The Eighth Amendment: Judicial Self-Restraint and Legislative Power

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The Eighth Amendment: Judicial Self-Restraint and Legislative Power

I. Introduction

Judicial review of the severity of sentences prescribed by state legislatures has been severely curtailed in recent United Stated Supreme Court decisions.\(^1\) Indicating the Burger Court's view of federalism,\(^2\) cases such as *Rummel v. Estelle*\(^3\) and *Hutto v. Davis*\(^4\) may also signal the end of the eighth amendment proportionality argument in federal courts. The eighth amendment prohibits "cruel and unusual punishments"\(^5\) and has been interpreted not only to ban certain methods or types of punishment\(^6\) but also to prohibit punishment disproportionate to the crime.\(^7\) Convicted felons in *Rummel* and in *Davis* each unsuccessfully challenged state prison sentences on the ground that the punishment was grossly disproportionate to the crime for which each was convicted.

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2. Compare Wilkes, The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 Ky. L.J. 421, 450 (1974), arguing that “[b]y lowering the level of constitutional protections the Burger Court has invited the states to adopt standards higher than those of federal law,” with Monaghan, The Burger Court and ‘Our Federalism’, 43 LAW & CONTEMP. PROBS. 39 (1980) and Sandalow, Federalism and Social Change, 43 LAW & CONTEMP. PROBS. 30 (1980). Monaghan and Sandalow suggest that the Burger Court has, for the most part, continued protecting concerns of the Warren Court.
5. U.S. Const. amend. VIII: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
6. In Robinson v. California, 370 U.S. 660, 675 (1961), Justice Douglas commented in his concurring opinion that “the historic punishments that were cruel and unusual included ‘burning at the stake, crucifixion, breaking on the wheel’ (*In re Kemmler*, 136 U.S. 436, 446), quartering, the rack and thumbscrew (see *Chambers v. Florida*, 309 U.S. 227, 237), and in some circumstances even solitary confinement (see *Medley*, 134 U.S. 160, 167-168).”
The rationale of *Rummel v. Estelle* was that state legislatures have nearly absolute discretion in setting the length of sentences in state felony cases. Rummel appeared to reject a four-tier proportionality test commonly used by courts to decide proportionality challenges. After *Rummel*, confusion ensued in federal courts. Some jurisdictions followed *Rummel* by declining to use the four-tier test, while other federal courts interpreted *Rummel* as allowing judicial analysis of proportionality cases under some variation of the traditional proportionality test. State courts responded in a similarly diverse fashion; two courts provided broader constitutional protections under state constitutional provisions than *Rummel* required under the federal Constitution.

In response, the Court recently issued a sharp reminder in *Hutto v. Davis* that "a precedent of this Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be." While the *Rummel* Court implied that courts should no longer use the four-tier test in determining whether a sentence was proportionate to the crime, and thus constitutional, the *Davis* Court explicitly and emphatically rejected the four-tier test as an unacceptable judicial usurpation of legislative power.

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9. *Hart v. Coiner*, 483 F.2d 136, 140-43 (4th Cir. 1973), cert denied, 415 U.S. 983 (1974), coined the phrase four-tier proportionality test. Judges were to consider four factors: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment defendant would have received in other jurisdictions for the same offense and (4) the punishment meted out for other offenses in the same jurisdiction.
15. *Id.*
16. *Id.* at 3541.
This comment questions the Court’s latest pronouncements on the eighth amendment and judicial self-restraint in federal courts. It can be argued that *Rummel* and *Davis* are historical aberrations—they lack historical constitutional underpinnings and detour from judicial precedent. Conversely, these cases can be justified on the principle that the judiciary should respond to the mores of contemporary society, and that the Court is reflecting a new federalism ideology of enhanced state power and diminished federal involvement. Whichever view one accepts, a primary consequence of *Rummel* and *Davis* is that in the future state courts may be more amenable to eighth amendment proportionality arguments than federal courts. Therefore, this comment also examines current state court decisions which have upheld proportionality analyses.

II. THE UNITED STATES SUPREME COURT AND THE EIGHTH AMENDMENT

A. From the “Historical” Approach to a Dynamic Reading

To begin any discussion touching on the eighth amendment, it is appropriate to discuss the history of the amendment. American courts initially favored an “historical” read-

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18. Fiss & Krauthammer, *The Rehnquist Court*, *The New Republic*, March 10, 1982, at 14. The authors argue that Justice Rehnquist’s ideals are reflected in recent Court decisions and that the Court champions state autonomy in order to promote property interests. Also, the authors suggest that Justice Rehnquist is opposed to incorporation of the Bill of Rights through the 14th amendment and that he “wants to free the states from the restrictions of the National Constitution, particularly those emanating from the Civil War Amendments and the Bill of Rights.” *Id.* at 16.

This comment suggests that a result of the proportionality cases could be a strengthening of personal liberties under state constitutions.
19. *See infra* text accompanying note 145.
The Magna Carta has been credited by some as the origin of the cruel and unusual punishments clause. J.C. Holt, Magna Carta and the Idea of Liberty 5 (1972); R. Perry, Sources of Our Liberties 5 (1978). Caption 20 of the Charter of Anglo-Norman government forbade excessive pecuniary penalties, cautioning that such penalties should be proportionate to the severity of the crime committed.

The English Bill of Rights is seen as one of the direct sources of the meaning of the eighth amendment. One interpretation perceives the English document as a check on heinous cruelties, while another views it as a restraint on the courts in passing judgments which are excessive by legislative standards. Legal historians who read the English Bill of Rights as a check on the methods of punishment affix their reasoning on the abuses carried out during the tumultuous reigns of Charles II and James II. I. Brant, The Bill of Rights, Its Origin and Meaning (1965).

Some argue that the Bill of Rights represented a check on excessive judicial sentences. Granucci, supra note 7, at 860-65. The perjury trial of a minister named Titus Oates, who had announced the existence of a "plot" to assassinate the monarch, provoked considerable debate on the subject of punishment. J. Pollock, The Popish Plot (1903). Fifteen men innocent of the charge of treason were dead before the plot was discovered to be a hoax. Oates was sentenced to a stiff fine, life imprisonment, whippings, pilloring four times a year, and defrocking. Oates appealed to Parliament, urging repeal on the grounds that the sentence was inhumane and unparalleled. The House of Commons agreed with Oates. See generally Weems v. United States, 217 U.S. 349, 394 (1910).

