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Criminal Procedure -- Eighth Amendment Proportionality Analysis In Its Infancy

Joe Stallings

to be a lasting formulation. Brennan's opinion may be just a first step towards eventual adoption of a standard similar to that espoused by Justices Douglas and Powell. The possibility that *Keyes* will not be the lasting standard is increased by the fact that only four justices joined in the opinion and that the views of two other justices, Burger and White, are not known at all. However, if the four justices joining the *Keyes* opinion do not change their position, it is difficult to conceive of the other five being able to concur in any one new standard.

At this writing, the Court has accepted no major school cases for its October 1973 docket.[66] It seems likely that the Court will wait until the effects of *Keyes* can be known before moving significantly further. *Keyes* has left the Court sorely divided in an area where it has been the clear leader in forcing change and is now acting almost alone.[67] The decision has done little to clear up the growing confusion about what standard of conduct a school board must adhere to. It is incumbent upon the Court, it if wishes to maintain the process begun twenty years ago in *Brown*, to decide what the constitutional right to integrated schools is, what standard will determine that right, and how the goal of equal educational opportunity is to be achieved.

JACK GOODMAN

Criminal Procedure—Eighth Amendment Proportionality Analysis In Its Infancy

In *Hart v. Coiner*,[1] the Court of Appeals for the Fourth Circuit reversed a life sentence imposed under West Virginia's habitual offender

[66]Petition for certiorari has been filed in the Detroit case, where de jure segregation was found. The central question there is not the existence of actionable segregation, but whether a metropolitan area wide plan may be ordered in a situation where integrating within the central school district alone, would have little effect. Bradley v. Milliken, No. 72-1809 (6th Cir., June 12, 1973) (en banc); *petition for cert. filed*, 42 U.S.L.W. 3170 (U.S. Sept. 6, 1973) (No. 73-475).

The Court recently declined to hear two other Northern school cases involving allegedly de jure acts. United States v. Board of School Comm'rs, 474 F.2d 81 (7th Cir.), *cert. denied*, 93 S. Ct. 3066 (1973) (Indianapolis, Ind.); Davis v. School District, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971) (Pontiac, Mich.).

[67]There may be some Congressional input forthcoming. In particular this would concern remedies, one proposal being similar to the approach suggested by Justice Powell *see* Preyer, *Beyond Desegregation—What Ought to be Done?*, 51 N.C.L. REV. 657 (1973).

[1]No. 71-1885 (4th Cir., July 13, 1973). The case was argued by two third-year law students from the University of North Carolina at Chapel Hill.

statute,[2] holding that it was "constitutionally excessive and wholly disproportionate to the nature of the offenses . . . committed, and not necessary to achieve any legitimate legislative purpose."[3] This case marks the first time that a federal court has attempted to set forth in a systematic fashion objective criteria for analyzing the proportionality of punishment to crime under the eighth amendment.[4] Although the decision is an important step forward, uncertainty persists in the application of this theory because of the court's failure to justify explicitly the criteria that it used and because of the United States Supreme Court's scarce and somewhat uncertain precedent in this area.

THE DECISION

Petitioner Dewey Hart was convicted of perjury in a West Virginia court for testimony that he had given at his son's murder trial. Before the court sentenced him, the state filed an information charging him with being an habitual offender on the basis of two prior felony convictions[5]— one in 1949 for writing a check for fifty dollars on insufficient funds and the other in 1955 for transporting a forged check worth 140 dollars across state lines. Following a jury finding that Hart had violated the recidivist statute, the trial judge imposed the mandatory life sentence required by the stature.[6] After Hart had unsuccessfully sought post-conviction relief in the state courts,[7] he applied for a writ of habeas corpus in federal district court, again without success.[8] From the order denying the writ, he appealed to the Fourth Circuit.[9]

Before reaching the eighth amendment issue, Judge Craven, writing for the majority, rejected the petitioner's contentions that (1) he was

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[2]W. VA. CODE ANN. § 61-11-18 (1966).

[3]No. 71-1885 at 17.

