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Mandatory Life Imprisonment under Texas Recidivist Statute Not Violative of Eighth Amendment When Applied to One Convicted of Three Non-Violent, Property-Related Felonies.

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CASENOTES

CRIMINAL LAW—Cruel and Unusual Punishment—Mandatory Life Imprisonment Under Texas Recidivist Statute Not Violative of Eighth Amendment When Applied to One Convicted of Three Non-Violent, Property-Related Felonies

Rummel v. Estelle,
___ U.S. ___, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980).

At the punishment phase of William Rummel's trial for the felony theft of obtaining $120.75 under false pretenses, the state prosecutor proved Rummel had been convicted twice previously of felonies in Texas state courts. His first conviction, for fraudulent use of a credit card with intent to obtain $80 worth of goods or services, resulted in a three year prison sentence. The second conviction, for passing a forged check in the amount of $28.36, produced punishment assessed at four years' imprisonment. Upon proof of these two prior felony convictions, the trial court imposed a sentence of life imprisonment as mandated by the Texas habitual offender, or recidivist, statute then in effect.[1] This conviction was affirmed on appeal by the Texas Court of Criminal Appeals.[2] Thereafter, Rummel's application for post-conviction relief in the Texas courts was denied without a hearing.[3] A panel of the United States Court of Appeals for the Fifth Circuit reversed and remanded the case.[4] The panel determined the

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1. TEX. PENAL CODE ANN. art. 63 (Vernon 1925) (repealed 1974) provided: "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." *Id.* The recidivist statute currently in effect in Texas was enacted by the Texas Legislature in 1974 and slightly modified article 63. The current statute provides:

> If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974).

2. *See* Rummel v. State, 509 S.W.2d 630, 634 (Tex. Crim. App. 1974).

3. *See* Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir. 1978), *rev'd*, 587 F.2d 1193, 1200 (5th Cir. 1978) (en banc), *aff'd*, ___ U.S. ___, ___, 100 S. Ct. 1133, 1145, 63 L. Ed. 2d 382, 398 (1980).

4. *See id.* at 1200.

life sentence imposed pursuant to article 63 of the Texas Penal Code[5] was disproportionately excessive as applied to Rummel, and thereby violated the eighth amendment.[6] On rehearing the court of appeals, sitting en banc, vacated the panel's reversal and affirmed the district court's denial of habeas corpus relief,[7] relying heavily upon the fact Rummel would be eligible for parole within twelve years of the commencement of his sentence.[8] The United States Supreme Court granted certiorari. Held —*Affirmed.* Mandatory life imprisonment under Texas' recidivist statute does not violate the eighth amendment when applied to one convicted of three non-violent, property-related felonies.[9]

The power to promulgate penal schemes categorizing crimes and determining their punishments has traditionally been vested in state legislatures.[10] Principles of federalism generally prohibit judicial interference with this power,[11] but deference to legislative discretion must yield when constitutional strictures are violated.[12] One such limitation is the eighth amendment prohibition against assessments of cruel and unusual punishments.[13] Originally construed to preclude unnecessarily cruel modes of

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5. TEX. PENAL CODE ANN. art. 63 (Vernon 1925) (repealed 1974).

6. *See* Rummel v. Estelle, 568 F.2d 1193, 1200 (5th Cir. 1978).

7. *See* Rummel v. Estelle, 587 F.2d 651, 662 (5th Cir. 1978) (en banc). The court remanded the portion of the case dealing with Rummel's claim he was denied effective assistance of counsel to the panel for further consideration. *See id.* at 662. The panel, in turn, remanded the case to the district court, ordering a federal evidentiary hearing be held on Rummel's sixth amendment claim. *See* Rummel v. Estelle, 590 F.2d 103, 105 (5th Cir. 1979). On remand, the court found Rummel's ineffective assistance of counsel claim valid and granted a writ of habeas corpus, requiring the state to conduct a new trial. *See* Rummel v. Estelle, No. SA-76-CA-20 (W.D. Tex. Oct. 3, 1980) (order granting application for writ of habeas corpus).

8. *See* Rummel v. Estelle, 587 F.2d 651, 657-59 (5th Cir. 1978). Six members of the panel dissented, however, stressing that Rummel had no enforceable right to parole. *See id.* at 665, 671 (Clark, J., dissenting).

9. Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1145, 63 L. Ed. 2d 382, 398 (1980).

10. *See* Knapp. v. Schweitzer, 357 U.S. 371, 375 (1958); Rochin v. California, 342 U.S. 165, 168 (1952); Moore v. Illinois, 55 U.S. 13, 14 (1852).

11. *See* Gregg. v. Georgia, 428 U.S. 153, 175 (1976); Gore v. United States, 357 U.S. 386, 393 (1958).

12. *See* Rochin v. California, 342 U.S. 165, 169 (1952); Malinski v. New York, 324 U.S. 401, 416-17 (1945) (Frankfurter, J., opinion).

13. *See* U.S. CONST. amend. VIII. The eighth amendment provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* This language was taken verbatim from the Enlgish Bill of Rights of 1689, inserted in the Virginia Constitution in 1776, and became the eighth amendment to the United States Constitution in 1791. *See* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment,* 24 STAN. L. REV. 838, 839 (1972).

punishments,[14] the more recent application of the eighth amendment has been to prevent cruelly excessive punishments.[15] Although the concept that the eighth amendment could forbid disproportionate sentences did not appear in American case law until 1892,[16] the principles underlying proportionality in punishments are deeply rooted in Anglo-American philosophy.[17]

The first successful eighth amendment attack based on disproportionality, or relative excessiveness of a punishment, was the 1910 case of *Weems v. United States.*[18] In *Weems,* the United States Supreme Court struck down a Phillipine statute authorizing a minimum of twelve years at hard labor, as well as permanent civil disabilities, for the crime of falsifying a public document.[19] The Court found the prescribed punishment

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14. *See, e.g.,* Francis v. Resweber, 329 U.S. 459, 464 (1947) (amendment protects against cruelty inherent in methods of punishment); *In re* Kemmler, 136 U.S. 436, 447 (1890) (amendment prevents "inhuman and barbarous" treatment); Wilkirson v. Utah, 99 U.S. 130, 135-36 (1878) (amendment forbids tortures such as disemboweling while alive, beheading, burning alive).

15. *See, e.g.,* Coker v. Georgia, 433 U.S. 584, 592 (1977) (amendment proscribes death penalty for rape); Robinson v. California, 370 U.S. 660, 666 (1962) (amendment forbids criminalization of drug addiction); Trop v. Dulles, 356 U.S. 86, 101 (1958) (amendment bars expatriation for wartime desertion).

16. *See* O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting). Justice Field contended the "whole inhibition [of the eighth amendment] is against that which is excessive. . . ." *Id.* at 340 (Field, J., dissenting).

17. *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 CALIF. L. REV. 839, 844-46 (1969). This concept was derived from Judeo-Christian, Greek, and English thought. *See id.* at 844-45. The Law of Moses exacted an "eye for an eye." *See id.* at 844. Though seemingly harsh, this concept of punishment was proportional in setting an upper limit on the penalty imposed. *See id.* at 844. Aristotle, in his *Ethics,* cautioned that injustice was found when a disproportionate sentence either favored or aggrieved an offender. *See id.* at 844. The Magna Carta assured a free man would be fined only in accordance with the relative severity of any offense commited. *See id.* at 846. The practice of graduating penal sanctions to the relative seriousness of crimes is premised on the belief that such apportionment will entice one bent on criminal activity, through the lure of reduced penalty, to commit the least socially harmful crime. *See* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATURE 178 (1789), *quoted in* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment,* 24 STAN. L. REV. 838, 852 (1972).

18. 217 U.S. 349 (1910).