After James II fled from England, Parliament convened to discuss the prospective social order. Primary importance was placed on drafting a general statement which would protect the individual. Granucci, supra note 7, at 854. The final draft of the English document provided: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Id. (emphasis added).

According to this interpretation of history, the 1689 Bill of Rights had a two-fold purpose: first, "an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties." Id. (emphasis added).

Although the influence of the English documents is not to be discounted, it would be incorrect to view English political and social history as the sole source of the eighth amendment. Id. at 860. It has been suggested that the social theories of Enlightenment Europe fused with the English materials and the unique American experience to form the underpinnings of the American Bill of Rights, the protection of the individual against governmental power. Carlson v. Landon, 342 U.S. 524, 557 (1952) (Black, J., dissenting). This thesis argues that the colonial framers of the American document had a different understanding of the cruel and unusual punishments clause than their English counterparts.

Colonial leaders were strongly influenced by the Enlightenment thinker, Becarria. Note, The Eighth Amendment, Becarra, and the Enlightenment, supra note 20, at 806. Cesare Becarria's message was promulgated in a slim volume entitled, On Crimes and Punishments. See C. Becaria, On Crimes and Punishments (H. Pavlocci trans. 1963). Becarria used the conventional notion of a social contract to explain that the individual had relinquished certain liberties to ensure the smooth functioning of society. The individual gave society the right to punish him for crimes he would commit against society; however, the punishment could not exceed the crime. Id. at 14.

Becarria's influence on colonial thought appeared pervasive. Note, The Eighth Amendment, Becarra, and the Enlightenment, supra note 20, at 806. Speeches and
The courts accepted the theory that the eighth amendment proscribed certain methods of punishment and they searched historical tracts for a literal reading of banned punishments. In *Wilkerson v. Utah,* however, the Court anticipated the emergence of a proportionality theme. The case involved a premeditated murder conviction punishable by death in the Utah Territory. The Court upheld the Utah statute by pointing out that death was a typical punishment for murder, the punishment was used in the Territory of Utah, and the mode of execution, being shot, was common in military executions. Justice Clifford, who announced the decision, initially followed the usual procedure of depicting what heinous punishments were condemned as cruel and unusual by Blackstone. But he also commented that "it is safe to affirm that punishments of torture, such as those mentioned by the commentators referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the constitution."

This theme was amplified in a vigorous dissent in *O'Neil v. Vermont.* O'Neil was a New England bootlegger found guilty of 457 offenses of selling, giving and distributing distilled spirits. He was sentenced to one month hard labor and a fine of $9,140, or if he was unable to pay the fine, to serve seventy-

letters of the colonial period indicate the popularity of Becarra's view of penology. *Id.* at 812-17.

Those who perceive Becarra's handiwork in the eighth amendment finally urge that the amendment is the antithesis of the English clause, for the amendment calls for "an increasing activism on the part of courts enforcing the prohibition against excessive or disproportionate penalties." *Id.* at 785.


23. 99 U.S. 130 (1878).

24. *Id.* at 132-33.


26. 99 U.S. at 136 (emphasis added).

27. 144 U.S. 323 (1892). The majority rejected O'Neil's argument that the sentence was oppressive. The Court noted that the severe penalty was warranted because O'Neil committed "a great many" offenses. *Id.* at 331. Also, the Court noted that the eighth amendment of the federal Constitution did not apply to the states. *Id.* at 331-32.
nine years of hard labor. Justice Field, in a seminal dissent, called the sentence unreasonably severe.28

A full-blown proportionality analysis emerged in Weems v. United States.29 Weems was a United States government disbursing officer stationed in the Phillipine Islands who was convicted of making a false entry on a public document. A Phillipine statute based on the Spanish penal code imposed a form of strict liability upon any government employee who made a false entry on an official record.30 Justice McKenna, who announced the Court's opinion, expressed wonder at the terms of the statutory punishment.31 Weems had been sentenced to hard labor for fifteen years, and to always carry a chain hanging from the wrists and the ankle.32 The Court agreed with Weems that his sentence violated the eighth amendment, for "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense."33

Broad parameters for judicial review were set forth. First, the Court noted the difficulty in ascertaining the true meaning of the eighth amendment as derived from English history.34 Thus, the eighth amendment must be flexible and dynamic. It is not to be read as excluding only particular punishments, for, "a principle, to be vital, must be capable of wider application than the mischief which gave it birth."35 This interpretation suggests that a punishment may be deemed constitutionally acceptable in one historical era, and unconstitutional in a different era; the social mores of a particular age provide the lens through which the eighth amendment must be read.

Second, the majority focused on legislatures and statutory sentences. The Court refused to even comment on lower court cases which dealt with court-imposed sentences.36 The Court

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28. Id. at 337-66.
30. Id. at 363.
31. Id. at 363-67. During Weems' imprisonment he was to be deprived of such rights as parental rights, property rights and the right to participate in the family council. Once Weems completed his fifteen year sentence, he would be subjected to continual government surveillance.
32. Id. at 363-67.
33. Id. at 367.
34. Id. at 368-73.
35. Id. at 373.
36. Id. at 377. This emphasizes the principle of judicial activism. The Court was focusing on sentences set by legislatures and not by courts.
recognized the true issue at stake was whether the judiciary could intrude into a legislative function, that is, determine sentencing limits, and declare that the sentencing parameters prescribed by a legislature were disproportionate and unconstitutional under the federal Constitution. The Court examined records of the constitutional debates and concluded that the overriding political sentiment of the framers of the American Constitution was "distrust of power."\textsuperscript{37}

Legislative power to define crimes and to set maximum or minimum sentences was thus limited by constitutional concerns, "and what these [constitutional concerns] are the judiciary must judge."\textsuperscript{38} The Court was unequivocal in its assertion that the courts had the power to declare a legislatively set punishment unconstitutional. It rejected the suggestion that the imprisonment was separable from the accessory punishments,\textsuperscript{39} that the latter could be declared illegal and the prison sentence remain. This argument was advanced by the government in \textit{Weems}, suggesting that "the imposition of the sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void."\textsuperscript{40} The Court noted that the sentence and the accessory punishments were not in excess of the law, but were in strict compliance with the law.\textsuperscript{41} Thus, the Phillipine court had not erred in sentencing Weems. It was merely following the terms of the Spanish penal code. The code itself was unconstitutional, because Weems' sentence was disproportionate to his crime.