[4]Many commentators had previously bemoaned the lack of attention given by the courts to the application of the proportionality theory. *See, e.g.*, Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1074-75 (1964); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 848 (1961); Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964).

[5]West Virginia's recidivist statute imposes a mandatory life sentence on anyone convicted of three separate offenses "punishable by confinement in a penitentiary." W. VA. CODE ANN. § 61-11-18 (1966).

[6]No. 72-1885 at 2-4.

[7]*Id* at 2.

[8]*Id.*

[9]*Id.*

denied effective assistance of counsel in connection with his guilty plea to the 1949 bad check charge [10] and that (2) the guilty plea in the 1949 case was unduly coerced.[11] The court then faced the eighth amendment issue and found that, although the West Virginia habitual offender statute was valid on its face and had been upheld by the United States Supreme Court against due process and equal protection attacks,[12] Hart's eighth amendment challenge was not foreclosed.[13] The petitioner, rather than attacking the statute itself, argued that the "recidivist mandatory life sentence *in this case*"[14] was disproportionate to his offenses and therefore in violation of the eighth amendment.[15]

Turning to a proportionality analysis, the court noted that while the theory's validity was well settled under the Supreme Court's decision in *Weems v. United States*[16] and its own decision in *Ralph v. Warden*,[17] its application was difficult because its meaning is drawn from " 'the

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[10]*Id.* at 4-5 n.2. Even though this issue is beyond the scope of this note, it does merit brief observation. Had the majority reached an opposite result on this issue, the eighth amendment inquiry would have been precluded. *Id.* at 26 (Boreman, J., dissenting). In the court's eagerness to reach the eighth amendment question, it might have limited well-established Fourth Circuit precedent that late appointment of counsel is so inherently prejudicial as to constitute a prima facie case of denial of effective assistance of counsel. Stokes v. Peyton, 437 F.2d 131, 136 (4th Cir. 1970); Fields v. Peyton, 375 F.2d 624, 628 (4th Cir. 1967); Twiford v. Peyton, 372 F.2d 670, 673 (4th Cir. 1967); Martin v. Virginia, 365 F.2d 549, 551-52 (4th Cir. 1966); *see* Jones v. Cunningham, 313 F.2d 347, 352 (4th Cir. 1963). The court in *Hart* asserted that the state rebutted this presumption because the record showed that the defendant "admitted his guilt to his attorney," who in turn advised him that he " 'didn't have to plead guilty.' " No. 71-1885 at 4 n.2. However, Judge Boreman noted that Hart told his attorney only that he was guilty because his name was on the check, unaware that proof of several other elements was necessary for conviction of the crime charged. *Id.* at 24-25 (dissenting opinion). Furthermore, the attorney failed to investigate the validity of the prior conviction on which the 1949 recidivist charge was based. *Id.* at 25. On the basis of precedent, the dissent appears to be sound. *See* Fields v. Peyton, 375 F.2d 624, 628-29 (4th Cir. 1967) (defendant was prejudiced by late appointment of counsel because his attorney did not inquire into whether the defendant had committed all of the elements of the crime); Martin v. Virginia, 365 F.2d 549, 552-53 (4th Cir. 1966) (attorney failed to consider whether the offense charged was a misdemeanor rather than a felony and whether he should have requested a change of venue); Jones v. Cunningham, 313 F.2d 347, 351-52 (4th Cir. 1963) (attorney must pursue avenues of defense, even after defendant tells him he is guilty).

[11]No. 71-1885 at 5 n.2.

[12]Oyler v. Boles, 368 U.S. 448 (1962) (due process); Graham v. West Virginia, 224 U.S. 616 (1912) (equal protection.) In response to the argument that the statute on its face inflicted cruel and unusual punishment, *Graham* replied simply: "Nor can it be maintained that cruel and unusual punishment has been inflicted." 224 U.S. at 631. This statement was not mentioned in *Hart*.

[13]No. 71-1885 at 5-6. *But see id.* at 27-28 (Boreman, J., dissenting).

[14]*Id.* at 6 (emphasis in original).

