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Constitutional Law—*Rummel v. Estelle*: Eighth Amendment Challenge to Length of Prison Sentence

Despite disagreement among legal historians as to whether its position is justified historically, the United States Supreme Court has interpreted the eighth amendment[1] as a prohibition against punishment that is grossly disproportionate to the crime committed as well as a prohibition against punishment that is cruel, inhumane or barbarous in nature.[2] Because of a dearth of cases and the ambiguity of existing precedent with regard to the proportionality principle,[3] its scope and meaning are ill-defined. Although the Court has never invalidated a term of imprisonment on the ground that it violated the eighth amendment,[4] it was not until the 1979-1980 term that the Court suggested a disproportionate prison sentence is beyond eighth amendment challenge.[5] In *Rummel v. Estelle*[6] the Court rejected a challenge to the constitutionality of a life sentence imposed upon an habitual offender after conviction of a third petty property offense. The *Rummel* Court's holding that

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1. The amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. This Note focuses on the portion of the amendment prohibiting cruel and unusual punishments.

2. The Court first adopted this position in Weems v. United States, 217 U.S. 349 (1910). *See* text accompanying notes 56-66 *infra*.

The leading proponent of the view that the framers of the amendment intended to incorporate a proportionality principle into the eighth amendment is Anthony F. Granucci. *See* Granucci, *"Nor Cruel and Unusual Punishmnents Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969). Other commentators, however, believe that the founding fathers included the clause in the Bill of Rights solely to prohibit torture. *See, e.g.*, Mulligan, *Cruel and Unusual Punishment: The Proportionality Rule*, 47 FORDHAM L. REV. 639 (1979).

3. The Court has been faced with proportionality challenges in a limited number of cases: Coker v. Georgia, 433 U.S. 584 (1977) (White, J., plurality opinion); Badders v. United States, 240 U.S. 391 (1916); Graham v. West Virginia, 224 U.S. 616 (1912); Weems v. United States, 217 U.S. 349 (1910); O'Neil v. Vermont, 144 U.S. 323 (1892). The Court summarily rejected the challenges made in *Badders*, *Graham* and *O'Neil*, and the Court's opinions in *Weems* and *Coker* do not state when the principle applies or how a determination is to be made. *See* text accompanying notes 56-79 *infra*.

4. The Court has upheld proportionality challenges in only two cases, Weems v. United States, 217 U.S. 349 (1910), and Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion). In *Weems*, the Court held that a sentence mandating a prison term of twelve years at hard labor with a loss of basic civil liberties upon release was unconstitutional. In *Coker*, the Court held unconstitutional the imposition of the death penalty for the crime of rape.

At the lower federal and state levels as well, proportionality challenges seldom have been upheld. *E.g.*, Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978) (reversing consecutive 20 year sentences for distribution and possession of marijuana), *aff'd on rehearing en banc*, 601 F.2d 153 (4th Cir. 1979), *vacated sub nom.* Hutto v. Davis, 100 S. Ct. 1593 (1980); Downey v. Perini, 518 F.2d 1288 (6th Cir.) (reversing 60 year sentence for possession and sale of marijuana), *vacated on other grounds*, 423 U.S. 993 (1975); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) (mandatory life imprisonment upon third felony conviction constitutionally excessive), *cert. denied*, 415 U.S. 983 (1974); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978) (48-50 years for safecracking ruled excessive); Carmona v. Ward, 436 F. Supp. 1153 (S.D.N.Y. 1977) (life imprisonment for sale of small amount of cocaine unconstitutional), *rev'd*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (indeterminate life sentence for second offense of indecent exposure held excessive); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972) (20 years for sale of marijuana excessive).

5. *See* cases cited at note 3 *supra*.

6. 445 U.S. 263 (1980).

sentencing decisions are purely a legislative matter[7] may well mark the end of constitutional review of legislatively prescribed terms of imprisonment under the eighth amendment.

