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Recidivism and the Eighth Amendment—Is the Habitual Offender Protected Against Excessive Punishment?

*Rummel v. Estelle**

I. Introduction

In its 190-year history of construing the “cruel and unusual punishment” clause of the eighth amendment, the Supreme Court has rarely focused on excessively long sentences. Consequently, the circuits are in conflict as to the proper standard of review in assessing eighth amendment challenges.¹ In particular, disagreement exists on whether parole probability should be considered when analyzing the severity of a sentence. Additionally, with respect to recidivist statutes,² there is disagreement as to how germane the nature of the individual underlying offenses is when judging the constitutionality of the penalty imposed.

In *Rummel v. Estelle*,³ the Fifth Circuit faced the issue whether Texas’ recidivist statute “as applied” to William Rummel was violative of the eighth amendment’s prohibition against excessive punishments. The contention that punishment might be so excessive as to constitute cruel and unusual punishment was first recognized by the Supreme Court in *Weems v. United States*.⁴ In *Weems*, the Court found that a sentence of fifteen years at hard labor for falsifying a government document was unconstitutionally excessive and therefore violative of the eighth amendment. Since that decision the Court has given little definitive guidance as to what punishments might come under the *Weems* prohibition. The facts of *Rummel*, however, present the Court with an excellent opportunity to set forth some definitive guidance in this area. Notwithstanding the need for Supreme Court guidance, the Fifth Circuit’s decision in *Rummel* warrants further analysis in light of existing case law and the demonstrably inequitable situation that the court’s decision presents.

II. Statement of the Case

In early 1973 William Rummel was mandatorily sentenced to life imprisonment pursuant to the Texas habitual offender statute which was then applicable.⁵ This statute provided that anyone three times convicted of a felony

* 587 F.2d 651 (5th Cir. 1978), cert. granted, 47 U.S.L.W. 3760 (1979) (No. 78-6386).

1 See, e.g., *id.*, in which the probability of parole was considered an element of a proportionality analysis; *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), cert. denied, 99 S. Ct. 874 (1979). *But see* Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 983 (1974), which implicitly rejected the application of parole in proportionality analysis.

2 See text accompanying notes 60-70 *infra*.

3 587 F.2d 651 (5th Cir. 1978), cert. granted, 47 U.S.L.W. 3760 (1979) (No. 78-6386).

4 217 U.S. 349 (1910).

5 TEX. PENAL CODE ANN. art. 63 (Vernon 1925) 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.” With slight rewording the recodified Texas Penal Code preserves the provisions of article 63 in TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974).

less than a capital offense shall be imprisoned for life. In addition to his 1973 conviction for obtaining \$120.75 under false pretenses, Rummel had been convicted in 1969 for passing a forged instrument with a face value of \$28.36 and in 1964 for presenting a credit card with the intent to defraud of approximately \$80.00.⁶

Rummel's conviction was affirmed by the Texas Court of Criminal Appeals.⁷ Soon thereafter he applied for post-conviction relief in state court, claiming that his life sentence violated the prohibition against cruel and unusual punishment provided by the eighth amendment of the United States Constitution.⁸ Rummel's application was denied without a hearing, and thereafter he petitioned the federal district court for a writ of habeas corpus. The petition was denied. This denial was appealed by Rummel to the United States Court of Appeals for the Fifth Circuit.

In March of 1978 a panel majority found that article 63,⁹ although facially valid, provided a punishment which as applied to Rummel was so "grossly disproportionate" to the underlying crimes as to constitute cruel and unusual punishment.¹⁰ One month later, the court sitting *en banc* reheard the case, and vacated the panel opinion.

The court, by an eight-six majority, found no cruel and unusual punishment in Rummel's life sentence.¹¹ Although it adopted a "proportionality test"¹² similar to the one used by the panel, the *en banc* opinion reached a contrary result because of its application of two self-imposed criteria. First, the *en banc* majority asserted that a "punishment must be viewed as it occurs in the real world"¹³ and therefore concluded that the probability of parole must be considered in evaluating the length of Rummel's sentence.¹⁴ Second, the court found fault with the panel because it failed to uphold the legislatively prescribed punishment when there was "any rational basis for so doing."¹⁵

III. Narrow Split

A. *En Banc Majority*

Since we have concluded that some criminal sentences can be so disproportionate as to amount to cruel and unusual punishment, the question then becomes one of the proper standard to apply.

