RECIDIVIST STATUTES AND THE EIGHTH AMENDMENT: A DISPROPORTIONALITY ANALYSIS

Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973)

Prior to the sentencing of defendant on a perjury conviction, the state charged him with being an habitual criminal. The charge[1] was based on defendant's two previous convictions: (1) for writing a check on insufficient funds in the amount of $50; and (2) for transporting forged checks in the amount of $140. Defendant was convicted under the West Virginia recidivist statute, and the mandatory life sentence was imposed.[2] The federal district court denied defendant's application for a writ of habeas corpus,[3] but the Fourth Circuit Court of Appeals reversed. *Held*: As applied to defendant, the mandatory life sentence imposed by the West Virginia recidivist statute was so disproportionate to the underlying offenses that it constituted a violation of the eighth amendment ban on cruel and unusual punishment.[4]

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1. Hart v. Coiner, 483 F.2d 136, 138 (4th Cir. 1973), *cert. denied*, 94 S. Ct. 1454 (1974).

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

> When it is determined, as provided in section nineteen hereof, that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the penitentiary for life.

3. Hart v. Coiner, 483 F.2d 136, 138 (4th Cir. 1973), *cert. denied*, 94 S. Ct. 1454 (1974).

4. *Id.* Both of Hart's prior convictions were punishable by confinement in a penitentiary as provided in W. VA. CODE ANN. § 61-11-18 (1966).

Judge Boreman, dissenting in *Hart*, believed that holding the statute unconstitutional as applied was an incorrect application of the "unconstitutional-as-applied" doctrine, that Graham v. West Virginia, 224 U.S. 616 (1912), upheld the statute as valid on its face, and that based on Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886), the doctrine applies only to cases in which there is too much discretion in the administration of the statute. He further pointed out that in the present case there was no room for discretion, since the sentence and the application of the statute both were mandatory. 483 F.2d at 147 (dissenting opinion).

Arguably, the doctrine is more flexible than Judge Boreman contends. *See* Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968) (holding that as applied to juvenile offenders, the Kentucky statute involved, KY. REV. STAT. ANN. § 435.090 (1969), contravenes federal and state constitutional provisions banning cruel and unusual punishment).

Habitual criminal statutes have been enacted in most states.[5] Historically, these statutes have been held constitutional, surviving attacks based on the due process,[6] equal protection,[7] privileges and immunities,[8] double jeopardy,[9] and ex post facto[10] clauses of the Constitution. Recidivist statutes also have generally been held immune to attacks alleging that they constitute cruel and unusual punishment as prohibited by the eighth amendment.[11]

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5. *See* ALASKA STAT. § 12.55.050 (1972); ARIZ. REV. STAT. ANN. § 13-1649 (Supp. 1973); ARK. STAT. ANN. § 43-2328 (Supp. 1973); CAL. PENAL CODE § 644 (Deering 1971); COLO. REV. STAT. ANN. § 39-13-1 (1963); CONN. GEN. STAT. REV. § 53a-40 (1973); DEL. CODE ANN. tit. 11, § 3911(a) (Supp. 1970); FLA. STAT. ANN. § 775.084 (Supp. 1972); GA. CODE ANN. § 27-2511 (Supp. 1972); IDAHO CODE § 19-2514 (Supp. 1973); IND. ANN. STAT. § 9-2207 (Supp. 1973); IOWA CODE ANN. § 747.5 (1950); KAN. STAT. ANN. § 21-4504 (1971); KY. REV. STAT. ANN. § 431.190 (1969); LA. REV. STAT. § 15-529.1 (1967); ME. REV. STAT. ANN. tit. 15, § 1742 (1964); MASS. GEN. LAWS ANN. ch. 279, § 25 (1968); MICH. STAT. ANN. § 28.1084 (1972); MINN. STAT. ANN. § 609.155 (1964); MO. REV. STAT. § 556.280 (Supp. 1974); MONT. REV. CODES ANN. § 94-4713 (1969); NEB. REV. STAT. § 29-2221 (1965); NEV. REV. STAT. § 207.010 (1967); N.H. REV. STAT. ANN. §§ 591:1 to 651:6 (1955); N.J. REV. STAT. § 2A:85-12 (1969); N.M. STAT. ANN. § 40A-29-5 (1953); N.Y. PENAL LAW § 70.10 (McKinney 1967); N.C. GEN. STAT. §§ 14-7.1 to 7.6 (1969, Supp. 1973); N.D. CENT. CODE §§ 12-06-18 to 06-21 (1969); OHIO REV. CODE ANN. § 2961.11 (Page 1954); R.I. GEN. LAWS ANN. § 12-19-21 (1970); S.D. COMPILED LAWS ANN. § 22-7-1 (1967); TENN. CODE ANN. § 40-2801 (Supp. 1973); VT. STAT. ANN. tit. 13, § 11 (1958); VA. CODE ANN. § 53-296 (1972); WASH. REV. CODE ANN. § 9.92.090 (1961); WIS. STAT. ANN. § 939.62 (1958); WYO. STAT. ANN. §§ 6-9 to -10 (Supp. 1973).

