supreme Court vacated and remanded in light of *Greenholtz*. Upon remand, the Second Circuit affirmed its prior holding and remanded the case to the district court to determine “at what point in an inmate’s incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected ‘liberty’ interest and due process rights.” 618 F.2d at 217.

⁴⁸⁰ Brief for Petitioner at 33–34, *Rummel v. Estelle*, 100 S. Ct. 1133. The argument is taken from Note, *Recidivist Laws Under The Eighth Amendment—Rummel v. Estelle*, 10 U. Tol. L. Rev. 606, 633 (1978).

⁴⁸¹ Brief for Petitioner at 35, *Rummel v. Estelle*, 100 S. Ct. 1133.

⁴⁸² *Id.* at 36, 37.

⁴⁸³ 576 F.2d at 405.

gain parole.⁴⁸⁴ The court further added that while parole is not a vested right, it is inappropriate to assume that the local authorities will improperly deny conditional release.⁴⁸⁵

In *Rummel* the Fifth Circuit, *en banc*, followed the Second Circuit’s analysis. The *Rummel* court added to the Second Circuit’s reasoning that to “ignore the Texas good time system is to close our eyes to reality”⁴⁸⁶ and to assume that the life sentence is one without the possibility of parole.

The real world argument was best expressed by the *Rummel* court in its comparison of *Rummel*’s punishment with those in other states:

[W]e . . . have held that the likely probability of *Rummel*’s jail term should be compared with the experience of other states. This *Rummel* has not done, and our research suggests that *Rummel*’s actual jail time would not be significantly longer in Texas than his jail time in many other states. An example will illustrate our point. Suppose that State A gives a ten-year sentence for the same theft. State A has a practice of fixed and determinate sentences and does not award early release based on good time or discretionary parole. State B, however, is similar to Texas and through long experience it can be shown that the thirty-year sentence amounts to about ten years imprisonment. Can it justifiably be said that State B punishes the theft three times more severely than State A? This Court thinks not.⁴⁸⁷

Suggested Resolution

Of the arguments offered in support of not considering parole, only the “no vested right” position is substantial. The argument that if parole is considered, the defendant will never have the opportunity to have his sentence tested and his future bad attitude may preclude parole forever, is insubstantial. There is no reason why a defendant serving an indeterminate sentence may not, some time in the future, argue that he has served a constitutionally appropriate sentence and therefore is entitled to relief. Indeed, there is precedent for such a position. In *In re Rodriguez*⁴⁸⁸ the defendant had served twenty-two years of an indeterminate sentence for conviction for lewd and lascivious acts on a child. The California Supreme Court held that, considering the circumstances, the twenty-two-year sentence was excessive.

The argument concerning the lifetime parole

⁴⁸⁴ *Id.* at 414.

⁴⁸⁵ *Id.*

⁴⁸⁶ 587 F.2d at 660.

⁴⁸⁷ *Id.*

⁴⁸⁸ 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552.

status is overstated. The *Rummel* Court gave the argument short shrift by stating that "[R]ummel suggests that even if he is paroled, he is still on probation and lifetime probation is in itself cruel and unusual punishment. This argument need not detain us long. We cannot understand how a lifetime requirement of good behavior is too much to ask of a habitual criminal."⁴⁸⁹

In reality, the parole requirements are extremely light. After the defendant is paroled he must complete three years of monthly reporting, after which he may be placed on annual reporting status. This annual report can be completed by mail. After four mailed-in reports, the parolee may attain nonreporting status.⁴⁹⁰

The arguments reduce to a consideration of the vested rights theory and the real world analysis. The question of the better argument is practically dispositive since many would consider a life sentence without the possibility of parole as excessive.

This article submits that the real world consideration ought to carry the day under the eighth amendment proportionality analysis. First, the real world concept does not work an affirmative injustice. The Rummels of the world will be able to litigate the question of excessiveness at an appropriate time. The contrary rule has grave implications for an indeterminate sentencing scheme. The purpose here is not to argue that an indeterminate sentencing scheme is the appropriate legislative response, only that the eighth amendment allows the adoption of either a determinate or indeterminate scheme. The prevailing penological theory swings wildly between the two theories. Indeterminate schemes were roundly approved in the Supreme Court in *Williams v. New York*.⁴⁹¹

⁴⁸⁹ 587 F.2d at 659 n.19.

⁴⁹⁰ Brief for Respondent at 28, *Rummel v. Estelle*, 100 S. Ct. 1133.

⁴⁹¹ Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. . . . Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences, the ultimate termination of which are sometimes decided by non-judicial agencies, have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy.