First, we hold that a punishment must be viewed as it occurs in the real world. We will consider the system as it actually works and we will not pass on academic possibilities. Second, we will at all times be mindful that it is the legislature that selects the range of punishments and it is our duty to uphold

6 Note that under the new Texas Penal Code, theft of \$120 by false pretext constitutes a Class A misdemeanor. TEX. PENAL CODE ANN. §§ 31.03(b)(1), .03(d)(3) (Vernon 1974 and Supp. 1977).

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

8 U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

9 See note 5 *supra*.

10 Rummel v. Estelle, 563 F.2d 1193 (5th Cir. 1978).

11 Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978) (*en banc*).

12 See text accompanying notes 46-59 *infra*.

13 587 F.2d at 655.

14 *Id.* at 658.

15 *Id.* at 655.

the legislature if there is any rational basis for so doing. We will remember that the petitioner challenging his sentence carries a heavy burden, *Gregg v. Georgia*, and the petitioner does not discharge this burden by merely showing that he is treated more harshly than he would be in another state or by positing a more rational system than the one adopted by the legislature.¹⁶

The court's first mandate, "that a punishment must be viewed as it occurs in the real world,"¹⁷ led it to conclude that the probability of parole should be considered when determining the length of Rummel's sentence.¹⁸ In support of this proposition the court cited two previous Fifth Circuit decisions¹⁹ and gave four practical justifications. First, to ignore the Texas good-time system would be inconsistent with the premise of viewing the system realistically.²⁰ Second, there is no such thing as a life sentence without the possibility of parole.²¹ Third, it cannot be assumed, even though good-time credits are not vested rights, that the state of Texas will act in a wrongful or unconstitutional manner in administering its good-time scheme.²² Finally, reasoned authority in other jurisdictions has considered the parole probability in reviewing sentences under the eighth amendment.²³

Under the Texas good-time credit system a person sentenced to life imprisonment can be eligible for parole in as few as twelve years. The *en banc* majority, therefore, argued that twelve years, not the maximum possible penalty of life imprisonment, should be the focus of any examination of the proportionality of Rummel's sentence. Twelve years reasoned the court is not a "grossly disproportionate" penalty for a habitual offender such as Rummel.

Applying their second premise, that a legislatively prescribed punishment should be upheld whenever "there is any rational basis for so doing," the majority adopted a contrary position to that of the panel. The panel, in evaluating the legislative prescription, had applied the so-called "lack of necessity" test, adopted from Justice Brennan's concurring opinion in *Furman v. Georgia*:²⁴ "Here the inquiry seeks to determine whether a *significantly* less severe punishment could achieve the purposes for which the challenged punishment is inflicted."²⁵

The panel concluded that Rummel's life sentence was disproportionate in light of the nonviolent nature of his underlying offenses.²⁶ The *en banc* majority, however, chastised the panel, noting "that it failed to apply the first principle of our analysis—that *every inference* is to be made in favor of the selected punishment and that it erred by looking to the underlying offenses to establish the

16 *Id.* (citations omitted).

17 *Id.*

18 Under Texas good-time credit system Rummel would be eligible for parole in 12 years, or considering his trusty status, even earlier. *Id.* at 659.

19 *Brown v. Wainwright*, 574 F.2d 200, 201 (5th Cir.), *substituted opinion*, 576 F.2d 1148 (5th Cir. 1978); *Rodriguez v. Estelle*, 536 F.2d 1096, 1097 (5th Cir. 1976).

20 587 F.2d at 657.

21 *Id.*

22 *Id.*

23 *Id.* The majority cites *Carmona v. Ward*, 576 F.2d 405, 413-14 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 874 (1979), as support for the proposition that parole probability should be considered.

