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Rummel v. Estelle: Leaving the Cruel and Unusual Punishments Clause in Constitutional Limbo

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COMMENT

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PUNISHMENTS CLAUSE IN CONSTITUTIONAL
LIMBO

INTRODUCTION

The eighth amendment guarantees an individual convicted of crime the right to be free from the infliction of cruel and unusual punishments.1 The eighth amendment language is terse; as a result, the Supreme Court has yet to arrive at a concrete standard applicable to all eighth amendment challenges. Historically, the Court applied the cruel and unusual punishments (CUP) clause to the method of punishment and was reluctant to hold that punishments may be cruel and unusual for being disproportionately excessive in relation to the offense, or offenses, committed. An important shift in eighth amendment interpretation took place in Coker v. Georgia,2 in which the Court explicitly found the death penalty an unconstitutionally disproportionate punishment for rape. Notwithstanding the fact that the Court accepted that proportionality is a constitutional minimum for the criminal law, the Court—under the guise of judicial deference to state legislative prerogative—has refused to apply, with few exceptions, the proportionality concept of the CUP clause to any punishment but the death penalty.

In Rummel v. Estelle,3 the Court encountered an eighth amendment challenge in which the Court had the opportunity to apply the concept of proportionality to length of imprisonment alone in the context of the Texas recidivist statute which mandated life imprisonment for three-time felons. The Court held that a mandatory life sentence imposed on a three-time nonviolent felon pursuant to the Texas recidivist statute does not constitute cruel and unusual punishment under the eighth and fourteenth amendments.4 The decision in Rummel was both consistent and inconsistent with earlier Supreme Court decisions and rationale.

1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
4. Id. at 285.
The inconsistencies in the *Rummel* decision are found in the refusal by the Court to extend the rationale the Court had developed in the capital punishment cases, and in the rejection of the standard established in the leading case of *Weems v. United States*. The Court in *Rummel* determined that neither the death penalty cases nor *Weems* applied to constitutional challenges to the length of prison terms because those cases involved punishments uniquely different than the life imprisonment at issue in *Rummel*. Mandatory life imprisonment is unique also; therefore the problems the Court considered in *Weems* and the death penalty cases should have applied to *Rummel* as well.

On the other hand, the decision in *Rummel* was consistent with earlier decisions because the Court maintained its traditional policy of judicial restraint. The Court declined to invalidate the sentence because Texas had a right to punish the defendant severely for being a habitual offender. Furthermore, a mandatory life sentence for a habitual nonviolent thief is not necessarily unconstitutionally disproportionate to the crimes committed, especially in light of the Texas policies regarding parole and good-time credit (GTC). The decision in *Rummel* was consistent with its earlier decisions because the Court refused to draw lines traditionally drawn by state legislatures.

**FACTS**

In 1973 William James Rummel was convicted for feloniously obtaining $120.75 under false pretenses. He had served two previous prison terms for felony convictions: a 1964 conviction for presenting a credit card with the intent to defraud in order to obtain approximately $80, and a 1969 conviction for passing a forged check with a face value of $28.36. The defendant received a life sentence under the Texas recidivist statute (article 63) which mandated a trial court to sentence a three-time felon to life imprisonment. The Texas Court of Criminal Appeals affirmed the conviction and the punishment. Without a hearing, the Texas courts denied

5. See notes 63-93 infra and accompanying text.
8. Id. at 265-66.
9. Id. at 266. Rummel was convicted and sentenced pursuant to TEX. PENAL CODE art. 63 (Vernon 1925) which provided: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." Id. at 264. Article 63 is now codified as TEX. PENAL CODE ANN. tit. 3 § 12.42(d) (Vernon 1974).

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Rummel any post-conviction relief, and the federal district court, also without a hearing, denied his petition for habeas corpus relief from his mandatory state confinement.\(^\text{11}\) Rummel appealed the district court decision on two grounds: first, that his sentence violated the eighth amendment prohibition of cruel and unusual punishments for the reason that a mandatory life sentence was excessive and disproportionate to the severity of his crimes; and second, that his court-appointed attorney rendered ineffectual assistance of counsel in violation of his sixth amendment right.\(^\text{12}\)

Originally the Court of Appeals for the Fifth Circuit reversed on the eighth amendment ground.\(^\text{13}\) After a brief review of past interpretation of the CUP clause, the divided panel court concluded that a sentence of imprisonment for life may be disproportionate under certain circumstances.\(^\text{14}\) Texas argued that the sentence imposed on the defendant should not be equated with actual life incarceration in light of Texas’ systems for GTC and parole. The panel court dismissed this argument, because if the proportionality (and hence the constitutionality) of his sentence were to depend on the availability of parole, then the court would have had to review the state parole decisions and procedures, both of which, ordinarily, were not reviewable in federal court.\(^\text{15}\) The panel court was unwilling to review the state parole proceedings, but in order to review the proportionality of Rummel’s life sentence, the panel adopted the systematic test employed in \textit{Hart v. Cointer}.\(^\text{16}\) Under the \textit{Hart} test,

\(^\text{11}\) Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir. 1978) (panel decision).
\(^\text{12}\) \textit{Id.} at 1194. The panel did not consider the sixth amendment issue originally and therefore the en banc court remanded this issue to the panel for treatment. Rummel v. Estelle, 587 F.2d 651, 662 (5th Cir. 1978) (en banc). This comment considers only the eighth amendment challenge.
\(^\text{13}\) Rummel v. Estelle, 568 F.2d 1193, 1200 (5th Cir. 1978) (panel).
\(^\text{14}\) \textit{Id.} at 1196.
\(^\text{15}\) \textit{Id.}
\(^\text{16}\) 483 F.2d 136 (4th Cir. 1973), \textit{cert. denied} 415 U.S. 938 (1974). In \textit{Hart}, the court held that a mandatory life sentence imposed upon the prisoner pursuant to West Virginia’s recidivist statute (which is similar to the Texas statute) was constitutionally excessive and wholly disproportionate to the nature of the underlying offenses. Since a life sentence was not necessary to achieve any legitimate legislative purpose, the court concluded that the life sentence amounted to cruel and unusual punishment. \textit{Id.} at 143. The crimes in \textit{Hart} were drawing a $50 check on insufficient funds, transporting forged checks with a face value of $140 across state lines, and perjury (facts not dissimilar to the situation in \textit{Rummel}).

In \textit{Hart}, the court considered cumulatively: the nature of the crimes committed, the legislative purpose behind the punishment, the punishment that the defendant would have received in other jurisdictions, and the punishment imposed for other offenses in the same jurisdiction. Although these four factors were applied cumulatively,
the panel court found the defendant's life sentence unconstitutionally disproportionate. The panel court recognized the broad prerogative of the state legislature to fix sentence ranges for prescribed criminal conduct, but the court added that this prerogative has some bounds defined by rational penological objectives, the bounds to be ascertained by the judiciary. The panel court held that a court may intervene if the punishment determined by the state legislature exceeds the bounds of rational objectives. However, this view, that the judiciary may place limits on state legislative prerogative, did not prevail when Rummel was reheard by the Court of Appeals sitting en banc.

