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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." 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 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 as...
as to forbid disproportionate penalties. 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.

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.’” 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. Moreover, the Whigs, who wrote the clause, suppressed the two Jacobite rebellions with the same strong methods employed by the Stuarts. Second, Granucci observes that a leading member of the Bloody Assize, Sir Henry Pollexfen, participated in drafting the Bill of Rights. Surely, Granucci argues, Pollexfen would not have condemned his own participation in the assize as illegal. 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.

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” and (b) the traditional English rule against disproportionate punishments.

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. Oates’ story was a complete hoax, but as a result of his subsequent testimony, at least fifteen Catholics were executed for treason.

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.

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.”

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. Therefore, Granucci concludes that the phrase must prohibit a “severe punishment unauthorized by statute and not within the jurisdiction of the court to impose.”

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.” Granucci argues that by the year 900, this injunction was codified in a sliding scale of fines. 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

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.
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 FORHAM 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.
amercements. "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

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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. These authors accept the traditional historical explanation for the English Bill of Rights—that it prohibits cruel methods of punishment. They also accept the notion that the American framers intended to prohibit barbarous punishments. 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.* Beccaria’s central thesis was that a punishment should relate to the seriousness of the crime. Two years later, Voltaire authored a Comment on Beccaria’s treatise which was translated along with the treatise into all the primary European languages.

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; (2) John Adams once quoted Beccaria in a speech to a jury while defending soldiers accused of the Boston Massacre; (3) Thomas Jefferson read Beccaria and adopted his ideas of proportionality. 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. Mason, the authors assert, was aware of Beccaria and agreed with his ideas; (5) some states included provisions in their constitutions prohibiting disproportionate punishments; and (6) the framers of the Eighth Amendment incorporated the state prohibitions against disproportionate punishments.

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.” 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.

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42 Granucci, supra note 8, at 847.
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.
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 Mason and Patrick Henry both spoke of the necessity to prohibit the government from using torture. In Massachusetts, a delegate spoke of the same necessity.

Finally, one may accept the authors' historical 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" 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,* 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. 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.

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,* the condemned prisoner argued that shooting as a mode of execution violated the cruel and unusual punishment provision of the eighth amendment. 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 unnecc-

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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.

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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.

**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.**

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

In this business of legislation, your members of Congress will lose 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.**

**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.

necessary cruelty, are forbidden by that amendment to the Constitution. 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. 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.

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." The Court held that a punishment is cruel and unusual if it involves "something inhuman and barbarous." Although electrocution was unusual in the sense that it was not an historical punishment, the unquestioned good motive of the New York 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*. *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." However, he asserted that the Eighth Amendment also outlawed "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." 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. Justice Field rejected the argument that O'Neil's sentence was justified as a cumulative sentence for many separate offenses, because the sentence was "greatly beyond anything required by any humane law for the offence."
The first attempt to test Justice Field's O'Neil dissent in the Supreme Court was Howard v. North Carolina. 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. ..." 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. 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. Among other things, Weems received a fifteen-year sentence in cadena temporal and a four-thousand-peseta fine.

The Supreme Court held that this punishment violated the Philippine Bill of Rights. Justice McKenna, writing for the Court, held that it had ordinarily been thought that the eighth amendment protected against "inhuman and barbarous" 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."

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, 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. 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.

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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 intervivos.
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.

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78 191 U.S. 126 (1903).
79 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.

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.
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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. We 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.

86 Id. at 364–65.
87 Id. at 363.
88 Id. at 363.
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tional because of its disproportionate length. 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.

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.

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 contingency, and deprive of essential liberty. No circumstance of degradation is omitted.

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 punishment. In Howard v. North Carolina, 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, 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. In his dissent, Justice White read the majority opinion as requiring proportional punishments. His reading is, of course, a product of the dissenter’s right of exaggeration, but it none-
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." 

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. 

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. 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." 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. The dissent argues that this fact demonstrates that the American framers intended to adopt the "well understood meaning" of the English Bill of Rights. 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. 

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. 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." 

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. Apparently, the Supreme Court read Weems as limited to its special circumstances. In Badders v. United States, 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. Moreover, the lower federal courts never adopted an expansive reading of Weems. Among the circuit courts, the Second, Fifth, 

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 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. 