\begin{itemize}
  \item \textsuperscript{37} \textit{Id.} at 372.
  \item \textsuperscript{38} \textit{Id.} at 379. The majority also noted:
    In Hobbs v. State, \textit{supra} and in other cases, prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, — that is, a consideration of the mischief and the remedy.
    \textit{Id.} at 378-79.
  \item \textsuperscript{39} \textit{See supra} note 31.
  \item \textsuperscript{40} \textit{Id.} at 381.
  \item \textsuperscript{41} \textit{Id.}
\end{itemize}
A dissenting opinion written by Justice White cogently explained the implications of the majority opinion. Four doubts about the majority opinion troubled the dissent. Ironically, these four doubts were to play a pivotal role in subsequent eighth amendment cases. They were crystallized into a four-tier test used by courts to determine the proportionality of sentences.42

*Weems* was greeted as a landmark decision,43 but cases immediately subsequent to *Weems* diminished its value. A scant two years after *Weems*, in 1912, the United States Supreme Court in *Graham v. West Virginia*44 upheld a challenge to the constitutionality of a West Virginia habitual offender statute. Graham, the petitioner, was fond of horses. In less than a decade, he was convicted three times of horse stealing.45

The unanimous opinion, delivered by Justice Hughes, quickly denied, in one sentence, that the recidivist statute violated the eighth amendment.46 Curiously, this Court failed even to mention *Weems*, a case decided two years earlier. The absence of reference to *Weems* can perhaps be explained by examining *In re Kemmler*,47 an 1890 case which the Court used to support its decision. Kemmler was a convicted murderer condemned to death by electrocution. The *Kemmler* Court refused to apply the eighth amendment against state action48 and denied Kemmler's application for a writ of error. The *Graham* Court was thus merely following the prevalent custom of not applying the federal Bill of Rights against state action.49

42. See supra note 8.
44. 224 U.S. 616 (1912).
46. 224 U.S. at 631.
47. 136 U.S. 436 (1890).
48. *Id.* at 448-49. The eighth amendment was incorporated into the due process clause of the fourteenth amendment in *Robinson v. California*, 370 U.S. 660 (1962). See also *Francis v. Resweber*, 329 U.S. 459 (1947) (assuming that the due process clause incorporated the eighth amendment).
49. See *Gitlow v. New York*, 268 U.S. 652 (1925) (assuming for purposes of the case that the first amendment was incorporated into the due process clause of the fourteenth amendment).
Dictum in *In re Kemmler* indicated that the proportionality argument had not been discarded. Even the *Graham* Court commented that the sentence of life imprisonment for a thrice-convicted horse thief was not manifestly unjust. This dictum suggests that the Court, despite the problem of applying the eighth amendment against the states, was beginning to adopt a teleological perspective of the law. *Weems* had asked the judiciary to draw the meaning of the eighth amendment from evolving standards of decency. The horse thief in *Graham* was seen as a serious menace to valued property rights.

The concept embodied in *Weems* was revitalized and clothed in spirited language in *Trop v. Dulles*. The prospect which Weems faced after imprisonment under the Spanish penal code, that is, denial of social and political rights, was actualized in *Trop*. Trop had served in the American Army in

50. *In re Kemmler*, 136 U.S. 436, 446-48 (1890). The Kemmler Court conceded that, "if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual it would be the duty of the court to adjudge such penalties to be within the constitutional prohibition." Id. at 446.

51. 224 U.S. 631 (1912).

52. R. DAVID & J. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 109 (1978), describes the teleological method:

A first technique is to detach the text from its historical context. The words of the text are interpreted without considering either their historical origins or the original intention of the draftsmen, and with a view to giving them a meaning which, at the time, satisfies the then current sense of justice.

A number of excellent reasons have been advanced in order to justify this method of interpretation, the "teleological method." The laws in force in a country, in order to make up a coherent system, must all be interpreted in the same spirit, that of the time when are to apply, without paying heed to the earlier conditions and circumstances in which they were originally enacted.


55. Arguably, convicted felons in the United States faced similar restrictions on civil liberties. For example, convicted felons in 1912 were not allowed to vote in political elections. 25 AM. JUR. 2D ELECTIONS § 94 (1966). Weems' punishments, however, were far more severe. He would be subjected to governmental surveillance for the rest of his life.
wartime French Morocco. He was dishonorably discharged from the military after being absent without leave one day. He later applied for a United States passport and his request was denied. According to the provisions of the Nationality Act of 1940, all persons dishonorably released from the military for wartime desertion were stripped of citizenship. Trop sought a declaratory judgment in district court to establish that he was an American citizen.\(^5\)

The *Trop* plurality opinion evoked a pristine view of government by drawing on the *Weems* doctrine that the eighth amendment was not a static principle; rather it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\(^6\) Stripping one of nationality was deemed equivalent to a total destruction of an individual's status in a community. The punishment was disproportionate to the crime of being absent without leave, and thus it was unconstitutional.

*Trop* foreshadowed an issue which later surfaced in *Rummel*: the constitutionality of noncapital punishments. The plurality commented in dictum that the existence of the death penalty "is *not* a license to Government to devise any punishment short of death within the limit of its imagination."\(^7\)

*Trop*'s rhetoric, unfortunately, failed to provide firm guidelines for courts to utilize when faced with difficult eighth amendment challenges. This failure would become acute two decades later when *Rummel* and *Davis* were decided by the Burger Court.

**B. Death Penalty Cases**

*Trop*'s warning that the existence of the death penalty did not make any punishment short of death constitutionally permissible gained fuller meaning after the death penalty cases of the 1960's and 1970's.\(^8\) The Burger Court saw the death pen-
alty cases as so different in kind from the nondeath sentence cases that it found the proportionality principle enunciated in the capital punishment cases simply inapplicable to cases which involved sentencing in years.  

A review of *Furman v. Georgia* indicates the Burger Court's error. In *Furman*, the United States Supreme Court in a per curiam opinion held that the federal Constitution's guarantee against cruel and unusual punishments may prohibit the imposition of capital punishment. In a thoughtful concurring opinion, Justice Brennan pieced together the confused history of the eighth amendment. His conclusion was that although the English Bill of Rights imposed restraint on executive and judicial power, the colonial framers of the American Bill of Rights did not merely adopt the mother country's language, but accepted it as a check on legislative power. Brennan's argument was bolstered by reference to the sparse information available about the Bill of Rights.