24 408 U.S. 238 (1972).

25 568 F.2d at 1198 (emphasis added).

26 *Id.* at 1197-98.

asserted triviality of the offenses.’²⁷ Instead, the majority adopted the position taken by the panel dissent which had concluded that “Rummel was not sentenced to life imprisonment for stealing \$230.00; the life sentence resulted from his having committed three separate and distinct felonies under the laws of Texas.”²⁸

Having set forth these guidelines, the court undertook a proportionality analysis in which it considered two factors, the nature of Rummel’s offense and the punishment accorded habitual offenders in other jurisdictions. The court concluded that, given the probability of parole, Rummel’s sentence was not so “grossly disproportionate” as to constitute a violation of the cruel and unusual punishment clause of the eighth amendment.

B. En Banc Dissent

The dissent adopted the views of the panel majority and emphatically rejected the majority’s decision to consider the probability of parole. Emphasizing the fortuity of parole, the dissent noted: “If parole ever comes it comes at the sheer grace of the State. . . . If Rummel has a constitutional right to interdict his prison term, this court must declare that right’s existence without regard to the possibility that Texas, by an act of executive grace, may grant him parole.”²⁹ The dissent accused the majority of distorting the issue by using “good-time credits” and parole interchangeably³⁰ when in fact the two systems differ as to several key issues. Because he is serving a life sentence, Rummel cannot have his sentence reduced by good-time credits but can only be *eligible* for parole at an earlier date. The dissent emphasized Rummel’s lack of legal entitlement to parole which “is a matter of executive grace which constitutional due process does not protect.”³¹ It concluded that “since parole is totally an act of grace by the state, there is no legal basis for judicial intervention in the *merits* of the parole decision.”³² Additionally, a life sentence would not be reduced by parole. Therefore, Rummel, even as a parolee, will be faced with the prospect of a lifetime of denial of many of the rights and liberties which are possessed by nonparoled ex-prisoners.³³ Arguing by analogy, the dissent cited *Lindsey v. Washington*,³⁴ an *ex post facto* clause case, as evidence of the Supreme Court’s disapproval of considering parole possibilities.³⁵

The dissent’s basic premise is that in examining the validity of a sentence a court should consider the maximum possible length and disregard the possibility of incarceration being shortened by parole. Consequently, the dissent reasoned that life imprisonment *was* “grossly disproportionate” to Rummel’s crimes and therefore “as applied” to these circumstances was unconstitutionally excessive.

27 587 F.2d at 659 (emphasis added).

28 568 F.2d at 1201 (Thorneberry, J., dissenting). *Accord*, 587 F.2d at 659.

29 587 F.2d at 666 (Clark, J., dissenting).

30 *Id.*

31 *Id.*

32 *Id.* at 667 (emphasis added). Judge Clark emphasizes the inability of the judiciary to review anything more than parole procedures.

33 *Id.* at 669.

34 301 U.S. 397 (1937).

35 587 F.2d at 669-70 (Clark, J., dissenting).

The forthcoming analysis will demonstrate that the dissent provides the better solution, both in terms of precedent and reason.

IV. Critique

A. Historical Background—“Cruel and Unusual Punishment”

1. Inherently Excessive Penalties

The general intent of the framers of the eighth amendment was to proscribe punishments that were cruel and unusual in their mode.³⁶ Not surprisingly most Supreme Court opinions concerning this area of the law have focused on the method used to punish. In 1892 Mr. Justice Field, dissenting in *O'Neil v. Vermont*,³⁷ contended, however, that the prohibition against cruel and unusual punishments should be directed to “all punishments which by their *excessive length* or severity are greatly disproportionate to the offenses charged.”³⁸

Eighteen years later in *Weems v. United States*³⁹ the majority, although still contending that the main purpose of the eighth amendment was to prevent barbaric forms of punishment, incorporated the Field position, noting that it is a “precept of justice that punishment for crime should be graduated and proportioned to the offense.”⁴⁰ They believed that in drafting the Bill of Rights the framers *must* have been aware of the possibility of a more subtle cruelty.⁴¹ Consequently, for the past sixty-nine years courts have uniformly cited *Weems* for the proposition that excessive punishments are forbidden by the eighth amendment.⁴² The Supreme Court, however, since *Weems*, has set forth no specific guidelines as to what will constitute an “excessive” punishment.