Id. at 410. 

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. 

240 U.S. 391 (1916). 

191 U.S. 126. 


Ginsberg v. United States, 96 F.2d 433, 437 (5th Cir. 1938).
Seventh,\textsuperscript{108} Eighth,\textsuperscript{109} and Tenth,\textsuperscript{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,\textsuperscript{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.”\textsuperscript{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,\textsuperscript{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.”\textsuperscript{114} Moreover, the Court held that the selected punishment violated “the evolving standards of decency”\textsuperscript{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.”\textsuperscript{116}

In Robinson v. California,\textsuperscript{117} another nontraditional challenge arose under the eighth amendment. California had made it a crime to “be addicted to the use of narcotics.”\textsuperscript{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-

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\textsuperscript{108} United States v. Sorcey, 151 F.2d 899, 902-03 (7th Cir. 1945), cert. denied, 327 U.S. 794 (1946).
\textsuperscript{109} Gurera v. United States, 40 F.2d 338, 341 (8th Cir. 1930).
\textsuperscript{110} Edwards v. United States, 206 F.2d 855, 857 (10th Cir. 1953).
\textsuperscript{111} 329 U.S. 459 (1947).
\textsuperscript{112} Id. at 464.
\textsuperscript{113} 356 U.S. 86 (1958).
\textsuperscript{114} Id. at 102.
\textsuperscript{115} Id. at 101.
\textsuperscript{116} Id. at 99.
\textsuperscript{117} 370 U.S. 660 (1962).
\textsuperscript{118} CAL. HEALTH & SAFETY CODE § 11721 (West 1962).
\textsuperscript{119} See Note, Cruel and Unusual Punishment, supra note 6.
\textsuperscript{120} 392 U.S. 514 (1968).
\textsuperscript{121} Robinson also held the eighth amendment enforceable against the states through the fourteenth amendment. 370 U.S. 660.
\textsuperscript{123} 375 U.S. 889.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 889-90.
\textsuperscript{126} Id. at n.1.
\textsuperscript{127} Id. at 891.
\textsuperscript{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. 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.

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* and unguided sentencing discretion was challenged in *McGuatha v. California*. 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*, 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?” 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* and *Branch v. Texas*, 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 penalty 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.” 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.

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.” 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.

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

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.
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

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*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.  
146 Theses 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.  
147 Id. (emphasis in original).  
148 Id. at 457–58.  
150 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

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 prisons 167 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 Justices 169 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;

159 428 U.S. at 187 & n.35.
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 charged circumstances and ruled instead that the Georgia Statute was unconstitutionally vague. Thereafter, in 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 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).

167 See, e.g., Jackson v. Bishop, 404 F.2d 571, 580-81 (8th Cir. 1968).
168 430 U.S. at 664.
(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* plurality\(^{173}\) 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.”\(^{176}\)

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 disproportionate. 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

\(^{172}\) 433 U.S. at 598–99.


\(^{174}\) 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.

\(^{177}\) 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 \textit{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. Next, Justice Powell took issue with the plurality'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-determined 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 but\(^{193}\)

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-\textit{Furman} catalogue of states was a more accurate indicator of societal attitudes toward the appropriate punishment for rape than the frenzied post-\textit{Furman} activity.\(^{195}\) Since at least two Justices in \textit{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 self\(^{197}\) 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."\(^{198}\)

\textbf{Habitual Criminal Statutes in the United States Supreme Court}

When Habitual Criminal 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.20).
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. 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. 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. 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. The Supreme 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. 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.”

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 disproportionality 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, the defendant had been convicted under a Massachusetts habitual criminal statute which mandated a twenty-five-year sentence upon certain third convictions. 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 forgery and uttering money orders. The Supreme Court summarily rejected McDonald’s constitutional arguments including one based on the eighth amendment.