After establishing that courts had an inherent duty to intervene, Brennan put teeth into the eloquent *Trop v. Dulles* rhetoric. Brennan stressed that the constitutional parameters of the eighth amendment required that the dignity of man must not be degraded, that punishment should not be arbitrary, that it must not be offensive to contemporary society and that any punishment more severe than necessary is violative of the eighth amendment.

In subsequent capital punishment cases, the Court embraced an understanding of the eighth amendment which indicated the following view of criminology and punishment. A punishment was unconstitutional if it failed to contribute to acceptable goals of punishment — needless infliction of suffering or inordinate punishment was not a goal of the criminal justice system. These cases cautioned that judicial pro-

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61. 408 U.S. 238 (1972).
62. Id. at 257.
63. Id. at 258-60.
64. Id.
66. 408 U.S. at 271-79.
nouncements should not be merely subjective views of individual judges, but judgments should be based on objective and informed reasoning.68

C. Rummel: May Courts Intervene Only in Clear Cases of Legislative Outrageousness?

By 1980, a different ideology appeared to dominate the Court.69 An ideology of judicial self-restraint and resulting deference to state legislatures can best explain the result reached in *Rummel v. Estelle*.70 Under a Texas habitual offender statute, Rummel was sentenced to mandatory life imprisonment after being convicted of a third felony.71

Rummel unsuccessfully appealed to the Texas appellate courts. He then sought a writ of habeas corpus in the Federal District Court for the Western District of Texas. The district court rejected his challenge that the sentence imposed upon him as an habitual offender was disproportionate to the severity of three felonies. A split panel of the Fifth Circuit Court of Appeals reversed.72 The court shied away from the proposition that a broad interpretation could be extracted from its holding. Nevertheless, it felt compelled by *Weems* and an often cited proportionality analysis to examine the facts under the four-tier test.73

The court of appeals, sitting en banc, reheard the case, vacated the panel decision and affirmed the district court's denial of habeas corpus relief.74 The en banc opinion reiterated

69. See Fiss & Krauthammer, *supra* note 18, at 14, 21. The authors suggest that although the Court is pursing a belief in new federalism, the Court does not support a deference to state legislatures. This comment concludes that the Burger Court has shown a deference to state legislatures, whatever the motivation may be.
71. In 1973, Rummel promised to repair an air conditioner and accepted $120.75 payment. He never repaired the appliance. Rummel was then charged with obtaining funds under false pretenses, a felony under Texas law. Rummel was also charged under the habitual offender statute for two prior felony convictions on his record: a 1964 conviction for fraudulent use of a credit card for the sum of $80, and a 1969 conviction for passing a forged check with the face value of $28.36.
72. Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978), rev'd en banc, 587 F.2d 651 (5th Cir. 1978).
74. Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978).
the familiar language of judicial deference to legislative decision making. It also pointed out that Rummel would be eligible for parole consideration within twelve years. Six judges dissented. They felt Weems and the four-tier proportionality test clearly enunciated proportionality guidelines. The dissent also rejected the notion that parole, which is not a certainty in all cases, should be considered in determining the constitutionality of a sentence.

The United States Supreme Court upheld the en banc opinion. Justice Rehnquist, speaking for the majority, conceded that in the past the Court did interpret the eighth amendment as a prohibition of sentences which were grossly disproportionate to the severity of the offense(s). He explained that in recent years, judicial interpretation of the eighth amendment has most often dealt with the death penalty. Justice Rehnquist then isolated death penalty cases from nondeath penalty cases, concluding that, "[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel."

D Distinguishing Capital Punishment Cases

Did the majority mean that the series of death penalty cases were of such a different nature from the present case that they were of no help in determining the constitutionality of Rummel's sentence? Did the majority mean that the death penalty cases were not entirely controlling because of the ultimate sentence in the capital punishment cases, but that they offered some assistance? Such questions become more than rhetorical inquiries when undertaking a review of cases decided after Rummel.

Apparently discarding the applicability of death penalty cases for guidance in Rummel, the majority noted that such "challenges to the proportionality of particular sentences have been exceedingly rare." Weems was the sole case which

75. 445 U.S. at 272.
76. Id. at 279.
77. Id. (emphasis added).
the majority cited as an illustration of the proportionality doctrine in noncapital cases. The majority opinion in *Rummel* did not acknowledge *Trop v. Dulles*, nor did it acknowledge that capital punishment cases transcended the narrow facts of particular death penalty cases to fit all criminal cases. Moreover, the Court in a brief, parenthetical comment\(^7^8\) noted that another case which did not involve the death penalty, *Robinson v. California*,\(^7^9\) was simply not applicable. The majority stated that "*Rummel does not challenge Texas' authority to punish each of his offenses as felonies...*"\(^8^0\) In *Robinson*, the Court struck down as a violation of the eighth amendment a California statute which required imprisonment for any narcotics addict.\(^8^1\)

The remaining viable case, *Weems*, was then distinguished and isolated from *Rummel*. The majority painted *Weems* as a unique case; the punishments imposed upon Weems made the case an historical oddity.\(^8^2\)

The majority selectively omitted the *Weems* statement that the sentence imposed was not a sentence in excess of legislative mandate but a sentence prescribed by statute. *Weems* made clear that the sentence was not judicial error; the Philippine trial court had followed the Spanish penal code. The legislative enactment itself was unconstitutional.\(^8^3\) This selective, limited reading of a past decision was used by the majority to reach the following conclusion:

> Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.\(^8^4\)

Two propositions emerge from this announcement. First, Justice Rehnquist apparently classified *Weems* and the capi-
tal punishment cases into discrete areas: one was confined to its "peculiar facts," the other dealt with the ultimate punishment. Thus, the broader language expressed in these cases regarding the value of the eighth amendment was apparently swept aside. Second, Justice Rehnquist appeared to hand carte blanche to legislatures to impose sentences in noncapital cases. Only one qualification was placed upon this carte blanche: a truly egregious statute would be reviewable under the eighth amendment. An example of an outrageous statutory punishment, the Court suggested, would be imprisonment for being convicted of overtime parking. Judicial intervention, according to the majority, is allowable only if there is an extreme, clearly abusive exercise of legislative power.