The state of Texas convicted petitioner William Rummel in 1964 of the fraudulent use of a credit card to obtain $80.00[8] and in 1969 of passing a forged check in the amount of $28.36.[9] When the state indicted petitioner in 1973 for obtaining $120.75 under false pretenses, the indictment charged him as an habitual offender on the basis of these two prior convictions.[10] The recidivist statute in force in Texas at the time mandated a life sentence upon conviction of a third felony.[11] Consequently, after a jury convicted Rummel of the false pretenses charge and found that he had committed two prior felonies, the trial court sentenced him to life imprisonment.[12]

After exhausting state remedies,[13] Rummel filed a petition for a writ of habeas corpus in the Federal District Court for the Western District of Texas.[14] Petitioner challenged the constitutionality of the Texas habitual offender statute as applied to him because it imposed upon him a sentence grossly disproportionate to the offenses he had committed.[15] The district court denied the petition without a hearing, and petitioner appealed to the United States Court of Appeals for the Fifth Circuit.[16]

While the district court accepted the state's contention that, in light of Rummel's eligibility for parole, his sentence should be viewed as one for less than life,[17] a panel of the Fifth Circuit rejected the contention and reversed

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7. *Id.* at 274.

8. "It shall be unlawful for any person to present a credit card or alleged credit card with intent to defraud, to obtain or attempt to obtain any item of value or service of any type; or to present such credit card or alleged credit card, with the intent to defraud, to pay for items of value or services rendered."

TEX. PENAL CODE ANN. art. 1555b (Vernon 1973) (current version at TEX. PENAL CODE ANN. tit. 7, § 32.31 (Vernon 1974)). The offense constituted a felony because the amount in question was more than $50.00. *See id.*

9. 445 U.S. at 265. In 1969, the Texas Code provided:

If any person shall knowingly pass as true, or attempt to pass as true, any such forged instrument in writing as is mentioned and defined in the preceding articles of this chapter, he shall be confined in the penitentiary not less than two nor more than five years.

TEX. PENAL CODE ANN. art. 996 (Vernon 1961).

10. 445 U.S. at 266.

11. Article 63 of the Texas Penal Code provided in 1973 that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." TEX. PENAL CODE ANN. art. 63 (Vernon 1952). The statute, with minor modifications, currently is codified at TEX. PENAL CODE ANN. tit. 3, § 12.42 (Vernon 1974).

12. 445 U.S. at 266.

13. The Texas state courts affirmed his conviction on direct appeal and denied his motion for post-conviction relief. *Id.* at 267.

14. *Id.*

15. *Id.* The United States Supreme Court previously had upheld the constitutionality of the Texas habitual offender statute in Spencer v. Texas, 385 U.S. 554 (1967). The constitutionality of habitual offender statutes generally has been affirmed by the Court against a variety of challenges. *See, e.g.*, Oyler v. Boles, 368 U.S. 448 (1962); Moore v. Missouri, 159 U.S. 673 (1895). *See generally* Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 1113-15 (1971).

16. 445 U.S. at 267.

17. *Id.*

the decision.[18] In making its determination that Rummel's sentence violated the eighth amendment, the panel relied on the following factors: the nature of the crimes committed, the legislative purpose of the statute under which the sentence was imposed, sentences imposed by the state for other crimes, and sentences imposed upon multiple offenders in other jurisdictions.[19]

On rehearing en banc, the Fifth Circuit vacated the panel opinion.[20] The court found that the eighth amendment may prohibit a term of imprisonment for a minor offense solely because of length,[21] and it accepted as the appropriate proportionality analysis three of the factors relied on by the panel: the nature of the offense committed, the sentences imposed by the same jurisdiction for other crimes, and the sentences imposed by other jurisdictions for the same crime.[22] The court, however, refused to consider the types of crimes underlying Rummel's classification as a recidivist in analyzing the nature of the offense,[23] and it rejected the prong of the test applied by the panel relating to the legislative purpose of the punishment imposed, finding that "every inference is to be made in favor of the selected punishment."[24] Moreover, the court viewed Rummel's sentence in the context of parole eligibility as one for approximately twelve years.[25]

The Supreme Court granted certiorari.[26] The Court affirmed the Fifth Circuit's finding that the sentence imposed upon Rummel did not violate the eighth amendment,[27] but it rejected the tripartite test approved by the Fifth Circuit.[28] The Court found that evidence of the nature of the offense committed,[29] the punishments imposed on multiple offenders by other jurisdictions,[30]

18. 568 F.2d 1193 (5th Cir. 1978).