[15]*Id.*

[16]217 U.S. 349 (1910) (the landmark case first espousing the proportionality theory).

[17]438 F.2d 786 (4th Cir. 1970).

evolving standards of decency that mark the progress of a maturing society'. . . ."[18] The court therefore set forth "several objective factors" to aid in its measurement of proportionality. The test employed was a "cumulative one focusing on an analysis of the combined factors."[19]

The first objective factor examined by the court was the nature of the offense itself with particular attention given to whether it involved elements of violence or danger to a victim. Applying this criterion the court found that none of the petitioner's offenses "involved violence or danger of violence toward persons or property," and moreover that there were mitigating circumstances in two of Hart's offenses.[20] At his son's murder trial Hart was faced with the moral dilemma of deciding whether to tell the truth or to protect his son. In considering the 1949 conviction the court emphasized that had the face amount of the bad check been a penny less, Hart could not have been given a life sentence.[21]

The second objective factor employed by the court was the legislative purpose of the punishment.[22] In response to the state's claim that the recidivist statute's purpose was one of deterrence, the court stated that a life sentence was "unnecessary to accomplish the legislative purpose to protect society from an individual who has committed three wholly nonviolent crimes over a period of twenty years" and was unnecessary to deter others "except on the theory that more is better."[23]

The third criterion adopted was a comparison of the punishment imposed to those that the petitioner could have received in other jurisdictions.[24] The court found that the recidivist scheme in West Virginia "is among the top four in the nation in terms of severity."[25] The court gave particular attention to those ten states allowing a *discretionary* life

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[18]No. 71-1885 at 9 *quoting* Trop v. Dulles, 356 U.S. 86, 101 (1958); *see* Weems v. United States, 217 U.S. 349, 378 (1910).

[19]No. 71-1885 at 9.

[20]*Id.* at 10

[21]*Id.* at 3 n.1, 10. Passing a bad check of less than fifth dollars is punishable by confinement in the county jail and not in a penitentiary. W. VA. CODE ANN. § 61-3-39 (1966). Thus, he would have been exposed only to the possibility of an extra five year sentence as a second offender. W. VA. CODE ANN. § 61-11-18 (1968).

[22]No. 71-1885 at 11-13 The court adopted Justice Brennan's view: "If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, . . . the punishment inflicted is unnecessary and therefore excessive. Furman v. Georgia, 408 U.S. 238, 279 (1972) (citations omitted).

[23]No. 71-1885 at 13.

[24]*Id.* at 13-15.

[25]*Id.* at 14.

sentence after three felony convictions. Since the provisions in these jurisdictions provide for judicial consideration of the nature of the underlying offenses, it appeared very unlikely that a sentencing judge would have given life imprisonment to a petitioner in Hart's situation.

The final criterion utilized by the court was a comparison of the punishment to punishments allowable for other crimes in the sentencing jurisdiction.[26] The court discovered that life imprisonment was available in West Virginia only for conviction of first-degree murder, rape, and kidnapping and that for other "grave crimes of violence" such as second-degree murder and robbery, much less severe maximum sentences are allowable.[27] Only after the third conviction of these more serious crimes would the mandatory life sentence apply. In conclusion the court held that this analysis of the four "relevant criteria under the eighth amendment" rendered the petitioner's punishment unconstitutional.[28]

Judge Boreman dissented from the court's analysis and conclusion.[29] In a general attack on the test employed by the majority, he argued that it was impossible to determine the relative weight given to the various factors and that therefore the guidelines would be practically impossible to apply to other cases. Noting the paucity of authority on the application of the proportionality test, he concluded that he was disturbed by the "chaos which may result from this decision."[30] Furthermore, he specifically disagreed with the court's evaluation of the nature of Hart's offenses. Asserting the inevitability of a statutory cutoff point, he found that for purposes of constitutional analysis the fact that the 1949 bad check was written for only fifty dollars was irrelevant. Although he agreed it was technically true that Hart's crimes were not violent ones, he stated that the petitioner's perjury occurred at a trial on a murder charge, "one of the most serious and cold-blooded crimes. . . ."[31] Finally, Judge Boreman dismissed the majority's concern for Hart's moral dilemma at his son's trial as one possibily appealing to a jury but inappropriate in the disposition of this appeal. The strong suggestion in this dissent was that since the sentence was mandated by statute, it should not be adjudged excessive.[32]

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[26]*Id.* at 15-16.

