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Rummel v. Estelle: Can Non-Capital Punishment Still Be Cruel and Unusual?

RUMMEL V. ESTELLE: CAN NON-CAPITAL PUNISHMENT STILL BE CRUEL AND UNUSUAL?

The eighth amendment of the United States Constitution prohibits the infliction of cruel and unusual punishments.[1] The phrase "cruel and unusual punishments" first appeared in the English Bill of Rights of 1689.[2] In England, this phrase prohibited disproportionate penalties.[3] The framers of the United States Constitution, however, intended the language to ban only torture and other barbarous punishment.[4]

The United States Supreme Court has consistently interpreted the eighth amendment as prohibiting torture,[5] but has never applied the eighth amendment to hold a sentence unconstitutional based solely upon a disproportionately long sentence.[6] Nevertheless, several lower courts have found a basis for a proportionality principle in the Supreme Court's treatment of other eighth amendment cases and in the historical origins of the phrase "cruel and unusual punishments."[7] In *Rummel v. Estelle*,[8] the Supreme Court once again addressed the cruel and unusual punishment issue. In a five to four decision,[9] the Court held that a mandatory

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[1] U.S. CONST. amend. VIII. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* The Supreme Court has interpreted the eighth amendment as fully applicable to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660, 666 (1962); *see* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947).

[2] I W. & M. 2, c.2, 189 (1689).

[3] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 860 (1969) [hereinafter cited as Granucci]. Prior to Granucci's article on the origins of the eighth amendment, most scholars believed that the prohibition originally banned only torturous punishments as administered during the English treason trials of 1685. *Id.* at 853; *see, e.g.*, G. EDWARDS, S. ROSENZWEIG, S. RUBIN, H. WEIHOFEN, THE LAW OF CRIMINAL CORRECTION 363-64 (1963); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636 (1966).

[4] *See* Granucci, *supra* note 3, at 840-42; 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881); 3 J. ELLIOT, *id.* at 447-48, 52; 1 ANNALS OF CONG. 782-83 (1789).

[5] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 319, 322 (1972) (Marshall, J., concurring) (three particular death sentences cruel and unusual); Howard v. Fleming, 191 U.S. 126, 136 (1903) (10 years imprisonment for conspiracy to defraud not torture and, therefore, not cruel and unusual punishment); Wilkerson v. Utah, 99 U.S. 130, 134-36 (1878) (execution by gunshot not torture and, therefore, not cruel and unusual punishment).

[6] *See* Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639, 646 (1979).

[7] *See, e.g.*, Hart v. Coiner, 483 F.2d 136, 139-40 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); State v. Freitas, 61 Hawaii 262, 602 P.2d 914, 920 (1979); State v. Beavers, 382 So.2d 943, 944 (La. 1980); State v. Maldonado, 176 Mont. 322, 578 P.2d 296, 304-05 (1978). *See generally* Campbell, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964) [hereinafter cited as Campbell].

[8] 445 U.S. 263 (1980), *aff'g* 587 F.2d 651 (5th Cir. 1978).

[9] 445 U.S. at 264. Justice Rehnquist delivered the opinion of the Court in which Chief

life sentence, imposed under Texas' recidivist statute, did not constitute cruel and unusual punishment.[10]

Rummel received a mandatory life sentence following his third felony conviction.[11] His offenses, committed over a nine-year period, consisted of fraudulently using a credit card to obtain approximately $80.00 worth of goods or services, forging a $28.36 check, and obtaining $120.75 by false pretenses.[12] Although the offenses were felonies when committed, they were non-violent, and the net proceeds of all three crimes totalled less than $230.00.[13] Texas' recidivist statute, however, does not consider these potentially mitigating factors.[14]

Following the imposition of the mandatory life sentence, Rummel appealed through the state and federal courts.[15] The Texas appellate courts rejected Rummel's direct appeal as well as his subsequent collateral attacks on his imprisonment.[16] Rummel then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Texas.[17] His petition alleged that his life sentence was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment.[18] Rummel did not contest the basic constitutionality of the Texas recidivist statute.[19] The district court rejected this

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Justice Burger and Justices Stewart, White, and Blackmun joined. Justice Stewart filed a concurring opinion, and Justice Powell filed a dissenting opinion in which Justices Brennan, Marshall, and Stevens joined. *Id.*

[10] *Id.* at 285. Under Texas law anyone convicted of three non-capital felonies shall receive a mandatory life sentence. TEX. PENAL CODE ANN. art. 63 (Vernon 1925). Despite some slight changes, the recently revised Texas Code still provides for the same penalty. *See* TEX. PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon 1974).

[11] Rummel v. Estelle, 509 S.W.2d 630, 631, 634 (Tex. 1974); *see* note 10 *supra.*

[12] 445 U.S. at 265-66. In 1964 Rummel pleaded guilty to fraudulently using a credit card to obtain approximately $80.00 worth of goods or services and received a sentence of three years imprisonment. The statute under which the court convicted Rummel provided for two to ten years' imprisonment. *See* TEX. PENAL CODE ANN. art. 1555b(4)(d) (Vernon Supp. 1973). In 1969 Rummel received a sentence of four years imprisonment for forgery. The statute in force at that time provided for a two to five-year sentence. *See* TEX. PENAL CODE ANN. art. 996 (Vernon 1961). Rummel received his life sentence after being convicted of obtaining money by false pretenses which carried a sentence of two to ten years' imprisonment. *See* TEX. PENAL CODE ANN. arts. 1410, 1413, 1421 (Vernon 1953).

