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CRIMINAL PROCEDURE—IS EIGHTH AMENDMENT PROPORTIONALITY APPLICABLE TO MERE LENGTH OF SENTENCE? Rummel v. Estelle, 445 U.S. 263 (1980)

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CRIMINAL PROCEDURE—IS EIGHTH AMENDMENT PROPORTIONALITY APPLICABLE TO MERE LENGTH OF SENTENCE? *RUMMEL V. ESTELLE*, 445 U.S. 263 (1980).

I. INTRODUCTION

In January 1973, a Texas grand jury indicted William Rummel for the felony offense[1] of obtaining $120.75 under false pretenses.[2] The indictment also cited him for two prior felony convictions.[3] The prosecution chose to proceed against Rummel under the Texas recidivist statute.[4] The indictment cited his 1964 and 1969 convictions as mandating imposition of a life sentence if Rummel was convicted of a third felony offense.[5] A jury found Rummel guilty of the false pretenses offense. The state also proved Rummel's two prior convictions. As a result, the trial court sentenced Rummel to life imprison-

1. In 1973, TEX. PENAL CODE ANN. art. 1421 (Vernon 1953) (current version at TEX. PENAL CODE ANN. tit. 7, § 31.03 (Vernon Cum. 1980)) provided: "Theft of property of the value of fifty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years."

2. In 1973, TEX. PENAL CODE ANN. art. 1410 (Vernon 1925) (current version at TEX. PENAL CODE ANN. tit. 7, § 33.03 (Vernon Cum. 1980)) provided:

> Theft is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

In 1973, TEX. PENAL CODE ANN. art. 1413 (Vernon 1953) (current version at TEX. PENAL CODE ANN. tit. 7, § 31.03 (Vernon Cum. 1980)) provided:

> The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful was obtained by false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

3. Rummel was convicted in 1964 of the fraudulent use of a credit card to obtain $80 worth of goods or services pursuant to TEX. PENAL CODE ANN. art. 1555(b)(4)(d) (Vernon Supp. 1973) (current version at TEX. PENAL CODE ANN. tit. 7, § 32.31 (Vernon 1974)). In 1969 Rummel was convicted of passing a forged check in the amount of $28.36 pursuant to TEX. PENAL CODE ANN. art. 996 (Vernon 1961) (current version at TEX. PENAL CODE ANN. tit. 7, § 32.21 (Vernon 1974)).

4. TEX. PENAL CODE ANN. art. 63 (Vernon 1925) (current version at TEX. PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon 1974)) provided: "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."

5. Rummel v. Estelle, 445 U.S. 263, 266 (1980).

ment as mandated under the Texas statute.[6] On appeal, the Texas Court of Criminal Appeals affirmed Rummel's conviction.[7] In *Rummel v. Estelle*,[8] defendant turned to the federal courts for relief.

Rummel filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas, claiming that his life sentence was so disproportionate to the crime committed that it constituted cruel and unusual punishment prohibited by the eighth amendment. Rummel's petition was denied without hearing. A divided panel of the United States Court of Appeals for the Fifth Circuit reversed.[9] The panel opinion, citing *Weems v. United States*[10] and *Ingraham v. Wright*,[11] noted that while the Supreme Court has yet to hold a sentence cruel and unusual due to length of sentence alone, the eighth amendment extends to the proscription of a punishment that is grossly disproportionate to the severity of the crime.[12] The panel therefore concluded that imposition of a life sentence for Rummel's three offenses would constitute cruel and unusual punishment in violation of the eighth amendment.[13] Rummel's appeal was reheard by the Fifth Circuit Court of Appeals sitting *en banc*. By an eight-to-six majority, the *en banc* court vacated the panel opinion and affirmed the district court's denial of Rummel's eighth amendment claim.[14] Eight years after Rummel committed the false pretenses offense, the United States Supreme Court held that the mandatory life sentence imposed upon Rummel did not constitute cruel and unusual punishment.[15] The Court acknowledged that, historically, courts have viewed criminal sentences with regard to the severity of the crimes committed to determine if the sentence was constitutionally acceptable. The actual circumstances present in those prior cases, however, were distinguished

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6. *Id.*

7. Rummel v. State, 509 S.W.2d 630 (Tex. Crim. App. 1974).

8. 568 F.2d 1193, 1200 (5th Cir.), *rev'd and remanded with directions*, 587 F.2d 651 (5th Cir. 1978) (*en banc*), *aff'd in part, remanded in part*, 590 F.2d 103 (5th Cir. 1979), *vacated in part and remanded*, 498 F. Supp. 793 (W.D. Tex.), *aff'd*, 445 U.S. 263 (1980).

9. *Id.* at 1200, 1203.

10. 217 U.S. 349 (1910).

11. 430 U.S. 651 (1977).

12. 568 F.2d at 1195.

13. *Id.* at 1200.