The en banc court determined that it should adhere to the policy of judicial restraint. In deference to the Texas legislature, the court held that it would not invalidate article 63 unless it was clearly irrational even if the law and the Texas penal system did not conform to modern penological trends. The court determined that it must uphold the defendant's mandatory life sentence because there existed a rational basis behind the sentence, especially in light of parole and GTC possibilities.

The court found several rational bases for upholding Rummel's sentence. It found that the article 63 mandate for life imprisonment would not be set in motion unless the state proved that a prisoner had been convicted of three felonies. It was also essential that a prisoner had actually spent time in prison for each prior conviction. The en banc court determined that these inherent requirements of article 63 protected a prisoner adequately.

In addition to the fact that the recidivist statute would rarely be invoked due to these stringent prerequisites, the en banc court determined that a review of the proportionality of sentence terms required the reviewing court to consider parole and GTC possibilities. The court found that it would be unrealistic to assess the Texas penal system without GTC and that Texas does not impose life sentences without the possibility of parole. The court took

the court in Hart analyzed the case also in terms of the factors in combination. While the Supreme Court had considered these factors in earlier cases, the first enunciation of this test occurred in Hart.

17. Rummel v. Estelle, 568 F.2d 1193, 1200 (5th Cir. 1978) (panel).
18. Id.
20. Id. at 655-56.
21. Id. at 656-57.
22. Id. at 657.
the GTC and parole possibilities into consideration and concluded that it was likely that the defendant could become eligible for parole in twelve years or less. Thus, the court upheld his mandatory life sentence because the sentence would be significantly less in practice as a result of parole and GTC.

The court further analyzed the sentence under the Hart tests. The court assessed the nature of the offenses committed and determined that the defendant was punished for his status as a habitual felon, not simply for stealing $230.00. Since he was punished for being a habitual felon and not for a single crime, the en banc court stated that his sentence could not be compared appropriately to a penalty for any single offense in Texas. The court held that to punish the defendant with a twelve-year sentence was constitutional and that the burden ought to be on him to prove that he is worthy of freedom. Since the court rejected the notion that the defendant had been sentenced for his natural life, but more likely for only about twelve years, the court determined that the comparison with other states' practices should be made according to this more realistic standard. Accordingly, the court found that he might have received comparable sentences in several other jurisdictions. Finally, the court expressly rejected the second Hart factor regarding legislative purpose because the test was impractical outside the context of the capital punishment cases. Under three of the four Hart standards, the court found the defendant was punished for his status as a habitual felon, and, as such, he might have received comparable punishment in other jurisdictions.

The en banc court held that Rummel's mandatory life sentence was not unconstitutionally disproportionate for three reasons. The sentence was, in practice if not in theory, one for a term of about twelve years. None of the Hart tests compelled a different result. Finally, the en banc court upheld the sentence because the court found several rational reasons for doing so. The Supreme Court affirmed the holding and rationale of the en banc court. Any analysis of the Supreme Court decision, however, must start with a review of the development of the proportionality concept because it can be argued that the Supreme Court rejected some of its previously held views.

23. Id. at 659.
24. Id. at 659-60.
25. Id.
DISPROPORTIONALITY IN HISTORICAL CONTEXT

In the past, courts applied a historical test to determine the nature and scope of the CUP clause. The basic interpretive problem with the CUP clause has been whether it referred only to the method of punishment, or whether it also authorized judicially enforceable limits to the severity of the punishment with respect to the severity of the crime. The term proportionality refers to this relationship between the severity of the punishment and the severity of the crime. While it always has been clear that one purpose of the ban was to avoid the atrocities of Stuart England, American courts, and especially the Supreme Court, have been slow to read the concept of proportionality in the CUP clause. Recent research suggests that the framers of the Bill of Rights intended disproportionality to be a part of the ban not only because the Stuarts' barbarities were used rarely in colonial America, but also because the European philosophers who influenced eighteenth century American political thought embraced the proportionality concept. Nonetheless, courts ignored the proportionality concept throughout the nineteenth century, during which time they applied the CUP clause generally to punishments that inflicted torture or acute pain and suffering. The early Supreme Court interpretation of the CUP clause was that the prohibition applied to the method of punishment, not to its amount or its proportion to the nature of the crime committed.

The first recognition of the proportionality principle occurred in a dissenting opinion in O'Neil v. Vermont. The majority failed to


32. 144 U.S. 323, 337 (1892) (Field, J., dissenting).
reach the issue of disproportionate punishment. It upheld a $6,600 fine, or upon default, a fifty-four year prison term for the conviction on 307 separate counts of illegal liquor sales. Justice Field likened the penalty to the state punishing a person indefinitely for drinking a glass of liquor under a prohibition against drinking a drop. Justice Field stated that, while the clause was usually applied to torturous punishments,

[t]he inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences [sic] charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.

Thus, it was not until the late nineteenth century that the proportionality principle was described by the Supreme Court.

Seventeen years later the Court faced another claim of disproportionate penalties in Weems v. United States. Weems, a minor government official in the Philippines, was convicted of falsifying an official cash book in order to conceal the illegal disposition of a small amount of money. Although there was no proof of intent to defraud nor evidence of any loss to the government, Weems was fined and sentenced to fifteen years of cadena temporal. Cadena temporal was an exotic punishment consisting of imprisonment for a term of years during which time the prisoner worked at hard labor while shackled in chains. In addition, the punishment included

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33. Id. at 339. This comparison highlights the fine line between the identity of the offense and the proportionality concept of the CUP clause. These concepts are separate and distinct and should not be confused. The issue in cases like O'Neil is not whether the punishment is proportionate to a single offense, but, rather, how a court can rationally break down a series of separate counts which, together, constitute a single crime or episode. In O'Neil, the defendant illegally transported liquor over state lines 307 times. These illegal sales were part of a continuing enterprise that should have been prosecuted as a single crime. As a single crime, the scheme should not have been punished by multiplying the penalty for one illegal sale by 307. Id. at 328, 365. In other words, at some point a court must clarify exactly what is the unit of the offense.

On the other hand, Rummel was clearly a proportionality case. The three crimes Defendant committed were separate and unrelated crimes, as opposed to the 307 counts that constituted one crime in O'Neil. This fine distinction makes Rummel a case of disproportionality governed by the CUP clause.