[27]*Id.* at 16.

[28]*Id.* at 17.

[29]*Id.* at 23-33. Judge Boreman also attacked the majority's disposition of several other issues in the case. *See* notes 10 & 13 *supra.*

[30]No. 71-1885 at 33.

[31]*Id.* at 30.

[32]*See id.* at 31, 33.

PRECEDENT AND THE APPLICATION OF THE PROPORTIONALITY THEORY

That the eighth amendment's prohibition against "cruel and unusual punishment"[33] requires proportionality in sentencing is well settled.[34] The United States Supreme Court held in 1910 that it is "a precept of justice that punishment for crime should be graduated and proportioned to offense,"[35] and at least twice since that time the Court has reiterated support for the theory.[36] However, Judge Boreman correctly recognized that a methodology for applying the theory "has never definitely and conclusively been determined."[37] Indeed, courts when faced with a claim of an excessive punishment often never reach analysis and dismiss the challenge on grounds either that the punishment was within the limits of statutory law[38] or that the sentencing judge did not abuse his discretion.[39] The few courts that have reached the merits typically have considered only whether the punishment, when compared with the crime, "shocks the conscience."[40] Only a miniscule number have developed objective tests to aid in analysis, [41] and none have given much attention to justifying the criteria they have used.[42] Attention will now be directed to these latter decisions in an attempt to evaluate the criteria used in *Hart*.

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[33]The eighth amendment is applicable to the states through the fourteenth amendment. Furman v. Georgia, 408 U.S. 238, 257 n.1 (1972); Robinson v. California, 370 U.S. 660 (1962).

[34]*See, e.g.*, Note, *Judicial Limitations on the Constitutional Protection Against Cruel and Unusual Punishment*, 1960 WASH. U.L.Q. 160, 162, authorities cited note *4 supra*.

[35]Weems v. United States, 217 U.S. 349, 367 (1910).

[36]*See* Robinson v. California, 370 U.S. 660, 676 (1962); (Douglas, J., concurring); Trop v. Dulles, 356 U.S. 86, 99 (1958).

[37]Hart v. Coiner, No. 71-1885 at 33 (4th Cir., July 13, 1973)..

[38]*See, e.g.*, Scott v. United States, 419 F.2d 264, 266 n.2 (D.C. Cir. 1969); United States v. Dawson, 400 F.2d 194, 200 (2nd Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); Smith v. United States, 273 F.2d 462, 467 (10th Cir. 1959); United States v. Wallace, 269 F.2d 394, 398 (3d Cir. 1959); Black v. United States, 269 F.2d 38, 43 (9th Cir.), *cert. denied*, 361 U.S. 938 (1959); United States v. De Marie, 261 F.2d 477, 479-80 (7th Cir. 1959); Gurera v. United States, 40 F.2d 338, 340-41 (8th Cir. 1930).

[39]*See, e.g.*, United States v. Wilson, 450 F.2d 495, 498 (4th Cir.1971) (citing general rule); United States v. Pruitt, 341 F.2d 700, 703 (4th Cir. 1965).

[40]*See, e.g.*, Coon v. United States, 360 F.2d 550, 555 (8th Cir.), *cert. denied*, 385 U.S. 873 (1966); Kasper v. Brittain, 245 F.2d 92, 96, (6th Cir. 1957); United States v. Rosenburg, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); Weber v. Commonwealth, 303 Ky. 56, 64, 196 S.W.2d 465, 469 (1946).

[41]*See, e.g.*, cases cited notes 44-45, 56-57 *infra*.

[42]*But see In re* Lynch, 8 Cal. 3d 410, 503 P2d 921, 105 Cal. Rptr. 217 (1972). After reviewing proportionality precedent, *Lynch* applied three of the four factors used in *Hart* without mentioning the legislative purpose criterion. However, the court did not say that its test was constitutionally required. Nor did the tribunal offer a thorough theoretical justification for its test.