Determining what constitutes “excessiveness” involves many complex problems and has spawned many learned proposals.⁴³ It is generally accepted that a punishment “grossly disproportionate” to the offense will be “excessive.”⁴⁴ Unfortunately, however, this attempted solution leaves open the question: When is punishment grossly disproportionate?

36 See Note, *Eighth Amendment Prohibits Excessively Long Sentences*, 44 *FORDHAM L. REV.* 637, 638 (1975). See generally Granucci, “Nor Cruel and Unusual Punishment Inflicted”: *The Original Meaning*, 57 *CAL. L. REV.* 839 (1969), for the view that this interpretation resulted from a misrepresentation of the intent of the English Bill of Rights.

37 144 U.S. 323 (1892).

38 *Id.* at 339-40 (Field, J., dissenting) (emphasis added).

39 217 U.S. 349 (1910).

40 *Id.* at 367.

41 *Id.* at 373. See also Note, *supra* note 36.

42 Some commentators feel that *Weems* was limited by the Court's decision in *Badders v. United States*, 240 U.S. 391 (1916). See Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine in the Supreme Court*, 16 *STAN. L. REV.* 996, 1008-09 (1964). However, a careful reading of *Badders* reveals the Court's disapproval merely to be with comparison as the sole basis for a claim of excessiveness. The principle set forth in *Weems* therefore is not tainted by *Badders*.

43 In *Trop v. Dulles*, 356 U.S. 86, 100 (1958), the Court found the standard to be the “dignity of man.” See also *Coker v. Georgia*, 433 U.S. 584 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 874 (1979); *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); *Rogers v. United States*, 304 F.2d 520 (5th Cir. 1962); *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921 (1972). See generally Note, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 *BUFFALO L. REV.* 783 (1975); Note, *Constitutional Law—Eighth Amendment—Appellate Sentence Review*, 1976 *WIS. L. REV.* 655.

44 See notes 46-47 *infra*.

In lieu of a Court-endorsed formula, most courts and commentators have looked to the high Court's capital punishment decisions⁴⁵ for guidelines to an effective constitutional analysis. The most widely accepted test has centered on a "proportionality analysis"⁴⁶ in which the court weighs several objective factors to determine whether the punishment is proportionate to the offense.⁴⁷

Courts have considered a wide range of objective criteria in applying the proportionality analysis.⁴⁸ Of these the panel majority adopted from *Hart v. Coiner*,⁴⁹ a case factually similar to *Rummel*, four of the most common: 1) consideration of the nature of the crimes for which the petitioner was convicted;⁵⁰ 2) consideration of the legislative objective in making the conduct a punishable offense;⁵¹ 3) comparison of the petitioner's sentence with the punishment prescribed for other crimes in the same jurisdiction which by their nature must be deemed to be more serious; and⁵² 4) comparison of the petitioner's sentence imposed in other jurisdictions for similar offenses.⁵³

In the course of any proportionality analysis, there is a presumption that the legislatively prescribed sentence is valid.⁵⁴ This presumption has varied in degree from upholding a penalty where there was "any rational basis for so doing"⁵⁵ to voiding the penalty if "a significantly less severe punishment could achieve the purposes for which the challenged punishment is inflicted."⁵⁶ Whatever the presumption, it is clear that legislative prescriptions remain subject to constitutional restraints.⁵⁷ As the Supreme Court stated in *Weems*:

We disclaim the right to assert a judgement against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the

45 See note 43 *supra*.

46 "[B]ecause of the broad scope of its language, *Furman* has been cited for the proposition that comparisons can be used to determine whether a particular punishment is cruel and unusual. In fact, however, justices have adopted the proportionality approach." 1976 Wis. L. Rev., *supra* note 43, at 661 (footnotes omitted). See also *Carmona v. Ward*, 99 S. Ct. 874 (1979) (cert. denial) (Marshall & Powell, JJ., dissenting).