14. 587 F.2d at 662. While the analysis implemented by the *en banc* majority was similar to the analysis used by the panel, its ultimate disagreement with the panel opinion was the panel's failure to uphold Rummel's sentence if it had any rational basis. *Id.* at 655-56.

15. 445 U.S. at 285.

from the case at bar.[16] The Court also considered Rummel's possibility of parole as relevant to a realistic assessment of the gravity of his sentence.[17] The questions of whether the Court actually did apply a form of a proportionality analysis in evaluating Rummel's sentence, or whether a proportionality approach is at all a viable form of analysis to evaluate mere length of a sentence, were not clearly addressed. *Rummel* is better understood through a brief analysis of habitual offender statutes and the historical parameters of the eighth amendment.

II. BACKGROUND

A. *The Supreme Court and Proportionality*

Rummel did not challenge the general constitutionality of the Texas recidivist statute but only its constitutionality as applied to the facts of his case.[18] This tactical approach was taken because it has been well established, since *Spencer v. Texas*,[19] that recidivist statutes no longer are open to general eighth amendment challenges.[20] Mandatory life imprisonment statutes have been upheld because courts have recognized that a state has a valid interest in dealing in a harsher manner with those who, by repeated criminal acts, have shown an inability to conform to the norms of society as enforced by its criminal laws.[21]

Rummel maintained that section 12.42(d) of the Texas Penal Code[22] should not be applied to the facts of his case.[23] Rummel sought a ruling by the Court that his life sentence was so disproportionate to the crimes he had committed that it constituted cruel and unusual punishment.[24] To succeed on this challenge, it was necessary for Rummel to convince the Court that a proportionality analy-

16. *Id.* at 271-74; *see* text accompanying notes 130-37 *infra*.

17. 445 U.S. at 280-81. For a cogent discussion of parole and parole trends, see Chitra, *Modern Trends On Parole Granting 1957-1976*, 5 QUEENS L.J. 46 (1980).

18. 445 U.S. at 268.

19. 385 U.S. 554 (1967).

20. Oyler v. Boles, 368 U.S. 448 (1962). These recidivist statutes generally are immune to other constitutional attacks. Note, *A Closer Look at Habitual Criminal Statutes* Brown v. Parratt *and* Martin v. Parratt, *A Case Study of the Nebraska Law*, 16 AM. CRIM. L. REV. 275, 282-84 (1978).

21. 445 U.S. at 276. Deterrence and social protection are the usual justifications for life sentences under the statute. Katkin, *Habitual Offender Law: A Reconsideration*, 21 BUFFALO L. REV. 99, 103 (1971).

22. TEX. PENAL CODE ANN. art. 63 (Vernon 1925) (current version at TEX. PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon 1974)).

23. 445 U.S. at 268.

24. *Id.* at 265.

sis was applicable: The Court should evaluate the relative severity of Rummel's crimes in relation to the length of his sentence.[25] The Supreme Court has never found a sentence imposed in a criminal case to violate the eighth amendment merely because of length of incarceration.[26] There is substantial case law, however, that can be interpreted to support Rummel's claim.

The proportionality concept first was enunciated in Justice Field's dissent to *O'Neil v. Vermont*.[27] This 1892 case involved a fifty-four year sentence imposed upon O'Neil following his conviction of 307 separate offenses for the illegal sale of liquor.[28] While the majority opinion refused to address the eighth amendment issue on procedural grounds,[29] Justice Field's dissent asserted that the eighth amendment extends to "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged."[30]

Justice Field's words later were quoted to support the majority holding in *Weems v. United States*.[31] In that landmark decision the Supreme Court declared a punishment cruel and unusual under the eighth amendment.[32] Weems, a United States government official in the Philippine Islands, was convicted of falsifying official documents.[33] The punishment for this crime was known as "*cadena temporal*."[34] "*Cadena temporal*" consisted of imprisonment in chains at hard and laborous work for a minimum of twelve years.[35] In addition, restrictions were imposed on a person's marital authority, parental rights, and property rights during such imprisonment.[36] Following the felon's term of imprisonment, he forever was unable

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25. For a detailed discussion of eighth amendment proportionality, see Clapp, *Eighth Amendment Proportionality*, 7 AM. J. CRIM. LAW 253 (1979).

26. *See* Carmona v. Ward, 576 F.2d 405, 408 (2d Cir. 1978); Downey v. Perini, 518 F.2d. 1288, 1290 (6th Cir. 1975); Note, *Constitutional Law—Cruel and Unusual Punishments—Eighth Amendment Prohibits Excessively Long Sentences*, 44 FORDHAM L. REV. 637, 644 (1975).

27. 144 U.S. 323 (1892).

28. *Id.* at 327-30.

29. The *O'Neil* majority never reached the issue of proportionality because the case was dismissed for lack of a federal question. *Id.* at 331, 334-35.

30. *Id.* at 339-40 (Field, J., dissenting).

31. 217 U.S. 349 (1910).

32. *Id.* at 382. *See generally* Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145 (1967).