34. Id. at 339-40 (emphasis added).
35. 217 U.S. 349 (1910).
various post-imprisonment restrictions. 37 The Court noted the excessiveness of the punishment and stated

[s]uch penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense. 38

The Court determined that, while the CUP clause historically had been applied to certain modes of punishment, the Court must construe the clause progressively in order to take "new conditions and purposes" into consideration. 39 Since the sentence under consideration had "no fellow in American legislation," and its origin was different from that of sentences derived from American jurisdictions, the Court held that it was "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under condemnation of the Bill of Rights, both on account of their degree and kind." 40 Weems represented the first case in which the Court relied on the proportionality principle of the CUP clause to invalidate a punishment.

The Court, however, inferred that it would invoke the CUP clause only in unusual cases. The Court conceded the broad legislative prerogative to define crimes and their punishment, but indicated that when that prerogative encounters a constitutional prohibition a legal duty to intervene arises. 41 After comparing Weems' sentence with those authorized in a number of American jurisdictions for crimes it considered equally serious, the Court held that, even if the minimum amount of cadena temporal had been imposed, such a punishment would have been repugnant to the Bill of Rights. 42 As a result of this decision, both state and federal courts

37. The post-imprisonment penalties included: (1) civil interdiction, consisting of deprivation of the rights of parental and marital authority, guardianship of person or property and the right to dispose of property inter vivos; and (2) perpetual absolute disqualification from holding office, voting, acquiring honors and loss of retirement pay; and (3) surveillance for life. See Weems v. United States, 217 U.S. 349, 364 (1910).
39. Id. at 373, 378. The Court indicated that the CUP clause of the Phillipine Bill of Rights derived from the United States Constitution and therefore must have the same meaning.
40. Id. at 377.
41. Id. at 378-79.
42. Id. at 382.
alike have accepted the concept that the excessiveness as well as method of punishment may be unconstitutionally cruel. 43

Even though the Court acknowledged the proportionality concept of the CUP clause and applied the concept in Weems, the Court has rarely invoked the CUP clause to invalidate harsh sentences. 44 In addition to the Court's traditional deference to legislative judgment, this reluctance has been attributed to the fact that the comparative law technique employed by the Court in Weems was limited substantially in Badders v. United States. 46 Without a clearly defined guide to eighth amendment application, appellate courts chose restraint; they invalidated punishments based on a measure of decency only when they were so disproportionate to the offense as to be morally shocking. 46

The Court found a morally shocking result in Robinson v. California. 47 This case involved a California statute that made it a criminal offense for a person to be a narcotics addict. The Court found this statute repugnant to the eighth and fourteenth amendments because the statute classified the status of narcotics addiction as a criminal offense. 48 The Court maintained that questions of imprisonment cannot be considered in the abstract for "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 49 The Robinson decision limited the states' power to define crime. 50 Robinson was not a case in which the Court found the particular punishment cruel and unusual in its method or

43. See Note, supra note 31, 79 HARV. L. REV. at 640.


45. 240 U.S. 391 (1916); Note, supra note 31, 79 HARV. L. REV. at 640. In Badders, Mr. Justice Holmes, a dissenter in Weems, cited Howard v. Fleming, 191 U.S. 126, 136 (1903) (10 years imprisonment for conspiracy not unconstitutional) for the proposition that "[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one." See notes 125-27 infra and accompanying text.


47. 370 U.S. 660 (1962).

48. Id. at 666. The decision in Robinson represented the first time that the eighth amendment had been applied to the state via the fourteenth amendment. D. Fellman, supra note 28 at 402.

49. Id. at 667.

50. See Note, supra note 31, 79 HARV. L. REV. at 646.
proportion to the offense of addiction.\textsuperscript{51} This application of the CUP clause to the nature of the criminal conduct instead of the method or kind of punishment was a novel use of the clause. Nonetheless, the Robinson decision failed to clarify the doctrinal uncertainty created by the Court's ill-defined eighth amendment standard.\textsuperscript{52}

This doctrinal uncertainty continued a year later when the Court in Rudolph v. Alabama\textsuperscript{53} declined the opportunity to decide whether the death penalty would be unconstitutional on eighth amendment grounds for rape. Mr. Justice Goldberg's dissenting opinion was significant in several respects.\textsuperscript{54} In addition to reasserting the legitimacy of the comparative law approach used effectively in Weems, Justice Goldberg queried whether the objective of punishment could be achieved just as effectively by punishing rape less severely than by death; and, if so, whether the death penalty then is unnecessarily cruel in the context of rape cases.\textsuperscript{55} The revitalization of the comparative law standard and the birth of the "legislative ends" test anticipated the reasoning later to be applied by the Court in finding that death was in fact a constitutionally inappropriate punishment for rape.\textsuperscript{56}

Notwithstanding the Rudolph dissent, the Court refused to extend its decision in Robinson to cover the status of a chronic alcoholic in Powell v. Texas.\textsuperscript{57} The Court held that Powell did not fall within the ambit of Robinson because Powell was not convicted for his status as an alcoholic, but for being drunk in public.\textsuperscript{58} According to the Court, Texas imposed the sentence for criminal behavior which created substantial health and safety hazards, not for mere status.\textsuperscript{59} The Court argued that to extend the Robinson doctrine to situations like that in Powell would violate "[t]raditional common-law concepts of personal accountability and essential considerations of federalism."\textsuperscript{60} The Court stated that to extend the Robinson doc-

51. See also Comment, supra note 30, at 802.
52. One commentator attributes this uncertainty to the lack of an acceptable historical justification for the Court's action and posits this void as a reason for the Court's reluctance to extend the excessive punishment doctrine of the CUP clause. Id.
58. Id. at 532.
59. Id.
60. Id. at 535.
trine would be akin to creating an inflexible constitutional test which would freeze the process of adjustment created by such state-controlled criminal law doctrines as *actus reus*, *mens rea*, insanity, mistake, justification and duress. The four dissenting Justices maintained that the fundamental teaching in *Robinson* demanded acquittal in this case. Like Robinson, Powell should not be criminally punished for "being in a condition he is powerless to change."

While the disproportionality doctrine experienced some revitalization during the Warren Court, the doctrine limped into the Burger era.

In *Furman v. Georgia*, the Court faced an eighth amendment challenge in the context of a murder and two rape convictions to be punished by death. In a 5-4 per curiam opinion, the Court held that the death penalty may in some cases constitute cruel and unusual punishment in violation of the eighth and Fourteenth amendments.

*Furman* is significant in that, while all five Justices in favor of the decision found the arbitrariness with which the sentence had been imposed to be an important factor in striking down the death penalty, only Justices Brennan and Marshall attempted to apply any variation of the proportionality concept to the cases and they were the only Justices who found the death penalty *per se* unconstitutional. Drawing from the dissent in *Rudolph*, Justice Brennan recognized four principles applicable to testing the constitutionality of specific punishments and designed to curb the abuse of legislative power.