47 "Few legal principles are more firmly rooted in the Bill of Rights and its common law antecedents than the requirement of proportionality between a crime and its punishment . . . [T]his Court has long recognized that the eighth amendment embodies a similar prohibition against disproportionate punishment." 99 S. Ct. at 876 (emphasis added).

48 See note 43 *supra*. See also *Downey v. Perini*, 518 F.2d 1288 (6th Cir.), *vacated on other grounds*, 423 U.S. 993 (1975); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); *People v. Broodie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d (1975). See generally Note, *supra* note 36; Note, *supra* note 42.

49 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). In *Hart* the Fourth Circuit held that a sentence imposed under a West Virginia recidivist statute was cruel and unusual based on length alone because it was grossly disproportionate to the crimes involved. The state court enhanced Hart's punishment for committing perjury at his son's murder trial to life imprisonment on the basis of a 1949 conviction for writing a \$50 check on insufficient funds and a 1955 conviction of interstate transportation of forged checks worth \$140. 568 F.2d at 1196.

50 568 F.2d at 1196.

51 *Id.* at 1197.

52 *Id.* at 1198.

53 *Id.*

54 Some courts have gone so far as to take the view that no sentence within the legislatively set limits could be considered cruel and unusual punishment. *Kirschgessner v. State*, 174 Md. 195, 198 A. 271 (1938); *McDonald v. Commonwealth*, 173 Mass. 322, 53 N.W. 874 (1899). See also Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. Rev. 846, 852 (1961). For a strong argument in favor of this theory, see Note, *Judicial Limitations on the Constitutional Protection Against Cruel and Unusual Punishment*, 1960 WASH. L.Q. 160, 169.

55 587 F.2d at 655.

56 483 F.2d at 141. *Accord*, 568 F.2d at 1197.

57 Although legislatures are empowered to enact laws, define offenses, and fix penalties without judicial interference, these powers are subject to constitutional limitations. Note, *Habitual Criminal Statute § 12.42(d)—Open Door to Disproportionate Sentences*, 29 BAYLOR L. REV. 629, 632 (1977).

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 discretion is invoked. Then the legislative power is brought to the judgement of a power superior to it for the instant.⁵⁸

Furthermore, cruel and unusual punishment is not a static concept but in the words of Chief Justice Warren, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁵⁹ Surely we have reached a level of maturity at which our "standard of decency" cannot tolerate life imprisonment being prescribed for the commission of three non-violent property crimes.

2. Recidivism and the Eighth Amendment

Recidivist statutes have been enacted in almost every jurisdiction⁶⁰ to provide enhanced penalties for the habitual criminal. "This approach to punishment may be based upon consideration of deterrence—more of a threat being seen as necessary to deter a person who has already demonstrated a tendency to violate the law—as well as a theory that stresses preventive isolation of the apparently incorrigible offender."⁶¹

Recidivist statutes brought before the Supreme Court have withstood constitutional challenges, founded on double jeopardy, the *ex post facto* clause, due process, equal protection, the privileges and immunities clause, and cruel and unusual punishment.⁶² Nonetheless, facial validity of a habitual offender statute does not preclude judicial review on an "unconstitutional as applied basis."⁶³ The court in *Hart* noted other areas where concededly valid statutes had been applied to a particular case and achieved unconstitutional results.⁶⁴ Like other punishments, the sentence prescribed by a recidivist statute may be disproportionate to the underlying offenses that gave rise to the habitual status.⁶⁵ This was the position taken by the Fourth Circuit in *Hart* and by the panel majority in *Rummel*. As a practical matter, there has been a general unwillingness on the part of courts to upset a legislatively prescribed punishment.⁶⁶ Nonetheless, the judicial branch cannot abdicate its constitutionally mandated duty of review.⁶⁷ Notwithstanding facial validity, the

58 217 U.S. at 378-79.