The procedure used by the State of West Vir-

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159 See Note, Don’t Steal a Turkey in Arkansas—The Second Felony Offender in New York, 45 Fordham L. Rev. 76 (1976).  
159 U.S. 673 (1895).  
202 Id. at 675–76.  
203 Id. at 677.  
204 Id.  
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.
Virginia 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 implement 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 foregoing 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

208 224 U.S. 616 (1912).
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.
214 *Id.* at 559–60 (citations omitted).
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 crime[^222] 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 constitution[^230] 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]

[^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.
[^226]: 75 N.C. 73 (1876).
[^227]: Id. at 77.
[^230]: Same text as the eighth amendment.
A third case erroneously believed to support the proportionality concept is Calhoun v. State.\textsuperscript{232} In Calhoun, a black man had been convicted of raping a white woman "who associated mainly with ... negroes"\textsuperscript{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.\textsuperscript{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.\textsuperscript{235} In overruling the motion for rehearing, the court mentioned the state's prohibition against cruel and unusual punishments for the first time\textsuperscript{236} 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.\textsuperscript{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.\textsuperscript{238} Indeed, the Texas courts disavow any power under the eighth amendment to review the length of prison sentences.\textsuperscript{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.\textsuperscript{240} In 1947, two dissenting judges in State v. Brandon\textsuperscript{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,\textsuperscript{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.\textsuperscript{243}

\textsuperscript{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." \textit{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).

\textsuperscript{239} See cases noted in Rummel v. Estelle, 557 F.2d 651, 654 n.3 (5th Cir. 1978) (en banc).

\textsuperscript{240} See Davis v. State, 88 S.C. 229, 79 S.E. 811, 813 (1911).


\textsuperscript{242} 46 S.E.2d 273 (S.C. 1948).

\textsuperscript{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.
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-year 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


**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 states 260 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


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. 454, 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.

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.


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 outlawsing 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

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.

271 CAL. HEALTH & SAFETY CODE § 11352 (West 1954). 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).
272 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.\textsuperscript{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 \textit{Ex Parte Rosenerante}\textsuperscript{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 \textit{In re Lynch}.\textsuperscript{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."\textsuperscript{277} In \textit{Lynch}, a second offender under this statute argued that his sentence was unconstitutionally excessive. While the \textit{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.\textsuperscript{278} Second, the \textit{Lynch} court compared the punishments imposed in California for more serious offenses than


\textsuperscript{274} For example, in \textit{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).

\textsuperscript{275} 205 Cal. 534, 271 P. 902 (1928).

\textsuperscript{276} 9 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217.

\textsuperscript{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), \textit{aff'd}, 345 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 \textit{In re Wells}, 46 Cal. App. 3d 592, 598, 121 Cal. Rptr. 23, 27 (1975).

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

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

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

\textsuperscript{279} Id. at 426, 503 P.2d at 931, 105 Cal. Rptr. at 227.

\textsuperscript{280} Id. at 427, 503 P.2d at 932, 105 Cal. Rptr. at 228.

Since the \textit{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.

\textsuperscript{281} Over a dissent, one California appellate court upheld a five-year to life sentence for sale of marijuana in \textit{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 \textit{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 \textit{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 144, 111 Cal. Rptr. 548 (1979), 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), \textit{vacated}, 14 Cal. 3d 169, 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 \textit{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), \textit{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).
The operating assumption of Lynch is that the severity of the sentence should be gauged by the maximum possible sentence. In two cases the California Supreme Court severely limited the effect of this operating assumption. In vacating the appellate court determinations in Wingo and Romo, 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 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. Schuermen 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.

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.

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.

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

14 Cal. 3d 185, 534 P.2d 1015, 121 Cal. Rptr. 111.


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

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 $76,853.74 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 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.

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.
The California Supreme Court followed with another case. In In re Grant291 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, 43 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, JJ., 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

294 In Workman v. Commonwealth294 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. Commonwealth299 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.


294 429 S.W.2d 374 (Ky. 1968).

295 465 S.W.2d 70, 75 (Ky. 1971).


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 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." 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," 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.

The first case in the federal courts to interfere

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.

The Fourth Circuit was also the first federal court to interdict a legislatively mandated sentence less than death. In Hart v. Coiner 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

with a legislatively approved punishment is Ralph v. Warden. 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, 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. 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.

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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. Two circuit judges filed a dissent from the majority's refusal to grant a rehearing en banc. Id. at 794-98.

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 790-93.

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.

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Chapter 7: 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 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 opinion\(^{325}\) 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. 355, 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.\(^{342}\)

\(^{329}\) 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.