19. *Id.* at 1197-1200. These factors were first delineated by the United States Court of Appeals for the Fourth Circuit in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974), to invalidate a life sentence imposed upon a habitual offender in circumstances factually indistinguishable from *Rummel*. The Fifth Circuit panel adopted the *Hart* test after determining that the Fourth Circuit had applied "objective criteria solidly grounded in decisions of the Supreme Court." 568 F.2d at 1197.

20. 587 F.2d 651 (5th Cir. 1978).

21. *Id.* at 655.

22. *Id.* at 659-60.

23. *Id.* at 660-61.

24. *Id.* at 659.

25. *Id.* at 657-59.

26. 442 U.S. 939 (1979).

27. 445 U.S. at 264.

28. *Id.* at 276-84. The Court's rejection of the test is implicit rather than explicit. *See* text accompanying notes 86-89 *infra*.

29. Rummel described the offenses underlying his habitual offender status as "petty," pointing to the absence of violence and the small amount of money involved. The Court stated that the absence of violence did not necessarily determine the strength of the societal interest involved in preventing the crime. Additionally, the Court found that the determination of a crime's severity by an inquiry into the sum of money involved caused judicial intrusion into the province of the legislature. Further, the Court noted that in the case before it Rummel received a life sentence for being an habitual offender. Thus, the Court concluded, the nature of his crimes would be irrelevant in any event. 445 U.S. at 274-77.

30. The Court found that a comparison of statutes involved too many factors to allow an objective determination of whether the Texas statute was the most severe; that, even if the Texas statute were the most severe, the distinctions between it and the statutes of other jurisdictions were

and the punishments imposed by the state of Texas for other crimes[31] did not provide a basis for an objective determination as to the proportionality of Rummel's sentence.[32]

Stating that it had never before invalidated a term of imprisonment solely because of length, the Court distinguished *Weems v. United States*,[33] in which the Court held a sentence imposed by the Philippine government to be disproportionate because it involved a number of penalties in addition to a lengthy term of imprisonment.[34] The Court noted that *Coker v. Georgia*,[35] the only other case in which a sentence had been held unconstitutional on proportionality grounds, also could be distinguished because it involved the death penalty, which is a punishment unique in kind.[36] The Court concluded that "one could argue without . . . contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . , the length of the sentence actually imposed is purely a matter of legislative prerogative."[37]

The Court quoted language from Justice White's plurality opinion in *Coker*,[38] indicating the necessity of objective factors upon which to base an eighth amendment judgment to avoid substitution of the subjective views of the individual Justices for that of the legislature,[39] and found that, if the punishment challenged differs in kind from a fine or term of imprisonment, an objective determination can be made.[40] In *Coker*, for example, the Court could "draw a 'bright line' " between the death penalty and punishments short of death.[41] Similarly, in *Weems*, the Court could objectively distinguish between the punishment inflicted and traditional forms of punishment imposed in the Anglo-Saxon system.[42] The Court reasoned that, in the absence of a punishment thus distinguishable, the Court could not make an eighth amendment judgment without violating the admonition of Justice White and infringing upon the legislative realm.[43]

The establishment of the proportionality principle as a component of the

"subtle and not gross"; and finally, that disparities in sentencing were a natural consequence of the American system of government. *Id.* at 279-82.

31. In a footnote, the Court stated that any comparison of punishments imposed by the State of Texas for different offenses would be "inherently speculative." *Id.* at 282 n.27. Although line-drawing admittedly is difficult in most instances, the Court has distinguished, for example, the crimes of murder and rape. *See* Coker v. Georgia, 433 U.S. 584, 597-98 (1977) (White, J., plurality opinion).

32. 445 U.S. at 275-84.

33. 217 U.S. 349 (1910).

34. 445 U.S. at 273-74.

35. 433 U.S. 584 (1977) (White, J., plurality opinion).

36. 445 U.S. at 272-73.

37. *Id.* at 274.

38. "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment[s] should be informed by objective factors to the maximum possible extent." 433 U.S. at 592.

39. 445 U.S. at 274-75.

40. *Id.* at 275.