337 U.S. 241, 247-48 (1949).

In the thirty years since *Williams*, penological and public opinion has changed. According to the American Bar Association Standards relating to the Administration of Criminal Justice Sentencing Alternatives and Procedures, "an excessive indeterminacy has been built into many, if not most, penal codes."⁴⁹² Moreover, according to a Justice Department study, eighteen states enacted mandatory sentencing laws during 1979 and five additional states adopted fixed term statutes to limit judicial discretion in sentencing. The study concludes that the clear national trend is toward determinative sentences and away from indeterminate sentences.⁴⁹³ Indeed, *Time* confidently declared indeterminate sentences as "discredited theory."⁴⁹⁴ If, once again, indeterminate sentencing schemes come into vogue, proportionality analysis ought not to stand in the way.

In making the choice between two logical arguments concerning the parole question, another factor strongly supports the real world view. This is the presumption of constitutionality that is accorded a legislative choice.

There are many problems with habitual criminal statutes, especially ones that sweep as broadly as the Texas statute. However, the state has been able to demonstrate by very strong evidence that a prisoner such as Rummel will (1) serve ten to fourteen years in prison, (2) report monthly for three years, (3) report annually for four years by mail, and (4) assume nonreporting status for life.⁴⁹⁵

The Texas scheme of punishment gradually al-

⁴⁹² Draft approved by the ABA, August 14, 1979. More specifically, the ABA strongly recommends a revamping of habitual statutes generally. See Standard 18-4.4.

⁴⁹³ See *23 States Enact Laws Limiting Judges' Discretion*, Houston Post, March 24, 1980, § A, at 23. There is, of course, no consensus in the scholarly literature on this point. Compare Reid, *A Rebuttal To The Attack On The Indeterminate Sentence*, 51 WASH. L. REV. 565 (1976), with Bruce, Burgess & Harno, *A Study Of The Indeterminate Sentence and Parole In The State Of Illinois*, 19 J. AM. INST. CRIM. L. & C. 1, 63 (Part II) (1928).

⁴⁹⁴ *Making The Crimes Fit The Times*, TIME, April 28, 1980, at 65.

Ironically, indeterminate sentences have been criticized because parole authorities have been too liberal in releasing offenders. A recent edition of the *Wall Street Journal* headlined with a story about the public outcry that resulted from the Georgia Parole Board's decision to release a prisoner serving a life term after ten years. The prisoner had kidnapped a young woman and buried her alive. *Guarding The Gates*, Wall St. J., Feb. 13, 1979, at 1.

⁴⁹⁵ "Available statistics indicate that approximately 40 percent of inmates are granted parole in their first year of eligibility. Of those passed over, more than 64 percent

lows the habitual offender more freedom. The eighth amendment speaks of punishments and not merely sentences. A court ought not to strike down a punishment scheme unless the entire scheme is excessive. It is much too narrow to look only at the excess sentence under the eighth amendment.

Take the example of the United States habitual offender statute. 18 U.S.C. § 3575 provides for a twenty-five-year sentence for certain habitual offenders. Under this statute the offender may gain discretionary release after serving about sixteen years in prison.⁴⁹⁶ Given a choice, would an offender choose to serve a life sentence in Texas or a twenty-five-year sentence in federal prison? Can we say that the eighth amendment answers this question as a constitutional matter?⁴⁹⁷ In *Rummel*, the Supreme Court properly concluded that parole is a part of the proper assessment of Rummel's sentence.⁴⁹⁸

THE SLIPPERY SLOPE AND THE ROLE OF AN APPELLATE COURT

In his dissent to the panel opinion in *Rummel*, Judge Thornberry expressed the opinion that the majority's opinion represented the "slippery slope in its most classic sense."⁴⁹⁹ This section addresses this single most important consideration in proportionality analysis and advocates that the insuperable problems associated with the slippery slope call for a rejection of activist intervention by the courts under a proportionality analysis.

The Rummel Panel Standard

The Fifth Circuit panel opinion suggested that if any one of the underlying offenses involved "violence, a potential for violence, or a strong social interest"⁵⁰⁰ a life sentence would be constitutional.

Consistent with this standard, a later Fifth Circuit panel upheld the imposition of a life sentence on a defendant convicted of two burglaries and a forgery in *Chapman v. Estelle*.⁵⁰¹ The Fourth Circuit rejected a *Hart* challenge to a life sentence when the underlying offenses were grand larceny, breaking and entering a grocery store, and burglary of a residence in *Griffin v. Warden*.⁵⁰² If one is forced to assume that the life sentence must be considered one for the natural life of the offender, is it any more conscionable to imprison Chapman and Griffin for life than Rummel and Hart?