33. 217 U.S. at 357-58.

34. *Id.* at 363.

35. *Id.* at 366.

36. *Id.*

to change his domicile without written permission from the criminal magistrate.[37] The Court found "*cadena temporal*" to be an extreme form of incarceration and therefore unconstitutional, both because of the length of the sentence and the intensity of the punishment.[38] The Court reached its result through use of a two-tiered approach to proportionality. First, the Court compared Weems' punishment to punishments levied in the United States for crimes such as inciting rebellion, misprision of treason, conspiracy, forgery, and larceny. While these offenses were similar to the offense for which Weems was convicted, the Court noted that the punishments levied were far less severe than "*cadena temporal*."[39] Second, the Court compared Weems' punishment to the Philippine punishment of "*cadena perpetua*," which was imposed for falsification of bank notes and other instruments. The Court found that Weems' sentence was excessive when compared with the punishment of "*cadena perpetua*," which the Court felt was of a far graver nature than merely falsifying a single item of a public account.[40]

Six years later, the comparison approach utilized in *Weems* was limited severely when the Court summarily refused to allow a proportionality challenge in *Badders v. United States*.[41] *Badders* endorsed a doctrine stated in *Howard v. Fleming*:[42] A punishment is not rendered cruel and unusual simply because other more serious offenses receive lesser penalties.[43] This approach, implemented in *Badders*, has never been reconciled with *Weems*.

It was not until 1958 that the Court, in *Trop v. Dulles*,[44] once again found that a punishment violated the eighth amendment.[45] The punishment under scrutiny was denationalization after a court-marital for wartime desertion.[46] After an historical overview of the eighth amendment, the Court, citing *Weems*, stated that the meaning and exact scope of the eighth amendment are neither precise nor

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37. *Id.*

38. *Id.* at 380-82.

39. *Id.* at 380.

40. *Id.* at 380-81.

41. 240 U.S. 391 (1916). *See* Note, *Revival of the Eighth Amendment: Development of the Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1008-09 (1964).

42. 191 U.S. 126 (1903).

43. 240 U.S. at 394.

44. 356 U.S. 86 (1958).

45. *Id.* at 101.

46. *Id.* at 88-91.

static.[47] While *Trop* did not deal directly with proportionality, the Court implied that eighth amendment analyses should focus on concepts of human dignity and evolving standards of decency.[48] With this in mind, the scope of the amendment was viewed in a flexible manner. The amendment's meaning was found to be subject to adjustment according to the changing conditions and attitudes of society.[49]

In *Robinson v. California*,[50] decided in 1962, the Court held unconstitutional a state statute that made narcotics addiction a criminal offense.[51] The Court reasoned that the length of the sentence under the statute could not be considered in the abstract, but must be considered in relation to the offense for which the statute dictates punishment.[52] It was pointed out that one day in prison would be cruel and unusual punishment for the crime of having a common cold.[53] This approach, which requires the length of the sentence to conform to the nature of the crime, is another formulation of the proportionality analysis.

The next comprehensive look at the eighth amendment prohibition against cruel and unusual punishment came in the death penalty cases of the 1970's. The first of these cases was *Furman v. Georgia*.[54] The Court rendered nine separate opinions in *Furman*,[55] thus hampering its value as a guide in subsequent cases. Justice Brennan's concurring opinion, however, is worthy of comment. Justice Brennan recognized that the determination that a punishment is excessive may be derived from a judgment that the punishment is disproportionate to the crime.[56] In conjunction with this determination, Justice Brennan recognized four principles with which to test the

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47. *Id.* at 99-101. *See generally* Note, *Constitutional Law—Eighth Amendment—Appellate Sentence Review*, 1976 WIS. L. REV. 655.

48. 356 U.S. at 100-01. *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969).

49. 356 U.S. at 100-01. The majority determined that a punishment making an individual "stateless" has grave and disastrous consequences. *Id.* at 102-03.

50. 370 U.S. 660 (1962).

51. *Id.* at 667.

52. *Id.*

53. *Id.* This example was used by the majority to exemplify the caveat that eighth amendment determinations should not be made in the abstract. *Id.*

54. 408 U.S. 238 (1972).

55. Justices Douglas, Brennan, Stewart, White, and Marshall filed separate concurring opinions. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist filed separate dissenting opinions. *Id.* at 240.

56. *Id.* at 280 (Brennan, J., concurring). For a critique of Justice Brennan's concurrence in *Furman*, see Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After* Furman v. Georgia, 25 STAN. L. REV. 62 (1972).

constitutionality of a specific punishment under the eighth amendment.[57] Use of these four objective criteria to evaluate a sentence's proportionality to the crime is designed to protect individuals from overtly abstract or subjective judgments by the courts. The criteria later were discussed by the Court in *Gregg v. Georgia*,[58] the next case in the Court's examination of the death penalty.