41. *Id.*

42. *Id.*

43. *Id.* at 274-82.

eighth amendment is a recent development in the history of the amendment.[44] In the earliest cases, before the turn of the century, the Supreme Court interpreted the cruel and unusual punishments clause as a prohibition against punishments that would have been deemed cruel and unusual at the time the amendment became part of the Constitution.[45] Using this interpretation, the Court limited the amendment's prohibition to torture and other forms of barbaric treatment and upheld electrocution[46] and shooting[47] as constitutional methods of execution. During this period, the Court held the amendment inapplicable to the states.[48]

Support for a broader interpretation of the amendment grew, and in *O'Neil v. Vermont*[49] the dissenters argued that the eighth amendment prohibited more than barbarous or inhumane forms of punishment.[50] The State of Vermont convicted O'Neil of selling liquor without authorization and, in accordance with state law which made every act of selling an offense, found him guilty of 307 separate offenses.[51] The state ordered O'Neil to pay $6140 or serve 19,914 days at hard labor.[52] The majority rejected O'Neil's claim of cruel and unusual punishment on the grounds that the issue had not been raised on appeal as it had in the lower courts and that the amendment did not apply to the states.[53] Justice Field, followed by Justices Harlan and Brewer, dissented and found that the eighth amendment prohibited punishments that, in severity or excessive length, were disproportionate to the offenses charged.[54] Justice Field compared the penalty imposed on O'Neil with the penalties imposed for manslaughter, perjury, and forgery, and found that the state had levied a penalty against O'Neil that constituted cruel and unusual punishment.[55]

In *Weems v. United States*,[56] the Court adopted the view expressed in the *O'Neil* dissent. The Philippine government convicted Weems of falsifying a public document and sentenced him to fifteen years of hard labor with chains at his ankles and wrists.[57] Moreover, the sentence required that after his release he be kept under constant surveillance and that he relinquish many of

44. In the 1970s the Court heard a series of challenges to the constitutionality of the death penalty. Although the challenges, with the exception of *Coker*, were not based on the proportionality principle, the Court repeatedly recognized that the cruel and unusual punishments clause prohibited punishment excessive in amount as well as in kind. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Stewart, J., plurality opinion); Furman v. Georgia, 408 U.S. 238, 458 (1972) (Powell, J., dissenting).

45. *See In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1879).

46. 136 U.S. 436 (1890).

47. 99 U.S. 130 (1879).

48. *See* Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1866).

49. 144 U.S. 323 (1892).

50. *Id.* at 337-40 (Field, J., dissenting).

51. *Id.* at 327.

52. *Id.* at 330.

53. *Id.* at 331-32.

54. *Id.* at 339 (Field, J., dissenting); *id.* at 371 (Harlan, J., dissenting).

55. *Id.* at 339 (Field, J., dissenting).

56. 217 U.S. 349 (1910).

57. *Id.* at 357-58, 364.

his rights as a citizen of the Philippines.[58] Weems charged that this sentence violated the cruel and unusual punishments clause in the Philippine Bill of Rights.[59] Because the Philippine cruel and unusual punishments clause had been derived from the eighth amendment, the Court found that the clause in the Philippine Bill of Rights had the same meaning as the clause contained in the eighth amendment.[60] The Court examined the nature of the offense committed by Weems[61] and compared the punishment imposed upon him with the punishment imposed in other jurisdictions for the same offense[62] and in the same jurisdiction for more serious crimes.[63] The Court concluded that the Philippine government had imposed upon Weems a punishment so grossly disproportionate to the offense committed that it violated the eighth amendment.[64] *Weems* established that the eighth amendment prohibits punishment that is excessive, either in nature or amount,[65] and that the contemporary values of society are the standard by which the constitutionality of a punishment is measured.[66]

The proportionality principle recognized in *Weems* is rarely applied,[67] and the cases in which proportionality is at issue seldom reach the Court.[68] Soon after it decided *Weems* and prior to its application of the eighth amendment to the states, the Court faced several proportionality challenges, but it rejected each claim summarily. In *Graham v. West Virginia*[69] the Court found meritless a claim that a life sentence imposed upon an habitual offender, who had been convicted three times of horse theft, violated the eighth amendment.[70] Similarly, in *Badders v. United States*,[71] the Court rejected a challenge to a sentence imposed as a result of a conviction of multiple violations of

58. The punishment deprived Weems of the rights of parental authority, guardianship of person and property, administration of property and inter vivos disposition of property. Moreover, he could not hold office. *Id.* at 364.