19. *See id.* at 366. This territorial statute imposed a minimum sentence of twelve years *cadena temporal* on one who entered false information in a public record, regardless of intent to defraud. *See id.* at 365-66. Weems was sentenced to fifteen years of this punishment, consisting of "hard and painful labor," while constantly enchained at ankle and wrist. *See id.* at 366. He sacrificed marital, parental, and property rights while in custody and would be accountable to the authorities for his whereabouts and activities for life. *See id.* at 366. The Court noted in *dicta* the eighth amendment was a progressive standard not to be confined merely to prohibiting unnecessary pain, and that a sentence for a term of years may be so disproportionate to an offense as to be cruel and unusual punishment. *See id.* at

both inherently cruel and cruelly excessive in relation to the crime committed.[20] Conceding the powers of the legislature to be primary in defining crimes and their punishments,[21] powers not to be intruded upon lightly by judicial notions of the prudence of such legislation,[22] the Court went on to note the sole legislative limits are constitutional boundaries which the judiciary must set.[23] The case of *Trop v. Dulles*[24] expanded the meager body of eighth amendment law by determining expatriation for wartime desertion was excessive[25] and finding further that the premise underlying the amendment was "nothing less than the dignity of man."[26]

The Court in the *Trop* decision acknowledged the state's power to punish,[27] but found the eighth amendment acts as a guarantee that this power will be circumscribed by the "evolving standards of decency that mark the progress of a maturing society."[28] Only with the relatively re-

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368, 372, 374.

20. *See* Weems v. United States, 217 U.S. 349, 377 (1910). The Court noted:

> Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.

Id. at 366-67; *accord,* Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring) ("[a] punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments' "); Lambert v. California, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting) ("a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute . . . a cruel and unusual punishment"); O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (the "inhibition [of the eighth amendment] is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences [sic] charged").

21. *See* Weems v. United States, 217 U.S. 349, 378-79 (1910).

22. *See id.* at 379.

23. *Id.* at 378; *see* Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971); Shelley v. Kraemer, 334 U.S. 1, 23 (1948); Marbury v. Madison, 5 U.S. 137, 177-78 (1803); A. HAMILTON, THE FEDERALIST, No. 78, 576-77 (Hamilton ed. 1880), *quoted in* United States v. Brown, 381 U.S. 437, 462 (1965). Criminal legislation is restricted by the Constitutional limitations that no *ex post facto* laws or Bills of Attainder be passed nor any enactment made infringing the rights and privileges announced in the first, second, fifth, eighth, and thirteenth amendments. *See* U.S. CONST. art. I, §§ 8-10, amends. I, II, V, VIII & XIII. *See generally* M. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 25-46 (1978).

24. 356 U.S. 86 (1957).

25. *See id.* at 101-03.

26. *Id.* at 100.

27. *See id.* at 100; Williams v. Illinois, 399 U.S. 235, 241 (1970).

28. *See* Trop v. Dulles, 356 U.S. 86, 100-01 (1958). The Court stated while the death penalty was constitutional, it did not license the legislature to "devise any punishment short of death within the limit of its imagination." *See id.* at 99. In *Robinson v. California* the Court extended eighth amendment prohibitions to the states through the fourteenth amendment. *See* Robinson v. California, 370 U.S. 660, 667 (1962). Finding the eighth and fourteenth amendments forbid criminalization of drug addiction, the Court stressed the neces-

cent decisions concerning the death penalty, however, has the Court attempted to identify and apply objective criteria to eighth amendment proportionality claims.[29]

In modern jurisprudence, goals of rehabilitation, deterrence, and isolation of criminals for the protection of society have largely replaced retribution as the dominant objectives of the criminal justice system.[30] Faced with a criminal who is resistant to reform, however, the penal focus shifts away from efforts at rehabilitation as well as attempts to apportion penalties to crimes.[31] The goal of the penal system then becomes deterring these habitual criminals, or recidivists, from further criminal endeavors by imposing increasingly severe sentences and ultimately isolating from society those who will not be deterred.[32] Although recidivist statutes ap-

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sity of apportioning punishment to the crime's severity. *See id.* at 667. A sanction acceptable in one instance may be prohibitive in another, as "[e]ven one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

29. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592 (1977) (death penalty cruel and unusual punishment for the crime of rape); Gregg v. Georgia, 428 U.S. 153, 207 (1976) (death penalty not necessarily cruel and unusual punishment for crime of murder); Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (death penalty may be cruel and unusual punishment for the crime of murder if arbitrarily imposed). Justice Brennan suggested several criteria for assessing eighth amendment claims in his concurring opinion in *Furman*. *See* Furman v. Georgia, 408 U.S. 238, 278, 281 (1972) (Brennan, J., concurring). These criteria were later adopted in *Coker*, when the Court stated a penalty is constitutionally excessive if it:

> (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. . . . Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.