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. Per-\textit{ini}*.\textsuperscript{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*.\textsuperscript{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. Bro\textit{die}*.\textsuperscript{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,”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{351}

One judge dissented from the panel opinion.\textsuperscript{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”\textsuperscript{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.\textsuperscript{354} Justice Marshall termed the Second Circuit’s view of the nature of the offense “problematic”\textsuperscript{355} and inconsistent with the “fundamental premise of the criminal justice system, that individuals are accountable only for their own criminal acts.”\textsuperscript{356} Justice Marshall also questioned the Second Circuit’s choice to discount the punishment by the probability of parole.\textsuperscript{357} Justice Marshall called this analysis “analytically unsatisfying.”\textsuperscript{358} Finally, Justice Marshall challenged the Second Circuit’s holding that a comparatively harsher drug law may be based on a finding that the problem is more acute locally than nationally.\textsuperscript{359}


\textsuperscript{344} 576 F.2d 405 (2d Cir. 1978), cert. denied, 439 U.S. 1091 (1979).

\textsuperscript{345} 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338.

\textsuperscript{346} Id. at 112–13, 371 N.Y.S.2d at 476–77, 332 N.E.2d at 342.


\textsuperscript{348} 576 F.2d at 407.

\textsuperscript{349} Id. at 412.

\textsuperscript{350} Id. at 413.

\textsuperscript{351} The court termed the New York problem a “plague.” Id. at 415.

\textsuperscript{352} Id. at 417 (Oakes, J., dissenting).

\textsuperscript{353} Id. at 422.

\textsuperscript{354} 439 U.S. at 1091.

\textsuperscript{355} Id. at 1096.

\textsuperscript{356} Id.

\textsuperscript{357} Id. at 1098.

\textsuperscript{358} Id.

\textsuperscript{359} Justice Marshall also questioned this factual premise. Id. at 1101.

\textsuperscript{360} Id.
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. Coiner362 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 TEXAS 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 success-fully 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, Revisited 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)人在监狱中的生活。

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. 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. 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. Addressing the question of the seriousness of Rummel's crimes the panel stated:

None of Rummel's offenses present exasperating 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.

Second, the panel sought to determine the legislative objective in making conduct a punishable offense. 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." The panel recognized that an habitual offender law has as its objective "protecting citizens from incorrigible repeat offenders." 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 murder and punishes a single felony such as murder, aggravated rape or arson with as little as five years. 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. 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 federal courts into the parole process. 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. 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. 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."

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.

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

\[370\] 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 Rener v. Beto, 447 F.2d 20 (5th Cir. 1971), cert. denied, 405 U.S. 1051 (1972). In Rener, 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.

\[373\] at 23.

\[374\] 568 F.2d at 1198.

\[375\] Id.

\[376\] Id. (emphasis in original).

\[377\] 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).

\[379\] Id.

\[380\] Id.

\[381\] Id. at 1199.


\[383\] 568 F.2d at 1200.

\[384\] Id.
he expressed sympathy with Rummel's plight, he stated that eighth amendment analysis cannot be guided by personal "feelings of compassion and justice."\textsuperscript{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.\textsuperscript{386}

THE \textit{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.\textsuperscript{387} Although the new majority opinion substantially accepted the conceptual framework posited by the panel opinion, the emphasis was markedly dissimilar.

The \textit{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.\textsuperscript{388} The court canvassed a mass of ill-defined and conflicting cases.\textsuperscript{389} While many American jurisdic-

\textsuperscript{385} Id. at 1201.
\textsuperscript{386} Id. at 1201–02.
\textsuperscript{387} The 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.

\textit{Id.}

\textsuperscript{388} Rummel v. Estelle, 587 F.2d 651.
\textsuperscript{389} Id. at 654–55.

\textsuperscript{390} 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. \textit{Id.} at 654 n.3. The second group catalogued cases from other jurisdictions claiming no power under the eighth amendment for disproportionality analysis. \textit{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. \textit{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

\textsuperscript{391} Since the \textit{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 \textit{Hart v. Coiner} standards used by the panel opinion; however, the \textit{en banc} court concluded the panel erred by failing to uphold a sentence "if there is any rational basis for so doing."\textsuperscript{395} The court started with the proposition that the Texas habitual criminal law is constitutional.\textsuperscript{396} The court then turned to a discussion of the \textit{Hart} standards emphasized in the panel opinion.