Justice Marshall concluded that the Court has invariably

61. *Id.* at 535-36.
62. *Id.* at 567 (Fortas, J., dissenting). It might be noted that there was a question whether a case or controversy existed in *Powell*, or whether it was in fact simply a test case. As Mr. Justice Marshall stated, "the record in this case [was] utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle." *Powell v. Texas*, 392 U.S. 514, 521 (1968).
63. 408 U.S. 238 (1972).
64. *Id.* at 240.
67. See notes 53-55 *supra* and accompanying text.
68. *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring). Primarily, a punishment must not be so severe as to be degrading to the dignity of human beings. States must not arbitrarily inflict severe punishment. A severe punishment must not be unacceptable to contemporary society (Justice Brennan suggested that the inquiry under this principle is whether any of several objective indicators are present, for example, the existence of the punishment in other jurisdictions, and the historic usage of the punishment). Finally, a severe punishment must not be excessive, which was defined as unnecessary punishment, because there was a significantly less
adjudicated eighth amendment challenges by considering the nature of the crime, the purpose of the law, and the length of the sentence imposed.69 In Furman, the Court held that the eighth and fourteenth amendments proscribed the death penalty imposed pursuant to statutes which leave juries and judges with "untrammelled discretion" in imposing the death penalty thereby creating a substantial risk that death would be inflicted arbitrarily and capriciously.70 Although the opinion in Furman left the death penalty in constitutional limbo, the focus on procedure coupled with the Brennan-Marshall substantive approach reinstated the objective factors as the appropriate benchmarks for future CUP clause analysis.

In the wake of Furman a number of states revised or reenacted their capital punishment statutes. This flurry of legislative activity set the stage for the Court's renewed debate about the death penalty. In Gregg v. Georgia71 and its companion cases, the Court clarified the conditions under which the death penalty may be imposed. In all five cases Justices Brennan and Marshall maintained that the death penalty was unconstitutional per se and reiterated the gist of their substantive approaches to the CUP clause enunciated in Furman. The plurality consisting of Justices Stewart, Powell and Stevens in all five cases focused primarily on the procedural aspects and concluded that capital statutes must require the sentencing authority to consider both mitigating and aggravating factors about both the offense and the defendant, and to provide some direction in these considerations. The Court did not specify the factors to be considered or the form of guidance required.72 The plurality in Gregg held that death is not invariably unconstitutional73 and that sentences must not be excessive in either unnecessarily or wantonly inflicting pain, or being grossly disproportionate to the severity of the crime, to be determined by “objective indicia that

severe punishment adequate to achieve the purposes for which the punishment is inflicted. Justice Brennan indicated that since the principles are interrelated, the test should be applied cumulatively. For a thorough assessment of the opinions of Justices Brennan and Marshall in Furman, see Wheeler, supra note 26.

70. Id. at 238-374 (Douglas, Brennan, Stewart, White, Marshall, JJ., concurring).
reflect the public attitude toward a given sanction." 74 Although the Court in Gregg and its companion cases applied these principles to the narrow issue of imposing death for deliberate murder, the analysis seems applicable to other eighth amendment challenges in which the inquiry is whether the sentence is grossly disproportionate to the offenses committed.

In another case involving the death penalty for rape, the Court further refined the objective test and explicitly utilized the concept of proportionality. In Coker v. Georgia, 75 the prisoner escaped from a Georgia prison (he was serving time for various violent crimes including murder and rape), and in the course of committing armed robbery, he raped an adult female. He was convicted and sentenced to death on the rape charge because the jury found aggravating circumstances, namely, that the rape was committed by a person with prior felony convictions and committed in the course of committing another capital felony, armed robbery. 76 The Court held that death is a grossly disproportionate and excessive punishment for the crime of rape and is therefore banned by the eighth amendment, 77 even though death may measurably achieve the objectives of punishment and is not invalid for its failure to do so. 78 The Court utilized the test it employed in Gregg and its companion cases which had approved the holdings and dicta from earlier cases. The current test for proportionality is:

the eighth amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. . . . [A] punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of propor-

74. Id. at 173. The Court added "[i]t is clear . . . that the Eighth Amendment has not been regarded as a static concept," citing Trop v. Dulles, 356 U.S. 86 (1958). In Trop, the Court invoked the CUP clause to hold that expatriation for wartime desertion was cruel and unusual. Id. at 103. Although Trop involved the method of punishment (not disproportionality) the Court established that "[t]he basic concept underlying the eighth amendment is nothing less than the dignity of man." Id. at 100. It also provided that the standard to be applied in eighth amendment questions should be based on "the evolving standards of decency that mark the progress of a maturing society." Id. at 101.

76. Id. at 587-91.
77. Id. at 592.
78. Id. at 592, n.4.
tion to the severity of the crime. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. . . . [A]ttention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.\textsuperscript{79}

In applying these considerations to the situation in \textit{Coker}, the Court found that Georgia was the only state that authorized death for the rape of an adult female\textsuperscript{80} and that in the vast majority of Georgia cases juries have not imposed the death sentence.\textsuperscript{81} The Court conceded that while rape deserves severe punishment, the death penalty is inappropriately excessive for the rapist because such a unique and irrevocable sentence is unsuitable for the rapist who, as opposed to the murderer, does not take human life.\textsuperscript{82} Nor did Coker's prior convictions or the fact that the rape occurred during the perpetration of another capital crime, both aggravating circumstances under Georgia law, affect the Court's decision.\textsuperscript{83} Finally, the Court refused to uphold the death sentence for rape in light of the fact that not even a deliberate killer (in the absence of aggravating circumstances) would receive the death penalty.\textsuperscript{84} \textit{Coker} represented the first modern application of the proportionality concept of the CUP clause, and, in addition, the Court stated a definitive test for future claims of disproportionality.

The Court recently reaffirmed the rule that the death penalty must not be imposed under sentencing procedures that create a substantial risk of punishment in an arbitrary, capricious manner. In \textit{Godfrey v. Georgia}\textsuperscript{85} the Court held that, if a state wished to authorize capital punishment, the state has a constitutional responsibility to tailor and apply its law to avoid arbitrary application of the death penalty. This responsibility includes defining capital crimes in a manner that obviates standardless sentencing discretion. In addition, the responsibility of the state involves channeling the

\textsuperscript{79} \textit{Id.} at 592.  
\textsuperscript{80} \textit{Id.} at 596.  
\textsuperscript{81} \textit{Id.} at 596-97.  
\textsuperscript{82} \textit{Id.} at 598.  
\textsuperscript{83} \textit{Id.} at 599.  
\textsuperscript{84} \textit{Id.} at 600.  
\textsuperscript{85} \textit{Id.} at 599.  