Coker v. Georgia, 433 U.S. 584, 592 (1977); *see* Furman v. Georgia, 408 U.S. 238, 271, 274, 277, 279 (1972).

30. *See* Furman v. Georgia, 408 U.S. 238, 344 n.86 (1972) (Marshall, J., concurring); Rudolph v. Alabama, 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting from dismissal of certiorari); Williams v. New York, 337 U.S. 241, 248 (1949). *See generally* W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 21-25 (1972); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 845 (1972).

31. *See* Morris, *Introduction—The Habitual Criminal*, 13 MCGILL L.J. 534, 549-50 (1967). *See generally* Brown, *The Treatment of the Recidivist in the United States*, 23 CAN. B. REV. 640, 640 (1945); Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 101-02 (1971); Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332, 349-50 (1965).

32. *See* Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1163 (1979). *See generally* Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 102-04 (1971). Originally recidivist statutes provided for gradual incre-

pear in a variety of forms, they generally operate by imposing a set term of imprisonment after a felon has been convicted of a specified number of crimes designated by the statute to trigger its imposition.[33] Statutes of several jurisdictions require the trial court to determine the appropriateness of invoking the statute.[34] The more common practice, however, is for the prosecutor to employ the statute at his discretion as a tool in plea bargaining.[35] Despite the sporadic application of these statutes,[36] and their apparent inconsistency with the precept of apportioning punishments to crimes,[37] the recidivist statutes have consistently withstood con-

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ments to sentences of repeat offenders in hopes of deterring them by the threat of longer sentences. *See id.* at 101.

33. *See, e.g.*, HAWAII REV. STAT. §§ 706-661 to -662 (1976 & Supp. 1979) (life sentence discretionary with sentencing authority with conviction of third specified felony); TENN. CODE ANN. §§ 40-2801 to -2806 (1975) (life sentence without parole mandatory on fourth felony conviction when two convictions are for listed violent felonies); TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974) (life sentence mandatory upon third felony conviction). *See generally* Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 104 (1971); Note, *Habitual Criminal Statute 12.42(d)—Open Door to Disproportionate Sentences*, 29 BAYLOR L. REV. 629, 629 (1977); Note, *Recidivist Laws Under The Eighth Amendment—Rummel v. Estelle*, 10 U. TOL. L. REV. 606, 609-17 (1979).

34. *See* 18 U.S.C. § 3575 (1976); HAWAII REV. STAT. §§ 706-661 to -662 (1976 & Supp. 1979); N.H. REV. STAT. ANN. § 651:6 (1976); N.D. CENT. CODE § 12.1-32-09 (Supp. 1979); OR. REV. STAT. §§ 161.725-.735 (1979). These jurisdictions require the court to consider the recidivist's past criminal record and predilection for future criminal activity in a special hearing before the recidivist statutes can be invoked. *See* 18 U.S.C. § 3575 (1976); HAWAII REV. STAT. §§ 706-661 to -662 (1976 & Supp. 1979); N.H. REV. STAT. ANN. § 651:6 (1976); N.D. CENT. CODE § 121-32-09 (Supp. 1979); OR. REV. STAT. §§ 161.725-.735 (1979). These statutes are comparable to the procedure proposed in the Model Penal Code. *See* MODEL PENAL CODE § 7.03 (Proposed Official Draft, 1962). The Model Penal Code suggests a procedure by which a court may sentence a person to an extended term upon his third felony conviction only after a determination he is a persistent offender, a professional criminal, or a dangerous, mentally abnormal person whose prolonged incarceration is necessary for public protection or is a "multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted." *Id.* § 7.03(4). The extended term may not exceed the authorized maximum penalties for each of his crimes if made to run consecutively. *See id.* § 7.03.