Gregg presented the Court with the question: Is the death penalty cruel and unusual *per se* under the eighth amendment?[59] The Court held that the death penalty was not necessarily a cruel and unusual form of punishment.[60] The plurality opinion of Justices Stewart, Powell, and Stevens is of special significance because the Justices delineated what they considered to be the relevant inquiries when evaluating a punishment under the eighth amendment. After reviewing *Weems*, *Trop*, and *Robinson*, and Justice Brennan's four objective criteria in *Furman*,[61] the plurality stated that, to withstand eighth amendment scrutiny, a punishment must not involve the unnecessary and wanton infliction of pain and must not be grossly disproportionate to the severity of the crime.[62] This later consideration, regarding the punishment's relative proportionality, was extended one step further in *Coker v. Georgia*.[63]

Coker is the most recent Supreme Court case to scrutinize the issue of proportionality under the eighth amendment. The Court held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[64] Citing *Gregg*, the Court acknowledged that a punishment is excessive and unconstitutional if it is grossly out of proportion to the severity of the crime.[65] In making a determination of disproportionality, the Court

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57. Justice Brennan's criteria were fourfold: (1) The punishment must not by its severity be degrading to human dignity; (2) the punishment must not be inflicted arbitrarily; (3) the punishment violates the eighth amendment if it clearly and totally is rejected throughout society; (4) the punishment is unacceptable if it clearly is unnecessary to achieve legislative aims. 408 U.S. at 281.

58. 428 U.S. 153 (1976).

59. *Id.* at 168.

60. *Id.* at 207.

61. *Id.* at 171-76.

62. *Id.* at 173. For a good discussion of how the standards in *Gregg* were formulated, see Note, Gregg v. Georgia: *The Search for the Civilized Standard* 1976 DET. C.L. REV. 645.

63. 433 U.S. 584 (1977).

64. *Id.* at 592. *See generally* Note, Coker v. Georgia: *Disproportionate Punishment and The Death Penalty For Rape*, 78 COLUM. L. REV. 1714 (1978).

65. 433 U.S. at 592.

compared the Georgia rape statute to other states' rape legislation, noting that Georgia alone authorized a death sentence when an adult woman is the rape victim.[66] The Court also examined the nature of the crime of rape, as compared to murder, and concluded that its relative lack of severity did not warrant the taking of a human life as punishment.[67]

While the Supreme Court never has found a sentence imposed in a criminal case to violate the eighth amendment merely because of its length,[68] the cases discussed above demonstrate that the concept of proportionality is embedded firmly in eighth amendment analysis.[69] *Rummel* provided an excellent opportunity for the Court to deal with this novel issue and to extend proportionality analysis in evaluating the constitutional propriety of Rummel's life sentence. The opinion, however, does not provide a clear indication of the Court's intent to expand the proportionality analysis.

B. *Circuit Courts and Proportionality*

Two circuit court cases that are factually analogous to *Rummel*, but followed a different mode of eighth amendment analysis, are *Hart v. Coiner*[70] and *Carmona v. Ward*.[71] These opinions are noteworthy because of the refusal by the *Rummel* majority to adopt a *Hart* or *Carmona* analysis in its eighth amendment scrutiny.

In 1949, Hart was convicted of writing a bad check and, in 1955, he was convicted of transporting forged checks across state lines.[72] Upon Hart's 1968 conviction for perjury, he received a mandatory life sentence under West Virginia's habitual offender statute,[73] a law that, like the Texas statute under which Rummel was convicted, mandates a life sentence upon conviction of a third felony. The United States Court of Appeals for the Fourth Circuit found the mandatory life sentence to be an unconstitutionally disproportionate

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66. *Id.* at 595-96.

67. *Id.* at 598.

68. The Court arrived at this determination by distinguishing the unique nature of the punishments considered in *Weems* and the death penalty cases. 445 U.S. at 272-74.

69. After reviewing the relevant cases, Justice Powell expounded this premise. *Id.* at 293 (Powell, J., dissenting, joined by Brennan, Marshall & Stewart, JJ.).

70. 483 F.2d 136 (4th Cir. 1973).

71. 576 F.2d 405 (2d Cir. 1978).

72. 483 F.2d at 140.

73. W. VA. CODE § 61-11-18 (1966) states in relevant part "[w]hen it is determined, as provided in section nineteen hereof, that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary the person shall be sentenced to be confined in the penitentiary for life." *Id.*

punishment for the three, nonviolent felonies committed by Hart.[74] In arriving at its holding, the Fourth Circuit cited Justice Field's dissent in *O'Neil*[75] and the majority opinions in *Weems*[76] and *Furman*,[77] and stated that proportionality is a well fortified eighth amendment concept.[78] The court established that Hart's sentence must be constitutionally proportionate to his offense and proceeded to delineate four, objective criteria for evaluating Hart's sentence.[79] The criteria, extracted from *Weems* and from Justice Brennan's concurrence in *Furman* were: (1) The nature of the offense; (2) whether the sentence was necessary to accomplish the legislature's purposes; (3) the punishment imposed for the crime in other jurisdictions; and (4) the punishments imposed for other crimes in the same jurisdiction.[80]