6. Spencer v. Texas, 385 U.S. 554 (1967); Oyler v. Boles, 368 U.S. 448 (1962); Ves v. Bomar, 213 Tenn. 487, 376 S.W.2d 446 (1964); Surratt v. Commonwealth, 187 Va. 940, 48 S.E.2d 362 (1948).

7. Oyler v. Boles, 368 U.S. 448 (1962); Skinner v. Oklahoma, 316 U.S. 535 (1942) (provision for sterilization of habitual criminals found to violate equal protection clause where provision applied to persons convicted at least twice of larceny by fraud, but exempted persons convicted of embezzlement); Graham v. West Virginia, 224 U.S. 616 (1912).

8. Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Hunter v. State, 375 P.2d 357 (Okla. Crim. App. 1962).

9. Gryger v. Burke, 334 U.S. 728 (1948); Carlesi v. New York, 233 U.S. 51 (1914); Poppe v. State, 155 Neb. 527, 52 N.W.2d 422 (1952); State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), *cert. denied*, 84 N.M. 271, 502 P.2d 296 (Sup. Ct. 1972); State v. LePitre, 54 Wash. 166, 103 P. 27 (1909).

10. Carlesi v. New York, 233 U.S. 51 (1914); McDonald v. Massachusetts, 180 U.S. 311 (1910); Commonwealth v. Graves, 155 Mass. 163, 29 N.E. 579 (1892); Ves v. Bomar, 213 Tenn. 487, 376 S.W.2d 446 (1964).

11. Graham v. West Virginia, 224 U.S. 616 (1912) (same statute as in *Hart*); McDonald v. Massachusetts, 180 U.S. 311 (1901); Cooper v. United States, 114 F. Supp. 464 (S.D.N.Y. 1953); Bennett v. State, 455 S.W.2d 239 (Tex. Crim. App. 1970); State v. Fisher, 123 W. Va. 745, 18 S.E.2d 649 (1941).

Two approaches are commonly used to attack a punishment as violating the eighth amendment.[12] The traditional approach has been to view the amendment as proscribing inherently cruel punishments.[13] The amendment may also be interpreted, however, as prohibiting punishments that are disproportionate to the underlying offense;[14] this approach does not attack the punishment per se, but rather the excessiveness of the punishment relative to the offense charged. Arguments employing this approach to attack punishments prescribed by recidivist statutes generally have proved unsuccessful.[15]

The limited success of the disproportionality approach is attributable in part both to judicial refusal to read the eighth amendment as relating to more than a ban on inherently cruel punishments,[16] and to the unwillingness of courts to substitute their view of what constitutes reasonable punishment for that of the legislature.[17] Moreover, the dis-

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12. The constitutional ban on cruel and unusual punishment may also be an absolute bar to the imposition of penal sanctions of any kind for certain conduct. The Supreme Court developed this concept in Robinson v. California, 370 U.S. 660 (1962), where it held unconstitutional a statute making it a crime for a person to "be addicted to the use of narcotics." *See* note 22 *infra*.

13. *See, e.g., In re* Kemmler, 136 U.S. 436, 443 (1890) (electrocution found not inherently cruel punishment); Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

14. Weems v. United States, 217 U.S. 349 (1910); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (interpreting cruel and unusual punishment clause in state constitution).