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discretion of the sentencing authority by clear and objective standards that provide specific, detailed guidance and allow for rational review of the sentencing process. The Georgia Supreme Court affirmed the death penalty, because the offense met the statutory requirement in that the crime was "outrageously or wantonly vile, horrible and inhumane." The Supreme Court found this interpretation of the state statute overbroad and vague, because these statutory words, standing alone, did not inherently restrain arbitrary imposition of capital punishment. The Court determined that a trial judge is obligated to dispel any juror's preconceptions about murder through his jury instructions. Since the Court found no such instructions in Godfrey, the Court held that Georgia had imposed the death penalty without any standards designed to guide the discretion of the jury. The Court could not distinguish this case, in which the death sentence was imposed, from the many cases in which the death sentence was not imposed. Therefore, the Court held that the imposition of capital punishment in Godfrey violated the constitutional protections of the eighth and fourteenth amendments.

The current status of the proportionality concept of the eighth amendment is that a state may impose the death sentence, subject to certain limitations, for deliberate murder, but may not impose it for anything less, like rape. In certain respects this status raises more questions than answers, especially with regard to the ability of a state to impose the penultimate sanction—life imprisonment—for crimes less serious than, for example, murder, rape and armed robbery. Another unanswered question is whether the proportionality concept, as applied in the context of recidivist statutes, is to be applied to the criminal's "status" as a habitual offender, or to the crimes he has committed. Rummel v. Estelle provided the testing ground for the Court but no new progress was made. Indeed, the

86. Id. at 1764.
87. Id. at 1765.
88. Id.
89. Id.
90. Id.
91. In his concurring opinion in Godfrey, Mr. Justice Marshall claimed that appellate courts have been incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated in Gregg. Justice Marshall concluded that the criminal justice system, in its present form, simply is incapable of objectively differentiating those persons who should be sentenced to die from those who should not. Godfrey v. Georgia, ___ U.S. ___, 100 S. Ct. 1759, 1769-72 (1980). See generally Dix, Appellate Review of the Decision to Impose Death, 68 GEO. L. J. 97 (1979).
decision in *Rummel* merely reiterated the appropriate tests to be applied and inquiries to be made in assessing the constitutionality of capital punishment. The decision failed to relieve any of the tension existing between the excessiveness principle and the modern axiom of penology—that the punishment should fit the offender and not merely the crime.⁹³

**RUMMEL v. ESTELLE**

The preceding analysis demonstrates several concepts about past Supreme Court interpretation of the CUP clause. The history of this interpretation by the Court is one of judicial restraint based on notions of federalism and comity. The CUP clause encompasses methods of punishment as well as punishments that are grossly disproportionate to the nature and number of offenses committed.⁹⁴ With regard to disproportionality, "[t]he inquiry focuses on whether a person deserves such punishment, not simply whether punishment would serve a utilitarian goal."⁹⁵ The disproportionality concept of the CUP clause applies to both capital and noncapital cases. Furthermore, the Court has attempted to minimize the subjective views of the individual justices by relying on certain objective factors including the nature of the crime, the sentence imposed for the same crime in other states, and the sentence imposed for other crimes in the same state.⁹⁶ The CUP clause cases demonstrate also that there exists a fine line between the disproportionality concept and other distinct concepts such as identity of offense⁹⁷ and the power of a state to define crime.⁹⁸ *Rummel* differed from earlier CUP clause cases in that the issue in *Rummel* was clearly one of disproportionality.

At the outset of its opinion the Court clarified that disproportionality was the sole question in *Rummel*. The Court indicated that the defendant conceded two issues. First, he recognized the constitutionality of the Texas recidivist statute⁹⁹ and objected merely to the

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⁹⁵. *Id.* at 288 (Powell, J., dissenting). See note 93 supra and accompanying text. See also Note, Disproportionality in Sentences of Imprisonment, 79 COLUM. L. REV. 1119 (1979). 
⁹⁷. See note 33 supra and accompanying text. 
⁹⁸. See notes 47-52 supra and accompanying text. 
statute as applied to the facts of his case.\textsuperscript{100} Second, Rummel did not challenge the authority of Texas to characterize his offenses as felonies.\textsuperscript{101} Rather, the issue before the Court was whether it was constitutional for Texas to impose a mandatory life sentence as opposed to a term of years for the defendant's third non-capital felony.\textsuperscript{102} In deciding this controversial issue, the Court determined that neither the capital punishment cases nor \textit{Weems} were applicable to \textit{Rummel}.

\textbf{Rejection of Weems}

Eighth amendment interpretation has been infrequent and has occurred predominantly within the context of capital punishment.\textsuperscript{103} The defendant relied in part on the death penalty cases to argue that his penalty was disproportionate to his offenses.\textsuperscript{104} The theme that the death penalty is unique in its irrevocability has been repeated often. The Court recognized that, as a result of the unique nature of the death penalty, the capital cases are of limited assistance in adjudicating a challenge that one's imprisonment is excessively cruel and unusual.\textsuperscript{105} By so restricting itself, the Court turned its back on the methods it employed in earlier eighth amendment interpretation and, in essence, begged the real question at issue in \textit{Rummel}. The defendant's challenge derived from the basic premise that mandatory life imprisonment is also unique in its permanent denial of fundamental rights and freedoms and therefore should not be meted out to just \textit{any} three-time felon, but only to those most threatening to society and therefore most deserving.\textsuperscript{106} In other words, he asked the Court to apply the same procedural safeguards to the penultimate sanction as the Court has required in

\textsuperscript{100} Rummel v. Estelle, 445 U.S. at 268.
\textsuperscript{101} The problem in Rummel was not one of the state improperly defining a crime. Compare Robinson v. California, 370 U.S. 660 (1962). See notes 47-52 supra and accompanying text.
\textsuperscript{102} Id. at 271. Texas argued also that the defendant had waived his right to object to his punishment since he failed to object during the sentencing phase of the trial. The en banc court dismissed this argument, Rummel v. Estelle, 587 F.2d 651, 653-54 (5th Cir. 1978), and the Court summarily agreed in deference to the circuit court interpretation of state law. Rummel v. Estelle, 445 U.S. at 267 n.7. Although the Court failed to make the distinction, it cannot be overemphasized that \textit{Rummel} was not a case involving identity of the offense. See note 33 supra.
\textsuperscript{103} Id. at 271. Texas argued also that the defendant had waived his right to object to his punishment since he failed to object during the sentencing phase of the trial. The en banc court dismissed this argument, Rummel v. Estelle, 587 F.2d 651, 653-54 (5th Cir. 1978), and the Court summarily agreed in deference to the circuit court interpretation of state law. Rummel v. Estelle, 445 U.S. at 267 n.7. Although the Court failed to make the distinction, it cannot be overemphasized that \textit{Rummel} was not a case involving identity of the offense. See note 33 supra.
\textsuperscript{105} Rummel v. Estelle, 445 U.S. at 272.
\textsuperscript{106} Id. at 268-72; Brief for Petitioner at 25-30.
capital cases after Furman.\textsuperscript{107} While Rummel did not claim that his sentence under the Texas recidivist statute was arbitrarily imposed, he did claim that the mandatory, nondiscretionary procedure unfairly grouped him with violent, threatening felons. This categorization, albeit not as grossly apparent as in the death cases, nonetheless singles out the recidivist in the same way as does capital punishment.\textsuperscript{108} By ignoring the death penalty cases, the Court implied that the principle of disproportionality may apply less to noncapital cases than to capital cases.\textsuperscript{109}