This qualification is even more telling when the facts of Rummel are considered. The face of the Texas recidivist statute was not reviewed by the Fifth Circuit Court of Appeals. The statute, by itself, was not deemed unconstitutional; rather, the application of the statute to such a petty offender as Rummel constituted cruel and unusual punishment. The Supreme Court apparently rejected this analysis and indicated that in order for a statute to merit judicial review under the eighth amendment, the statute must be facially unconstitutional. According to the majority in Rummel, courts have no leeway to intervene and hold that a particular sentence is impermissible because of the facts of an individual case.

The majority legitimized this restriction on judicial review of legislatively imposed punishments by turning to the death penalty cases. These cases cautioned that eighth amendment judgments should be made by maximum use of informed, objective factors. The majority's syllogistic reasoning transformed that warning into a barrier to judicial intervention.

85. 445 U.S. at 274 n.11.
86. See generally G. Gunther, CONSTITUTIONAL LAW 1186-87 (10th ed. 1980) (discussion regarding reading a statute "on its face" as compared to "when applied").
87. Id.
88. 568 F.2d 1193 (5th Cir. 1978). The dissent in the initial court of appeals decision argued, "No neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed." Id. at 1201-02.
First, the Court noted, judicial review necessarily involves subjective impressions of judges. Second, objective factors are best obtained by state legislatures which represent the contemporary values of a society. Thus, judgment about the permissibility of sentences should be left only to the legislatures.

Conceptual as well as constitutional difficulties arise from the Rummel syllogism. Two conceptually distinct processes have suddenly been merged. When the majority referred to “judicial review,” it apparently referred to the permissibility of a court’s review of a piece of legislation. The cautioning words cited in the capital punishment cases referred to the mechanics of sifting through the facts and casting judgment on a statutory sentence. The majority manipulated this call for objective criteria to set up a barrier to prohibit the implementation of judicial review.90

Once past cases contrary to the holding of Rummel were distinguished, the majority sought past case authority supporting the Rummel decision. Remarkably, support was found in Graham v. West Virginia,91 a case which Rehnquist labeled “factually indistinguishable from Rummel’s case.”92 Justice Rehnquist noted Graham’s hasty disposition of the cruel and unusual punishments challenge. Reflection reveals that these cases are different. Graham was decided prior to partial incorporation of the Bill of Rights through the fourteenth amendment. Also, the case was decided in the heyday of heightened protection of property rights.93 Unless Rummel was indicating that the Court favored an elevated protection of property rights,94 the cases are, in fact, very different.

Curiously, the familiar theme of “gross disproportionality” emerged again in Rummel and was ultimately not resolved. The majority noted that even if the statute, “employed against Rummel was the most stringent found in the 50 states, that severity hardly would render Rummel’s punishment ‘grossly disproportionate’ to his offenses or to the punishment

91. 224 U.S. 616 (1912).
92. 445 U.S. at 276.
93. See supra note 53.
94. Accord Fiss & Krauthammer, supra note 18, at 14.
he would have received in other states."  

In another portion of the opinion, the majority conceded: "Rummel's charts and tables do appear to indicate that he might have received more lenient treatment in almost any state other than Texas, West Virginia or Washington. The distinctions, however, are subtle rather than gross." These excerpts may be read to indicate that a statute levying punishments grossly disproportionate to the offenses would be unconstitutional. Moreover, the majority took into consideration statutes of other states, perhaps indicating that the four-tier proportionality analysis still lives.

The puzzling question confronting federal courts after Rummel was whether Rummel discarded or recognized the four-tier test. Although the Court appeared to use a proportionality test, it also registered strong disapproval of cases which have used such a test. The Washington Supreme Court and the Fourth Circuit Court of Appeals were two courts which previously used the proportionality test to hold statutes violative of the Eighth Amendment. A stern and pointed reminder was given to those two courts that the federal hierarchy requires lower court obedience to the Supreme Court. The response of federal and state courts to these mixed signals will be discussed later in this comment.

E. The Dissent: Judicial Respect for Legislative Enactments, Not Judicial Paralysis

Justice Powell, dissenting, came to three conclusions. He believed that: "[first] the penalty for a noncapital offense may be unconstitutionally disproportionate, [second] a mandatory life sentence is grossly disproportionate as applied to petitioner, and [third] the conclusion that this petitioner has suffered a violation of his Eighth Amendment rights is

95. 445 U.S. at 281.
96. Id. at 279.
97. Id.
98. Id. at 285. Justice Powell's dissent was joined by Brennan, Marshall and Stevens, J.J. Justice Stewart wrote a separate concurrence.
99. A fourth conclusion, not addressed in this comment, was that "the possibility of parole should not be considered in assessing the nature of the punishment." 445 U.S. at 287.
compatible with principles of judicial restraint and federalism."

Primary to the dissent's argument was the observation that the principle of proportional sentencing is deeply rooted in the common law. This precept is not, as the majority urged, confined to capital punishment cases; rather, the rationale of the American penal system is to mete out punishment that an individual deserves. The dissent noted that the following basic principles accepted by the Court in the death penalty cases were applicable in all criminal cases. First, a principle recognized in *Furman v. Georgia* was that the eighth amendment bars disproportionate punishment. Second, the scope of the eighth amendment is to be measured by "evolving standards of decency." Finally, a sentence may be excessive if it serves no acceptable social purpose or if it is grossly disproportionate to the seriousness of the crime.

Courts, the dissent noted, are commanded by the eighth amendment to enforce the constitutional limits of the cruel and unusual punishments clause. The dissent admitted that the risks inherent in discharging such responsibilities should make judges wary of using their subjective impressions. Such risks, however, do not bar judicial review of legislatively set sentences.

Finally, the dissent argued that a comparison of the Texas habitual offender statute with statutes of other states is compatible and consistent with federalism. A state's selection of a sentence will never be declared unconstitutional merely because the sentence is more stringent than other sentences created by other states for similar offenses. However, since objective criteria are needed, a review of sentences of other states will provide an objective view. This method of comparison helps a court assess contemporary values.

