MANDATORY LIFE SENTENCE UNDER RECIDIVIST STATUTE IS NOT CRUEL AND UNUSUAL PUNISHMENT

Rummel v. Estelle, 445 U.S. 263 (1980)

The United States Supreme Court severely restricted the eighth amendment's prohibition against disproportionate punishments[1] in holding that a mandatory life sentence imposed under Texas' recidivist statute[2] does not constitute cruel and unusual punishment.[3]

Petitioner was sentenced under Texas' recidivist statute[4] to a mandatory life term following his conviction for fraudulent procurement of $120.75.[5] Petitioner's two prior convictions for unlawful use of a credit card to obtain goods valued at $80,[6] and for passing a forged instrument in the amount of $28.36,[7] invoked the recidivist statute. The state court upheld the conviction,[8] and the United States district court denied petitioner's writ of habeas corpus without a hearing.[9] Al-

1. For cases recognizing the eighth amendment prohibition against disproportionate sentencing, see Hutto v. Finney, 437 U.S. 676, 685 (1978) (dictum); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality); Ingraham v. Wright, 430 U.S. 651, 667 (1977) (dictum); Estelle v. Gamble, 429 U.S. 97, 103 n.7 (1976) (dictum); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality); Furman v. Georgia, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring); Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality) (dictum); Weems v. United States, 217 U.S. 349, 367 (1910). *See generally* W. LEFAVE & A. SCOTT, CRIMINAL LAW § 22 at 163 (1972); Jefferies & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1377 (1979); Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639, 639-40 (1979); Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145, 147 (1967); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 841 (1972); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846, 847 (1961); Note, *Recidivist Statutes and the Eighth Amendment: A Disproportionality Analysis*, 1974 WASH. U.L.Q. 147, 147.

2. TEX. REV. CRIM. STAT. art. 63 (1925) (current version at TEX. PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon 1974)).

3. Rummel v. Estelle, 495 U.S. 263 (1980).

4. TEX. REV. CRIM. STAT. art. 63 (1925) (current version at TEX. PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon 1974)).

5. *See* TEX. REV. CRIM. STAT. art. 1410 (1925) (current version at TEX. PENAL CODE ANN. tit. 7, § 31.03 (Vernon Supp. 1980)) (Rummel's offense is no longer considered a felony under the current version).

6. *See* 1959 Tex. Gen. Laws 885 (current version at TEX. PENAL CODE ANN. tit. 7, § 32.31 (Vernon 1974)).

7. *See* TEX. REV. CRIM. STAT. art. 996 (1925) (current version at TEX. PENAL CODE ANN. tit. 7, § 32.21 (Vernon 1974)).

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

9. Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir. 1978).

though a divided panel of the Fifth Circuit Court of Appeals reversed the conviction,[10] the decision was vacated on rehearing en banc.[11] The United States Supreme Court affirmed the en banc decision and *held*: Petitioner's mandatory life sentence does not constitute cruel and unusual punishment under the eighth and fourteenth amendments.[12]

In England, the Magna Carta[13] and the cruel and unusual punishment clause of the English Bill of Rights[14] prohibited the imposition of disproportionate punishments.[15] The eighth amendment incorporated almost identical language from the cruel and unusual punishment clause of the English Bill of Rights.[16]

State legislatures first enacted recidivist statutes in 1796.[17] Forty-six of the fifty states presently have some form of recidivist or enhancement statute to deal with repeat offenders.[18] Recidivist statutes are in-

10. Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978) (sentence held to be cruel and unusual punishment).

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

12. Rummel v. Estelle, 445 U.S. 263 (1980).

13. J. HOLT, MAGNA CARTA 323 (1965). "A free man shall not be amerced for a trivial offense, except in accordance with the degree of the offense; and for a serious offense he shall be amerced according to its gravity." *Id.*

14. The cruel and unusual punishment clause of the Bill of Rights of 1688 provides: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." Bill of Rights, 1688, 1 W. & M. sess. 2, ch. 2, *reprinted in* R. PERRY & J. COOPER, SOURCES OF OUR LIBERTY 247 (1959).

15. "The English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was first, an objection to the imposition of punishments which were unauthorized by statute . . . and *second, a reiteration of the English policy against disproportionate penalties*." Granucci, *"Not Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 860 (1969) (emphasis added). *See also* Wheeler, *supra* note 1, at 853.

16. *See* notes 14-15 *supra*.

17. *See* 1796 N.Y. Laws 696, ch. 30; 1796 Va. Acts ch. 2, §§ 24, 42.