[13] *See* note 12 *supra.* Rummel's third offense, obtaining $120.75 by false pretenses, is now a Class A misdemeanor. TEX. PENAL CODE ANN. tit. 7 §§ 31.03(b)(1) & .03(d)(3) (Vernon 1974 & Supp. 1977). Class A misdemeanors carry maximum jail terms of one year. TEX. PENAL CODE ANN. tit. 3 § 12.21 (Vernon 1974).

[14] *See* note 10 *supra.* The Texas recidivist statute requires a mandatory life sentence following a third felony conviction, regardless of the type of felonies involved. *Id.*

[15] 445 U.S. at 286 (Powell, J., dissenting).

[16] 445 U.S. at 267.

[17] *Id.* at 264-65.

[18] *Id.* at 267.

[19] *Id.* at 268. The Supreme Court had already held that Texas' recidivist statute is constitutional. Spencer v. Texas, 385 U.S. 554, 569 (1967). Traditionally, courts have held recidivist statutes constitutional, despite attacks on grounds other than the eighth amendment. The first attack concerns due process challenges under the fifth and fourteenth

claim, but a divided panel of the Fifth Circuit Court of Appeals reversed and found Rummel's sentence unconstitutional.[20] The panel, however, also granted a motion for a rehearing en banc.[21] At the rehearing the Fifth Circuit vacated the panel decision and reinstated Rummel's sentence.[22] Following grant of certiorari,[23] the Supreme Court affirmed the Fifth Circuit opinion and held that Rummel's life sentence was not cruel and unusual punishment.[24]

In reaching its decision, the Supreme Court rejected both Rummel's proportionality argument and his analysis of eighth amendment precedent. Rummel contended that prior Supreme Court cases utilized a proportionality test as an indicator of cruel and unusual punishment and urged the Court to apply that test in his case.[25] The majority refuted Rummel's argument by pointing out that nearly all of the cases employing a proportionality test involved capital punishment.[26] The Supreme Court distinguished the relevant capital punishment cases by emphasizing the unique nature of the death penalty.[27] Accordingly, the majority held that capital punishment cases were of limited assistance in deciding the constitutionality of Rummel's sentence.[28]

The majority also distinguished an earlier Supreme Court case, *Weems v. United States*,[29] in which the Court applied a proportionality

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amendments. Courts have dismissed due process arguments reasoning that although the statutes impose a more severe penalty on recidivists, no separate offense is charged. *See, e.g.*, Graham v. West Virginia, 224 U.S. 616, 625 (1912); Beland v. United States, 128 F.2d 795, 797 (5th Cir.), *cert. denied*, 317 U.S. 676 (1942). The second attack alleges that recidivist statutes violate the constitutional provision against ex post facto laws. *See* U.S. CONST. art. I, § 9. Courts generally have held such an argument invalid if the recidivist statute was in operation prior to the last offense. *See, e.g.*, Gryger v. Burke, 334 U.S. 728, 732 (1948); Wey Him Fong v. United States, 287 F.2d 525, 526 (9th Cir.), *cert. denied*, 366 U.S. 971 (1961).

Since courts impose an extended sentence only for the most recent offense, courts have also rejected fifth amendment double jeopardy arguments. *See, e.g.*, 334 U.S. at 732; 224 U.S. at 623; McDonald v. Massachusetts, 180 U.S. 311, 313 (1901). Courts have also dismissed equal protection arguments under the fourteenth amendment. *See, e.g.*, 180 U.S. at 313; Moore v. Missouri, 159 U.S. 673, 677-78 (1895); Barr v. State, 205 Ind. 481, 187 N.E. 259, 262 (1933).

[20] Rummel v. Estelle, 568 F.2d 1193, 1200 (5th Cir.) (2-1 decision holding Rummel's sentence unconstitutional), *rev'd*, 587 F.2d 651, 662 (5th Cir. 1978) (en banc).

[21] 568 F.2d at 1203.

[22] 587 F.2d 651, 662 (5th Cir.) (8-6 en banc decision held Rummel's sentence constitutional), *rev'g* 568 F.2d 1193 (5th Cir. 1978); *see* Comment, *Rummel v. Estelle: Leaving the Cruel and Unusual Punishments Clause in Constitutional Limbo*, 15 VAL. U.L. REV. 201, 204-05 (1980) [hereinafter cited as *Constitutional Limbo*].

[23] 441 U.S. 960 (1979).

[24] 445 U.S. 285.

[25] *Id.* at 272-73.

[26] *Id.*

[27] *Id.* at 272. The Court observed that the death penalty differs from other penalties not in degree, but in kind since the penalty is totally irrevocable, rejects rehabilitation, and is an absolute renunciation of humanity. *Id.*; Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

[28] 445 U.S. at 272.