The distinction between nonviolent and violent crimes, between those crimes with potential for violence and those crimes with no potential for violence, and those crimes with a strong social interest, is almost an impossible distinction to make in practice. This is demonstrated by the following taken from the oral argument in the *Rummel* case:

Question (Burger): Suppose in each offense case you had exactly the same amount involved, that it was the theft of a welfare check going to a welfare recipient, what would be your position?

Answer: [defendant] . . . [S]ince stealing whatever amount from a welfare victim presumably constitutes the same offense under Texas law, regardless of the identity of the victim, we would argue that the harm should make no difference in this court's analysis . . .

Question (White): How about embezzlement?

Answer: [defendant] Embezzlement . . . gives me somewhat more trouble than the normal petty check offense.

Question (White): Why should it? You just drew the line, and embezzlement certainly falls on the nonviolent side.

Answer: [defendant] Yes, Your Honor, but, Mr. Justice White, embezzlement cases often indicate professional criminality, and we . . . argue that if we are dealing with professional criminals, someone who forges three \$100,000 checks—

Question (White): How about tax evasion?

Answer . . .

⁵⁰¹ 593 F.2d 687, 688 n.l (5th Cir. 1979). "[E]ven the original panel in *Rummel* . . . would likely reject [the eighth amendment] claim." *Id.*

⁵⁰² 517 F.2d 756.

are granted parole in their second year of eligibility. By the third and fourth year of eligibility, the figure approaches 100 percent." Brief for Respondent at 24, *Rummel v. Estelle*, 100 S. Ct. 1133.

⁴⁹⁶ 18 U.S.C. § 3575 does have the advantage of being more finely tailored than the Texas statute.

⁴⁹⁷ 18 U.S.C. § 4161 provides that a federal prisoner may earn a maximum of ten days per month good time credit.

⁴⁹⁸ *Rummel* makes no argument that a 10- to 12-year sentence would be unconstitutional; however, if we consider the life sentence as an indeterminate sentence precluding parole for ten years, this sentence is suspect in California under the *Goss* rationale.

⁴⁹⁹ 568 F.2d at 1202.

⁵⁰⁰ *Id.* at 1196.

Question (White): What about three times?

Answer . . .

Question . . .

Answer: [defendant] Absolutely, the court ought not to consider an eighth amendment claim under those circumstances.

Question (White): Why, is it completely nonviolent?

Answer: [defendant] Yes, Your Honor, but, it represents an area in which the state has a peculiarly strong interest in preserving the integrity of the tax process, and we feel it is probably entitled to receive special treatment by the courts. . . .

Question (White): [W]hat about just a compulsive con man who just goes around conning people out of money, with false schemes, especially children and old ladies? . . .

Question (White): (Consider that the state based this conclusion on three convictions.)

Answer: [defendant] (The state could not.)

Question (White): Then it turns on the number, in effect? If it were seven rather than three, the case should come out differently?

Answer: [defendant] (Difficult to argue against.)

Question (White): What about four?

Answer: [defendant] By far the most difficult line drawing question here. I cannot tell this court where the line ought to be drawn.

Question (White): Well, you are though.

Answer: [defendant] I can only tell this court that wherever that line is drawn, it ought not be at three.⁵⁰³

The Supreme Court opinion in *Rummel* fully recognizes these difficulties. The opinion makes clear that the amount of money stolen by Rummel is of little probative value. The opinion suggests that Rummel could have stolen no money and this fact would prove only that he is an unsuccessful thief, not that Rummel is blameless.⁵⁰⁴ Moreover, the Court discounted the distinction between vio-

⁵⁰³ Transcript of Oral Argument at 5-9, *Rummel v. Estelle*, 100 S. Ct. 1133 (Jan. 6, 1980) [hereinafter Transcript].

⁵⁰⁴ 100 S. Ct. at 1140.

lent and nonviolent crimes. Mr. Justice Rehnquist suggested that Caesar's death was violent, but that the death of Hamlet's father by poison was not violent, yet the social interest in preventing both murders is equal.⁵⁰⁵

The Special Social Interest Exception

The *Rummel* panel suggested that in addition to the violent/nonviolent distinction, certain crimes involve a special social interest. The panel further suggested that laws concerning drugs have a special social interest.⁵⁰⁶ Other courts dealing with the proportionality problem have not shared the Fifth Circuit's view. In *People v. Lorentzen*⁵⁰⁷ the Michigan Supreme Court struck down a marijuana penalty, but in *People v. Stewart*⁵⁰⁸ it upheld a stiff sentence for a heroin offense. Apparently, the Michigan Supreme Court only partially agrees with the Fifth Circuit. In *Downey v. Perin*⁵⁰⁹ and in *Davis v. Davis*⁵¹⁰ the Sixth and Fourth Circuits respectively struck down penalties for marijuana offenses as disproportionate. The California Supreme Court has never recognized a special societal interest in drugs, as a clear majority of the California cases strike down drug related penalties. The Second Circuit, however, in *Ward v. Carmona*⁵¹¹ apparently accepted the Fifth Circuit's formulation, at least as to narcotic drugs.