Unlike the majority, which acknowledged only that a statute may be unconstitutional on its face for a gross disparity between the severity of an offense committed and the harshness of the sentence inflicted, the dissent argued that the ap-

100. 445 U.S. at 286-87.
103. 445 U.S. at 293.
104. 445 U.S. at 299 n.19.
lication of a given sentence may be unconstitutionally disproportionate. The Texas habitual offender statute made no distinction between an habitual criminal who committed three murders and an habitual criminal who cashed three fraudulent checks.\textsuperscript{105}

III. FEDERAL COURT ANALYSIS

A. Pre-Hutto: Approach to Rummel

Perhaps the most innovative reading of \textit{Rummel} is from the Fifth Circuit Court of Appeals, the court which had refused en banc to issue a writ of habeas corpus. In \textit{Terrebonne v. Blackburn},\textsuperscript{106} a twenty-one year old heroin addict volunteered to purchase a heroin bundle\textsuperscript{107} for undercover agents. Terrebonne was tried and convicted for distributing heroin. Under the Louisiana statute,\textsuperscript{108} persons convicted of the sale of narcotics receive a mandatory life sentence. The Fifth Circuit Court of Appeals explained that the Supreme Court in \textit{Rummel} did not state that the capital cases are of no impact to the review of noncapital punishments. It thus left intact the applicability of its holding in (a capital punishment case) that a punishment is unconstitutionally excessive 'if it (1) makes no measurable contributions 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 proportion to the severity of the crime.'\textsuperscript{109}

Crucial to the court's decision was its observation that the proportionality theme was recognized and approved by the Supreme Court in \textit{Rummel}.\textsuperscript{110}

\textsuperscript{105} Id. at 301-02. Ironically, the State of Texas has since reclassified Rummel's third offense, theft by false pretext, as a misdemeanor. \textit{Tex. Penal Code Ann. \S 31.03(d)(3)} (Vernon Supp. 1980).

\textsuperscript{106} 624 F.2d 1363 (5th Cir. 1980).

\textsuperscript{107} "A 'bundle' consists of approximately 24 packets, or individual doses, of heroin — a small amount." 624 F.2d at 1364 n.1.


\textsuperscript{109} 624 F.2d at 1367 (citing \textit{Coker v. Georgia}, 433 U.S. 584, 592 (1977)).

\textsuperscript{110} Id. at 1366-67.

Judge Johnson wrote a special concurring opinion. He argued that since the case had such compelling facts it should be remanded; however, he disagreed with the
Terrebonne was soon rewritten by another fifth circuit opinion, Francioni v. Wainwright. Francioni, a Miami Beach police officer with twenty years of service, was convicted of aggravated assault of another police officer and the use of a firearm in the commission of a felony. When Francioni was stopped by a plainclothes detective who was driving an unmarked police car, he pointed a loaded revolver at the detective and threatened to kill him. In rejecting Francioni's claim that his three year sentence was disproportionate to the offense, the court recalled that

In Terrebonne v. Blackburn, we examined the Supreme Court's opinion in Rummel and concluded that, although the Court affirmed our decision to deny Rummel relief, it nevertheless rejected our underlying analysis. Rummel, as interpreted in Terrebonne, essentially limits our inquiry to whether the sentence imposed for the offense involved serves a substantial state interest. Terrebonne was also given limited credence by the Ninth Circuit Court of Appeals on the ground that Terrebonne was sentenced under a mandatory sentence and not a discretionary provision. In United States v. Valenzuela, Valenzuela was convicted of nine drug related offenses. Under 21 U.S.C. § 848, life sentence was a discretionary sentence exercised by the district court after it determined that Valenzuela operated a long term, large scale, highly profitable drug operation. This organization was responsible for distributing large quantities of heroin to a nationwide network of customers. Valenzuela's criminal activities, the court reflected, were substantially more serious than Terrebonne's.

majority's approval of the Hart proportionality test.
I write separately because I have difficulty with that part of the majority's opinion that states Rummel 'endorses' the use of proportionality analysis in considering non-capital Eighth Amendment claims and that Rummel leaves 'intact' the particular mode of proportionality analysis adopted by the Fifth Circuit in its decision in Rummel en banc.

I read the Supreme Court opinion to provide that, although proportionality analysis may be appropriate in extremely egregious situations, courts should be extremely reluctant to use it.

Id. at 1371 (Johnson, J., specially concurring) (citations omitted).
112. Id. (citations omitted).
113. United States v. Valenzuela, 646 F.2d 352, 354 n.1 (9th Cir. 1980).
114. Id.
Other federal courts interpreted *Rummel* as discarding the proportionality analysis. In *Chapman v. Pickett*,\(^{115}\) Chapman was imprisoned in a federal penitentiary. He refused to perform a work assignment and the disciplinary board chastised Chapman by placing him in a segregation unit for an indeterminate term. Nine months later, he was released into the general prison population. The Illinois District Court rejected petitioner's claim that he was subjected to cruel and unusual punishment:

This court reads *Rummel* as disapproving the application of disproportionality tests in cases arising under the Eighth Amendment except in capital or other factually unique cases. As the court found in *Rummel*, the judiciary is ill-equipped to make any kind of objective constitutional distinction between one term of years and a shorter or longer sentence.\(^{116}\)

**B. Hutto v Davis: An Expansion of Rummel?**

The federal courts' confusion after *Rummel* was announced forced the Supreme Court to issue an explicit rejection of the four-tier proportionality test. In *Hutto v. Davis*,\(^{117}\) in a terse per curiam opinion,\(^{118}\) the Court severely reprimanded the Fourth Circuit Court of Appeals for ignoring the controlling precedent of *Rummel* and for improperly intruding into the legislative decision making process.\(^{119}\)

The facts of *Hutto v. Davis* are straightforward; the judi-

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116. Id. at 974. A Sixth Circuit Court of Appeals case, *Hayes v. Bordenkircher*, 621 F.2d 846, 849-50 (6th Cir. 1980), involved a court which reluctantly and grudgingly followed *Rummel* and upheld petitioner's life sentence. The court ironically noted that “had Mr. Hayes waited to better the forged instrument until after Kentucky modernized its recidivist statute, he would not now be faced with the mandatory life sentence.” *Id.* at 850. Nevertheless, the court felt bound by its reading of the Supreme Court opinion: “Justice Rehnquist concluded that American citizens do not have an Eighth Amendment constitutional right to have punishment proportionate to the severity of the crime. *Rummel* appears to preclude invoking the disproportionality principle as violative of the Eighth Amendment except in capital punishment and ‘unique of actual circumstances.’” *Id.* at 848-49 (emphasis added).
117. 50 U.S.L.W 3540 (1982).
119. 50 U.S.L.W 3540 (1982).
cial logistics which engulfed the case are complex. Eads and Davis met in prison. During Eads' confinement, his wife became a drug user. Eads became concerned about the effect of his wife's "habit" on their young child and he agreed to help the police expose and arrest drug suppliers in the community. Eads then identified Davis as a local drug dealer. A $75 sale of three ounces of marijuana was transacted between Davis and Eads. Davis also provided Eads with pills containing traces of LSD. Several days later, the police raided Davis' home and seized nine ounces of marijuana, two scales and various drug paraphernalia. Virginia law at the time of Davis' trial allowed fines of up to $25,000 and prison terms ranging from four to forty years for each count of possessing, selling or manufacturing marijuana. Davis was convicted on both counts and received a $10,000 fine and a total prison term of forty years, twenty years for each offense. Davis sought habeas corpus relief in the district court by arguing that forty years imprisonment was a punishment grossly disproportionate to the crime of possessing nine ounces of marijuana. The district court analyzed Davis' plight under the familiar four-tier proportionality test and concluded that the sentence violated the eighth amendment prohibition against cruel and unusual punishment.