35. *See* Ferguson, *The Law of Recidivism in Texas*, 13 MCGILL L.J. 663, 663 (1967); Note, *Recidivist Laws Under the Eighth Amendment—Rummel v. Estelle*, 10 U. TOL. L. REV. 606, 611 (1979). The common practice of prosecutors threatening invocation of recidivist statutes to induce guilty pleas was recently upheld by the United States Supreme Court against a due process challenge. *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

36. *See* People v. Anaya, 572 P.2d 153, 156 (Colo. 1977) (Carrigan, J., dissenting); Note, *The 'Bitch' Threatens But Seldom Bites*, 8 CREIGHTON L. REV. 893, 912 (1975); Note, *Recidivist Laws Under The Eighth Amendment—Rummel v. Estelle*, U. TOL. L. REV. 606, 614 (1979).

37. *See* TEX. PENAL CODE ANN. § 1.02(3) (Vernon 1974) (one objective of Texas Penal Code to prescribe penalties proportionate to seriousness of offense). *Compare id.* §§ 37.02, 12.21 (perjury punishable by imprisonment up to one year and/or fine up to $200) *with id.*

stitutional attack.[38]

One notable exception to the constitutional impregnability of recidivist statutes is the Fourth Circuit Court of Appeals' decision in *Hart v. Coiner*.[39] The *Hart* court formulated a four-pronged test in an effort to assess Hart's eighth amendment claim objectively.[40] Hart had been convicted of three non-violent crimes[41] and received a life sentence as man-

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§§ 19.03(a)(2), .03(b) & 12.31 (murder of victim by kidnapper punishable by imprisonment for life or by death). *But see id.* § 12.43(d) (third felony conviction must be punished by imprisonment for life).

38. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (due process claim: threatening imposition of recidivist statute does not "chill" right to trial); Gryger v. Burke, 334 U.S. 728, 732 (1948) (*ex post facto* claim: statutes do not create a new offense); Graham v. West Virginia, 224 U.S. 616, 623 (1912) (double jeopardy claim: "repetition of criminal conduct aggravates . . . [the offenders' immediate] guilt and justifies heavier penalties when they are again convicted"). The Texas recidivist statute withstood an assortment of constitutional challenges in *Spencer v. Texas*. *See* Spencer v. Texas, 385 U.S. 554, 560 (1967) (Texas recidivist statute not violative of constitutional bans on double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, nor privileges and immunities). *See generally* Note, *Recidivist Laws Under The Eighth Amendment—Rummel v. Estelle*, 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).

Eighth amendment challenges to recidivist statutes have been repelled but have always received only summary treatment by the United States Supreme Court in their dismissal. *See* Oyler v. Boles, 368 U.S. 448, 451 (1962); Graham v. West Virginia, 224 U.S. 616, 631 (1912); McDonald v. Massachusetts, 180 U.S. 311, 313 (1901); Moore v. Missouri, 159 U.S. 673, 677 (1895). Constitutional affirmation has always been premised on the rational relationship presumed to exist between statutes and the legitimate state purposes of deterring criminal activity and protecting society. *See* Sullivan v. Ashe, 302 U.S. 51, 54-55 (1937). *But see* Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). In *Hart* the court stated:

> [I]f a life sentence is good for the purpose [of deterrence], surely a death sentence would be better. 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. Is it a rational exercise of state police power to put a man away for life—at tremendous expense to the state—because over a 20-year period he passed or transported three bad checks and might do it again? Life imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others. It is not a practical solution to petty crime in America. Aside from the proportionality principle, there aren't enough prisons in America to hold all the Harts that afflict us.

Id. at 141. *See generally* Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 105, 112 (1971). Katkin suggests empirical evidence exists to show these statutes affect only petty criminals from whom society may not need such drastic protection and may not, therefore, effect the statutes' purported goals. *See id.* at 105-20.

39. 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

40. *See id.* at 140-42.

41. *See id.* at 138. Hart had been convicted in 1949 of writing a $50 bad check, was again convicted in 1955 for transporting $140 in forged checks across state lines, and finally

dated by the West Virginia recidivist statute.[42] In making the determination that a life sentence violated the eighth amendment as applied to Hart, the court initially considered the nature of his offense in relation to the relative severity of the punishment.[43] Secondly, the court considered the legislative purpose of the statute to determine whether a less harsh punishment would adequately accomplish the legislature's intent.[44] The third aspect considered was a comparison of Hart's punishment with those levied for the same crime in other jurisdictions.[45] The final prong of the test was an examination of punishments meted out in the same jurisdiction for other crimes as compared with the punishment for Hart's crime.[46] The court proposed that an analysis based on these four factors,

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was convicted in 1968 of committing perjury at his son's murder trial. *See id.* at 138. Had Hart's first conviction been for writing a check for one cent less than $50 he would have been guilty of a misdemeanor and liable for a sentence of only five to sixty days in the county jail thereby precluding invocation of the recidivist statute. *See id.* at 138 n.1; W. VA. CODE § 61-3-39 (1977) (current version at § 61-3-39 (Supp. 1980)) (forging less than $200 a misdemeanor).