18. *See* ALA. CODE § 13-A-5-9 (Supp. 1978); ALASKA STAT. § 12.55.125 (1980); ARIZ. REV. STAT. § 13-604 (West Supp. 1980); ARK. STAT. ANN. § 41-1001 (1977); CAL. PENAL CODE § 667.5-.6 (Deering Supp. 1980); COLO. REV. STAT. § 16-13-101 (Supp. 1979); CONN. GEN. STAT. § 53a-40(c) to 40(e) (1979); DEL CODE ANN. tit. 11, §§ 4214, 4215 (1979); D.C. CODE ANN. § 22-104a (1973); FLA. STAT. ANN. § 775.084 (West 1976 & Supp. 1980); GA. CODE ANN. § 27-2511 (1978); HAWAII REV. STAT. § 706-662(4) (1976); IDAHO CODE § 19-2514 (1979); ILL. ANN. STAT. ch. 38, § 33B-1 (Smith-Hurd Supp. 1980); IND. CODE ANN. § 35-50-2-8 (Burns Supp. 1980); IOWA CODE ANN. § 902.8 (West 1979); KAN. STAT. ANN. § 21-4504 (Supp. 1979); KY. REV. STAT. ANN. § 532:080 (Baldwin Supp. 1980); LA. REV. STAT. ANN. § 15:529.1 (West Supp. 1980); MD. ANN. CODE art. 27 § 643B (Supp. 1980); MASS. ANN. LAWS ch. 279, § 25 (Michie/Law. Co-op 1980); MICH. STAT. ANN. § 28.1084 (Supp. 1980); 1978 Minn. Laws 770 (to be codified at MINN. STAT. § 609.346); MISS. CODE ANN. § 99-19-83 (Supp. 1979); MO. REV. STAT. §§ 558.016, 571.015 (Supp. 1979); MONT. REV. CODES ANN. § 46-18-501 (1979); NEB. REV. STAT. § 29-2221 (1979); NEV. REV. STAT. § 207.010 (1979); N.H. REV. STAT. ANN. § 651:6 (1974); N.J. STAT. ANN. § 2c-44-3 (West Supp. 1980); N.M. STAT. ANN. § 31-18-17 (Supp. 1980); N.Y. PENAL LAW § 70.06, .08, .10

variably upheld against challenges[19] that they violate the privileges and immunities,[20] equal protection,[21] due process,[22] double jeopardy,[23] ex post facto,[24] and cruel and unusual punishment[25] clauses of the Consti-

(McKinney Supp. 1979); N.C. GEN. STAT. § 15A-1340.5 (Supp. 1979); N.D. CENT. CODE § 12.1-32-09 (Supp. 1979); OKLA. STAT. ANN. tit. 21, § 51 (West Supp. 1980); OR. REV. STAT. § 161.725 (1979); R.I. GEN. LAWS § 12-19-21 (1969); S.C. CODE § 17-25-40 (1976); S.D. CODIFIED LAWS ANN. § 22-7-7 (1979); TENN. CODE ANN. § 40-2801 (1975); TEX. PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon 1974); UTAH CODE ANN. §§ 76-8-1001, -1002 (1978); VT. STAT. ANN. tit. 13, § 11 (1974); WASH. REV. CODE ANN. § 9.92.090 (1977); W. VA. CODE § 61-11-18 (1977); WIS. STAT. ANN. § 939.62 (West 1958 & Supp. 1980); WYO STAT. §§ 6-1-109, -110 (1977).

19. *See generally* Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 110-19 (1971); Note, *A Closer Look at Habitual Criminal Statutes*: Brown v. Parrat *and* Martin v. Parrat, *A Case Study of the Nebraska Law*, 16 AM. CRIM. L. REV. 275, 282 (1979); Note, *Don't Steal a Turkey in Arkansas — The Second Felony Offender in New York*, 45 FORDHAM L. REV. 76, 76 (1976); Note, *Recidivist Laws Under the Eighth Amendment*, 10 U. TOL. L. REV. 606, 612-13 (1979); Note, *Recidivism and Virginia's "Come-Back" Law*, 48 VA. L. REV. 597, 602-07 (1962); Note, *Recidivist Statutes and the Eighth Amendment: A Disproportionality Analysis*, *supra* note 1, at 148.

20. *See* Graham v. West Virginia, 224 U.S. 616 (1912); Moore v. Missouri, 159 U.S. 673 (1895) (dictum).

21. *See* Oyler v. Boles, 368 U.S. 448, 454-56 (1962); Graham v. West Virginia, 224 U.S. 616, 629-31 (1912); McDonald v. Massachusetts, 180 U.S. 311, 313 (1901); Moore v. Missouri, 159 U.S. 673, 677-78 (1895); Ohler v. Beto, 356 F.2d 879, 880 (5th Cir. 1966); People v. Luckey, 90 Ill. App. 2d 325, 331, 234 N.E.2d 26, 29-30 (1967), *cert. denied,* 397 U.S. 942 (1970); State v. Maldonado, 176 Mont. 322, 328-29, 578 P.2d 296, 300 (1978); State v. Thomas, 16 Wash. App. 1, 15-16, 553 P.2d 1357, 1366 (1976).

22. *See* Spencer v. Texas, 385 U.S. 554, 559-69 (1967); Oyler v. Boles, 368 U.S. 448, 451-54 (1962); Graham v. West Virginia, 224 U.S. 616, 623-24 (1912); Martin v. Parratt, 549 F.2d 50, 52 (8th Cir. 1977); Capuchino v. Estelle, 506 F.2d 440, 443 (5th Cir.), *cert. denied,* 423 U.S. 842 (1975); Johnson v. Kansas, 284 F.2d 344, 345 (10th Cir. 1960); State v. Maldonado, 176 Mont. 322, 328-29, 578 P.2d 296, 300 (1978); Vess v. Bomar, 213 Tenn. 487, 491, 376 S.W.2d 446, 448 (1964); State v. Thomas, 16 Wash. App. 1, 15-16, 553 P.2d 1357, 1366 (1976). *Contra,* Hicks v. Oklahoma, 445 U.S. 901 (1980).