Several courts are in accord with *Hart* in stressing the trivial nature of the offense[43] as an important factor to be considered.[44] In *Weems*, for example, the Supreme Court emphasized that the defendant was falsely claiming only a few hundred pesos as a government expenditure[45] and that the offender gained nothing from this crime and injured no one.[46] In *O'Neil v. Vermont*[47] Justice Field stressed that the liquor offense for which that defendant was convicted in Vermont was not even a crime in New York, the defendant's residence.[48] Further, the defendant's only connection with Vermont was certain jugs of liquor which he had sent to that state via common carrier.[49]

Other courts have stressed the nonviolent nature of the crime in judging proportionality. A Michigan court[50] emphasized that the sale of marijuana was a nonviolent crime in holding that a compulsory prison sentence of twenty years for that offense was "so excessive that it 'shocks the conscience.' "[51] Yet, the absence of violence is not necessarily a requirement for a finding of disproportionality. In *Ralph v. Warden*,[52] for example, in which the defendant had been convicted of forcible rape and sentenced to death, the court, although conceding that " 'there is a sense in which life is always endangered by sexual attack' "[53] stated that "there are rational gradations of culpability that can be made on the basis of injury to the victim."[54] Thus, the court held that, since life was neither endangered not threatened in the case before it, the death sentence was disproportionate to the crime.[55]

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[43]No. 71-1885 at 10 ("The bad check case was very nearly trivial. . . .").

[44]*See* United States v. McKinney, 427 F.2d 449, 455 (6th Cir. 1970); Faulkner v. State, 445 P.2d 815, 818-19 (Alas. 1968).

[45]217 U.S. at 358, 366 *see* Faulkner v. State, 445 P.2d 815, 818-19 (Alas. 1968).

[46]217 U.S. at 365.

[47]144 U.S. 323 (1892).

[48]*Id.* at 337 (dissenting opinion). This opinion was relied upon heavily by the majority in *Weems*.

[49]*Id.* at 337-41.

[50]People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972).

[51]*Id.* at 181, 194 N.W.2d at 834.

[52]438 F.2d 786, (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972).

[53]*Id.* at 788, *quoting* Packer, *supra* note 4, at 1077.

[54]438 F.2d at 788.

[55]While this harm-no harm dichotomy may be useful in establishing a general hierarchy of crime, it leaves many unanswered questions:

> There is a virtually infinite array of conduct engaged in daily by all of us that carries with it some danger to persons or property. The risk may be a great risk of some small danger or a small risk of some great danger. The danger may be of short-run consequences or of long-run accumulation of minor problems. The risk may be of direct physical harm or harm to property, or it may be indirect. . . .

Probably the most extensively used criteria are those that compare the punishment for a particular crime with punishments for similar crimes in other jurisdictions[56] and with other crimes in the same jurisdiction.[57] *Weems* relied extensively on this comparative approach because "the sentence in this case may be illustrated by examples even better than it can be represented by words."[58] The Court showed the excessiveness of the penalties for falsifying a public document by listing a variety of more serious federal crimes that were not punished so severely. The Court also examined the punishment for an offense of the same general nature as that charged and found that "the highest punishment possible for a crime which may cause the loss of many thousands of dollars, and to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public

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Wheeler, *supra* note 4, at 862.

Hart's evaluation of the nature of the crime might seem inconsistent with its analysis in *Ralph*. In both bases the defendant was given the maximum punishment allowable for any crime in the respective jurisdictions. Hart was given a life sentence and Ralph, a death sentence. Since *Ralph* held that the absence of actual or threatened violence was determinative, arguably *Hart* could have found disproportionality without discussin the trivial nature of the crimes involved.