42. *See* Hart v. Coiner, 483 F.2d 136, 138 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); W. VA. CODE § 61-11-18 (1977).

43. *See* Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). The *Hart* court considered the fact that Hart's crimes did not involve violence or threat of violence to person or property, and that the amount of the bad check was one penny above misdemeanor classification. This aspect of the test, an examination of the nature of the offense, was derived from Justice Marshall's concurring opinion in *Furman v. Georgia*. *Id.* at 140; *see* Furman v. Georgia, 408 U.S. 238, 325 (1972) (Marshall, J., concurring). Justice Marshall, in turn, took this criterion of comparing nature and gravity of offense to severity of penalty from the *Weems* decision. *Id.* at 325 (Marshall, J., concurring); Weems v. United States, 217 U.S. 349, 381 (1910).

44. *See* Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). The *Hart* court found the legislative purpose to be deterrence and deemed life imprisonment excessive to deter one from writing bad checks. *See id.* at 141. This prong of the test was drawn from Justice Brennan's concurring opinion in *Furman v. Georgia*. *Id.* at 141; *see* Furman v. Georgia, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring). A punishment is excessive if it "serves no penal purpose more effectively than a less severe punishment." *See id.* at 280 (Brennan, J., concurring).

45. *See* Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). The court determined Hart's punishment to be a more severe punishment than he would have received in all but three other states. *See id.* at 141-42; IND. ANN. STAT. § 9-2207 (1956) (repealed 1976); KY. REV. STAT. ANN. § 431.190 (Baldwin 1963) (repealed 1975); TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974). The Indiana and Kentucky statutes have since been amended to discard the mandatory imposition of life imprisonment on the conviction of a third felony. *See* IND. CODE ANN. § 35-50-2-8 (Burns 1979); KY. REV. STAT. ANN. § 532.080 (Baldwin Supp. 1979). This interjurisdictional comparison aspect of the test was suggested in *Trop v. Dulles*, although the *Hart* court did not acknowledge its derivation therefrom. *Compare* Trop v. Dulles, 356 U.S. 86, 102-03 (1957) *with* Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

46. *See* Hart v. Coiner, 483 F.2d 136, 142 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). The court in *Hart* noted Hart would receive mandatory life imprisonment only for

viewed cumulatively, provided a principled and objective test with which to assess eighth amendment claims.[47]

In *Rummel v. Estelle*,[48] a case factually similar to *Hart*,[49] the United States Supreme Court found no unconstitutional disproportionality in Rummel's life sentence once he was determined to be a recidivist.[50] While conceding a sentence grossly disproportionate to the severity of a particular crime would be constitutionally barred,[51] Justice Rehnquist noted the length of sentence imposed is wholly within the discretion of the legislature.[52] This legislative discretion, the Court stated, was circumscribed only by the bounds of the eighth amendment which could be objectively discerned by the judiciary.[53] The majority considered several criteria

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the crimes of first-degree murder, rape, and kidnapping in his jurisdiction. The court did not believe it rationally could be urged Hart's status as a recidivist check forger posed as great a threat to society as did the previously enumerated violent crimes. *See id.* at 142. This final prong of the test came from *Weems v. United States*, the landmark decision in proportionality determination. *See id.* at 142; Weems v. United States, 217 U.S. 349, 381 (1910).

47. Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); *see* Furman v. Georgia, 408 U.S. 238, 282 (1972) (Brennan, J., concurring). The test that emerged from the *Hart* decision comprised a cumulative consideration of 1) the nature of the offense for which the challenged punishment is imposed, 2) the legislative purpose behind the choice of the particular punishment prescribed for the offense, 3) an examination of punishments levied for the same crime in other jurisdictions, and 4) a comparison of other penalties assessed for other crimes in the same jurisdiction. *See* Hart v. Coiner, 483 F.2d 136, 140-42 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

48. ___ U.S. ___, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980).