[29] 217 U.S. 349 (1910).

test to strike down a non-capital punishment.[30] In *Weems*, the Court held that a fifteen-year sentence at *cadena temporal*,[31] imposed by a Phillipine court for falsification of an official document, violated the eighth amendment.[32] The *Rummel* Court distinguished *Weems* on the grounds that Weems' punishment was cruel and unusual punishment, not due to the sentence's length, but in light of the torturous accompaniments associated with the sentence.[33] Therefore, the *Rummel* Court concluded that the unique nature of Weems' punishment distinguished that case just as the unique nature of the death penalty distinguished the capital punishment cases.[34]

The majority cited the Supreme Court cases of *Badders v. United States*[35] and *Graham v. West Virginia*[36] in support of its conclusion that a proportionality test was not applicable in *Rummel*.[37] Both cases involved non-capital punishment and were decided soon after the *Weems* case.[38] The *Rummel* Court found particularly significant the fact that the Supreme Court dismissed the eighth amendment challenges in both cases, without any discussion or analysis.[39]

Following the analysis of precedent, the *Rummel* majority emphasized the need for judicial restraint in order to avoid usurping the legislative function of establishing specific criminal penalties.[40] The Court noted that Texas, in mandating Rummel's sentence, was interested in more than establishing the penalty for unlawfully acquiring another person's property.[41] The majority emphasized that Texas' overriding concern was in punishing those who had shown, by repeated criminal acts, that they were simply incapable of conforming their behavior to the law.[42] The majority thus dismissed Rummel's claim that

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[30] 445 U.S. at 272-74; 217 U.S. at 380-82. Mr. Justice Field first proposed a proportionality test for eighth amendment violations. O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

[31] *Cadena temporal* is a Hispanic punishment consisting of confinement in a penal institution; hard and painful labor while bound by a chain at the ankle and wrist; and deprivation of marital authority, parental and property rights. Following confinement, the person remains under the perpetual supervision of the criminal magistrate. 217 U.S. at 366.

[32] 217 U.S. at 382. The Phillipine Islands were a United States territory, and Weems was an official in the United States Government of the Phillipines. Therefore, the United States Supreme Court had jurisdiction to review the decision of the Phillipine Supreme Court. *See id.* at 359-61.

[33] 445 U.S. at 274.

[34] *Id.*

[35] 240 U.S. 391 (1916) (five years imprisonment and $7,000 fine not cruel and unusual punishment for seven counts of mail fraud).

[36] 224 U.S. 616 (1912) (mandatory life sentence following third horse theft not cruel and unusual punishment).

[37] 445 U.S. at 274, 276-77.

[38] *See* notes 35-36 *supra*.

[39] *Id.*; *see* Badders v. United States, 240 U.S. 391, 393-94 (1916); Graham v. West Virginia, 224 U.S. 616, 631 (1912).

[40] 445 U.S. at 276, 284-85.

[41] *Id.* at 276.

[42] *Id.*

his offenses were petty and non-violent, reasoning that violence and the value of goods involved are not always relevent.[43]

Although the majority specifically rejected the use of a proportionality analysis in examining Rummel's sentence,[44] the Court did discuss the criteria Rummel offered as evidence of disproportionality.[45] The Court, however, found little merit in Rummel's application of the proposed factors and dismissed both his arguments and conclusion.[46] Rummel attempted to ground his proportionality attack on the exceptional severity of Texas' recidivist statute and the petty and non-violent nature of his offenses.[47] The majority refuted Rummel's claim that Texas' statute was uniquely severe by pointing out that in the absence of mandated uniform laws, inimical to federalism, some state will always bear the distinction of treating particular offenders more severely than other states.[48]

In evaluating Rummel's contentions, the majority also weighed Texas' practice of allowing a prisoner serving a life sentence to obtain parole.[49] Although the majority observed that it could not treat the possibility of parole in twelve years as a twelve-year sentence, the Court held that a proper assessment of the imposed penalty could not ignore that possibility.[50] The majority found that at the very least the possibility of parole mitigated the relative severity of Texas' statute.[51] The majority concluded the opinion by reemphasizing the need for judicial

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[43] *Id.* at 275-76. The majority argued that the presence or absence of violence does not always reflect society's interest in deterring a particular crime or punishing a particular criminal. The Court observed that white collar crimes are characterized by non-violence and yet do not go unpunished. *Id.* at 275. White collar crime, however, is inherently non-violent and the sentences imposed reflect that fact. Certainly courts do not impose life sentences for white collar crimes. *See White Collar Crime Symposium Part II*, 17 AM. CRIM. L. REV. 409-18, 479-500 (1980). The majority argued that culpability does not quantitatively relate to the gain realized. As an example, the majority states that if Rummel had attempted to defraud his victim of $50,000, but had failed, no money whatsoever would have changed hands. Yet, Rummel would be no less blameworthy, only less skillful, than if he had succeeded. 445 U.S. at 276.

[44] 445 U.S. at 274.

[45] *Id.* at 277-82.

[46] *See id.* at 285.

[47] *Id.* at 277; *see* note 10 *supra.*

[48] *Id.* at 282; *see* note 51 *infra*; text accompanying notes 70-73 *infra.* To support the argument that various states punish the same crimes with different sentences, the Court cited California's uniquely severe statute governing the theft of avocados and artichokes, *see* CAL. PENAL CODE § 487(1) (West 1970), and compared the Idaho and Nevada statutes dealing with the theft of $100. 445 U.S. at 282. *Compare* IDAHO CODE §§ 18-4604, -4607 (1979) (fine or short jail term) *with* NEV. REV. STAT. § 205.220 (1973) (up to 10 years' imprisonment).

[49] 445 U.S. at 280-81.