First, the \textit{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.

\textsuperscript{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 \textit{v. Coiner}, 483 F.2d 136. Six months after the \textit{en banc} Rummel opinion, the Fourth Circuit \textit{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 \textit{v. Davis}, 601 F.2d 153.

\textsuperscript{391} Litigants have been relieved of prison sentences in several state courts. These cases are discussed in the text accompanying notes 221–359 \textit{supra}.

\textsuperscript{392} 587 F.2d at 654 nn.3, 4.
\textsuperscript{393} Id. at 655.
\textsuperscript{394} 433 U.S. 584.
\textsuperscript{395} 587 F.2d at 656.
\textsuperscript{396} Id. The court relied on Spencer \textit{v. Texas}, 385 U.S. 554. \textit{See} text accompanying note 214 for the Court's language.

For a criticism that the Court's language in \textit{Spencer} was too broad, \textit{see} Katkin, \textit{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 possession and distribution of marijuana.\(^{403}\) the other upholding a forty-year sentence for possession and distribution of marijuana.\(^{404}\)

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

\(\text{\cite{587 F.2d at 659.}}\)

\(\text{\cite{Id.}}\)

\(\text{\cite{Id. at 658-59.}}\)

\(\text{\cite{Id. at 657-58.}}\)

\(\text{\cite{Texas Code Crim. Pro. Ann. art. 42.12 \S 15(a) (Vernon 1974).}}\)

\(\text{\cite{The 20-year maximum is not calendar years, but is further reduced by “good time credits.”}}\)

\(\text{\cite{The good time system in Texas is generous and well developed.}}\)

\(\text{\cite{There are also two disciplinary classes: one class earns 40 days credits for every 30 served during periods of good behavior.}}\)

\(\text{\cite{The Texas good time system is explained more fully in Jackson, Hard Times, Texas MONTHLY, December 1978, at 138, 258.}}\)

\(\text{\cite{Wood v. South Carolina, 483 F.2d 149. \textit{Wood} was decided by the same Fourth Circuit panel that decided \textit{Hart v. Coiner}.}}\)

\(\text{\cite{Davis v. Davis, 585 F.2d 1226. The 40-year sentence in \textit{Davis} was a jury determination and not a mandatory sentence. The panel decision in \textit{Davis} was later reversed by the Fourth Circuit en banc, which, in turn, was reversed by the Supreme Court. Davis v. Davis, 601 F.2d 153 (4th Cir. 1979) (en banc), vacated sub nom. Hutto v. Davis, 100 S. Ct. 1593 (1980). The en banc court in \textit{Davis} made no mention of the Fifth Circuit’s rejection of a differing standard between life sentences and sentences for a term of years. See Rummel v. Estelle, 587 F.2d at 656 n.8.}}\)

\(\text{\cite{587 F.2d at 659.}}\)

\(\text{\cite{Id.}}\)

\(\text{\cite{568 F.2d at 1199.}}\)

\(\text{\cite{We believe that the evidence on this point is, at best inconclusive. Of course, if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the majority's assertion is probably accurate.}}\)

\(\text{\cite{587 F.2d at 659.}}\)

\(\text{\cite{If one reads the “majority’s assertion” to refer to “confirms the gross disproportionality of Rummel's sentence,” then the en banc opinion can be read to hold a sentence for natural life without possibility of parole unconstitutional. The \textit{en banc} dissent takes this reading. \textit{Id.} at 665-66.}}\)

\(\text{\cite{The other reading would read the majority’s assertion to refer to a comparison made by the panel opinion without comment as to the legal effect of such comparison.}}\)

\(\text{\cite{587 F.2d at 659-60.}}\)

\(\text{\cite{Id. at 659. The court reached this conclusion by surveying other jurisdictions.}}\)

\(\text{\cite{The court noted that three states punish a four-time felon with a mandatory life sentence and eight states give discretionary power to punish a three-time felon with a life sentence. The states are canvassed at \textit{Id.} at 660 nn.22, 23.}}\)
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.\footnote{Id. at 660.}