49. *Compare id.* at ___, 100 S. Ct. at 1134-35, 63 L. Ed. 2d at 385-86 (defendant received life sentence under Texas recidivist statute for convictions of fraudulent use of credit card in the amount of $80, passing a $28.36 forged check, and obtaining $120.75 under false pretenses) *with* Hart v. Coiner, 483 F.2d 136, 138 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974) (defendant received life sentence under West Virginia recidivist statute for convictions of writing a check for $50 on insufficient funds, transporting $140 in forged checks across state lines, and committing perjury at his son's murder trial).

50. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1134, 63 L. Ed. 2d 382, 385 (1980).

51. *Id.* at ___, 100 S. Ct. at 1138, 63 L. Ed. 2d at 389.

52. *See id.* at ___, 100 S. Ct. at 1139, 63 L. Ed. 2d at 391. The Court stated the determinations of the relative seriousness of crimes and their respective punishments are necessarily subjective and the consequent line-drawing is properly within the province of the legislatures, not courts. *Id.* at ___, 100 S. Ct. at 1143 n.27, 1145, 63 L. Ed. 2d at 396 n.27, 397. Citing *Badders v. United States* and *Graham v. West Virginia* as examples, the *Rummel* Court noted the reluctance of the judiciary to review disproportionality challenges when the focus is on length of sentence alone. *Id.* at ___, 100 S. Ct. at 1139-41, 63 L. Ed. 2d at 391-92; see *Badders v. United States*, 240 U.S. 391, 393-94 (1916) (five years imprisonment and $1000 in fines not disproportionately severe for seven counts of mail fraud); *Graham v. West Virginia*, 224 U.S. 616, 631 (1912) (life imprisonment under recidivist statute not unduly harsh for three convictions of horse theft).

53. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1144, 63 L. Ed. 2d 382,

urged by Rummel to allow objective proportionality analysis,[54] but deemed them insufficient to avoid sentences representing "merely the subjective views of individual Justices."[55] The Court concurred with the court of appeals' premise that Rummel's parole chances were properly considered in the proportionality analysis.[56] While recognizing Rummel had no entitlement to parole,[57] the Court acknowledged the probability of parole as a reality in the Texas penal system,[58] and affirmed the lower courts' denial of habeas corpus relief.[59]

Justice Powell's dissent, in which Justices Brennan, Marshall, and Stevens joined,[60] traced the development of proportionality in prior eighth amendment analyses.[61] This survey, the dissent maintained, did not support the majority's contention that the analytic criteria developed therein

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397 (1980).

54. *See id.* at ___, 100 S. Ct. at 1140-44, 63 L. Ed. 2d at 394-97. The Court found consideration of the nature of the offense not a proper judicial function. Categorizing Rummel's crimes as felonies was wholly within legislative purview. *Id.* at ___, 100 S. Ct. at 1144, 63 L. Ed. 2d 397. Punishing Rummel as a recidivist with a life sentence was "nothing more than a societal decision . . . ." *Id.* at ___, 100 S. Ct. at 1141, 63 L. Ed. 2d at 394. Comparison of Rummel's sentence with one he might receive in other jurisdictions was considered to be fraught with too many variables to provide an adequately objective criterion. *Id.* at ___, 100 S. Ct. at 1141-42, 63 L. Ed. 2d at 394. Finally, comparing Rummel's punishment with punishments imposed for other crimes in Texas was dismissed by the Court as inherently speculative, since different crimes implicate other societal interests. *See id.* at ___, 100 S. Ct. at 1143 n.27, 63 L. Ed. 2d at 396 n.27.