59. *Id.* at 359.

60. *Id.* at 367-68.

61. The Court found that the offense required merely the entry of a false notation on a public document; intent was not required. *Id.* at 363.

62. *Id.* at 381.

63. The Court compared the sentence prescribed for falsification of a document with those imposed for treason, forgery, robbery, and larceny. *Id.* at 380.

64. *Id.* at 381.

65. In interpreting the eighth amendment it will be regarded as a "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Id.* at 367.

66. "The clause of the Constitution . . . may be . . . progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378.

67. *See* note 3 and accompanying text *supra*.

68. *Id.*

69. 224 U.S. 616 (1912).

70. The facts in *Graham* are almost identical to the facts in *Rummel*, and the Court in *Rummel* cites *Graham* as authority for its conclusion that Texas constitutionally could sentence Rummel to life imprisonment. *Graham*, however, is of dubious significance. Graham challenged a state law prior to the Court's incorporation of the eighth amendment into the due process clause of the fourteenth amendment, and the Court gave no explanation for its rejection of Graham's claim. *See* 445 U.S. at 290-91 n.7 (Powell, J., dissenting).

71. 240 U.S. 391 (1916).

a mail fraud statute.[72] The Court stated that Congress has the authority to make each deposit of a letter in violation of the statute a separate offense and that, as a consequence, a sentence imposed for each of those separate offenses did not violate the eighth amendment.[73]

Since *Weems*, the Court has not invalidated a noncapital punishment as disproportionate to the underlying offense.[74] In fact, after *Badders* the Court did not again entertain a proportionality claim[75] until it held in *Coker v. Georgia*[76] that imposition of the death penalty for the crime of rape violated the eighth amendment. The Court decided that case after the eighth amendment was incorporated into the fourteenth amendment's due process clause.[77] The Court reiterated its statement in *Weems* that the eighth amendment prohibits excessive punishment but cautioned that a determination that a punishment is unconstitutional must be based on objective factors.[78] The Court found Coker's death sentence grossly disproportionate to his crime on the basis of the severity of the offense, the punishments inflicted in other jurisdictions for rape, and the harm to the victim.[79]

In *Rummel* the Court examined its prior eighth amendment decisions and determined that decisions as to length of imprisonment are to be left to the legislative branch.[80] Although none of the precedents state explicitly that the proportionality principle is applicable to terms of imprisonment, none supports the *Rummel* position either.[81] In cases dealing with eighth amendment challenges, the Court has repeatedly stated, without qualification, that the cruel and unusual punishments clause prohibits excessive punishment.[82] The Court has rejected proportionality challenges to terms of imprisonment,[83] but the Court has never indicated that it based these decisions on the broad proposition that the eighth amendment is inapplicable to prison sentences.[84]

The *Rummel* Court's explanation of *Coker* and *Weems*,[85] however, made its decision inevitable. The Court distinguished the type of punishment chal-

72. As Powell noted in his dissent in *Rummel*, *Badders* "merely teaches that the Court did not believe that a five-year sentence for the commission of seven crimes was cruel and unusual." 445 U.S. at 290-91 n.7 (Powell, J., dissenting).

73. 240 U.S. at 393.

74. *See* Mulligan, *supra* note 2, at 644.

75. The Court, however, did make a number of eighth amendment determinations. In Trop v. Dulles, 356 U.S. 86 (1958), for example, the Court found unconstitutional the punishment of expatriation imposed for wartime desertion from the armed forces. The Court in *Trop* reiterated the progressive nature of the eighth amendment: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

76. 433 U.S. 584 (1977) (White, J., plurality opinion).

77. *See* Robinson v. California, 370 U.S. 660 (1962).

78. 433 U.S. at 592.

79. *Id.*

80. 445 U.S. at 274.

81. *See* text accompanying notes 67-79 *supra*.

82. *See, e.g.*, text accompanying notes 49-55 *supra*.