The concept of a special social interest is invalid. If a state has a sufficient reason to legitimately prohibit some conduct as a felony, it is mere judicial force of will to say that some laws represent a special interest and are therefore immune from proportionality scrutiny.

The Flood

A related problem to the slippery slope is the problem of a flood of litigation. The petitioner in *Rummel* and the state of Texas engaged in a reckless discussion concerning the number of cases generated in Texas under the habitual criminal statute.⁵¹² The effect in Texas is, of course, only the tip of the iceberg. The proportionality analysis, adopted by the Supreme Court, applies to every

⁵⁰⁵ *Id.* at 1143 n.27.

⁵⁰⁶ 568 F.2d at 1198.

⁵⁰⁷ 387 Mich. 167, 194 N.W.2d 827.

⁵⁰⁸ 400 Mich. 540, 256 N.W.2d 31 (1977).

⁵⁰⁹ 518 F.2d 1288 (6th Cir. 1975), *vacated on other grounds*, 423 U.S. 823 (1976).

⁵¹⁰ 601 F.2d 153.

⁵¹¹ 576 F.2d 405.

⁵¹² Compare Brief for Petitioner at 66 n.83, *Rummel v. Estelle*, 100 S. Ct. 1133, with Brief for Respondent at 30, *Rummel v. Estelle*, 100 S. Ct. 1133.

sentence in every American jurisdiction. The Fifth Circuit panel opinion in *Rummel* suggested that proportionality analysis might be limited to death and life sentences;⁵¹³ however, such a suggestion is unsound. It would be an outrageous result to inquire into the excessiveness of a life sentence and not consider a sixty-year sentence.⁵¹⁴

The mere proof of a flood of litigation certainly should not deter a court from upholding the constitutional rights of litigants. It is, however, a permissible factor to consider when considering the difficult questions of standards. Rummel argues that "[l]ower state courts have employed similar tests [to the proportionality test] for years without being deluged by litigation."⁵¹⁵ While this statement is true, it overlooks the fact that in every state that has adopted proportionality analysis, the state shortly thereafter adopted a flood-stopping device to stem the tide of litigation. Some of the flood-stopping analysis is plainly illogical and supportable only to the extent that the state court has the power to stop the flood as a matter of state law.

The South Carolina Supreme Court interdicted a prison sentence in *State v. Kimbrough*⁵¹⁶ under the proportionality principle. Shortly after *Kimbrough*,⁵¹⁷ the South Carolina Supreme Court interpreted *Kimbrough* to apply only when the statute itself is unconstitutional.⁵¹⁸

The Michigan Supreme Court adopted proportionality analysis in *People v. Lorentzen*,⁵¹⁹ in an extremely broad opinion for a sale of a small amount of marijuana. When given the opportunity to extent the analysis to heroin cases the Michigan Supreme Court summarily rejected it without any effort to distinguish the case.⁵²⁰

The Kentucky Court of Appeals held two life sentences without the possibility of parole uncon-

stitutional for two young rapists.⁵²¹ But when faced with considering the same sentence imposed on an offender a few years older, the Kentucky court simply stated that the rule of the prior two cases did not apply.⁵²²

The California experience with the proportionality test represents both the flood-stopping concept and the flood.⁵²³ After the intermediate appellate courts in California were reading *In re Lynch* in a totally unpredictable manner, the California Supreme court in *In re Wingo* stopped the flood of litigation by holding that attacks to an indeterminate sentence were premature until the California adult authority set a release date.

Certainly, the proportionality analysis must be applied to an extraordinarily broad range of criminal sentences and the vast majority of state court flood-stopping devices cannot appropriately be applied to stop the potential flood.⁵²⁴

JUDICIAL RESTRAINT

Beyond the problem of the slippery slope is the question of the appropriate role of the appellate court in the proportionality analysis. One respected observer has noted that appellate review of sentences "would administer the *coup de grace* to courts of appeals as we know them."⁵²⁵

Almost all courts that have considered proportionality analysis have recognized that the court's role in reviewing legislatively selected sentences is a limited one. Arguably there have been exceptions to this rule, most probably in California. There are

⁵²¹ See note 454 *supra*.