[50] *Id.*

[51] *Id.* at 281. The majority cited Mississippi's recidivist statute as being more severe since it mandates a life sentence without parole upon conviction of three felonies, provided that at least one of the felonies involves violence. *Id.*; *see* MISS. CODE ANN. § 99-19-83 (Supp. 1979).

restraint and the importance of respecting the decision of the Texas legislature.[52]

Justice Powell's vigorous dissent disputed the majority's findings and holding and determined that Rummel's life sentence was cruel and unusual punishment.[53] Analyzing the history of the eighth amendment, the dissent concluded that the penalty imposed for a non-capital crime can be unconstitutionally disproportionate.[54] This conclusion rested on a historical analysis of the eighth amendment combined with the principle of disproportionality.[55] To establish the legitimacy of a proportionality analysis in non-capital eighth amendment cases, the dissent relied on *Weems* and other Supreme Court cases.[56] The dissent maintained that the Supreme Court in *Weems* found that the length of a sentence alone could be the basis of an eighth amendment claim and that later Supreme Court cases recognized this principle.[57] The dissent stated that a proportionality analysis is appropriate in all cases and is required and recognized by Supreme Court precedent.[58] The dissent distinguished the two cases upon which the majority relied for the proposition that a proportionality analysis was not applicable to Rummel's punishment.[59] Powell urged that both *Badders* and *Graham* involved superficial eighth amendment claims that are meritless in considering the applicability of a proportionality analysis.[60]

The dissent also disputed the majority's characterization of Rummel's sentence.[61] Powell's dissent focused on the fact that since Rummel had no constitutional or inherent right to parole, the possibility of parole did not ameliorate the severity of his sentence.[62] The dissent

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[52] 445 U.S. at 284.

[53] *Id.* at 285-307 (Powell, J., dissenting).

[54] *Id.* at 286-93.

[55] *Id.* at 288-93.

[56] *Id.* at 290; *see* note 57 *infra*.

[57] 445 U.S. at 290 (Powell, J., dissenting). The dissent maintained that in both capital and non-capital cases the Supreme Court has recognized that the *Weems* decision proscribes punishment grossly disproportionate to the severity of the crime. *Id.*; Hutto v. Finney, 437 U.S. 678, 685 (1978); Ingraham v. Wright, 430 U.S. 651, 667 (1977); *see* Coker v. Georgia, 433 U.S. 584, 592 (1977) (opinion of White, J.); Gregg v. Georgia, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Furman v. Georgia, 408 U.S. 238, 325 (1972) (Marshall, J., concurring).

[58] 445 U.S. at 290 (Powell, J., dissenting); *see* note 57 *supra*.

[59] 445 U.S. at 290 n.7 (Powell, J., dissenting); *see* notes 35-36 *supra*; text accompanying notes 97-100 *infra*.

[60] 445 U.S. at 290 n.7 (Powell, J., dissenting); *see* notes 35-36 *supra*; text accompanying notes 97-100 *infra*.

[61] 445 U.S. at 294 (Powell, J., dissenting).

[62] *Id.* The dissent cited Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 7 (1979), for the proposition that a criminal conviction extinguishes whatever liberty interest a prisoner has in securing freedom before the end of his lawful sentence. 445 U.S. at 293-94. Powell also cited figures that illustrate the speculative nature of parole in Texas. In June of 1979, the Governor of Texas refused to grant parole to 79% of the prisoners whom the state parole board recommended for release. *Id.* at 294 (Powell, J., dissenting).

thus argued that a just evaluation of Rummel's sentence must consider the sentence as life imprisonment.[63]

In addition to a different perception of Rummel's sentence, the dissent disputed the majority's reliance on federalism and the need for judicial restraint. Powell maintained that the eighth amendment, which commands courts to enforce the constitutional limitation of the cruel and unusual punishment clause, supersedes the policy of judicial restraint.[64] The dissent argued that judicial restraint and the enforcement of the eighth amendment are not mutually exclusive.[65] Powell noted that use of objective factors in evaluating punishments provides the necessary degree of judicial restraint and respect for federalism.[66] The first objective factor the dissent relied upon in finding Rummel's sentence unconsitutional was the nature of the offense.[67] Powell accepted Rummel's contention that the offenses were petty and non-violent and stated that it was difficult to imagine felonies that posed less danger to society.[68] Therefore, the dissent concluded that the nature of the offenses did not call for life imprisonment.

The severity of Texas' recidivist statute was the second objective factor that the dissent considered. The dissent observed that only West Virginia and Washington have statutes nearly as severe as Texas'.[69] Powell cited several state statutes and the federal habitual offender statute to illustrate what he considered to be more acceptable legislative schemes.[70] The dissent cited these statutes as lending credence to the

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[63] 445 U.S. at 294 (Powell, J., dissenting).

[64] *Id.*

[65] *Id.* at 303-04.

[66] *Id.* at 295. The dissent listed the factors and their authority as (i) the nature of the offense, *see* Coker v. Georgia, 433 U.S. 584, 598 (1977); *id.* at 603 (Powell, J., concurring and dissenting); (ii) the sentence imposed for commission of the same crime in other jurisdictions, *see* 433 U.S. at 593-94; Gregg v. Georgia, 428 U.S. 153, 179-80 (1976); Weems v. United States, 217 U.S. 349, 380 (1910); and (iii) the sentence imposed upon other criminals in the same jurisdiction, *id.* at 380-81.