Carmona did not involve a recidivist statute. Defendants Carmona and Fowler each were sentenced to life imprisonment for the sale of narcotics.[81] The United States Court of Appeals for the Second Circuit upheld both life sentences but recognized that a proportionality analysis, in certain circumstances, could invalidate a sentence solely because of its length.[82] The Second Circuit employed three of the four factors enumerated in *Hart*.[83] The court eliminated the *Hart* criterion that examines whether a sentence is penologically "necessary."[84] This criterion was eliminated as a result of the extreme deference that the Second Circuit emphasized should be given to the legislature in fixing criminal sentences.[85] This consideration may be one reason why the *Rummel* majority refused to evaluate the constitutionality of Rummel's sentence.

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74. 483 F.2d at 143.

75. *See* text accompanying notes 27-30 *supra*.

76. *See* text accompanying notes 31-40 *supra*.

77. *See* text accompanying notes 54-57 *supra*.

78. 483 F.2d at 139-40. For a tracing of the proportionality analysis, see Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639 (1979).

79. 483 F.2d at 139-40.

80. *Id.* at 140-42.

81. 576 F.2d at 407-09. The Second Circuit did not conclude that the proportionality analysis articulated in the death penalty cases was unique to capital punishment cases. *See also* Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975).

82. 576 F.2d at 409.

83. *Id.*

84. *Id.*

85. *Id.* at 415-16. For a discussion concerning the reluctance of courts to disrupt legislatively prescribed punishments, see Comment, *Recidivist Statutes and the Eighth Amendment: A Disproportionality Analysis*, 1974 WASH. U.L.Q. 147, 149.

III. Analysis of Fifth Circuit and United States Supreme Court Opinions

A divided panel of the United States Court of Appeals for the Fifth Circuit held Rummel's life sentence to be cruel and unusual under the eighth amendment and, in doing so, recognized the viability of proportionality analysis.[86] The panel opinion applied the four *Hart* criteria in assessing Rummel's sentence.[87] The panel majority felt that the objective criteria used in *Hart* were extracted properly from the Supreme Court's decisions in *Coker*, *Weems*, *Trop*, *Gregg*, and *Furman* and should guide its decision.[88] In applying the "nature of the offense" test the panel majority concluded that, while Rummel's crimes were felonies under Texas law, they lacked the indicia of depravity associated with felonies.[89] The panel opinion pointed out that all of Rummel's offenses essentially were nonviolent, property offenses.[90]

The panel next evaluated the legislative objective behind the Texas recidivist statute to determine whether its intent was fulfilled by sentencing Rummel to life imprisonment. The panel majority concluded that the legislative purpose behind the Texas statute was to protect Texas citizens from incorrigible repeat offenders.[91] While Rummel's offenses required punishment, the court seriously questioned whether Rummel's crimes were of such gravity to mandate the imposition of society's harshest penalty short of death.[92] In comparing Rummel's sentence with punishments levied under Texas law for other crimes and with sentences imposed in other jurisdictions for offenses similar to that of Rummel's, the court concluded that there was a gross disproportionality between Rummel's crime and his sentence.[93] The panel majority also noted that it would not consider Rummel's possibility of parole as relevant to an eighth amendment determination.[94] The grant or denial of parole by a state, in the absence of some unusual circumstances, is not reviewable by a federal court.[95] If the federal court were to consider good time credit as relevant to eighth amendment scrutiny, it then would be forced to

86. 568 F.2d at 1199-200.
87. *Id.* at 1200; *see* text accompanying note 80 *supra*.
88. 568 F.2d at 1197.
89. *Id.* at 1198.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 1199.
94. *Id.* at 1196.
95. *Id.*

become more involved in the state parole process.[96]

The Fifth Circuit, sitting *en banc*, agreed with the panel opinion that some criminal sentences could be so disproportionate as to amount to cruel and unusual punishment under the eighth amendment.[97] The court, however, held that Rummel's life sentence was not so disproportionate as to violate the eighth amendment.[98] The *en banc* majority, while accepting the panel's use of three of the four *Hart* criteria,[99] stated that the panel erred by looking to the underlying offenses of Rummel to establish the asserted triviality of those offenses for the "nature of the offense" test.[100] The court stated that Rummel was being sentenced as an habitual criminal who, by past behavior, had demonstrated an inability to conform to the rules of society. That was the offense that should be evaluated.[101] The court also held that, for a realistic assessment of Rummel's sentence, it was necessary to consider his eligibility for parole.[102]

The Supreme Court upheld Rummel's life sentence in a five-to-four decision. Unlike the lower courts' opinions, however, the Supreme Court did not overtly apply a proportionality approach to evaluate the length of Rummel's sentence. The majority, in an opinion written by Justice Rehnquist, initially distinguished *Weems* and the death penalty cases from *Rummel* because of the unique nature of the punishments involved.[103] Justice Rehnquist's majority opinion also noted that the presence or absence of violence is not relevant to the legislative determination of length of sentence and does not always affect the strength of society's interest.[104]

To support the rejection of Rummel's eighth amendment claim, the majority opinion cited *Graham v. West Virginia*.[105] Graham was an incorrigible thief who was convicted three times for stealing hor-

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96. *Id. See generally* Comment, *Rights of the Convicted Felon on Parole*, 13 U. RICH. L. REV. 367 (1979).