One possible basis for this difference in evaluation is that *Hart* considered the variance in the severity of capital punishment and life imprisonment significant; thus, the petitioner's sentence could not have been held disproportionate to his crimes without a finding that his culpability was less than that of the defendant in *Ralph*. In addition, however, *Hart* differed from *Ralph* by focusing on an analysis of the *combined* relevant factors. *Hart* then was characterizing the crimes as only one part of its evaluation. Without a thorough evaluation of the nature of the crimes, the data available for the court's analysis would have been incomplete.

Indeed, it would seem that any analysis should focus on evaluation both of the nature of the crime and of the punishment involved in a case since the theory as stated in *Weems* establishes these factors as unknowns in the proportionality equation. At least arguable, however, is the notion that the comparative test, discussed in text accompanying notes 56-62 *infra*, is a better measure of the nature of a crime than an abstract evaluation because legislatures in setting punishments have tended to establish hierarchies of crime according to their different levels of culpability. On the other hand, *Hart*'s cumulative test, No. 11-1885 at 9, has the advantage of giving the appellate court more data to use in dealing with a complex subject. For instance, the nature-of-the-crime test permits the consideration of mitigating circumstances where the appellate court deems this is necessary.

[56]*See* Trop v. Dulles, 356 U.S. 86, 102-03 (1958); Ralph v. Warden, 438 F.2d 786, 791-92 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972); State v. Evans, 73 Idaho 50, 58-59, 245 P.2d 788, 792-93 (1952); People v. Lorentzen, 387 Mich. 167, 179, 194 N.W.2d 827, 832 (1972).

[57]*See* O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (dissenting opinion); State v. Evans, 73 Idaho 50, 59, 245 P.2d 788, 793 (1952); Dembrowski v. State, 251 Ind. 250, 252-53, 240 N.E.wd 815, 816-17 (1968); People v. Lorentzen, 387 Mich. 167, 176-78, 194 N.W.2d 827, 831-32 (1972); State v. Driver, 78 N.C. 423, 426 (1878); Cannon v. Gladden, 203 Ore. 629, 632-33, 281 P.2d 233, 235 (1955).

[58]217 U.S. at 380. The Court did not, however, state or even suggest that this test was mandated by the eighth amendment.

account."[59]

Although few courts have attempted to justify this test, one has stated that "an objective indication of society's 'evolving standards of decency' can be drawn from the trend of legislative action."[60] Another has stated that although there may be isolated instances of excessive punishment enacted by the legislature because of transitory public emotion, a legislature will usually "act with due and deliberate regard for constitutional restraints in prescribing the vast majority of punishments. . . ."[61] Thus, the criminal statutes are "illustrative of constitutionally permissible degrees of severity; and if among them are found more serious crimes punished less severely than the offense in question, the challenged penalty is to that extent suspect."[62]

In support of a legislative purpose test,[63] *Hart* turned to Justice

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[59]*Id.* at 381. Several commentators have asserted, however, that *Weems*' support for the comparative test was undermined in a later Supreme Court case. Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145, 148 (1967); Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1008-09 (1964); Note, *Constitutional Law—Cruel and Unusual Punishment—Eighth Amendment Applied to Sentence Within Statutory Limits*, 15 WAYNE L. REV. 882, 884 (1969). In Badders v. United States, 240 U.S. 391 (1916) (Holmes, J.), the defendant claimed that a thirty-five year prison sentence, five years for each of seven separate letters deposited in the mail in the execution of a scheme to defeaud, was disproportionate to the crime. *Id.* at 393. This allegation was dismissed cursorily. *Id.* at 394. The significant aspect of *Badders* is that Justice Holmes, writing for a unanimous court, cited Howard v. Fleming, 191 U.S. 126 (1903), a case expressing strong opposition to the comparative test: "That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make the sentence cruel." *Id.* at 135-36 (dictum). The citation may have been a deliberate attempt to weaken the comparative test since Holmes had joined Justice White in dissenting in *Weems*.