59 356 U.S. at 100-01.

60 Note, *supra* note 57, at 629.

61 Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 644 (1966).

62 *Spencer v. Texas*, 385 U.S. 554 (1976); *Oyler v. Boles*, 368 U.S. 448 (1961); *Gryger v. Burke*, 334 U.S. 728 (1947); *Graham v. West Virginia*, 224 U.S. 616 (1912); *McDonald v. Massachusetts*, 180 U.S. 311 (1901); *Moore v. Missouri*, 159 U.S. 673 (1895).

63 483 F.2d at 139. *See also* *Brown v. Estelle*, 544 F.2d 1244, 1245 (5th Cir. 1977); Note, *supra* note 57, at 630.

64 483 F.2d at 139, *citing* *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (speech and assembly); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (equal protection).

65 *See* Note, *supra* note 57, at 631.

66 *See* Comment, *Recidivist Statutes and the Eighth Amendment: A Disproportionality Analysis*, 1974 WASH. U. L.Q. 147, 149.

67 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

judiciary must determine whether the statute "as applied" poses an unconstitutional result.

It has been argued that excessiveness analysis is particularly applicable in "those jurisdictions that provide for a mandatory life sentence, precluding any judicial discretion in considering what punishment is necessary in a particular case to effectuate the law's purposes."⁶⁸ Presently, only three states⁶⁹ provide a mandatory life sentence for a three-time felon. Two of these state statutes have probably been limited by judicial decree⁷⁰ and the third state, Texas, provides the setting for *Rummel v. Estelle*.

B. Analysis

The *en banc* and panel opinions reach contrary results for two reasons. First, they have different perceptions as to what constitutes reality. Is it realistic to consider parole or unrealistic to assume that you can? Second, the two opinions evince a difference in the degree of presumptive validity they are willing to give a legislatively created punishment.

The framework within which the majority structured its opinion was sufficient for it to have reached the proper conclusion. The majority's failure, however, resulted from its intent to uphold the legislative mandate at all possible costs.

1. The Realities of Parole

Viewing the system realistically is a commendable goal. Indeed, it is realistic to observe that many prisoners receive parole. On the other hand, it is impractical to assume that the probability of parole can easily be judged by a court of law. Due to the speculative nature of parole, the judiciary will be forced to get more deeply involved so as to enable it to make an effective evaluation of a particular petitioner's chances for parole. A basic policy of non-confrontation with other branches underlies the majority's mandate to uphold the legislature whenever there is a "rational basis" for so doing. Increased judicial scrutiny of the parole process, however, will ultimately lead to the interference with executive and legislative functions which the majority seeks to avoid.

The majority assumes that serving twelve years and being paroled is equivalent to serving twelve years and being released. Such an assumption is dangerously misleading. Even if Rummel is paroled in twelve years, he will enjoy fewer rights and liberties than the man who served his time and was released.⁷¹ Foremost among these is the possibility of parole revocation. Parole

⁶⁸ Note, *supra* note 61, at 645.

⁶⁹ Three other states (Colorado, New Mexico, and Wyoming) provide a mandatory life term for a four-time offender. COLO. REV. STAT. § 16-13-101 (1973); N.M. STAT. ANN. § 40A-29-5 (1963); WYO. STAT. § 6-1 (1977).

⁷⁰ WASH. REV. CODE. § 9.92.090 (1977) (perhaps limited by *State v. Lee*, 87 Wash. 2d 932, 558 P.2d 236, 240 n.4 (1976) (*en banc*); W. VA. CODE § 61-11-18 (1973) (limited by *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974)).