[67] 445 U.S. at 295. The dissent characterized the nature of Rummel's offenses as the non-violent use of fraud to obtain small sums of money. *Id.*

[68] *Id.*

[69] *Id.* at 296. At the time of Rummel's conviction only Texas, Washington, and West Virginia provided mandatory life imprisonment upon the commission of a third non-violent felony. *Id.*

[70] *Id.* at 297-99 (Powell, J., dissenting). Recidivist statutes that the dissent found more acceptable than Texas' include a flexible scheme taking circumstances into account. *Id.* at 297-99 *citing see, e.g.*, KY. PENAL CODE ANN. § 532.080 (1978). The dissent also favorably cited statutes requiring the commission of more than three offenses. *See, e.g.*, COLO. REV. STAT. § 16-13-101(2) (1978). The dissent also considered more acceptable statutes requiring the commission of at least one violent crime. *See, e.g.*, DEL. CODE ANN., tit. 11, §§ 4214-4215 (1975 & Supp. 1978); MISS. CODE ANN. § 99-19-83 (Supp. 1979). Finally, those statutes that limit a mandatory penalty to less than life and those that grant discretion to the sentencing authority the dissent saw as more acceptable. *See, e.g.*, N.M. STAT. ANN. § 31-18-17 (Supp. 1979) (persons who have committed two felonies punishable by at least one year in prison receive four years additional sentence upon the commission of a third felony and eight years

view that a mandatory life sentence for the commission of three nonviolent felonies is unconstitutionally disproportionate.[71]

The final objective factor upon which the dissent relied was the punishment that Texas provides for other criminals.[72] First and second offenders who commit far more serious crimes than Rummel committed may receive markedly less severe sentences.[73] Even when sentencing two-time offenders, Texas varies the amount of punishment with the severity of the offenses committed.[74] The dissent argued that the imposition of the same punishment, life imprisonment, upon persons who have committed completely different types of crimes raises serious doubts about the constitutional proportionality of the sentence as applied to the less harmful offender.[75] The dissent concluded that while Rummel had committed criminal acts and received a sentence that was not inherently barbarous, the relationship between the acts and the sentence was grossly and unconstitutionally disproportionate.[76]

The dissent insisted that the objective standards it applied were proper and established the necessary degree of judicial restraint.[77] The experience of the Fourth Circuit in applying an objective test for the last seven years provided support for this contention.[78] The dissent characterized the Fourth Circuit's experience as impressive empirical evidence that federal courts are capable of applying the eighth amendment to disproportionate non-capital offenses with a high degree of sensitivity to the principles of federalism and state autonomy.[79]

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upon the commission of a fourth felony); WIS. STAT. § 939.62 (1977) (persons who have committed one felony within five years may receive 10 years additional sentence upon the commission of offense punishable by term greater than 10 years); D.C. CODE § 22-104a (1973) (persons committing three felonies may be sentenced to life); IDAHO CODE § 19-2514 (1979) (persons who have committed three felonies may receive a sentence ranging from five years to life).

[71] 445 U.S. at 300 (Powell, J., dissenting).

[72] *Id.* at 300-02.

[73] *Id.* at 300. The only first-time offender subject to a mandatory life sentence in Texas is a person convicted of capital murder. TEX. PENAL CODE §§ 12.31, 19.03 (Vernon 1974). A person who commits a second felony is punished as if he has committed a felony of the next higher degree. *Id.* §§ 12.42(a)-.42(b); 445 U.S. at 301 (Powell, J., dissenting).

[74] 445 U.S. at 301 (Powell, J., dissenting). *Compare* TEX. PENAL CODE §§ 12.42(a) *and* 31.07 (two time unauthorized use of vehicle) *with* §§ 12.42(b) *and* 21.02 (1974 and Supp. 1980) (two rapes).

[75] 445 U.S. at 301 (Powell, J., dissenting).

[76] *Id.* at 302.

[77] *Id.* at 304.

[78] *Id.* The Fourth Circuit first applied a proportionality test similar to that used by the *Rummel* dissent in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973). Hart was sentenced to life imprisonment for issuing a $50.00 check with insufficient funds, transporting forged checks totalling $140.00 across states lines, and perjury. 483 F.2d at 138. The Fourth Circuit considered the nature of the crime, the legislative purpose of the punishment, the punishment for the same crime in other jurisdictions, and the punishment for unrelated crimes in the same jurisdiction. *Id.* at 140-42. Based upon these consideration, Hart's sentence was found to be cruel and unusual punishment. *Id.* at 138.

[79] 445 U.S. at 304-06 (Powell, J., dissenting); *see* Davis v. Davis, 601 F.2d 153, 154 (4th Cir. 1979), *vacated sub nom.*, Hutto v. Davis, 445 U.S. 947, 947 (1980) (40-year prison

The dissent concluded that by limiting a proportionality test to capital punishment cases, the majority had chosen simply to draw the easiest, but not the best line.[80] The dissent insisted that courts must extend a proportionality analysis to non-capital cases.[81] In closing, the dissent appealed to common sense and claimed that virtually every layman and lawyer would view Rummel's sentence as grossly unjust.[82] The dissent concluded that Rummel's mandatory life sentence crossed any rational line separating lawful punishment from cruel and unusual punishment.[83] The dissent, therefore, found that life imprisonment is not intrinsically permissible.[84]

Three areas of contention exist between the majority and dissenting opinions. The first distinction lies in the differing analyses of precedent. The majority distinguished *Weems* on the basis of the accompaniments associated with the sentence and the unique nature of the case.[85] The dissent regarded *Weems* as creating a proportionality analysis applicable to a non-capital offense.[86] The *Weems* case, however, can support either conclusion. Although the accompaniments to the sentence were a factor in finding Weems' sentence cruel and unusual,[87] the Court recognized that length of imprisonment alone can constitute cruel and unusual punishment.[88] The majority thus did not adequately consider that the *Weems* Court relied, at least in part, on the length of the sentence to find the punishment cruel and unusual.