23. *See* Gryger v. Burke, 334 U.S. 728, 732 (1948); Graham v. West Virginia, 224 U.S. 616, 624-29 (1912); Moore v. Missouri, 159 U.S. 673, 676-77 (1895); Woodward v. Beto, 447 F.2d 103, 104-05 (5th Cir.), *cert. denied,* 404 U.S. 957 (1971).

24. *See* Fong v. United States, 287 F.2d 525, 526 (9th Cir.), *cert. denied,* 366 U.S. 971 (1961); Cooper v. United States, 114 F. Supp. 464, 465-66 (S.D.N.Y. 1953); Vess v. Bomar, 213 Tenn. 487, 490-91, 376 S.W.2d 446, 447-48 (1964).

25. *See* Graham v. West Virginia, 224 U.S. 616, 631 (1912); McDonald v. Massachusetts, 180 U.S. 311, 313 (1901); Martin v. Parratt, 549 F.2d 50, 52 (8th Cir. 1977); Capuchino v. Estelle, 506 F.2d 440, 442-43 (5th Cir.), *cert. denied,* 423 U.S. 842 (1975); Cooper v. United States, 114 F. Supp. 464, 465-66 (S.D.N.Y. 1953); Wilson v. State, 251 Ark. 900, 901-02, 475 S.W.2d 543, 544 (1972); Ex parte Rosencrantz, 205 Cal. 534, 537-40, 271 P. 902, 904-05 (1928) (en banc); *In re* Boatwright, 119 Cal. App. 420, 423-24, 6 P.2d 972, 973 (1931); People v. Luckey, 90 Ill. App. 2d 325, 331, 234 N.E.2d 26, 30 (1967), *cert. denied,* 397 U.S. 942 (1970); Cox v. Commonwealth, 514 S.W.2d 49, 50 (Ky. 1974); Rolack v. Commonwealth, 514 S.W.2d 47, 50 (Ky. 1974); State v. Custer, 240 Or. 350, 352, 401 P.2d 402, 403 (1965); West v. State, 511 S.W.2d 502, 506 (Tex. Crim. App. 1974); Bennett v. State, 455 S.W.2d 239, 242-43 (Tex. Crim. App. 1970); State v. Lee, 87

tution. Only four sentences imposed under recidivist statutes have been overturned[26] or altered.[27] In two of the cases the sentence was held to be cruel and unusual because of its excessive length.[28]

The eighth amendment prohibits both federal and state governments[29] from inflicting cruel and unusual punishment.[30] Early interpretations of the eighth amendment limited its scope to barbaric and torturous forms of punishment.[31] Later interpretations, however, expanded the scope of the eighth amendment to include substantive limitations on the type of conduct that can be considered criminal[32] and prohibited the imposition of punishments that were disproportionate to the crime charged.[33]

The United States Supreme Court has invoked the principle of proportionality on only two occasions to overturn disproportionate punish-

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Wash. 2d 932, 937, 558 P.2d 236, 239-40 (1976), *appeal dismissed,* 432 U.S. 901 (1977). *But see* Hart v. Coiner, 483 F.2d 136, 139-43 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974); Stephens v. State, 73 Okla. Crim. 349, 352-54, 121 P.2d 326, 328 (1942).

26. *See* Hicks v. Oklahoma, 445 U.S. 901 (1980); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974).

27. *See* Stephens v. State, 73 Okla. Crim. 349, 121 P.2d 326 (1942).

28. Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974) (mandatory life sentence under recidivist statute overturned for perjury conviction where defendant had two prior convictions for writing a check with insufficient funds and transporting forged checks across state lines); Stephens v. State, 73 Okla. Crim. 349, 121 P.2d 326 (1942) (twenty-one month sentence imposed under recidivist statute for a bigamy conviction reduced to nine months where defendant had gotten divorced but remarried before the six month waiting period was up). *See also* Hicks v. Oklahoma, 445 U.S. 901 (1980) (appellate court affirmance of mandatory forty year sentence under recidivist statute previously held unconstitutional held to be a denial of due process); Terrebonne v. Blackburn, 624 F.2d 1363 (5th Cir. 1980) (remand to district court for determination whether mandatory life sentence for sale of heroin constituted cruel and unusual punishment).

29. *See* Robinson v. California, 370 U.S. 660, 662 (1962) (applied the cruel and unusual punishment clause of the eighth amendment to the states through the due process clause of the fourteenth amendment). *See generally* Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964); Turkington, *supra* note 1, at 152.

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

31. *See, e.g., In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 136 (1878). *See generally* Jefferies & Stephan, *supra* note 1, at 1377; Turkington, *supra* note 1, at 145; Note, *Revival of the Eighth Amendment: Development of a Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 1004 (1964); Note, *Recidivist Statutes and the Eighth Amendment: A Disproportionality Analysis*, *supra* note 1, at 149.

32. *See* Ingraham v. Wright, 430 U.S. 651, 667 (1977); Robinson v. California, 370 U.S. 660, 666-67 (1962); W. LAFAVE & A. SCOTT, *supra* note 1, § 22 at 163; Packer, *supra* note 25, at 1071.