In addition to claiming that the death penalty cases were not applicable, the Court brushed off Weems as being inapplicable to Rummel. The defendant claimed that the Court in Weems objected not only to the exotic accessories of \textit{cadena temporal}, but held that the length of the sentence alone was unconstitutionally excessive. Rummel argued that frequent recent citations to Weems attested to its continued vitality.\textsuperscript{110} However, the Court concluded that the Court in Weems considered \textit{cadena temporal} in its entirety as excessive.\textsuperscript{111} The Court held that Weems could not "be applied without regard to its peculiar facts: the triviality of the charged offense, the impressive length of the minimum term of imprisonment, and the extraordinary nature of the 'accessories' included within the punishment of \textit{cadena temporal}."\textsuperscript{112} The dissent pointed out, however, that \textit{Weems} has been cited generally for the proposition that punishments grossly disproportionate to the severity of the crime are unconstitutionally cruel and unusual.\textsuperscript{113} While it may be true that the Court will never find a sentence unconstitutional for its excessive length alone, the facts in \textit{Rummel} are as equally peculiar as those in \textit{Weems}. Even though he committed three felonies, the defendant's offenses were not only close to the line drawn between

\begin{itemize}
  \item \textbf{107.} See notes 63-93 supra and accompanying text.
  \item \textbf{108.} This is especially true since Texas imposes mandatory life imprisonment only upon the capital murderer and the recidivist. Tex. Penal Code Ann. tit. 3 §§ 12.31, 12.42(d) (Vernon 1974). Rummel v. Estelle, 445 U.S. at 300-01 (Powell, J., dissenting); Brief for The Petitioner at 11, 44-46.
  \item \textbf{109.} Rummel v. Estelle, 445 U.S. at 288 (Powell, J., dissenting).
  \item \textbf{110.} Brief for The Petitioner at 8, 20-23.
  \item \textbf{111.} Rummel v. Estelle, 445 U.S. at 274.
  \item \textbf{112.} Id. (emphasis in original).
\end{itemize}
felony theft and petty theft,114 they were in fact "trivial" when compared to such crimes as murder, rape, armed robbery, or, as the majority suggests, antitrust and bribery. The minimal length of the imprisonment term, life, is certainly impressive notwithstanding possibilities of parole and good-time credit. Finally, parole restrictions, while not as aggressive or extraordinary as the accessories of cadena temporal, are nearly as restricting in practical terms.115 Weems then would appear to be controlling because the factual situation therein is analogous to the situation in Rummel in terms of triviality of offenses, impressive length of imprisonment, and the accessories. The Court accepted the notion of proportionality in Weems, but then determined that Weems did not apply to Rummel, because the finding of disproportionality in Weems could not be divorced from the extreme nature of the facts of that case.116 Thus, the Court in Rummel acknowledged the existence of the principle of disproportionality espoused in the death penalty cases and Weems. The Court, however, determined that neither the death cases nor Weems were of any assistance in deciding the constitutionality of the sentence imposed on the defendant. As the dissent correctly pointed out, "[s]uch a limitation finds no support in the history of eighth amendment jurisprudence."117

**Deference to Legislative Prerogative**

While the Rummel decision was inconsistent with earlier CUP clause cases, because the Court rejected both Weems and the death

114. This is demonstrated by the fact that his third felony, theft by false pretext, would not qualify as a felony under current Texas law. TEX. PENAL CODE ANN. tit. 3 § 31.03(d)(3) (Vernon 1974) as amended (1979 Supp.). See Rummel v. Estelle, 445 U.S. at 295 (Powell, J., dissenting) (Brief for The Petitioner at 11, 46).

115. Although released from prison, a parolee lives under wide-ranging restrictions, any violation of which may result in revocation of parole and return to prison. See Supplement to Brief for the Respondent at S.3-3b (Rules, Texas Board of Pardons and Paroles, § 205.03.02.001-.005). As stated by the Court in *Morrissey v. Brewer*

Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. 408 U.S. 471, 478 (1972). See also Rummel v. Estelle, 587 F.2d 651, 669 (5th Cir. 1979) (en banc) (dissenting opinion). Compare these restrictions to those of *cadena temporal supra* note 37 and accompanying text.


117. *Id.* at 288 (Powell, J., dissenting).
penalty cases, the decision was consistent with earlier decisions in
that the Court maintained its traditional policy of judicial restraint.
Historically the Court has been reluctant to strike a punishment im-
posed by a state pursuant to the legislative prerogative of that
state.\(^{118}\) The Court in *Rummel* cited the warning that judgments on
eighth amendment challenges ought to be made free from the sub-
jective views of the individual Justices.\(^{119}\) The Court distinguished
the line-drawing done in the death penalty cases from that re-
quired by the defendant by stating that "this line [between death
and imprisonment] was considerably clearer than would be any con-
stitutional distinction between one term of years and a shorter or
longer term of years."\(^{120}\) The Court relied also on the objective
distinction made by the Court in *Weems* between *cadena temporal*
and the traditional punishments imposed by the various American
states.\(^{121}\) The Court concluded that it could undermine state
legislative prerogative only in extreme cases such as when the state
legislature approved the arbitrary imposition of the death penalty
or *cadena temporal*.\(^{122}\)

The defendant never claimed that lines should not be drawn at
some point, nor did he dispute the fact that Texas may punish him
severely with a long term of years. In attacking the point at which
the state legislature drew the line, he argued that it was unconsti-
tutional for the state legislature to legislate a mandatory life sentence
to be imposed on a recidivist who has neither threatened society nor
shown a propensity to threaten society. However, neither the
absence of violence nor the small amount of money involved in
*Rummel* influenced the Court.\(^{123}\) The Court rejected the nature-of-the-
offense argument, because the state interest involved in *Rummel*
was to punish a repeat offender, not to punish a non-violent thief.\(^{124}\)

The Court relied on two early cases\(^{125}\) to emphasize further the
Court's history of judicial restraint and to lend credence to its deter-
mination that it should retain that posture. Neither case contains

\(^{118}\) Rummel v. Estelle, 445 U.S. at 274; Weems v. United States, 217 U.S. 349,
378-79 (1910).

\(^{119}\) *Id.* at 274-75. See note 79 supra and accompanying text.