83. *See* Graham v. West Virginia, 224 U.S. at 631; Badders v. United States, 240 U.S. at 392. *See also* text accompanying notes 69-72 *supra*.

84. *See* notes 70 & 72 *supra*.

85. *See* text accompanying notes 34-43 *supra*.

lenged by Rummel from the punishments deemed unconstitutional in *Coker* and *Weems*,[86] and implied that its decision in both cases could be justified solely on the basis of the "objective" distinction made by the Court between fines and imprisonment, and other types of punishment such as the death penalty.[87] The Court reasoned that the principle of judicial restraint requires an objective determination to be made[88] and found that the distinction possible in *Coker* and *Weems* is the only "objective" factor upon which a determination of disproportionality can be made.[89] Because the punishment challenged by Rummel could not be "objectively" distinguished from the punishments imposed in other jurisdictions for the same offense, the principle of judicial restraint precluded constitutional review.

The *Rummel* opinion violates precedent in three respects. First, by excluding comparison of a challenged punishment with punishments imposed by other jurisdictions for the same crime, the Court ignores its own admonitions that the eighth amendment is "progressive"[90] and that the amendment must be interpreted in light of contemporary values.[91] Comparison of punishments among jurisdictions is an indispensable barometer of these values. Second, despite the consideration of the nature of the defendant's offenses in *Coker* and *Weems*, the Court refused to examine this factor to determine the proportionality of Rummel's sentence.[92] The Court's use of the factor in *Coker* implies that, prior to *Rummel*, the Court viewed the nature of the offense as a relevant and objective factor to be considered in determining whether a punishment is so disproportionate as to violate the eighth amendment.

Third, the court erred in concluding that *Coker* and *Weems* proscribed review of Rummel's sentence.[93] The Court ignored the fundamental principle that the desirability of judicial restraint must be balanced against the need for constitutional review.[94] In *Coker* and *Weems* the Court discussed the tension between the two goals[95] and concluded that, in the cases before it, the severity of the punishments warranted judicial intervention.[96] The Court in both cases recognized that the eighth amendment limits legislative discretion and that the Court has an obligation to ensure that these limits are delineated and ob-

86. 445 U.S. at 272-75.

87. *See id.* at 283 n.27.

88. *See* text accompanying notes 41-43.

89. 445 U.S. at 274-75.

90. *See, e.g.*, Weems v. United States, 217 U.S. at 378.

91. *See* note 66 and accompanying text *supra*.

92. 442 U.S. at 276.

93. *See* text accompanying notes 56-66 & 76-79 *supra*.

94. *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF THE FEDERAL COURTS 218-29 (3d ed. 1976).

95. In *Weems*, for example, the Court stated: "There is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation . . . but constitutional ones, and what those are the judiciary must judge." 217 U.S. at 379.

96. 433 U.S. at 592; 217 U.S. at 381.

served.[97] However, the *Rummel* holding that the principle of judicial restraint prohibits constitutional review of a term of imprisonment precluded consideration of the real issue: whether the eighth amendment requires judicial modification of prison sentences that are disproportionately severe relative to the gravity of the underlying offense. The Court, in effect, has held that the inherent difficulty in defining "proportionality" justifies erasing the concept from the eighth amendment, irrespective of any constitutional imperatives to the contrary.

Despite the Court's avoidance of the crucial issue in *Rummel*, the opinion removes terms of imprisonment from eighth amendment scrutiny. As a long accepted method of punishment, imprisonment is not subject to challenge as an excessive form of punishment, and the Court, by rejecting as subjective the factors previously used in proportionality analysis, makes it impossible to prove that a particular prison sentence is so excessive in length as to constitute an eighth amendment violation. In a society that imposes only three increasingly severe forms of punishment—fines, imprisonment and death—the result is to remove legislatively imposed punishment, with the exception of capital punishment, from judicial scrutiny. This limitation of the scope of the eighth amendment is contrary to the concept of the cruel and unusual punishments clause as a measure of "the progress of a maturing society,"[98] and, in time, this limited reading of the amendment may render it a nullity.

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97. *See, e.g.*, note 95 *supra*.
98. Trop v. Dulles, 356 U.S. 86, 101 (1958).