33. *See* note 1 *supra*.

ments.[34] The Court's infrequent reliance on the proportionality principle reflects its uncertainty surrounding the meaning of the eighth amendment.[35] Because the framers of the Constitution adopted the eighth amendment with little debate, there is a lack of legislative history to clarify this uncertainty.[36] In addition, lower courts did not develop an objective standard to judge cruel and unusual punishments.[37] Thus, when faced with proportionality issues, courts invariably defer to

34. Coker v. Georgia, 433 U.S. 584 (1977) (plurality); Weems v. United States, 217 U.S. 349 (1910). *Cf.* Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality) (eighth and fourteenth amendments prohibit the imposition of mandatory death penalty); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality) (same); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) (capital punishment sentencing procedure violates the eighth amendment); Robinson v. California, 370 U.S. 660 (1962) (ninety day sentence for drug addiction cruel and unusual punishment); Trop v. Dulles, 356 U.S. 86 (1958) (denationalization for wartime desertion cruel and unusual punishment).

Lower courts have overturned less than two dozen sentences because of excessive length. *See* Davis v. Davis, 601 F.2d 153 (4th Cir. 1979), *vacated sub nom.* Hutto v. Davis, 445 U.S. 947 (1980) (vacated on appeal in light of the holding in *Rummel*); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), *cert. denied,* 408 U.S. 942 (1972); United States v. McKinney, 427 F.2d 449 (6th Cir. 1970), *cert. denied,* 402 U.S. 982 (1971); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.D. 1978); Faulkner v. State, 445 P.2d 815 (Alaska 1968); *In re* Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975); *In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974) (en banc); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (en banc); People v. Keogh, 46 Cal. App. 3d 919, 120 Cal. Rptr. 817 (1975); Kenimer v. State, 83 Ga. App. 264, 63 S.E.2d 280 (1951); Bissell v. Devore, 225 Iowa 815, 281 N.W. 740 (1938); Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972); People v. Bruinsma, 34 Mich. App. 167, 191 N.W.2d 108 (1971); Atwood v. State, 146 Miss. 662, 111 So. 865 (1927) (en banc); Politano v. Politano, 146 Misc. 792, 262 N.Y.S. 802 (Sup. Ct. 1933); State v. Tyson, 223 N.C. 492, 27 S.E.2d 113 (1943); Stephens v. State, 73 Okla. Crim. 349, 121 P.2d 326 (1942); Cannon v. Gladden, 203 Or. 629, 281 P.2d 233 (1955) (en banc); State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273 (1930); Cason v. State, 160 Tenn. 267, 23 S.W.2d 665 (1930).

35. *See, e.g.,* Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879).

36. 1 ANNALS OF CONGRESS 754 (Gales & Seaton ed. 1789):

> MR. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.
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> MR. LIVERMORE: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. Nor cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping; and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.
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> The question was put on the clause, and it was agreed to by a considerable majority.

Id. at 754.

37. Note, *Recidivist Statutes and the Eighth Amendment: A Disproportionality Analysis*, *supra*

legislative judgments.[38]

The Supreme Court first recognized the eighth amendment prohibition against disproportionate sentences in a dissenting opinion in *O'Neil v. Vermont*.[39] The Court in *Weems v. United States*[40] subsequently adopted the *O'Neil* dissent as a majority view.[41] In *Weems* a United States Coast Guard disbursing officer, convicted for falsifying a public document while stationed in the Philippine Islands,[42] was sentenced to fifteen years of "hard and painful labor in chains."[43] In holding the sentence cruel and unusual, the Court found it a "precept of justice that punishment for a crime . . . be graduated and proportioned to the offense."[44]

The Court in *Weems* compared the punishment imposed on the defendant with the punishment imposed for similar crimes in other jurisdictions and the punishment for more serious crimes within the same jurisdiction.[45] After concluding that the sentence imposed on Weems

note 1, at 149-50. *But see* Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974).

38. Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), *cert. denied,* 439 U.S. 1091 (1979); United States v. Wilson, 506 F.2d 521 (9th Cir. 1974); United States v. MacClain, 501 F.2d 1006 (10th Cir. 1974); Yeager v. Estelle, 489 F.2d 276 (5th Cir. 1973), *cert. denied,* 416 U.S. 908 (1974); Page v. United States, 462 F.2d 932 (3d Cir. 1972); Sluder v. Brantley, 454 F.2d 1266 (7th Cir. 1972); United States v. Dawson, 400 F.2d 194 (2d Cir. 1968), *cert. denied,* 393 U.S. 1023 (1969); United States v. Martell, 335 F.2d 764 (4th Cir. 1964); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); *In re* Boatwright, 119 Cal. App. 420, 6 P.2d 972 (1931); W. LAFAVE & A. SCOTT, *supra* note 1, § 22 at 164; Note, *Recidivist Statutes and the Eighth Amendment: A Disproportionality Analysis*, *supra* note 1, at 149; Note, *Judicial Limitations on the Constitutional Protection Against Cruel and Unusual Punishment*, 1960 WASH. U.L.Q. 160, 169.

39. 144 U.S. 323, 337 (1892) (Field, J., dissenting). In his dissent Mr. Justice Field stated: "The inhibition is directed, not only against punishments [which inflict torture], but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.* at 339-40.

40. 217 U.S. 349 (1910).

41. *Id.*

42. *Id.* at 364.

43. *Id.* In addition to a fifteen year term of confinement, the sentence imposed on Weems included hard labor chains at both hands and feet, no marital or parental authority, no property rights, restrictions on family contact, and perpetual surveillance after release from prison. *Id.*

44. *Id.* at 367.