There are several possible mitigating factors in the *Badders* case, however. First, its precedential value is limited by the brevity of the Court's attention to the eighth amendment issue. More importantly, *Weems*, which was decided just six years before, was not even cited in *Badders*. Justice Holmes' main objection to *Weems* was his opposition to the proportionality theory itself and not to its method of application. *See* 217 U.S. at 385 (White, J., dissenting). Certainly, a citation to Justice White's dissent would have better served his purposes. The Court may have tipped its hand when it berated the petitioner for stating a vast number of obviously feckless grounds for relief and then refused to consider them. *See* 240 U.S. at 394. In addition, the Court may have felt it unnecessary to use an objective analysis because the crime and punishment did not initially "shock their conscience." *See* note 68 *infra*.

[60]Ralph v. Warden, 438 F.2d 786, 790-91 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972).

[61]*In re* Lynch, 8 Cal. 3d 410, 426, 503 P.2d 921, 932, 105 Cal. Rptr. 217, 228 (1972). It may be questioned whether a state's statutory scheme is the result of its conscious adherence to eighth amendment standards rather than solely a response to what it considers relevant policy considerations.

[62]*Id.*

[63]No. 71-1885 at 11.

Brennan's concurring opinion in *Furman v. Georgia.*[64] However Justice Brennan, unlike the Court in *Weems*, did not believe that proportionality should be analyzed by a combination of factors. Rather he asserted that proportionality is overshadowed by a lack-of-necessity test: "Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment."[65] Neither Justice Brennan nor the majority in *Weems* suggested how such a test would be implemented. In fact, proof that a more serious punishment fulfills a legislative purpose better than a lesser punishment may be impossible.[66] Lacking such evidence courts are likely to turn to conclusory statements such as those encountered in *Hart.*[67] Throughout its discussion of this test general abhorrence was expressed at the severity of the punishment for such insignificant crimes.[68]

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[64]408 U.S. 238, 300 (1972). Justices Marshall and White also expressed support for this test in their concurring opinions, *id.* at 311, 331.

[65]*Id.* at 280.

[66]Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 STAN. L. REV. 62,77-78, (1972).

[67]*See* No. 71-1885 at 12.

The court never suggested a lesser punishment that would serve the deterrent purpose as well as life imprisonment even though it commented that life imprisonment is justified only on the theory that "more is better." *Id.* at 13.

Also, the court apparently misread the deterrent theory when it commented that "if a life sentence is good for the purpose [of deterrence], surely a death sentence would be better." *Id.* at 11-12. Implicitly, this position recognizes only the fear function of deterrence: "the criminal who engages in rational decision-making will consider the possible penalties for various choices of action and, other things being equal, will act in the way which holds the least dangerous consequences." Wheeler, *supra* note 66, at 75. It has been recognized, however, that deterrence consists of an educational function as well. *See, e.g.*, Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L.C. & P.S. 176, 179-80 (1952). Theoretically, a criminal statutory structure imports to the citizenry the immorality of various types of conduct, with the goal that "[p]unishments are thereby supposed to create not only conscious and unconscious inhibitions against committing crime, but also inhibitions against committing a more severe crime rather than a less severe one." Wheeler, *supra* note 66, at 75. Thus, to argue that a death sentence would as well serve the deterrent purpose as life imprisonment in regard to a particular crime is lacking in its failure to consider the effect of the increased sentence on the entire scheme of statutory crimes.

Of course, a more basic question than whether the legislative purpose test is proper *as applied* in *Weems* concerns whether the test is proper at all. For a thorough analysis that concludes that the legislative purpose test is subsumed by a proper proportionality test in most instances and is impractical in the remaining, see Wheeler, *supra* note 66, at 71-79.

[68]This general abhorrence suggests that the punishment "shocked the conscience" of the court independently of the tribunal's proportionality analysis. We may speculate that the court will not give extended consideration to the substance of an eighth amendment challenge unless it is initially shocked. *See* Turkington, *supra* note 59, at 148. Supporting this notion is United States v. True-

PROPORTIONALITY IN PERSPECTIVE

Although *Hart* fails to provide justification for its proportionality analysis, the decision at least attempted to develop a methodology for applying the eighth amendment. The constitutionally required criteria are important because they may potentially force courts to do more than pronounce their boiler plate that sentences will not be reviewed either because they are within statutory limits or because there was no abuse of discretion. *Hart's* contribution will be minimal, however, if courts use the criteria only after determining that their consciences are shocked, a possibility suggested earlier.[69] The analysis still would limit wholly subjective determinations of disproportionality.