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sentence and $20,000 fine for possession and distribution of less than nine ounces marijuana held cruel and unusual punishment); Roberts v. Collins, 544 F.2d 168, 170 (4th Cir. 1976) (sentence imposed for lesser-included offense of assault held unconstitutional to extent punishment exceeded maximum receivable for greater offense of assault with intent to murder); Hall v. McKenzie, 537 F.2d 1232, 1236 (4th Cir. 1976) (10 to 20-year sentence for statutory rape not cruel and unusual punishment); Griffin v. Warden, 517 F.2d 756, 757 (4th Cir. 1975) (mandatory life sentence for breaking and entering, burglary, and grand larceny not cruel and unusual punishment); United States v. Atkinson, 513 F.2d 38, 42 (4th Cir. 1975) (12-year sentence for possession and distribution of heroin not cruel and unusual punishment); United States v. Wooten, 503 F.2d 65, 67 (4th Cir. 1974) (two-year sentence for unlawful possession of firearm not cruel and unusual punishment); Wood v. South Carolina, 483 F.2d 149, 150 (4th Cir. 1973) (10-year sentence for two obscene telephone calls not cruel and unusual punishment).

[80] 445 U.S. at 307 (Powell, J., dissenting).

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *See* text accompanying notes 29-34 *supra.*

[86] 445 U.S. at 290 (Powell, J., dissenting).

[87] 217 U.S. at 366, 372, 377, 380.

[88] *Id.* at 377. Regarding Weems' punishment, the Supreme Court stated "[i]t is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. . . . Its punishments come under the condemnation of the bill of rights both on account of their degree and kind." *Id.* The Court held the sentence unconstitutional based on the length of term and the accompanying deprivations. *Id.* at 382. Either ground would have been sufficient for the Court's ruling of unconstitutionality. *See* Gregg v. Georgia, 428 U.S. 153, 171-72 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Furman v. Georgia, 408 U.S. 1

The majority also eliminated capital punishment cases as precedent on the basis of the unique nature of the death penalty.[89] While the death penalty is unique in its total irrevocability, the cases distinguished do not require capital punishment as a prerequisite for a proportionality analysis.[90] The line the majority drew between capital punishment and non-capital punishment cases is convenient, yet is not grounded in either precendent or principle.[91] All eighth amendment cases require the application of a proportionality test according to the cases' unique factual circumstances.[92]

The majority relied upon *Graham*[93] and *Badders*[94] as controlling precedent for *Rummel*.[95] As the dissent illustrated, this was misplaced reliance.[96] *Graham* was a state case decided fifty years before the Supreme Court extended the eighth amendment to the states.[97] Additionally, the entire discussion in *Graham* of the cruel and unusual punishment allegation consisted of one sentence.[98] In *Badders*, the Supreme Court merely rejected the claim that a five-year sentence and a $7,000 fine for seven counts of mail fraud were cruel and unusual punishment.[99] Although discussion of the eighth amendment claim was again only one sentence long, the conclusion is compatible with an implicit proportionality test.[100] The dissent, therefore, properly applied and dis-

238, 325 (1972) (Marshall, J., concurring) (*Weems* made it plain beyond reasonable doubt that excessive punishments were as objectionable as those inherently cruel); Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (expatriation for wartime desertion cruel and unusual punishment); Campbell, *supra* note 7, at 1007-08 (Court did not rely on element of physical cruelty in invalidating Weems' sentence); Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the* Weems *Principle*, 3 CRIM. L. BULL. 145, 147 (1967) (either the length of Weems' sentence or the accompaniments would have been sufficient to make the sentence unconstitutional).

[89] *See* text accompanying notes 25-28 *supra*.

[90] 445 U.S. at 272; Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); *see* note 57 *supra*.

[91] 445 U.S. at 287-93 (Powell, J., dissenting); *see Constitutional Limbo*, *supra* note 22, at 206-16.

[92] 445 U.S. at 293 (Powell, J., dissenting); Weems v. United States, 217 U.S. at 366-67.

[93] 445 U.S. at 276; *see* note 36 *supra*.

[94] 445 U.S. at 274; *see* note 35 *supra*.

[95] 445 U.S. at 274, 276-77.

[96] 445 U.S. at 290 n.7 (Powell, J., dissenting).

[97] *Id. Graham* was a state case decided in 1912. The Supreme Court did not clearly apply the eighth amendment as a prohibition on state action until 1962. Robinson v. California, 370 U.S. 660, 666 (1962); *see* note 1 *supra*.

[98] 224 U.S. at 631.

[99] 240 U.S. at 393-94; *see* 445 U.S. at 290 n.7.

[100] *See* 240 U.S. at 394. *Badders* seems compatible with a proportionality analysis. For seven counts of mail fraud he received a five-year jail term and a $7,000 fine. Such punishment does not seem grossly disproportionate to the offenses. *Badders* adds little to the available knowledge of the scope of the eighth amendment. Furman v. Georgia, 408 U.S. 238, 325 (1972) (Marshall, J., concurring). It only shows that the Court did not consider that a five-year sentence for the commission of seven crimes was cruel and unusual. 445 U.S. at 290 n.7 (Powell, J., dissenting).

tinguished available precedent. The majority drew previously undrawn lines between capital and non-capital offenses, cavalierly discounted *Weems*, and relied upon two inapplicable one sentence holdings.[101] On the basis of capital and non-capital punishment precedent, a proportionality test was appropriate in *Rummel*.[102]

The second major difference between the majority and dissent concerns the nature of Rummel's sentence. The majority determined that the possibility of parole in twelve years mitigated Rummel's sentence.[103] The dissent insisted that Rummel had no right to parole and the mere possibility of the exercise of an executive privilege could not reduce the severity of the sentence for eighth amendment consideration.[104] Speculation on possible future parole is not a reasonable or proper foundation for a judicial decision because there is no assurance that the state will parole a particular prisoner.[105] The dissent's assumption that Rummel will spend his life in prison, therefore, is appropriate.