45. *Id.* at 380-81. This comparative approach was implicitly rejected seven years later in Badders v. United States, 240 U.S. 391 (1916). In *Badders*, Justice Holmes ignored *Weems* and relied on Howard v. Flemming, 191 U.S. 126, 135-36 (1903), which rejected the comparative approach. In recent decisions, however, the Court has compared statutes and punishments in assessing whether a punishment is cruel and unusual. *See* Coker v. Georgia, 433 U.S. 584, 593-96 (1977) (plurality); Gregg v. Georgia, 428 U.S. 153, 179-80 (1976) (plurality); Trop v. Dulles, 356 U.S. 86, 102-03 (1958).

was cruel and unusual in its "degree and kind,"[46] the Court found both the length and the "accessories" of the sentence to be cruel and unusual under the eighth amendment.[47] In addition the Court recognized the evolving nature of the eighth amendment and found that the amendment must be capable of broader interpretations as "conditions and purposes" change.[48]

Recent Supreme Court decisions adopt the *Weems* broad interpretation of the eighth amendment.[49] In *Trop v. Dulles*[50] the Court found that the scope of the eighth amendment is not static, but incorporates "evolving standards of decency that mark the progress of a maturing society."[51] The expansive interpretation of the eighth amendment was used to overturn punishment of denationalization for wartime desertions;[52] imposition of a ninety day sentence for drug addiction;[53] imposition of the death penalty in an arbitrary and discriminatory manner;[54] and mandatory imposition of the death penalty.[55]

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46. 217 U.S. at 377.

47. *Weems* suggests that either ground would have merited reversal of the sentence. "*It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment*. . . . Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind." *Id.* at 377 (emphasis added). *But see* Mulligan, *supra* note 1, at 643; Packer, *supra* note 29, at 1075.

48. 217 U.S. at 373. The Court further stated:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.

Id. The Court referred to its broad interpretations of the general language in the commerce clause, the due process clause, and the provision prohibiting ex post facto laws as justifying an expansive reading of the eighth amendment. *Id.* at 373-75.

49. Hutto v. Finney, 437 U.S. 676, 685 (1978); Coker v. Georgia, 433 U.S. 584, 593-94 (1977) (plurality); Estelle v. Gamble, 429 U.S. 97, 102 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *Id.* at 263-64 (Brennan, J., concurring); *Id.* at 325 (Marshall, J., concurring); *Id.* at 409 (Blackmun, J., dissenting); Robinson v. California, 370 U.S. 660, 666 (1962); Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality).

50. 356 U.S. 86 (1958) (plurality).

51. *Id.* at 100-01.

52. *Id.*

53. Robinson v. California, 370 U.S. 660 (1962).

54. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

55. Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality).

The eighth amendment was also applied to improve inadequate conditions in penal institutions. Hutto v. Finney, 437 U.S. 678 (1978) (prison condition of isolation held to be cruel); Estelle v.

In *Coker v. Georgia*[56] the Supreme Court invoked the eighth amendment to overturn imposition of the death penalty for the crime of rape.[57] In holding the death penalty disproportionate to the underlying crime, the Court found that a punishment is excessive and unconstitutional if it makes "no measurable contribution to acceptable goals of punishment [or is] grossly out of proportion to the severity of the crime."[58] The Court in *Coker* considered the nature of the offense, the punishment imposed by other jurisdictions for the same offense, and the frequency with which juries impose the death penalty for rape[59] to assess the proportionality of the punishment.

The lower courts have applied three distinct standards to review the proportionality of a sentence under the eighth amendment. One group of cases flatly rejects proportionality analysis and considers an attack on a sentence to be an attack on the statute itself.[60] If the statute is constitutional, then any sentence imposed within limits set by the statute is necessarily constitutional.[61] A second group of cases reviews a sentence imposed within the statutory limits only when "exceptional circumstances" exist.[62] A final group of decisions inspects the individual facts of each case to determine whether a sentence is disproportionate.[63] The courts in these decisions assess the gravity of the offense, determine the legislative purpose of the statute, and compare the punishment imposed with the punishment imposed for the same offense in

Gamble, 429 U.S. 97 (1976) (deliberate indifference by prison officials to prisoner's serious illness or injury constitutes cruel and unusual punishment).

56. 433 U.S. 584 (1977) (plurality).

57. *Id.* at 592. The Court limited its decision to the rape of an adult woman and did not decide whether statutes authorizing the death penalty for raping a child constituted cruel and unusual punishment. *Id.* at 596.

58. *Id.* at 592.

59. *Id.* at 593-97.

60. *E.g.,* United States v. Dawson, 400 F.2d 194, 200 (2d Cir. 1968), *cert. denied,* 393 U.S. 1023 (1969); Gallego v. United States, 276 F.2d 914, 918 (9th Cir. 1960).

61. *Id.*

62. Courts applying this standard invariably uphold the imposition of the sentence and do not define what constitutes "exceptional circumstances." *E.g.,* United States v. Martell, 335 F.2d 764, 766 (4th Cir. 1964); Perkins v. North Carolina, 234 F. Supp. 333, 337 (W.D.N.C. 1964). Other courts using a similar standard refuse to review a sentence within the statutory limits unless it "shocks the conscience." *See, e.g.,* Capuchino v. Estelle, 506 F.2d 440 (5th Cir.), *cert. denied,* 423 U.S. 823 (1975); Yeager v. Estelle, 489 F.2d 276 (5th Cir. 1973); *Ex parte* Rosencrantz, 205 Cal. 534, 539, 271 P. 902, 904 (1928).