Even if the *Hart* analysis is applied in all cases in which proportionality is in issue, objectively should not be overemphasized. In *Trop v. Dulles* the Supreme Court only commanded that reviewing the constitutionality of a statute "requires the exercise of judgment, not the reliance on personal preferences."[70] *Ralph v. Warden*, however, stated: "The constitutionality of Ralph's punishment cannot rest on the subjective opinions of the judges who imposed the sentence or of the judges who must review the case. On the contrary, his punishment must be tested objectively."[71] While *Ralph* apparently intended only to paraphrase *Trop's* admonition, its language may be misunderstood. No analysis of proportionality can be wholly objective, for the "evolving standard"[72] used in evaluating punishments under the eighth amendment precludes development of a formula that will almost automatically produce a conclusion. The criteria, set forth in *Hart*, therefore, should be viewed as placing limits on appellate subjectivity rather than supplanting it. The guidelines should amelioriate the situation that compelled one writer to

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love, No. 72-2495 (4th Cir., Aug. 9, 1973) (per curiam) (Craven & Boreman, JJ., joining Winter, J., in an unanimous decision), in which the court, upon rejecting a challenge to a five year sentence stated: "In the absence of the most exceptional circumstances, a sentence that does not exceed the statutory limits is within the sole discretion of the trial judge and an appellate court has no authority to review it." *Id.* at 2. Also, in Wood v. South Carolina, (No. 72-1336 (4th Cir., July 13, 1973), the court rejected a challenge of disproportionality without employing the cumulative test used in *Hart*. The petitioner in *Wood* had plead guilty to two counts of making an obscene telephone call and was sentenced to a term of five years in prison on each count, the sentences to run concurrently. Surely, if *Hart* had established a proportionality test of general applicability, this test would have been used in *Wood*, an opinion handed down the same day as *Hart* and decided by the same panel.

[69]*See supra* note 68.

[70]356 U.S. 86, 103 (1958).

[71]438 F.2d 786, 789 (1970), *citing* Trop v. Dulles, 356 U.S. 86, 103 (1958).

[72]438 F.2d at 101; Weems v. United States, 217 U.S. 349, 373 (1910).

conclude: "[I]t probably makes little practical difference in most cases whether a judge professes to follow community conscience or not. The appeal is essentially to his own innate standards of fairness and humanity."[73]

Furthermore, there may be a distinction between appellate review of statutes requiring mandatory sentences and of statutes allowing judicial discretion in setting the punishment. In *Wood v. South Carolina*,[74] the court in its very brief analysis stressed that the sentencing judge may have considered the defendant's prior record of convictions in setting the punishment. In *Hart*, on the other hand, it was emphasized that the judge was totally without discretion.[75] The assumption in *Hart* may have been that either at the trial court or appellate level there must be a consideration of personally mitigating circumstances in evaluating proportionality. This, however, does not negate appellate review of punishments given in the discretion of the sentencing judge. To the contrary, the appellate court might find that there are no *personal* circumstances that could justify the punishment because of the great discrepancy between the crime and punishment on their face—a discrepancy determined from the use of criteria like those used in *Hart*, albeit without consideration of personal circumstances.

Proportionality analysis is not yet, if it ever will be, a safeguard against the myriad inequities in sentencing practices. As the Fourth Circuit cases discussed above illustrate, the courts have had difficulty in applying the eighth amendment standard. In addition, legislatures have much more flexibility to deal with the broad policy questions involved in developing well integrated sentencing schemes. Nevertheless, the courts must not abdicate their responsibility under the constitution to nullify a punishment grossly disproportionate to the offense committed To effectuate this mandate, they must criticize and improve the criteria used in *Hart*.

JOE STALLINGS

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[73]Note, 36 N.Y.U.L. REV., *supra* note 4, at 851.
[74]No. 72-1336 (4th Cir., July 13, 1973).
[75]No. 71-1885 at 14-15.