97. 587 F.2d at 655.

98. *Id.* at 662.

99. The court would not accept the "necessity" test, as presented in Justice Brennan's concurring opinion in *Furman*. *Id.* at 661.

100. *Id.* at 659.

101. *Id. But see* Comment, *Recidivism and the Eighth Amendment—Is The Habitual Offender Protected Against Excessive Punishment?*, 55 NOTRE DAME LAW. 305 (1979).

102. 587 F.2d at 657.

103. This is not to say that a proportionality analysis would not come into play in extreme circumstances. 445 U.S. at 274 n.11.

104. *Id.* at 274. The extreme punishment involved in *Weems* and the unique nature of the death penalty were seen as significant factors making any analogy between those cases and the case at bar improper. *Id.*

105. *Id.* at 275. *See also* Katkin, *supra* note 21.

ses.[106] Graham was sentenced to a mandatory life sentence under the West Virginia recidivist statute.[107] The judgment was affirmed by the Supreme Court of Appeals of West Virginia.[108] The majority noted that *Graham* was decided only two years after *Weems* and was indistinguishable from the case at bar.[109]

Justice Rehnquist's opinion also agreed with the court of appeals, concluding that Rummel's possibility of parole was a relevant consideration.[110] Justice Rehnquist reached this conclusion because parole is an established consideration of imprisonment of convicted criminals, and a proper assessment of Texas' treatment of Rummel could not ignore the possibility that Rummel may not actually be imprisoned for the remainder of his life.[111]

Three Justices joined a dissent written by Justice Powell.[112] The dissent concluded that a proportionality analysis was applicable to the evaluation of Rummel's sentence.[113] The dissent reached its determination by tracing the evolution of the eighth amendment as applied in *Weems*, *Robinson*, *Furman*, and *Coker*.[114] Once the dissent determined that a proportionality analysis was applicable, it delineated three of the four factors in *Hart* to measure the constitutionality of Rummel's sentence.[115] In the dissent's application of the "nature of the offense" test it was noted that each of Rummel's crimes involved nothing more than the use of fraud to obtain sums of money totaling $230.[116] The nonviolence of Rummel's offenses also was a major factor considered by the dissenting Justices.[117]

Justice Powell's dissent then compared, hypothetically, Rummel's treatment under the Texas statute with treatment in other jurisdictions under identical factual circumstances.[118] The comparison resulted in a conclusion that Rummel's treatment in Texas is an aberration from the punishments he would receive in other jurisdic-

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106. 224 U.S. 616 (1912).

107. *Id.* at 620-21.

108. *Id.* at 621-22.

109. *Id.*

110. 445 U.S. at 276-77.

111. *Id.* at 280-81.

112. *Id.* *See also* Comment, *supra* note 96.

113. 445 U.S. at 285 (Powell, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.).

114. *Id.* at 293-95.

115. *Id.* at 289-93; *see* Mulligan, *supra* note 78.

116. Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

117. 445 U.S. at 295.

118. *Id.*

tions.[119] The dissent also examined Rummel's punishment in comparison to Texas' treatment of two-time felony offenders, noting that the severity of the offense has an effect on the length of sentence for the dual offender, but that all three-time felony offenders under Texas law are given the same sentence without consideration given to the gravity of the crime.[120] After examining the above factors, the dissent concluded that Rummel suffered a cruel and unusual punishment in violation of the eighth amendment.[121]

The dissent also disagreed with Justice Rehnquist's consideration of Rummel's possibility of parole as relevant to an eighth amendment determination of the constitutionality of his life sentence.[122] Rummel has no enforceable right to parole, and parole remains a matter of executive grace.[123] The dissent, therefore, determined that an approach that weighed the possibility of parole in eighth amendment analysis was both unfair and inconsistent with the amendment itself.[124]

IV. COMMENTS

Justice Rehnquist's majority opinion in *Rummel* vacillated on the issue of the applicability of a proportionality analysis in examining the mere length of a sentence.[125] In a footnote, however, it was acknowledged that in certain extreme circumstances a proportionality analysis would be applied to evaluate the constitutionality of the length of a sentence.[126] The majority also recognized Rummel's possibility of parole as a relevant factor in eighth amendment scrutiny.[127] This recognition could be construed as a form of proportionality analysis.[128] The majority expressly refused to evaluate Rummel's sentence under a strict proportionality analysis. In effect, however, the Justices may have agreed to consider Rummel's possibility of parole and may have determined that he actually was

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119. *Id.* This is in line with the factual evaluation that took place in *Robinson*, 370 U.S. at 667. *See* text accompanying notes 50-53 *supra*.