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,\footnote{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.
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 144938 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.
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.}

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 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.\footnote{Id. at 660-61.} 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.\footnote{Id. at 661.} 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.\footnote{Id. at 661-67.}

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.\footnote{100 S. Ct. 1133.}

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.\footnote{Id. at 666-67.}

RUMMEL IN THE SUPREME COURT

The Supreme Court affirmed the Fifth Circuit's \textit{en banc} decision by a five-to-four vote.\footnote{587 F.2d at 660.} Justice
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.\(^4\)

The Court's analysis proceeded from the proposition that the proportionality language in the capital punishment line of cases is "of limited assistance"\(^4\) 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."\(^4\) 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 *cadenas temporales*.\(^4\) 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."\(^4\)

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 penalty\(^4\) and *Weems* because of the unusual nature of *cadenas temporales*.\(^4\) 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.\(^4\)

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.\(^4\) Justice Rehnquist suggested that a high official in a large corporation can commit "undeniably serious"\(^4\) crimes without the violence. Moreover, Justice Rehnquist discounted the relatively small amounts of money taken by Rummel's various criminal enterprises.\(^4\) 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.\(^4\)

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."\(^4\) 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."\(^4\) 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 statute\(^4\) and the subtle differences between the habitual criminal acts of various states such as the application of a life sentence upon the fourth felony.\(^4\) Moreover, the Court, while agreeing that the life sentence should not be considered a twelve-year sentence because of the goodness of provisions of the Texas law,\(^4\) determined that the proper assessment of the sentences includes a recognition of the good time and parole process.\(^4\) 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

\(^{423}\) *Id.*
\(^{424}\) *Id.*
\(^{425}\) *Id.*
\(^{426}\) *Id.*
\(^{427}\) *Id.*
\(^{428}\) *Id.*
\(^{429}\) *Id.*
\(^{430}\) *Id.*
\(^{431}\) *Id.*
\(^{432}\) *Id.*
\(^{433}\) *Id.*
\(^{434}\) *Id.*
\(^{435}\) *Id.*
\(^{436}\) *Id.*
failed to prove his case for disproportionality.\footnote{437} The Court’s opinion apparently rejects the \textit{Hart} approach of an intrajurisdictional analysis of the seriousness of crimes because such a ranking is “inherently speculative.”\footnote{438} Moreover, the Court does not mention the \textit{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.\footnote{439}

Justice Powell dissented. Like the Fifth Circuit \textit{en banc} minority, he took issue with the majority’s consideration of a state’s practices concerning parole and discretionary release.\footnote{440} Justice Powell argued that a prisoner has no liberty interest in parole and that consideration of parole was unduly speculative.\footnote{441} Justice Powell argued for the adoption of three of the four \textit{Hart v. Coiner} standards.\footnote{442} After a review of these standards, Justice Powell concluded that Rummel’s crimes were relatively insignificant\footnote{443} and that Texas punishes a person in Rummel’s position more harshly than most other American jurisdictions\footnote{444} and more harshly than it punishes others who commit more serious crimes.\footnote{445}

Justice Powell recognized the difficulty inherent in the subjective nature of the proportionality inquiry.\footnote{446} However, he concluded that this difficulty does not prohibit the Court from developing ascertainable standards.\footnote{447} Justice Powell called the “flood gates” argument “easy to make and difficult to rebut.”\footnote{448} To him the Fourth Circuit experience with the proportionality question demonstrated that the lines were not impossible to draw.\footnote{449} Justice Powell concluded by observing that Rummel’s sentence “would be viewed as grossly unjust by virtually every layman and lawyer.”\footnote{450}

\section*{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 \textit{Rummel v. Estelle}. This section will address the questions unique to \textit{Rummel} and problems raised by proportionality analysis generally. Despite what \textit{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.