The third main difference between the majority and dissent involves their respective opinions on the principles of judicial restraint and federalism. The majority emphasized the need to respect the decision of the Texas legislature in punishing recidivists and argued that judicial restraint prohibits the federal judiciary from imposing its moral judgments on the states.[106] The objective factors that the dissent employed, however, amount to a constitutionally mandated application of the eighth amendment and not an imposition of a subjective moral judgment.[107] Since the eighth amendment is applicable to the states, the dissent correctly concluded that applying the amendment cannot be inconsistent with the principles of federalism.[108]

Courts should respect federalism during judicial scrutiny of state laws, but it cannot serve to foreclose or limit the examination.[109] Con-

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[101] *See* text accompanying notes 93-100 *supra*.

[102] 445 U.S. at 293 (Powell, J., dissenting); *see* text accompanying notes 85-93 *supra*.

[103] 445 U.S. at 280-81.

[104] *Id.* at 293-94.

[105] *Id.* at 294. Speculation regarding parole should be avoided as is speculation involving a pardon for those convicted of capital offenses. *See* note 62 *supra*. The possibility of each always exists, but neither should be considered in evaluating the sentence. *Id.* In Rummel's particular case, parole is no longer a question. Texas District Court Judge Doren Suttle had granted Rummel a new trial on the claim that he had ineffective counsel at his 1973 trial. On November 15, 1980, before the new trial could take place, Judge Prado released Rummel following a plea-bargaining agreement. The terms of the agreement were that his sentence would be reduced to time served and that the state would drop the habitual offender indictment. The fact that Rummel's third offense is now a misdemeanor, *see* note 13 *supra*, was apparently a key factor in the bargain.

[106] 445 U.S. at 283-84.

[107] *Id.* at 295 (Powell, J., dissenting); *see* note 66 *supra*.

[108] 445 U.S. at 303 (Powell, J., dissenting); *see* Furman v. Georgia, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting); Weems v. United States, 217 U.S. 349, 378-79 (1910); *see* note 1 *supra*.

[109] *See* note 108 *supra*.

sidering the states' obligation to follow the eighth amendment, the judiciary should not hestitate to evaluate their performances. As the dissent and Fourth Circuit cases illustrate, courts may apply objective factors to state decisions to determine whether a specific action falls within the constitutional framework.[110] The experience of the Fourth Circuit exemplifies the efficacy of the proportionality test and its compatibility with the theories of judicial restraint and federalism.[111] The majority's reliance on these two theories to discard Rummel's eighth amendment claim has given the state legislatures unbounded discretion in this area and has confused the lower courts.

Cases decided since *Rummel* illustrate the confusion the Supreme Court's decision and logic created in the lower courts.[112] Courts that had consistently applied a proportionality analysis are now struggling to reconcile *Rummel* with their view of the eighth amendment.[113] The Third Circuit misread *Rummel* and may continue to apply a proportionality test to non-capital cases.[114] Using the *Rummel* fact situation as a yardstick, the Third Circuit held they would not consider a cruel and unusual punishment allegation unless the punishment in question was even more disproportionate than in Rummel's case.[115] While this interpretation of *Rummel* was unusual, *Rummel* affords some basis for the opinion that a proportionality argument may still be appropriate in a non-capital offense. Footnote eleven of the majority opinion provides that a proportionality principle might be appropriate in an extreme case.[116] The Third Circuit's initial reading of *Rummel* as providing evidence of the minimum requirement to establish a successful eighth amendment proportionality attack on criminal sentences, therefore, is a possible interpretation.

Footnote eleven, however, is inconsistent with the logic of the majority opinion. The Supreme Court placed heavy reliance upon the distinction between capital and non-capital punishment.[117] The majority stated that the length of an imposed sentence is purely a matter of legislative prerogative but immediately contradicted that broad statement in a footnote.[118] Footnote eleven undermines the credibility of the

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[110] 445 U.S. at 304 (Powell, J., dissenting); *see* text accompanying notes 78-79 *supra*.

[111] 445 U.S. at 304 (Powell, J., dissenting); *see* notes 7 and 79 *supra*.

[112] *See* notes 114-131 *infra*.

[113] *Id.*

[114] *See* Virgin Islands v. Berry, 631 F.2d 214, 218 (3d Cir. 1980).

[115] *Id.* Berry pleaded guilty to his second felony, second-degree murder, and received a sentence of 35 years imprisonment with parole possible in 10 years. The Third Circuit held that if Rummel's sentence was not so grossly disproportionate as to amount to cruel and unusual punishment, then the court could not conclude that Berry's sentence was grossly disproportionate to the severity of the crime committed. *Id.* The Third Circuit thus found no violation of the eighth amendment. *Id.*

[116] 445 U.S. at 274 n.11. The majority admitted that a review of a life sentence for overtime parking would require a proportionality test. *Id.*

[117] *Id.* at 275.