120. 445 U.S. at 296-97.

121. *Id.* at 300. The majority pointed out that both Washington and West Virginia have similiar penalogical schemes. *Id.* at 296-97.

122. *Id.* at 300-02.

123. *Id.* at 307.

124. *Id.* at 293-94.

125. *Id.* at 293.

126. *Id.* at 294.

127. *See* text accompanying notes 102-12 *supra*.

128. "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, . . .if a legislature made overtime parking a felony punishable by life imprisonment." 445 U.S. at 274 n.11.

getting something less than a life sentence and, therefore, was not unconstitutionally incarcerated. While the majority opinion does not give any indication of the weight to be given to the possibility of parole, mere recognition of this aspect indicates the existence of some degree of sentence evaluation.[129]

In refusing to explicitly examine Rummel's sentence, the Court gave great deference to the Texas legislature.[130] Indeed, it may be proper to leave difficult penological judgments to legislatures rather than to the courts. The problem after *Rummel*, however, is to determine when a court should apply the proportionality analysis to determine the constitutionality of a criminal sentence.

There is no guidance from Justice Rehnquist's opinion regarding what cases are sufficiently extreme, in the judgment of the Court, to require a proportionality analysis. While the majority agreed that a statute that levies a mandatory life sentence for overtime parking is sufficiently extreme to merit such scrutiny,[131] there is no indication where the line is to be drawn or why Rummel's case is not sufficiently compelling.[132]

Indeed, the case law seems to justify a proportionality analysis, regardless of whether capital or barbarous forms of punishment are involved.[133] In order to solve the eighth amendment issue in *Weems*, the Court chose to measure the relationship between the punishment and the offense and compared the punishment to other punishments for more serious offenses.[134] In *Robinson*, the Court used a proportionality approach in a noncapital case to find a violation of the eighth and fourteenth amendments when California punished those with the mere status of narcotic addiction.[135] The most compelling authority dictating application of proportionality is *Coker*, in which the Court used a pure proportionality approach in holding the death penalty unconstitutional when applied to an individual who raped an adult woman.[136] The majority opinion, however, distinguished the cases involving capital punishment and barbarous forms of pun-

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129. *Id.* at 280-81.

130. *Id.*

131. *Id.* at 283-85.

132. *See* note 128 *supra*.

133. One reason the Court did not find Rummel's claim especially compelling was its recognition of Texas' strong interest in punishing the habitual offender. 445 U.S. at 276.

134. *Id.* at 293 (Powell, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.).

135. 217 U.S. at 380-81.

136. 370 U.S. at 667.

ishment as factually different.[137]

The *Rummel* dissent pointed out that no basis exists for the majority's suggestion that the *Coker* analysis applies only to capital cases.[138] While the death penalty is unique, it is not the only form of punishment that can be administered in a cruel and unusual manner, as *Weems*, *Robinson*, and *Trop* have established. In addition, *Graham* is not strong authority for refusing to approve a proportionality analysis because, under the eighth amendment, the individual circumstances must be examined for a determination of constitutionality.[139] Pursuant to *Trop* and *Furman*, the eighth amendment is to be measured according to evolving standards of decency. Citation to a fifty-year-old horse theft case as authority against the applicability of a proportionality analysis to evaluate Rummel's sentence is questionable when the eighth amendment is to be construed in a flexible manner and in relation to contemporary societal values.

The dissenting opinion in *Rummel* applied the proportionality analysis to Rummel's sentence and evaluated the sentence pursuant to three of the four *Hart* criteria.[140] The dissent was consistent with prior case law in concluding that a proportionality analysis was applied properly in the case. Although there is no holding that applies eighth amendment proportionality to evaluate the length of a criminal sentence, the application of a proportionality analysis to *Rummel* should have been a logical extension of preceding case law. The use of objective criteria, as delineated in *Hart* and in the *Rummel* dissent, may prevent eighth amendment scrutiny from becoming simply the subjective opinions of individual Justices. Prior, consistent use of a proportionality analysis plus the use of appropriate objective criticism suggest that the dissenting opinion analytically is more acceptable.

There also are significant problems of interpretation with the majority opinion. There are at least three possible alternative holdings that are ascertainable and feasible. Justice Rehnquist implied that legislatures deserve the utmost deference in sentencing policies and therefore length of sentence alone will not be evaluated under an eighth amendment proportionality analysis. In the concluding paragraphs of the majority opinion, Rehnquist explicitly pointed out that drawing lines for sentencing practices largely are legislative du-

137. 433 U.S. at 592.
138. 445 U.S. at 274-75.
139. *Id.* at 292-93.
140. 370 U.S. at 667.

ties.[141] If this approach, however, is adhered to the majority's discussion of parole and the role of prosecutorial discretion was not necessary and cannot be rationalized.[142] There also remains the rare situation when, according to Justice Rehnquist's footnote, extreme circumstances necessitate eighth amendment scrutiny.[143] Under a pure deferential approach, future courts will never reach the issue of the proportionality of a sentence in *Rummel*-like factual situations.