\section*{The Problem of an “As Applied” Attack}

Given the extraordinarily broad approval of the Texas habitual criminal statute in \textit{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 \textit{Hart v. Coiner} and the Fifth Circuit panel in \textit{Rummel}. Both courts relied primarily on \textit{Yick Wo v. Hopkins}\footnote{451} for this proposition. In \textit{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.”\footnote{452}

It must be clear that the “as applied” attack in \textit{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 \textit{Oyler v. Boles}.\footnote{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.\footnote{454}
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, Edward v. Commonwealth, 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 Edward was eighteen years old. The Kentucky court struck down the punishment in Anderson while upholding the life sentence without possibility of parole in Edward. Similarly, the Michigan Supreme Court in People v. Lorentzen noted that the defendant convicted of a small-scale sale of marijuana was a first offender gainfully employed. In Wood v. South Carolina, 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.” 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 inmaterial 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.” 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. Rhetorically, the Court asked if the state could resentence Rummel to life imprisonment, based on his full record in the event that the life sentence for the three charged felonies was unconstitutional. 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. 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, 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 Coburn v. State, 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

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464 465 S.W.2d at 75.
465 500 S.W.2d 396.
466 387 Mich. 167, 194 N.W.2d 827.
467 483 F.2d 149.
468 Id. at 150.
469 Reply Brief for Petitioner at 5, 6, Rummel v. Estelle, 100 S. Ct. 1133.
470 100 S. Ct. 1143.
471 Id.
472 Brief for Petitioner at 13, Rummel v. Estelle, 100 S. Ct. 1133.
473 601 F.2d 153.
474 273 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.\textsuperscript{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?\textsuperscript{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\textsuperscript{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 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,\textsuperscript{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,\textsuperscript{469} because “[p]arole, parole or commutation is an act of grace and another of discretion, and may be refused.”\textsuperscript{470}

In People v. Lorentzen\textsuperscript{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\textsuperscript{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\textsuperscript{473} the Second Circuit held that the possibility of parole should be considered when assessing the gravity of a punishment under the eighth amendment.\textsuperscript{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.\textsuperscript{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 law\textsuperscript{476} and the prior judicial treatment of the law by the California courts\textsuperscript{477}—are not directly relevant to the constitutional question under the eighth amendment. The third factor given by the California court—

\textsuperscript{465} Id. at 549, 142 So. 2d at 869–70.
\textsuperscript{466} Five Dollar Mistake, Sixty Minutes, (CBS), Oct. 7, 1979.
\textsuperscript{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.).
that the defendant has no vested right to parole or release prior to the expiration of the sentence—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* 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." The third argument advanced for not considering parole is that the "added 'crime' of a 'bad attitude' in prison" 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.

**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* 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 gain parole. 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.

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" 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:

[We... 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.]

**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* 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

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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.
481 Brief for Petitioner at 35, Rummel v. Estelle, 100 S. Ct. 1133.
482 *Id.* at 36, 37.
483 576 F.2d at 405.
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.”

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.

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.

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.” 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.

Indeed, Time confidently declared indeterminate sentences as “discredited theory.” 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.

The Texas scheme of punishment gradually al-

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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.

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).


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.

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 express 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 APPPELLATE 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—

Answer (White): How about tax evasion?

Answer ...
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 violent 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. Perini*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

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.

505 Id. at 1143 n.27.

506 568 F.2d at 1198.

507 387 Mich. 167, 194 N.W.2d 827.


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; 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 "[i]f lower state courts have employed similar tests [to the proportionality test] for years without being deluged by litigation,"\(^{516}\) 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*\(^{517}\) under the proportionality principle. Shortly after *Kimbrough*, 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 extend the analysis to heroin cases the Michigan Supreme Court interdicted 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 extend the analysis to heroin cases the Michigan Supreme Court interdicted 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."\(^{523}\)

The Kentucky Court of Appeals held two life sentences without the possibility of parole unconstitutional 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."\(^{523}\)

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

\(513\) 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).

\(515\) See note 454 supra.

\(516\) 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. Sates*, 46 S.E.2d 693.

\(519\) 387 Mich. 167, 194 N.W.2d 827.

\(520\) See note 268 supra.

\(521\) 387 Mich. 167, 194 N.W.2d 827.

\(522\) *See* *note 268* supra.

\(523\) *See* *note 455* supra.

\(524\) *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. 436, 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).

\(525\) 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).

\(526\) *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.*
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.”

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.

One cannot deny that banner headlines proclaiming that the Supreme Court upholds a life-time 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

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.

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.