⁷¹ See generally Comment, *Rights of the Convicted Felon on Parole*, 13 U. RICH. L. REV. 367 (1979).

does not reduce a parolee's sentence. Therefore, if parole is revoked the parolee will return to prison for the remainder of his sentence.⁷²

The foregoing reasons, and others cited by the dissent,⁷³ have served as the foundation upon which most courts have adopted the better rule,⁷⁴ namely, judging punishments by the maximum penalty and omitting the probability of parole from the evaluation. Indeed, in their dissent to a denial of writ of certiorari in *Carmona v. Ward*, Justices Powell and Marshall termed the approach "analytically unsatisfactory and inconsistent with the position taken by other courts that have considered the constitutionality of maximum life sentences."⁷⁵ Furthermore, the *Carmona* dissent noted that "[t]he majority's argument for testing the constitutionality of a lesser sentence than defendant's maximum exposure is not analytically very different from saying that the defendant's sentence in *Coker v. Georgia*, should not have been considered to be the death penalty because of the possibility of executive pardon."⁷⁶

Similarly, the other cases cited as authority by the majority are less than convincing on the parole issue. In *Brown v. Wainwright*⁷⁷ the court had second thoughts about the viability of parole probability as a determining factor. In its *per curiam* opinion of May 30, 1978, the *Brown* court cited the probability of parole as a consideration for denying the petitioner's eighth amendment claim.⁷⁸ Fifty-two days later, however, the court withdrew its opinion and judgment and substituted an opinion which based the eighth amendment denial solely on the violent nature of Brown's crimes,⁷⁹ declining to mention the possibility of parole. Additionally, the majority's other authority, *Rodriguez v. Estelle*,⁸⁰ merely notes the parole issue in upholding the petitioner's sentence for the sale of heroin.⁸¹

Noting that a prisoner will probably be paroled is a pragmatic assumption in light of modern-day penal experience. A prisoner, however, has no constitutional right to parole and if paroled his rights as a parolee will be diminished vis-a-vis released prisoners not on parole. Further, the judiciary lacks the capacity to evaluate this probability without invading the provinces of co-equal branches of government. For these reasons the probability of parole should not be considered and the courts should continue to evaluate the maximum possible penalty.

2. The "Rational Basis" Requirement

The *en banc* majority premised its analysis on the duty of the court to

72 587 F.2d at 669 (Clark, J., dissenting).

73 *Id.* at 665-71 (dissenting opinion).

74 See note 1 *supra*.

75 *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 874, 878 (1979) (Powell & Marshall, JJ., dissenting).

76 576 F.2d at 420 (Oakes, J., dissenting).

77 574 F.2d 200 (5th Cir.), *substituted opinion*, 576 F.2d 1148 (5th Cir. 1978).

78 574 F.2d at 201.

79 576 F.2d at 1149.

80 536 F.2d 1096 (5th Cir. 1976).

81 Moreover, under Texas law, any prisoner is eligible for parole upon receiving credit for 20 years imprisonment or after serving one third of his sentence, whichever is less. "Under the circumstances of this case we find that the sentence imposed does not give rise to a constitutional violation." *Id.* at 1097 (emphasis added).

uphold a legislatively prescribed crime whenever there was any "rational basis" for so doing. In contrast, as part of its proportionality analysis the panel majority had sought to determine if a "significantly less severe" punishment would have accomplished the legislative objective implicit in the penalty. Theoretically, the difference between the positions is one of perspective. An advocate of the "rational basis" test will assume the validity of the sentence and focus his attention on the legislative purpose. The "significantly less severe" punishment test, however, will assume a valid legislative purpose and center its attention on whether that purpose can be attained through a significantly less severe penalty. In reality, these perspectives are concrete presumptions which when applied to cases cease to be a means of viewing a situation and become a burden for one side or the other to overcome.

The majority need not have employed a "lack of necessity"⁸² test to find Rummel's sentence unconstitutionally excessive. Their failure stems from their inability to find a "rational basis" for upholding article 63 *as it applies to Rummel and his specific crimes*. Few would contend that there is no rational legislative purpose embedded in article 63. However, this does not justify article 63's prescribed punishment as applied to Rummel. There can be no "rational basis" for giving Rummel the same sentence and parole eligibility timetable as a person who had been separately convicted of manslaughter, rape, and arson. Indeed, under the majority's analysis Rummel would have been less culpable if he had forcibly stolen \$300,000.00 once rather than having committed three separate nonviolent property crimes comprising an aggregate of \$229.11.