Another interpretation of Justice Rehnquist's opinion is that the issues involved in sentencing determinations are too complex to be decided through objective criteria like those applied in *Hart* and *Carmona*. This reading would explain Justice Rehnquist's failure to apply a *Hart*-like approach and his reluctance to give tangible weight to any salient factors such as the possibility of parole. This approach ultimately would either leave the task of sentencing to the state legislatures and obviate eighth amendment scrutiny or, even worse, allow for such scrutiny to continue unguided. If, in the future, courts are faced with a factual situation comparable to *Rummel*, their only recourse will be to balance the criteria noted in the majority opinion and evaluate the sentence in accordance with their own principles of equity and fairness.

A third reading of Justice Rehnquist's opinion may lead to the conclusion that a proportionality analysis actually was used despite Justice Rehnquist's denial of its applicability. Evidence of this possible conclusion is present in Justice Rehnquist's evaluation of the Texas recidivist statute as compared to other state statutes and his indication of the lack of significant differences.[144] The majority's consideration of Rummel's possibility of parole, as well as the strong state interest in dealing with habitual offenders, are evidence of a balancing test and an evaluation of the propriety of Rummel's sentence. In light of this, courts may proceed with a proportionality analysis to evaluate the length of a sentence and will have the use of objective criteria for making such determinations.

The effect of *Rummel* depends upon which interpretation is applied. A larger question, however, remains: What is the propriety of a judicial inquiry into legislated sentencing requirements? The *Rummel* majority felt that the use of objective criteria was improper when dealing with eighth amendment issues and, because of this

141. 445 U.S. at 284-85.

142. *Id.* at 280-81.

143. *Id.* at 274 n.11; *see* note 128 *supra* and accompanying text.

144. 445 U.S. at 279.

conclusion, the Court proceeded carefully into the legislative sphere. The circuit court decisions in *Hart* and *Carmona* and Justice Powell's dissent in *Rummel* established objective criteria that were used to evaluate the proportionality of a sentence pursuant to the eighth amendment. These criteria better prepare courts to deal with the issues in this difficult area. The presence of judicial standards does not assure removal of subjective judicial bias in eighth amendment determinations. Such standards, however, do provide the courts with necessary guidelines with which to construe the concept of eighth amendment proportionality with appropriate fairness and equity.

V. CONCLUSION

William Rummel, upon conviction of his third felony offense, was sentenced to life imprisonment under the Texas recidivist statute. In *Rummel v. Estelle*,[145] Rummel challenged his life sentence under the eighth amendment, attempting to obtain a determination that his sentence was unconstitutionally disproportionate to the severity of his offenses. The Court, however, did not allow Rummel's claim.

While the concept of proportionality is heavily embedded in eighth amendment analysis, the Supreme Court, unlike the lower courts, refused to expressly apply a proportionality analysis to evaluate Rummel's sentence. The Court arrived at this conclusion by distinguishing *Weems* and the death penalty cases and by focusing on the unique nature of the punishments that were involved. The Court decided that there had been no Supreme Court case that extended proportionality solely to evaluate the length of a criminal sentence.

Recent case law, however, indicates that application of proportionality to evaluate the length of a sentence may be a necessary and proper extension of eighth amendment scrutiny. Decisions such as *Weems*, *Robinson*, and *Coker* are sufficient proof that proportionality has been applied to a variety of factual circumstances and that there is no salient reason for the Court's failure to expressly apply a proportionality analysis in evaluating Rummel's life sentence.

Indeed, from Justice Rehnquist's opinion, there are at least three possible alternative interpretations. Justice Rehnquist implied that a decision regarding the mere length of a criminal sentence is best left to legislative discretion. According to this deferential read-

145. *Id.* at 263.

ing, future courts will never reach the issue of whether a sentence would survive a proportionality analysis.

Another reading of Justice Rehnquist's opinion may be that the issues involved in evaluation of a criminal sentence are too complex to be analyzed according to objective criteria. This explains the majority's refusal to apply a *Hart*-like approach to evaluate Rummel's sentence. This interpretation allows courts to go forward and analyze future *Rummel*-like situations by balancing the criteria noted in the majority opinion.

A third reading of the majority opinion may be that a proportionality analysis actually took place, in that various criteria were balanced to decide the propriety of Rummel's sentence. Under this perspective, courts may proceed, with the weight of precedent, to make eighth amendment evaluations of the length of a sentence with the use of a proportionality analysis. The effect of *Rummel* depends upon which of the above interpretations will be followed by the courts.

Herbert J. Shepardson