63. Important factors in assessing the nature of an offense are the presence or absence of violence and danger to other persons. Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974).

other jurisdictions and with the punishment fixed for other crimes within the same jurisdiction.[64]

In *Rummel v. Estelle*[65] the United States Supreme Court, in a plurality opinion,[66] refused to apply the eighth amendment to invalidate a life sentence imposed under the Texas recidivist statute.[67] The plurality, speaking through Justice Rehnquist, reiterated that the eighth amendment embodies a principle of proportionality,[68] but refused to apply the proportionality principle to the particular facts.[69]

The Court first distinguished both *Coker* and *Weems* as inapplicable to the *Rummel* facts.[70] Because *Coker* involved capital punishment, which is qualitatively different in "kind" from any term of confinement, the *Coker* standard could not be applied in a noncapital case.[71] Additionally, *Weems* could not be applied to challenge the length of a sentence alone because it involved both cruel "accessories" and a long term of confinement.[72]

The Court addressed the relative "pettiness" of Rummel's crimes in relation to the punishment imposed and noted that the lack of violence and the small amount of money involved were not objective indicators of the severity of the crimes.[73] Texas' interest in punishing Rummel,

64. *See* Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), *cert. denied,* 439 U.S. 1091 (1979); Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976), *cert. denied,* 430 U.S. 973 (1977); Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976); Wood v. South Carolina, 483 F.2d 149 (4th Cir. 1973); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974).

65. 445 U.S. 263 (1980) (plurality).

66. Justice Rehnquist, writing for the Court, was joined by the Chief Justice and Justices White and Blackmun.

67. 445 U.S. 263 (1980).

68. *Id.* at 272.

69. *Id.* at 272-73.

70. *Id.*

71. *Id.* at 272.

72. *Id.* at 273-74. The punishment in *Weems*, in addition to a fifteen year term of confinement, included hard labor, chains at both the hands and feet, no marital or parental authority, no property rights, restrictions on family contact, and perpetual surveillance after release from prison. Justice Rehnquist distinguished *Weems* from Rummel's challenge to the proportionality of his term of confinement on the basis of these "accessories," stating that, "we do not believe that *Weems* can be applied without regard to its peculiar facts: the triviality of the charged offense, the impressive length of the minimum term of imprisonment, and the extraordinary nature of the 'accessories' included within the punishment . . . ." *Id.* at 274.

73. The Court argued that the seriousness of a crime is determined by "the strength of society's interest in deterring a particular crime or in punishing a particular criminal." Examples such as bribery and corporate violations of clean air and water statutes are serious offenses that do not involve violence. Additionally, the Court asserted that the line distinguishing more serious from

however, stemmed from the defendant's repeated criminal behavior.[74] The imposition of a harsher penalty is justified because Texas has a greater interest in dealing more severely with recidivists than with first time offenders.[75]

In reviewing recidivist statutes in other states the Court noted that two states,[76] in addition to Texas, impose mandatory life sentences after three felony convictions.[77] The Court, however, discredited the utility of examining sentences imposed by other jurisdictions in noncapital cases because additional factors, including the prosecutorial discretion initially to invoke the recidivist statute[78] and the possibility of early release through parole,[79] must be considered in noncapital cases.[80]

In concluding that the sentence imposed under the Texas recidivist statute was not cruel and unusual, the Court found that the length of a sentence is "purely a matter of legislative prerogative."[81] Thus, any trend toward less severe discretionary sentences "must find its source . . . in the legislatures, not in the federal courts."[82]

Justice Stewart found in concurrence that although the imposition of severe sentences on recidivists may be unwise, it does not transgress the minimum constitutional standard.[83]

Justice Powell, joined in dissent by Justices Brennan, Marshall, and Stevens,[84] found support in prior case law for the application of a proportionality test in noncapital cases.[85] The dissent noted that the na-

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less serious crimes based upon the amount of money involved is a subjective decision best left to the legislature. *Id.* at 274.

74. *Id.* at 276.

75. *Id.* at 277.

76. *Id.* at 279.

77. WASH. REV. CODE ANN. § 9.92.090 (1977); W. VA. CODE § 61-11-18 (1977). Rummel attempted to distinguish these statutes on the grounds of the Fourth Circuit's limited application of West Virginia recidivist statute and the Washington Supreme Court's implication that it would apply disproportionality analysis in an appropriate situation. Brief for Petitioner at 39 nn.28 & 29, Rummel v. Estelle, 445 U.S. 263 (1980).

78. 445 U.S. at 281 (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)).

79. *Id.* at 280-81.

80. *Id.* at 281.

81. *Id.* at 274.

82. *Id.* at 284.

83. *Id.* at 285. This is a reiteration of Justice Stewart's concurring opinion in Spencer v. Texas, 385 U.S. 554, 569 (1967) (upholding the constitutionality of Texas' recidivist statute).

84. 445 U.S. at 285.