[118] *Id.* at 274, 274 n.11.

majority opinion by stating that a proportionality principle might come into play in an extreme case; the majority admitted that a review of a sentence of life imprisonment for overtime parking would require a proportionality test.[119] While it is difficult to envision a more extreme case than *Rummel*, the dissent's logic apparently compelled the inclusion of footnote eleven.[120] The contradictory note and the majority's discussion of Rummel's proposed factors combine to undermine the Court's ruling against a proportionality test. The footnote provides a route for future modification or reversal of the Court's ruling.

The Fifth Circuit, whose decision the Supreme Court affirmed,[121] has seized upon footnote eleven to conclude that a proportionality principle remains applicable to challenges involving length of a sentence.[122] While admitting that one might conclude from *Rummel* that a sentence cannot be disproportionate solely because of excessive length,[123] the Fifth Circuit emphasized both footnote eleven and the fact that the majority stated that capital cases were of "limited", rather than "no" assistance in preserving a proportionality analysis.[124] The Fifth Circuit also pointed out that the Supreme Court evaluated Rummel's contentions and did not dismiss them peremptorily.[125] In an imaginative reading of *Rummel*, the Fifth Circuit found that the Supreme Court's conclusion that Rummel's sentence conformed to the eighth amendment was based on the determination that, on the facts of that case, Rummel's sentence was not grossly disproportionate to the severity of his offenses.[126] The Third and Fifth Circuits both misread *Rummel* as preserving some type of proportionality test for non-capital offenses.[127]

Several states also have preserved that proportionality principle for non-capital punishment by either explicitly circumventing *Rummel* or continuing the application of a proportionality test.[128] Kansas courts have specifically repudiated *Rummel* by requiring a proportionality test in evaluating all sentences.[129] The Kansas Supreme Court based the holding

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[119] *Id.*

[120] *Id.*

[121] Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978), *aff'd*, 445 U.S. 263 (1980).

[122] Terrebonne v. Blackburn, 624 F.2d 1363, 1366-67 (5th Cir. 1980).

[123] *Id.*

[124] *Id.* at 1367.

[125] *Id.*

[126] *Id.*

[127] The Third Circuit in Virgin Islands v. Berry preserved a proportionality test using the *Rummel* fact situation as a yardstick. 631 F.2d at 218; *see* notes 114-115 *supra*. The Fifth Circuit retained the proportionality test they employed in *Rummel*. Rummel v. Estelle, 587 F.2d 651, 659-60 (5th Cir. 1978) (en banc); *see* Terrebonne v. Blackburn, 624 F.2d 1363, 1368 (5th Cir. 1980). The Fifth Circuit test looks at the nature of the offense, compares the penalty to that imposed by others, and compares the punishments imposed by the sentencing jurisdiction on other criminals. 624 F.2d at 1368.

[128] *See* notes 133-135 *infra*.

[129] *See* State v. Weigel, 228 Kan. 195, 612 P.2d 636, 645 (1980); State v. McDaniel, 228 Kan. 172, 612 P.2d 1231, 1242 (1980).

on its interpretation of a Kansas constitutional amendment identical to the eighth amendment of the Federal Constitution.[130] The courts in Nevada and Washington have also continued to apply a proportionality test in non-capital cases.[131] The rejections and misapplication of *Rummel* illustrate confusion and disagreement with the Supreme Court's interpretation of the cruel and unusual punishment clause as applied to non-capital offenses. Other states are likely to reject *Rummel* and find that their state constitutions also require a proportionality test.[132]

In addition to differences regarding the scope and meaning of the eighth amendment, states have practical reasons for retaining a proportionality test for non-capital offenses. Above all, the proportionality test provides flexibility. In each case courts may weigh objective factors such as the presence or absence of violence, the harm done to society, and the reprehensibility of the offenses.[133] The *Rummel* test is inflexible, particularly when courts must impose mandatory penalties.[134] The proportionality test provides for judicial scrutiny over otherwise unbridled legislative authority. Life imprisonment, like capital punishment, may also be cruel and unusual for certain crimes. A proportionality test for non-capital offenses would enforce the eighth amendment prohibition against cruel and unusual punishments.

The Supreme Court cannot easily modify its holding in *Rummel*. State courts, however, are likely to hold that their state constitutions provide greater protection than the Federal Constitution to preserve the proportionality test for non-capital offenses.[135] Until the Supreme Court overrules *Rummel* either explicitly or by adopting a circuit court's innovative reading of *Rummel*, the Court will have to continue holding all punishments of imprisonment alone to be constitutional, regardless of the length of imprisonment or the crime involved.

EDWARD J. BEDFORD

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[130] KAN. CONST. Bill of Rights § 9.

[131] *See* Deveroux v. State, 96 Nev. ____, 610 P.2d 722, 722-23 (1980) (per curiam) (eight years' imprisonment for grand larceny not so disproportionate as to be unconstitutional); State v. Smith, 93 Wash.2d 329, 344-45, 610 P.2d 869, 879 (1980) (five-year sentence suspended and three years probation for drug violation not so disproportionate as to be cruel and unusual punishment).

[132] The hypothesis that other states will establish a proportionality test under their state constitutions is based upon the state courts' prior acceptance of a proportionality principle. *See* note 7 *supra*.

[133] 445 U.S. at 295 (Powell, J., dissenting); *see* note 79 *supra*.

[134] The combination of mandatory penalties and the absence of a proportionality test removes discretion from both the sentencing and appellate courts. *See* note 70 *supra*.

[135] *See* text accompanying notes 128-132 *supra*.