In the general purposes section of its revised code, Texas sets forth an objective that indicates a legislative intent that Rummel not be punished the same as a violent habitual offender. The revised penal code provides that "[t]he general purposes of this code are . . . to achieve the following objectives: . . . (3) to prescribe penalties that are proportionate to the seriousness of offenses and that permit recognition of differences in rehabilitation possibilities among individual offenders."⁸³ Thus, the revised statute codifies the concept of proportionality.

Indispensable to any proportionality analysis is a comparison of the penalty with the nature of the underlying offenses. "The majority agrees that looking to the nature of the offense is an inexorable part of proportionality analysis."⁸⁴ The majority finds fault with the panel, however, because "it failed to apply the first principle of our analysis—that every inference is to be made in favor of the selected punishment and that it erred by looking to the underlying offenses to establish the asserted triviality of the offenses."⁸⁵ The effect of the majority's reasoning is to ignore the nature of the underlying offenses. Indeed, under their rationale it would only be proper to look to the underlying offenses if it provided support for the legislative prescription.

The majority avoids discussion of Rummel's crimes, but instead notes

⁸² See notes 24-25 *supra*.

⁸³ TEX. PENAL CODE ANN. § 1.02(3) (Vernon 1974). Although the revised code is not applicable to article 63, it is safe to assume that the attitude of the legislature did not sway substantially from the time Rummel was convicted in 1973 until the new code became law in 1974.

⁸⁴ 587 F.2d at 659.

⁸⁵ *Id.*

that his "sentence resulted from his status as a habitual criminal."⁸⁶ Significantly, throughout its opinion the majority treats Rummel's "status" as if it were itself a separate offense. Habitual offender status, however, is not a separate offense but is merely grounds for enhanced punishment.⁸⁷

Failure to evaluate the nature of Rummel's underlying offenses renders the rest of the proportionality test meaningless. The majority's analysis of penalties given under other state habitual offender statutes provides no guidance whatsoever in determining Rummel's individual claim. Rummel does not contend any facial invalidity in the statute yet the majority's analysis goes only that deep. In effect the majority treats Rummel and all other habitual offenders alike and seeks only to determine if Texas habitual offenders as a class are disproportionately punished when compared to the punishment given their counterparts in other states.

The Fifth Circuit's efforts to apply the "any rational basis" test did not result in error. Rather, the error arises because of the circuit court's failure to recognize that no "rational basis" exists for punishing Rummel the same as violent three-time offenders.

V. Conclusion

The Fifth Circuit's reliance on the possibility of parole provides the major issue for Supreme Court resolution in its grant of writ of certiorari. Indeed, the majority and dissent would agree that resolution of the parole issue would be outcome determinative.

The Supreme Court could resolve *Rummel* on the parole question and go no further. By limiting itself to consideration of the parole issue, however, the Court would leave undecided an issue of considerable importance in the area of recidivism: How much weight is to be given the nature of the habitual offender's underlying crimes? To avoid future confusion in the lower courts, a proper resolution of *Rummel* will require answers to both of these important questions.

Proper resolution of the issues presented in *Rummel* dictates that the maximum possible length of sentence be used to evaluate excessiveness of imposed punishments. Additionally, the nature of the underlying offenses is a critical element in determination of the applicability of recidivist statutes. To deny Rummel or others a thorough appraisal of the nature of their crimes defeats modern-day notions of an "evolving standard of decency" and unjustly treats habitual offenders as a "class" and not as individual defendants.

Cameron Jay Rains

⁸⁶ *Id.* at 660.

⁸⁷ *Mullins v. State*, 409 S.W.2d 869 (Tex. Crim. App. 1966); *Beyer v. State*, 172 Tex. Crim. 279, 356 S.W.2d 436 (1962); *Robinson v. State*, 163 Tex. Crim. 499, 293 S.W.2d 781 (1956); *Punchard v. State*, 142 Tex. Crim. 531, 154 S.W.2d 648 (1941).