\(^{120}\) *Id.* at 275.

\(^{121}\) *Id.*

\(^{122}\) *Id.*

\(^{123}\) *Id.* at 275-76.

\(^{124}\) *Id.* at 276.

\(^{125}\) Badders v. United States, 240 U.S. 391, 394 (1916); Graham v. West
Virginia, 224 U.S. 616, 631 (1912).
any discussion of CUP clause and in each case the Court summarily dismissed the eighth amendment challenge without even a hint of reasoning. Neither case can support any solid conclusion, except that in those specific instances the Court found the eighth amendment challenge unpersuasive. While the Court has in fact been reluctant to intervene in a state legislature's line-drawing process with respect to the imposition of sentences, the Court in *Rummel* relied on several cases "that added little to our knowledge of the scope of the cruel and unusual language." In retaining its policy of judicial restraint in *Rummel*, the Court virtually rejected the notion that the nature of the offense is a critical consideration in determining whether a punishment is grossly disproportionate to the crime committed. "It is difficult to imagine felonies that pose less danger to the peace and good order of a civilized society than the three crimes committed by the petitioner." The Court also exercised restraint by declining to adopt the comparative analysis it had employed in earlier cases.

**Rejecting the Comparative Analysis**

To minimize the risk of judicial subjectivity, the Court has relied on certain objective factors in adjudicating eighth amendment challenges. In addition to considering the nature of the offense, the Court in *Weems* adopted a two-pronged comparative analysis which the Court continues to employ. The test compares the challenged sentence with the sanction for the same crime in other states; and, the sanction for other crimes in the same state. In *Rummel*, the Court, while not expressly rejecting interjurisdictional comparative analysis, determined that to compare the Texas recidivist system to systems in other jurisdictions would be complex and "inimical to traditional notions of federalism." The Court also expressly re-

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126. With reference to *Graham*, and equally applicable to *Badders*, is the dissent's assertion that "[a] one-sentence holding in a preincorporation decision is hardly relevant to the determination of [Rummel]." *Rummel v. Estelle*, 445 U.S. at 290 n.7. Indeed, one recent commentator did not include *Graham* on her list of preincorporation cases which discussed the CUP clause. Radin, *The Jurisprudence of Death: Evolving Standards For The Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989, 997 n.28 (1978).


jected the intrajurisdictional analysis as being too speculative. In light of the actual operation of the Texas recidivist scheme, judicial restraint was the appropriate posture. As a result, however, the Court has left lower courts without any standards to apply in future disproportionality cases.

The Court examined the operation of the Texas recidivist statute prior to outlining the difficulties it perceived in applying the comparative analysis to Rummel The Court questioned why the defendant failed to reform after having served time on two previous occasions. The Court correctly pointed out that under Texas law, a person does not receive "a mandatory life sentence merely because he is a three-time felon," as the dissent argued, but rather a recidivist must twice demonstrate his or her incorrigibility. "One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail." Any analysis of the appropriateness of a punishment requires consideration of the penological objectives of the state and the viable methods which would achieve them. The dissent posited a discretionary system, employed by several states, in which the sentencing authority may consider all behavioral evidence including the crimes of the habitual felon to determine whether the maximal sentence is justified. The Court concluded that the mandatory life sentence Texas imposes on three-time felons is simply a societal decision that such criminals deserve serious penalties after shorter terms of imprisonment have proven ineffectual. Punishing recidivism is not only constitutional but an important aspect of the penological objectives of most states. To arrive at a workable system, the state legislatures must draw lines and inevitably the criminal at the margin, like Rummel, receives what would appear to be an unconstitutionally disproportionate sentence. Assuming that the Texas prison/parole system is effectual, Rummel should have reformed after twice serving time; Texas may punish him severely for his failure to reform, based on his recidivist status. In this way,

132. Id. at 282 n.27.
133. Id. at 278. See note 21 supra and accompanying text.
135. Id. at 278.
136. Id. at 298 n.18 (Powell, J., dissenting). See, e.g. Idaho Code § 19-2514
137. Id. at 278.
the punishment is in fact designed "to fit the offender and not merely the crime," and thus it appears to be in accord with modern penological theory.

With regard to the criterion concerning the punishment of recidivists in other jurisdictions, the defendant cited the national and worldwide trends toward lighter, discretionary sentences and the requirement in many states that at least one of the crimes of the recidivist be violent. The Court did not dwell long on this point and indicated that both West Virginia and Washington have similar statutes and that, even if other appellate courts had been willing to review the proportionality of sentences under these statutes, the Court itself must ultimately decide the issue. The Court determined that, not only was the legislative judgment in those states the same as that in Texas, but whatever distinctions existed between the Texas system and that in other states were "subtle rather than gross." The Court concluded that it could not apply a comparison test in Rummel, because comparing the crimes for which various states impose death is different from attempting to evaluate the various state recidivist schemes within the complex matrix proposed by the defendant. The dissent, on the other hand, found no difficulty in applying the comparison test; it determined that comparing the Texas system with that in other states was an appropriate method of ascertaining the "contemporary values concerning the infliction of a challenged sanction." While these arguments are persuasive, the Court refused to apply the interjurisdictional comparative test it had employed previously.

139. See note 93 supra and accompanying text.
140. Brief for The Petitioner at 39-44. The defendant indicated that the other states employing recidivist statutes require at least one of the following:
   (1) commission of more than three felonies; or
   (2) at least one felony must have been violent; or
   (3) a limit on mandatory sentence to periods substantially less than life; or
   (4) grant discretion to the sentencing authority.
See also Rummel v. Estelle, 445 U.S. at 298 (Powell, J., dissenting).
142. Id.
143. Id. The Court hinted also that it might have been swayed had it found evidence of contemporary legislative or public opinion contrary to its findings. The Court cited the legislative reaction to Furman in re-enacting the death penalty for murder. For the Court, the analogous situation was Spencer v. Texas which confirmed the constitutionality of recidivist statutes, but did not evoke an outpouring of legislation or public response like Furman. Id. at 280 n.22.
The Court discussed two additional factors that, according to the Court, further impaired its ability to utilize the comparative analysis. The Court pointed out that even under a life sentence the defendant could be eligible for parole in as few as twelve years under the Texas good-time credit system. The Court also acknowledged Rummel’s right-privilege distinction and agreed that it could not treat a life sentence as if it were a twelve year term. Nonetheless, the Court noted the general acceptance of parole as a variation on imprisonment and thereby adopted the en banc majority’s realistic approach to conclude that the defendant’s life sentence with the possibility of parole was distinguishable from a prisoner serving a life sentence without parole as is allowed under some recidivist statutes to punish violent felons. A key factor for the Court, then, was the likelihood that Rummel would be paroled after a term of years as long as that which he would have received for his third crime alone. Thus, the Court determined that in light of the Texas parole and GTC policies, any comparison to other state practices would be too complex.