15. This is true even where a life sentence is the punishment involved. *In re* Boatwright, 119 Cal. App. 420, 6 P.2d 972 (1931); People v. Luckey, 90 Ill. App. 2d 325, 234 N.E.2d 26 (1967), *aff'd*, 42 Ill. 2d 115, 245 N.E.2d 769 (1968), *cert. denied*, 397 U.S. 942 (1970); State v. Custer, 24 Ore. 350, 401 P.2d 402 (1965). A statute nearly identical to the one involved in *Hart* was recently upheld against a similar eighth amendment attack in Bennett v. State, 455 S.W.2d 239 (Tex. Crim. App. 1970).

16. *See* Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle*, 3 CRIM. L. BULL. 145 (1967); Wheeler, *supra* note 13; Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964).

17. Sansone v. Zerbst, 73 F.2d 670 (10th Cir. 1934); Schultz v. Zerbst, 73 F.2d 668 (10th Cir. 1934); Jones v. State, 247 Md. 530, 233 A.2d 791 (1967); Merchant v. State, 217 Md. 61, 141 A.2d 487 (1958); *see* Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846 (1961); Note, *Judicial Limitations on the Constitutional Protection Against Cruel and Unusual Punishment*, 1960 WASH. U.L.Q. 160, 163.

The court in *Hart* disapproved these judicial attitudes:

> The fact that a West Virginia statute requires a life sentence does not establish the punishment's constitutionality in a particular case. The eighth amendment

proportionality approach is difficult to apply because of the inadequacy of constitutional standards upon which a court might rely in determining whether a punishment is "cruel and unusual" within the meaning of the eighth amendment.[18] Although the United States Supreme Court used the disproportionality approach in *Weems v. United States*[19] to assess the legality of a punishment dictated by a Philippine law,[20] the Court merely assumed the constitutionality of punishments in American jurisdictions to which it compared the Philippine law.[21] The decision failed, therefore, to provide any guidance to courts that might employ the disproportionality approach directly to assess a statute's constitutionality in light of the eighth amendment ban on cruel and unusual punishment.[22]

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is a limitation on both legislative and judicial action.

483 F.2d at 141. *Accord*, Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J., concurring); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970).

18. *See* Note, *The Effectiveness of the Eighth Amendment*, *supra* note 17; Note, *supra* note 16.

19. 217 U.S. 349 (1910).

20. In *Weems*, the defendant, a United States Coast Guard officer employed in the Philippines, was convicted in a Philippines court (under United States authority) on a charge of falsifying government wage statements. The defendant was sentenced for this one crime to fifteen years hard labor in chains, forfeiture of all his civil rights, and surveillance during the remainder of his life.

21. Justice McKenna noted that no jurisdiction in the United States would have punished the defendant in *Weems* with more than two years imprisonment, and that the punishment the defendant in fact received would not have been imposed for even the most serious of crimes in the United States. 217 U.S. at 380-81. This comparative approach of measuring punishment in one jurisdiction against that imposed in another has proved an impractical tool for analyzing the constitutionality of state and federal legislation. What one jurisdiction considers a cruel punishment is not necessarily dispositive of the question as to another jurisdiction. *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 639-41 (1966).

22. *Weems* apparently is the only case in which the Court has utilized the disproportionality approach in ruling on the legality of a statutorily prescribed punishment, although there is some doubt whether *Weems* represents anything more than a ban on inherently cruel punishment. *See* Packer, *supra* note 13, at 1075-76. The importance of the case as an excessiveness decision may have been substantially weakened by the fact that the punishment in question involved hard and painful labor in chains. Such punishment appears more cruel in kind than in excessiveness. The majority in *Weems* did not rely, however, on the inherently cruel argument, but read the eighth amendment as embodying a ban on disproportionate or excessive punishments. 217 U.S. at 376-77.