A panel of the United States Court of Appeals for the Fourth Circuit reversed on the ground that the sentence imposed within parameters set by the legislature was not, on its face, cruel and unusual punishment. Sitting en banc, the appellate court reconsidered the case and affirmed the district court's grant of relief. After the United States Supreme Court remanded the case in light of Rummel, a majority of the appeals court perfunctorily affirmed the district court's approval of habeas corpus relief.

120. Id.
121. See supra note 8 and accompanying text.
123. Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978).
124. 601 F.2d 153 (4th Cir. 1979).
126. 646 F.2d 123 (4th Cir. 1981).
The Supreme Court again reviewed Davis’ sentence and reversed the appeals court decision.\(^1\) The *Davis* Court reaffirmed the distinction between death penalty cases and those cases which involved sentences which varied according to the duration of term imposed on the defendant.\(^2\) The Court reiterated the principle of legislative power: “The length of the sentence actually imposed is purely a matter of legislative prerogative.”\(^3\) While the *Rummel* Court implied that courts should no longer use the four-tier test in determining whether a sentence was proportionate to the crime, the *Davis* Court expressly rejected the four-tier test as an unacceptable judicial usurpation of legislative power.\(^4\)

Finally, almost parenthetically, the Court reflected that successful challenges to a sentence set within legislative limits should be “exceedingly rare.”\(^5\) For example, the judiciary could, and should, intervene when a sentence is shocking to the standards of the day and grossly disproportionate on its face. The per curiam opinion conceded, as the majority did in *Rummel*, that a life sentence meted out for overtime parking violated the proportionality principle.

In an acidulous attack on the per curiam opinion,\(^6\) the dissent\(^7\) berated the majority for improperly expanding the holding of *Rummel* without fully studying or discussing the case at hand. The dissent primarily argued that *Rummel* stood on a narrow ground and the majority was now expanding it without precedent and without a logical transition. *Rummel*, the dissent argued, held that “in the context of Texas’ habitual offender statute, the imposition of a life sentence on Rummel served the legitimate state interests of deterring recidivism and of segregating habitual offenders ‘from

\(^{127.}\) 50 U.S.L.W. 3540 (1982).
\(^{128.}\) Rummel v. Estelle, 445 U.S. at 274.
\(^{129.}\) 50 U.S.L.W 3540 (1982).
\(^{130.}\) Id.
\(^{131.}\) Id.
\(^{132.}\) Id.
\(^{133.}\) Justice Powell reluctantly concurred. He pointed out that the Virginia State Legislature in 1979 reduced the maximum penalty for the offenses in question to 10 years on each count. Va. Code § 18.2-246.1(A)(2), § 18.2-10(E). Also, the general lack of uniformity in sentencing for marijuana offenses causes inequities in the criminal justice system. Id. at 1340-41.
\(^{133.}\) Id. at 3541-43.
the rest of society for an extended period of time.’”134 Since Rummel was a narrow decision, the dissent explained, the Rummel Court did not determine whether a nonrecidivist statute offended the eighth amendment proportionality principle.135 As support for the proposition that Rummel approved of the proportionality principle, the dissent noted the Rummel majority’s reference to the egregious illustration of a life sentence imposed for overnight parking.136 Finally, the dissent criticized the per curiam opinion for failing to demonstrate why this case was not one of those “extremely rare” proportionality cases which demanded a determination of passing constitutional muster.137

The dissent then offered a mini-analysis for use in determining whether a case requires a proportionality inquiry. First, the dissent compared Davis’ forty years sentence with punishments handed out for comparable drug offenses in Virginia. The average sentence for possessing, selling or manufacturing marijuana in Virginia at the time of Davis’ indictment was three years and two months.138 The disparity was gross, not subtle. Second, the dissent pointed out that even the district attorney who had prosecuted the case conceded that the sentence given to Davis, in comparison with sentences in Virginia for comparable crimes, was “grossly unjust.”139 Finally, the Virginia legislature had subsequently amended the marijuana penalties and reduced the maximum sentence to ten years for each count of marijuana possession, manufacturing or sales.140 Under the new laws, Davis could be sentenced to a maximum of twenty years, not forty.

The factors raised by the dissent are, in fact, indicia of the mores of society, “the evolving standards of decency that mark the progress of a maturing society.”141 Thus, the dissent and the majority disagreed on what were the mores of contemporary society. The majority opined that the federal judi-

134. Id. at 3542.
135. Id.
136. Id.
137. Id. at 3542-43.
138. Id. at 3542.
139. Id.
140. Id.
ciary should bow to state legislatures; the dissent implicitly acknowledged that society values just sentencing.

The outrage expressed by the dissent obscured crucial problems raised by the per curiam opinion. The dissent did not emphasize the Court's radical alteration of a concept implicit in the American criminal justice system — proportionality and just punishment.\textsuperscript{142}

By primarily arguing that the holding of \textit{Rummel} was narrow and originally confined to habitual offender sentences, the dissent missed the opportunity to probe the underpinnings of \textit{Rummel} and \textit{Davis}. The majority in \textit{Rummel} and the \textit{Davis} per curiam indicated that it was permissible for the judiciary to rule in extreme situations, as the hypothetical life sentence for an overnight parking ticket. This hypothetical indicates that \textit{Rummel} indeed applies not only to habitual offender cases, but to all nondeath penalty felony cases. Conversely, this hypothetical may indicate that the judiciary may not intervene if a statute proscribing punishment is not grossly disproportionate on its face.