The second factor that prevented the Court from using the comparative analysis was that of prosecutorial discretion. Under the

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145. Rummel v. Estelle, 445 U.S. at 280. Theoretically, there exists a distinction between a finite term of years from which GTC may be deducted and mandatory life imprisonment from which GTC cannot be deducted due to the indefinite duration of the life sentence. This academic argument is unfounded because those serving life sentences in Texas are in fact eligible for parole and GTC. Rummel v. Estelle, 587 F.2d 651, 665 (1978). An inmate serving a life sentence is eligible for parole in twenty years. TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 15(a)(b) (Vernon 1979), GTC shortens the prison time that an inmate must serve before he is eligible for parole. If an inmate gets the best possible classification, that is, State Approved Trusty (SAT), for every thirty days served in good conduct, thirty days are subtracted from the period which must be served in order to become eligible for parole. Thus, the defendant, as an SAT, would only have to serve about ten years before becoming eligible for parole. Of course, an inmate’s classification may vary depending on his record both in and out of prison. Furthermore, GTC is a privilege, not a right. TEX. CIV. CODE ANN. tit. 108, art. 6184 §§ a-1 (Vernon 1970).

It may also be noted that in the past several years, all those serving life sentence for theft in Texas received parole status after serving between 10-25 years. See Supplemental Brief for the Respondent at S.9, S.10.

146. Id. See also Brief for the Petitioner at 10, 30-38; Rummel v. Estelle, 587 F.2d 651, 668-69 (5th Cir. 1978) (en banc) (dissenting opinion).

147. Id.

148. See Morrissey v. Brewer, 408 U.S. 471, 477 (1972); see also note 115 supra and accompanying text.


150. Id. For a critique of the en banc court’s analysis along these lines see Note, Recidivist Laws Under the Eighth Amendment-Rummel v. Estelle, 10 Tol. L. REV. 606, 627-40 (1979).
Texas recidivist scheme, the prosecutor has the discretion to prosecute the offender for his or her third offense, or proceed under the recidivist statute for an enhanced sentence. As the Court noted, this discretionary feature coupled with the threat of an enhanced sentence in the plea-bargaining stage weeds out the "petty" offenders technically within the recidivist statute.\textsuperscript{151} According to Rummel, prosecutorial discretion was not an issue in the case because it was not argued on the record. Furthermore, he challenged the legislative right to confer the power to punish a three-time petty offender under the recidivist statute, not the decision of the prosecutor to exercise that power.\textsuperscript{152} The Court determined that it must uphold the sentence because the state requested a remand to the sentencing court for the purpose of introducing the entire criminal record of the defendant in the event his present sentence was unconstitutional. The Court stated that "one reasonably might wonder whether that court could then sentence Rummel to life imprisonment [if it found additional felonies] even though his recidivist status based on only three felonies had been held to be a 'cruel and unusual' punishment."\textsuperscript{153} Thus, the Court upheld the sentence at least in part for fear that if it did not, the recidivist statute for any number of felonies greater than three would have been rendered ineffectual.

The Court in \textit{Rummel} not only rejected \textit{Weems} and the death penalty cases, it also declined to utilize the tests successfully employed in other eighth amendment cases under the guise of federalism and comity. The Court posited the complexities courts encounter in attempting to make interjurisdictional comparisons as an excuse for not having applied the comparison tests. The Court indicated that under our present federal system, "some State will always bear the distinction of treating particular offenders more severely than any other State."\textsuperscript{154} The Court held that since neither precedent nor penologists gave them any clear direction in their decision-making process, any change toward lighter, discretionary sentences is one which must be legislatively not judicially mandated.\textsuperscript{155} The Court found that, since states draw the line be-


\textsuperscript{152} Brief for The Petitioner at 15, 73-74. \textit{See} Bordenkircher v. Hayes, 434 U.S. 357, 361-65 (1978) (prosecutor's discretionary power upheld on basis of need for broad prosecutorial power).

\textsuperscript{153} Rummel v. Estelle, 445 U.S. at 281.

\textsuperscript{154} \textit{Id.} at 282.

\textsuperscript{155} \textit{Id.} at 283-84.
between petty and felony theft at markedly different amounts, then Texas may draw its own line "subject only to those strictures of the eighth amendment that can be informed by objective factors,"¹⁵⁶ and Texas may treat the defendant differently because of his recidivist status than it could had he been a first time offender.¹⁵⁷ The court refused to utilize the various objective indicia that it had developed earlier and conveniently tucked itself under the comfortable blanket of federalism. The Court failed to posit an alternative framework to guide state legislatures thereby leaving state lawmakers free to define the breadth of the eighth amendment proportionality "stricture." By its decision in Rummel, the Court created an uncertainty as to which tests for disproportionality might be applicable outside the context of capital punishment.

**CONCLUSION**

The CUP clause of the eighth amendment proscribes both barbarous methods of punishment and those punishments that are grossly disproportional to the nature and number of offenses committed. Traditionally, the Supreme Court has been reluctant to invalidate sentences imposed pursuant to state statutes. Nonetheless, there have been instances, especially in the context of capital punishment, in which the Court has exercised its constitutional duty to invalidate disproportional punishments. Rummel v. Estelle was a case in which the defendant received a sentence for life imprisonment as mandated by the Texas recidivist statute for three theft crimes involving about $230. Given that proportionality is an accepted constitutional minimum, it would appear that the Court in Rummel abridged its constitutional duty to intervene to prevent unconstitutional legislative overreaching.

That conclusion, however, is purely academic and fails to consider the practical ramifications of the Texas recidivist scheme. Under current practice, a recidivist serving a life sentence in Texas is likely to be paroled after about fifteen or twenty years in prison. Mandatory life sentences are not inherently disproportional, and, indeed, they play a significant deterrent role in a recidivist system designed to protect society from those offenders most repugnant to it. The result reached by the Court in Rummel is justifiable in that the line-drawing process is one traditionally reserved for state legislatures. The decision in Rummel clearly indicates that the

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¹⁵⁶. *Id.* at 284 (citing Coker v. Georgia, 433 U.S. 584, 592 (1977)).
¹⁵⁷. *Id.*
Court willingly accepts the state prerogative to punish a habitual offender for his or her recidivist status alone regardless of the nature of the criminal conduct of the offender. Furthermore, it can be reasonably inferred that in future cases the Court will take cognizance of the practical operation of the particular penal/recidivist system in question with little regard as to systems employed under similar circumstances in other jurisdictions. The rejection by the Court of the comparative analyses developed in earlier CUP clause cases leaves other courts and legislatures without suitable guidance to deal with challenges to the proportionality of terms of imprisonment. Such a state of affairs may well leave the CUP clause in a constitutional limbo.