While the Court's decision in Robinson v. California, 370 U.S. 660 (1962), can be interpreted as following either the inherently cruel or the disproportionality approach, it seems more reasonable to read the decision as relating to inherently cruel punish-

In *Hart v. Coiner*[23] the Fourth Circuit Court of Appeals adopted a disproportionality approach.[24] In deciding that the life sentence imposed on Hart was unconstitutionally disproportionate, the court considered three factors that it thought relevant to an analysis of the constitutionality of a criminal punishment under the eighth amendment: (1) the nature of the offense(s) charged; (2) the legislative purpose behind the enactment of the statute; and (3) a comparison of the punishment both with the punishment imposed in other jurisdictions for similar crimes, and with the punishment imposed for other crimes in the same jurisdiction.[25]

The *Hart* court's analysis of the nature of the offense(s) charged emphasized the non-violent nature of the offenses, noting:

> Hart's first conviction was for writing a bad check in 1949, and the second was for transporting forged checks six years later. His third conviction was more serious—committing perjury during the murder trial of his son. . . . None of Hart's offenses were against the person. None involved violence or danger of violence toward persons or property. The bad check case was very nearly trivial—one penny less in the face amount of the check and the offense would have been a five- to sixty-day petty misdemeanor.[26]

Next the court determined that the legislative purpose underlying

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ment. The Supreme Court reversed the defendant's conviction for being a narcotics addict on the ground that narcotics addiction is an illness, punishment for which is prohibited by the eighth amendment.

Until *Robinson* was decided, the *Weems* decision had been further limited as a result of uncertainty over whether the eighth amendment applied to the states. Turkington, *supra* note 16. Turkington points out, however:

> Although the Eighth Amendment had not been specifically applied to the states before *Robinson*, all states except Illinois, Vermont and Connecticut have provisions in their constitutions prohibiting cruel and unusual punishment.

Id. at 148.

23. 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 94 S. Ct. 1454 (1974).

24. The Fourth Circuit had previously recognized the disproportionality aspect of cruel and unusual punishment in a rape case involving the death penalty. Ralph v. Warden, 438 F.2d 786, 789-90 (4th Cir. 1970).

25. Two of these standards were identical to those suggested in Justice Goldberg's dissenting opinion in Rudolph v. Alabama, 375 U.S. 889 (1963), *denying cert. to* Rudolph v. State, 275 Ala. 115, 152 So. 2d 662 (1963). Goldberg proposed (1) pitting the offense against the punishment, and (2) analyzing the constitutionality of the punishment by ascertaining whether or not the punishment goes beyond what is necessary to achieve the aim of public intent as expressed by the legislative act. 375 U.S. at 889-91.

26. 483 F.2d at 140.

the punishment could have been adequately served by the imposition of a lesser penalty. The court pointed out that:

> Putting Hart in prison for the remainder of his life for three offenses that rank relatively low in the hierarchy of crimes would presumably prevent him from passing bad checks but would not likely make of him a truthful man. . . . Life imprisonment is the penultimate punishment. . . . It is not a practical solution to petty crime in America. . . . We think that a sentence of life imprisonment, the most severe punishment available under West Virginia law, is 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.[27]

Finally, the court undertook a comparative analysis, noting that only three other states provide a mandatory life sentence for three-time offenders,[28] and that other crimes in West Virginia are burdened with comparatively lesser punishments.[29]

The *Hart* decision sets forth workable standards for analyzing disproportionality cases. Perhaps more importantly, however, it applies those standards to a recidivist statute, an area of the law heretofore practically untouched by the courts. The factual situation in *Hart* emphasizes the need for a liberal injection—especially where a mandatory life sentence is involved—of judicial discretion into the application of sentences under state recidivist statutes.[30]

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27. *Id.* at 141.

28. Indiana and Kentucky also provide mandatory life sentences for three-time felony offenders. IND. STAT. ANN. § 9-2207 (1956); KY. REV. STAT. ANN. § 431.190 (1969). Texas, which had a similar provision at the time of the *Hart* decision, has amended its statute to eliminate the mandatory imposition of a life sentence. Ch. 399, § 12.42, [1973] Tex. Laws 908, *amending* TEX. PENAL CODE ANN. art. 63 (1952).

29. *See* Brown, *West Virginia Habitual Criminal Law*, 59 W. VA. L. REV. 30 (1956), for a discussion of the relative harshness of the West Virginia recidivist statute. tence jurisdictions provide perhaps the most plausible forum for the application and

30. *See* Note, *supra* note 21, at 645, indicating that the mandatory life sentence jurisdictions provide perhaps the most plausible forum for the application and further cultivation of a workable eighth amendment disproportionality principle.