85. *Id.* at 289 (citing Ingraham v. Wright, 430 U.S. 651, 667 (1977)); Hutto v. Finney, 437 U.S. 678, 685 (1978); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality); Gregg v. Georgia, 428

ture of the offense, the sentences imposed in other jurisdictions for the same crime, and the sentence imposed for other crimes within the same jurisdiction should be considered to assess the proportionality of a sentence.[86] The dissent maintained that Rummel's crimes were relatively minor in nature[87] because they were nonviolent offenses[88] amounting to less than $230 and Rummel's third offense was no longer a felony under Texas law.[89] Thus, the life sentence was disproportionate to the crime.[90] Finally, the dissent found that the disproportionality analysis of the Fourth Circuit could be applied to noncapital cases without impinging the principles of federalism and state autonomy.[91]

The Court's reluctance to apply proportionality analysis in noncapital cases is unwarranted. Neither *Weems* nor *Coker* restricts the application of proportionality analysis to capital cases. Because the Court in *Weems* found the punishment imposed "cruel in its excess of imprisonment," as well as in the accessories that accompanied imprisonment,[92]

U.S. 153, 171 (1976) (opinion of Stewart, Powell and Stevens, JJ.); Furman v. Georgia, 408 U.S. 238, 325 (1972) (Marshall, J., concurring).

86. 445 U.S. at 295 (citing Coker v. Georgia, 433 U.S. 584, 593-94 (1977) (plurality)); *id.* at 603 (Powell, J., concurring and dissenting in part); Gregg v. Georgia, 428 U.S. 153, 179-80 (1976); Weems v. United States, 217 U.S. 349, 380-81 (1910).

87. 445 U.S. at 295.

88. *Id.*

89. *Id.* Between the time Rummel was convicted as an habitual offender and the time the Court heard the case, Texas reclassified his third offense, theft by false pretext, as a misdemeanor. *Id. See* TEX. PENAL CODE ANN. tit. 7, § 3103(d)(3) (Vernon Supp. 1980).

90. *Id.* at 300-02. The dissent also analyzed other state recidivist statutes, noting that out of 12 states that had statutes punishing nonviolent recidivists with mandatory life sentences, only three remain. *Id.* at 295-96 n.13 and accompanying text. The vast majority of states punishes recidivists with discretionary or graduated sentences, depending on the severity of the crimes. *Id.* at 298-99 nn.15-18. Moreover, the dissent found that Texas punishes first and second time offenders proportionately, but all third time offenders receive a mandatory life sentence. *Id.* at 300-01. *See* TEX. PENAL CODE ANN. tit. 3, § 12.31-.34 (with exception of capital murder, all felonies classified by degree, and length of sentence is discretionary); 12.42(a), 12.42(b) (commission of second felony increases degree of felony, but sentence remains discretionary); 12.42(d) (mandatory life sentence for third felony conviction).

91. 445 U.S. at 305-06 (citing Davis v. Davis, 601 F.2d 153 (4th Cir. 1979), *vacated* 445 U.S. 947 (1980) (vacated and remanded for a decision consistent with *Rummel*)); Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976), *cert. denied,* 430 U.S. 973 (1977); Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976); Griffin v. Warden, 517 F.2d 756 (4th Cir.), *cert. denied,* 423 U.S. 990 (1975); United States v. Atkinson, 513 F.2d 39 (4th Cir. 1975); United States v. Wooten, 503 F.2d 65 (4th Cir. 1974); Wood v. South Carolina, 483 F.2d 149 (4th Cir. 1973); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974); Robinson v. Warden, 455 F.2d 1172 (4th Cir. 1972); United States v. Martell, 335 F.2d 764 (4th Cir. 1964).

92. Weems v. United States, 217 U.S. 349, 377 (1910).

the Court implied a prohibition against disproportionate sentences.[93] Furthermore, the Court in *Coker* devised its proportionality analysis from several noncapital cases.[94]

The Court's failure to consider the overall nature of Rummel's offenses in assessing the constitutionality of the sentence results in faulty reasoning. An objective assessment of the seriousness of any crime must rest on an analysis of all elements of the crime,[95] including whether violence is involved[96] and the amount of money or property involved.[97] The lack of violence and danger to persons,[98] the relatively small amount of money involved in the crimes,[99] and the subsequent reclassification of Rummel's last offense as a misdemeanor[100] suggest that imposition of a life sentence was disproportionate in Rummel's case.[101]

In hiding behind the concepts of "state autonomy" and "federalism," the *Rummel* Court avoids applying proportionality analysis to length of confinement. Although Texas may have a greater interest in punishing recidivists more severely than first time offenders,[102] the interest does not justify imposition of disproportionate sentences on recidivists. The cruel and unusual punishment clause prohibits sentence disproportionality whether the offender is convicted of a first or a third offense.

93. *Id.* The Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 367. The issue before the Court was whether "a punishment of fifteen years imprisonment was a cruel and unusual punishment." *Id.* at 362. Additionally *Weems* characterized O'Neil v. Vermont, 144 U.S. 323 (1892), as raising the same issue. 217 U.S. at 371. In *O'Neil* one of the issues was whether a 54 year sentence for the sale of illegal whiskey was cruel and unusual punishment. *But see* Mulligan, *supra* note 1, at 643; Packer, *supra* note 29, at 1075. The authors contend that *Weems* would have been decided differently absent the "accessories" accompanying the term of confinement.

94. Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality) (citing Furman v. Georgia, 408 U.S. 238 (1972) (capital), Robinson v. California, 370 U.S. 660 (1962) (noncapital), Trop v. Dulles, 356 U.S. 86 (1958) (same), and Weems v. United States, 217 U.S. 349 (1910) (same)).

95. *See* Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied,* 415 U.S. 983 (1974).