Impermissible judicial subjectivity would arise, the majority contended, when a court determines that the facts of a given case warrant construing the legislatively mandated punishment to be inappropriate to the crime. The critical issue left untouched in \textit{Hutto v. Davis} is the proper role of the judiciary to determine the constitutionality of a sentence when the statute is applied to the facts of a specific case.

\textbf{IV.  STATE COURT ANALYSIS}

As a result of \textit{Hutto v. Davis}, states will probably gain increased attention in the area of eighth amendment proportionality challenges. Federal courts generally must defer to state legislatures, and attorneys who are representing criminal defendants may discover state courts are more willing listeners to such eighth amendment arguments. An examination of state court responses to \textit{Rummel} indicates a varied reaction: some courts perfunctorily cite to \textit{Rummel} and disclaim proportionality attacks,\textsuperscript{143} some have expanded on the

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{142}] See supra note 20.
\item[\textsuperscript{143}] See Underhill v. State, No. 181517 (Ind. filed Dec. 3, 1981); Shepler v. State, 412 N.E.2d 62 (Ind. 1980) (narrow reading of \textit{Rummel}).
\end{enumerate}
\end{footnotesize}
Court's language, and others have chosen not to follow the Court. Washington and West Virginia are two states which have adopted broader state constitutional standards than those afforded under the United States Constitution. In State v. Fain, the Washington Court held that Fain's life sentence was unconstitutionally disproportionate under the Washington Constitution. The defendant, Fain, was convicted as an habitual offender whose crimes totaled $470. In 1960, Fain wrote a check for $30 on a bank account with insufficient funds. He was charged with grand larceny and was sentenced to two years probation. In 1965, Fain pled guilty to a California forgery charge. He had taken blank checks from a friend and signed the friend's name to a $30 check payable to a service station. He served one and one-half years in a California prison. In 1977, the State of Washington charged him with second degree theft. Between December, 1976 and May, 1977, the defendant had written twenty-four checks with a total value of $408 payable to different businesses. Unfortunately, the checks were drawn on an account opened in December, 1976 and closed in January, 1977. The Supreme Court of Washington, sitting en banc, reversed the state court of appeals. Fain's challenge to the life sentence rested on a clause in the Washington Constitution, almost identical to the federal Constitution. The pertinent clause of the state constitution provided: "Excessive bail should not be required, excessive fine imposed, nor cruel punishments inflicted." The Washington Supreme Court noted the absence of the word "unusual" in the state constitution and indicated that the framers of the state constitution obviously did not have the same legislative intent as did the framers of the federal Con-

146. See Oregon v. Hass, 420 U.S. 714, 719 (1975) (providing that a state constitution may be construed to encompass a higher level of protection than that afforded by the federal constitution).
147. 94 Wash. 2d 387, 617 P.2d 720 (1980).
Defendant Fain’s sentence was then analyzed under a three-tier test, and the punishment was deemed constitutionally impermissible. The case was remanded for resentencing.

Dissenting Justice Rosselini complained that the majority was using specious reasoning. The dissent observed that the majority simply rejected the reasoning of the United States Supreme Court as unpersuasive.

The West Virginia Supreme Court used a different approach in Wanstreet v. Bordenkircher, a case which revitalized the “discredited” four-tier proportionality test. Although the court acknowledged that Rummel had refused to follow this test, the court relied on the right of a state “to establish under its own constitution higher standards of protection than are afforded under the United States Constitution.” In 1951, Wanstreet was indicted for forging a check valued at $18.62. Four years later he was convicted of arson for burning a barn worth $490. In 1967, he was convicted of forging a check with a face value of $43.00. The West Virginia recidivist statute triggered a mandatory life sentence upon his final conviction.

In addition to analyzing Wanstreet’s life sentence under the four-factor test, the court also considered the nature of the final offense which triggered the recidivist sentence and the cumulative character of the prior offenses. This analysis prompted the conclusion that “the imposition of a life recidivist sentence for the relator’s third felony of forging a $43.00 check was unconstitutional.”

149. “As we have stated in previous decisions, we may interpret the Washington Constitution as more protective than its federal counterpart Especially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation.” 617 P.2d at 723.

150. The court abstained from using the second tier of the traditional four-tier test, noting that determining legislative purpose is too speculative to be a determining factor. Id.


152. Id. at 214.

153. The four-factor test analyzes: “(1) [T]he nature of the offense; (2) the legislative purpose behind the punishment; (3) a comparison of the punishment with what would be inflicted in other jurisdictions; and (4) a comparison of punishment with other related offenses within the same jurisdiction.” Id. at 210.

154. Id.
check violates our constitutional proportionality principle.  

V CONCLUSION

It is possible to argue that the majority of the Court has rewritten the history of the eighth amendment by classifying and excluding prior decisions as "capital punishment" cases and as "peculiar facts" cases. Under this theory, the Court in Rummel v. Estelle erased a substantive body of eighth amendment principles and left in its wake a void. Hutto v. Davis further compounded the problem.

This view is tenable when one considers all of the historical evidence: colonial debates ratifying the eighth amendment, private letters written by notable colonial thinkers, and the apparent acceptance on the part of the drafters of the Bill of Rights that punishments should be just and proportionate. Some suggest that an historical reading of the eighth amendment indicates an inherent proportionality principle. Also, an historical interpretation may validate judicial activism — the judiciary standing as a vigilant check on legislative abuses. Conversely, perhaps legal scholars in the future will argue that Rummel v. Estelle and Hutto v. Davis were consistent with a teleological reading of eighth amendment principles, that a punishment must be judged according to the mores of contemporary society. The new federalism which has been spoken of in recent months indicates a strong shift toward states' rights — though what these rights are remains largely undefined. If the new federalism represents contemporary values, then by abdicating federal judicial review to the wisdom of state legislatures the Court has arguably followed the eighth amendment precept of responding to current mores.

155. Id. at 214.
157. See supra note 20.
160. State of the Union Speech by President Reagan (January 26, 1982).
However one views the Court's reluctance to provide a coherent analysis of proportionality, it is clear that the state courts provide fecund ground for raising proportionality challenges. In order to be successful, practitioners raising such challenges must persuade state courts that the new federalism means state autonomy, not judicial self-restraint on the state level. Furthermore, the concept of fair punishment is so grounded in American custom that it cannot be discarded as an historical oddity

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