⁵²² See note 455 *supra*.

⁵²³ See notes 269-93 & accompanying text *supra*. The California Supreme Court's experience also demonstrates the proportionality test run riot. In *In re Grant*, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430, a plurality of the court struck down all minimum sentences for recidivist narcotics offenders. In *In re Carter*, 125 Cal. Rptr. 177, a California appellate judge joined in an opinion striking down a part of a sentence providing for a five-year parole preclusion for a recidivist narcotics offender convicted of possession of heroin with the statement that the sentence could not be "found to be out of proportion to the offense when tested against any rational standard." *Id.* at 180 (Puglia, P.J., concurring).

⁵²⁴ The California timing case is a probable exception. Such a device could be constitutionally used for the proportionality test. Another possible flood-stopping device for the federal courts is a habeas corpus preclusion similar to that of *Stone v. Powell*, 428 U.S. 465 (1976).

⁵²⁵ H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 36 (1973). Judge Friendly suggest that the flood of litigation would not be caused by an increase in existing appeals from conviction but by appeals from the 90 percent of the criminal convictions that result from guilty pleas. *Id.*

⁵¹³ 568 F.2d at 1196.

⁵¹⁴ Moreover, one must question if the mandatory nature of a selected penalty has any place in the proportionality analysis. It would seem that it should make no difference if the selected penalty were picked from a fishbowl. See *McQuaid v. Smith*, 556 F.2d 595 (1st Cir. 1977) (upholding mandatory penalty for one year imprisonment for carrying a firearm without a license).

⁵¹⁵ Brief for Petitioner at 14, *Rummel v. Estelle*, 100 S. Ct. 1133.

⁵¹⁶ 46 S.E.2d 273.

⁵¹⁷ Interestingly, the punishment in *Kimbrough* was selected by the trial judge. Rummel argues that such a sentence is immune from review under the eighth amendment.

⁵¹⁸ *State v. Scates*, 46 S.E.2d 693.

⁵¹⁹ 387 Mich. 167, 194 N.W.2d 827.

⁵²⁰ See note 268 *supra*.

suggestions in some opinions that fail to follow this fundamentally sound advice. For example, a famous passage in *Hart v. Coiner* argues that “[t]radition, custom, and common sense reserve [a life sentence] for those violent persons who are dangerous to others. It is not a practical solution to petty crime in America. Aside from the proportionality principle, there aren’t enough prisons in America to hold all the Harts that afflict us.”⁵²⁶

It is impossible to deny that compassion and a sense of justice must obviously play a part in the judging process. However, one must question if nonelected, lifetime officials should determine if there is enough prison space for the Harts of our nation.⁵²⁷

One cannot deny that banner headlines proclaiming that the Supreme Court upholds a lifetime sentence for the petty criminal holds no public allure for a population looking to its highest court to provide justice. I hope that this article demonstrates that despite the compelling case of William Rummel, the injustice to Rummel is not what it at first appears, and the cost in terms of neutral legal principle far outweighs a reversal of the Fifth Cir-

⁵²⁶ 483 F.2d at 141.

⁵²⁷ Compare with Judge Thornberry’s opening in dissent to the *Rummel* panel:

Perhaps, if I were the prosecutor, I would not have sought an indictment charging the defendant with

cuit result. There is no better way to conclude than this passage from the oral argument:⁵²⁸

Question (White): Well, what kind of a standard do you think we ought to have?

Answer: [defendant] Your Honor, the standard ought to be—and I think the Court could enact a fairly narrow standard if it chose—

Question (Stewart): Enact?⁵²⁹

a habitual count; if I were a state lawmaker I would vote to amend the statute so that it would not be applied as has been done here, or if I were governor of the State of Texas, I would consider the petitioner a prime candidate for clemency. But, I do not hold these offices and my decision must be guided by the eighth amendment rather than my feelings of compassion and justice.

568 F.2d at 1201.

⁵²⁸ Transcript, *supra* note 503, at 48.

⁵²⁹ On October 3, 1980, a federal judge in the Western District of Texas granted William Rummel’s application for habeas corpus relief. This finding was based on Rummel’s trial attorney’s failure to investigate and interview potential witnesses. *Rummel v. Estelle*, No. SA-76-CA-20 (W.D. Tex., Oct. 3, 1980). Rummel was freed November 14, 1980, after he pled guilty to theft by false pretenses and, under a plea bargaining agreement, a court set his sentence at time served. *Two-Bit Lifer Finally Freed—After Pleading Guilty*, Chicago Tribune, Nov. 15, 1980, 1, at 2, col. 3.