96. *See* Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973), *cert. denied,* 415 U.S. 983 (1974); Ralph v. Warden, 438 F.2d 786, 788 (4th Cir.), *cert. denied,* 409 U.S. 942 (1970) ("there are rational graduations of culpability that can be made on the basis of injury to the victim.").

97. *See, e.g.*, Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974).

98. 445 U.S. at 265-66.

99. The total dollar amount of Rummel's crimes was $229.11. *Id. See* notes 5-7 *supra* and accompanying text.

100. *See* note 87 *supra* and accompanying text.

101. 445 U.S. at 273, 281-84.

102. *See id.* at 276; Carmona v. Ward, 576 F.2d 405, 415 (1978), *cert. denied,* 439 U.S. 1091 (1979).

The Court improperly injected parole considerations into the analysis of disproportionate sentences.[103] Because the decision to grant or deny parole is an entirely discretionary matter,[104] a prisoner does not have an enforceable right to early release and may serve the complete term of a sentence. The chance of parole is not a guarantee of early release.[105] The determination of a sentence's proportionality under the eighth amendment should not rest on considerations of parole when early release is neither a guaranteed nor an enforceable right.[106]

In holding that Texas' imposition of a mandatory life sentence under a recidivist statute was not cruel and unusual punishment, the Court ignored two principles applicable in eighth amendment analysis. First, the principle that eighth amendment judgments should be informed by objective factors to the maximum possible extent is well settled.[107] While the dissent posited objective criteria applicable in proportionality analysis,[108] the plurality failed to formulate or apply an objective test.[109] Second, eighth amendment decisions repeatedly assert that the scope of the amendment is not static, but is measured by "evolving

103. 445 U.S. at 280.

104. A prisoner could have a perfect conduct record and be denied parole. Factors outside of the prisoner's control, such as prior commitments, family background, age, and the family and community available to receive a parolee, are considered. *See* 1978 HANDBOOK ON PAROLE, MANDATORY SUPERVISION, AND EXECUTIVE CLEMENCY 23-26 (1978) (cited in Brief for Petitioner at 35 n.22, Rummel v. Estelle, 445 U.S. 263 (1980)).

Although Rummel could be eligible for parole after 10 years, his release would be dependent upon a favorable recommendation by the Parole Board and final approval by the Governor. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(a)-(b), (e)-(g) (Vernon 1979); TEXAS REV. CIV. STAT. ANN. art. 6181-1 (3) (Vernon Supp. 1980). In June 1979 the Governor of Texas denied 79% of parole recommendations, and for a six month period in 1979 he denied 33% of the parole recommendations submitted to him. These figures indicate the discretion exercised by the Governor. Austin American-Statesman, Sept. 23, 1979, at 1, col. 1; Reply Brief for Petitioner at 10-11 n.11, Rummel v. Estelle, 445 U.S. 263 (1980).

105. *Id.*

106. *See* 445 U.S. at 293-94 (Powell, J., dissenting); Greenholtz v. Inmates, 442 U.S. 1 (1979) (no constitutional or inherent right to be conditionally released before the expiration of sentence); Johnson v. Wells, 566 F.2d 1016 (5th Cir. 1978) (Texas prisoner has no constitutionally enforceable interest in being freed before the expiration of his sentence); Craft v. Texas Bd. of Pardons & Paroles, 550 F.2d 1054 (5th Cir. 1977) (same).

107. *E.g.*, Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality); Weems v. United States, 217 U.S. 349, 380-81 (1910).

108. 445 U.S. at 295 (Powell, J., dissenting). *See* Coker v. Geogia, 433 U.S. 584, 592 (1977) (plurality); Weems v. United States, 217 U.S. 349, 380-81 (1910).

109. 445 U.S. at 281-82.

standards of decency."[110] In ignoring the expansive nature of the eighth amendment, the plurality limits the amendment's application to capital cases and unusual forms of punishment while foreclosing any realistic possibility of successfully attacking an excessive term of confinement.

The *Rummel* decision is a step backward in eighth amendment analysis. The Supreme Court's decision severely restricts proportionality analysis and renders the eighth amendment ineffective to challenge imposition of disproportionate terms of confinement. The Court should reconsider the issue presented in *Rummel* and adopt an objective and expansive interpretation of the eighth amendment.[111]

110. *Id.* at 291 (Powell, J., dissenting); Furman v. Georgia, 408 U.S. 238, 266 (1972) (Brennan, J., concurring); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality).

111. In October, U.S. District Judge Dorwin W. Suttle overturned Rummel's 1973 conviction on the grounds that his original lawyer failed to investigate potential witnesses before trial. Suttle held that Rummel received ineffective assistance of counsel and ordered Rummel's release unless Texas granted him a new trial within 120 days. Rummel v. Estelle, 498 F. Supp. 793 (W.D. Tex. 1980). Rummel and the District Attorney's office entered into a plea bargain whereby Rummel agreed to plead guilty to his last offense of fraudulently obtaining $120.75 and waive all malpractice claims against his original attorney, while the District Attorney and the Attorney General would (1) drop their appeal for a new trial for Rummel; (2) recommend a lesser sentence amounting to less than that Rummel had already served; and (3) essentially ignore Rummel's prior convictions, thus avoiding the habitual offender statute. The plea bargain was accepted and on November 14, 1980, Rummel left jail, a free man. L.A. Times, Jan. 16, 1980, at 1, col. 3; Houston City Magazine, Jan. 1981, at 8.