55. *Id.* at ___, 100 S. Ct. at 1140, 63 L. Ed. 2d at 391. The Court deemed objective criteria developed in previous eighth amendment proportionality challenges to be of little assistance in this case. *See id.* at ___, 100 S. Ct. at 1138, 63 L. Ed. 2d at 390. The cases cited by the Court in apparent approval of the concept of proportionality were all considered to be distinguishable, involving punishments differing in kind rather than degree from the more traditional punishment of imprisonment involved in *Rummel. Compare id.* at ___, 100 S. Ct. at 1134, 63 L. Ed. 2d at 385 (imprisonment for life) *with* Coker v. Georgia, 433 U.S. 584, 592 (1977) (death penalty) *and* Ingraham v. Wright, 430 U.S. 651, 658 (1977) (corporal punishment in schools) *and* Gregg v. Georgia, 428 U.S. 153, 161 (1976) (death penalty) *and* Furman v. Georgia, 408 U.S. 238, 239 (1972) (death penalty) *and* Trop v. Dulles, 356 U.S. 86, 100 (1958) (denationalization) *and* Weems v. United States, 217 U.S. 349, 364 (1910) (*cadena temporal*).

56. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1142, 63 L. Ed. 2d 382, 395 (1980).

57. *See id.* at ___, 100 S. Ct. at 1142, 63 L. Ed. 2d at 395.

58. *See id.* at ___, 100 S. Ct. at 1142, 63 L. Ed. 2d at 395.

59. *See id.* at ___, 100 S. Ct. at 1145, 63 L. Ed. 2d at 398. In a separate opinion, Justice Stewart concurred in the Court's holding. He found the Texas recidivist scheme met minimal constitutional standards, despite being clearly inferior to more enlightened procedures followed in many other jurisdictions. *See id.* at ___, 100 S. Ct. at 1145, 63 L. Ed. 2d at 398 (Stewart, J., concurring).

60. *See id.* at ___, 100 S. Ct. at 1145, 63 L. Ed. 2d at 398 (Powell, J., dissenting).

61. *See id.* at ___, 100 S. Ct. at 1146-49, 63 L. Ed. 2d at 400-03 (Powell, J., dissenting).

were restricted to considerations of capital or inhumane punishments.[62] The dissent suggested a test could be formulated from the objective criteria that had evolved in prior cases.[63] Taken into consideration by the dissent's test were the nature of the offense,[64] sentences imposed in other jurisdictions for the same crime,[65] and sentences imposed in the same jurisdiction for other crimes.[66] Justice Powell pointed out a substantially similar test had been used by the Fourth Circuit since 1973 to demonstrate the test could be applied without violating principles of judicial restraint and federalism.[67] Moreover, the dissent criticized the consideration of parole in the majority's proportionality analysis.[68] As Rummel had

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62. *See id.* at ___, 100 S. Ct. at 1149, 63 L. Ed. 2d at 403 (Powell, J., dissenting). The dissent stated the principles of proportionality were applicable to all sentences grossly excessive to the seriousness of the crime for which imposed. *See id.* at ___, 100 S. Ct. at 1149, 63 L. Ed. 2d at 403 (Powell, J., dissenting).

63. *See id.* at ___, 100 S. Ct. at 1150, 63 L. Ed. 2d at 404 (Powell, J., dissenting).

64. *Id.* at ___, 100 S. Ct. at 1150, 63 L. Ed. 2d at 404 (Powell, J., dissenting). In considering the nature of Rummel's offenses, the dissent noted: "[i]t is difficult to imagine felonies that pose less danger to the peace and good order of a civilized society than the three crimes committed by the petitioner." *Id.* at ___, 100 S. Ct. at 1150, 63 L. Ed. 2d at 404 (Powell, J., dissenting).

65. *Id.* at ___, 100 S. Ct. at 1150-53, 63 L. Ed. 2d at 405-07 (Powell, J., dissenting). The dissent noted an overwhelming majority of jurisdictions never adopted the Texas scheme and of those that did, three-quarters have abandoned it. *See id.* at ___, 100 S. Ct. at 1150-51, 63 L. Ed. 2d at 405 (Powell, J., dissenting).

66. *See id.* at ___, 100 S. Ct. at 1150, 1153, 63 L. Ed. 2d at 403, 407 (Powell, J., dissenting). In comparing Rummel's punishment to other punishments imposed in Texas, the severity of the recidivist life sentence was found to be comparable only to those found guilty of crimes of violence against the person such as murder and kidnapping. *Id.* at ___, 100 S. Ct. at 1153, 63 L. Ed. 2d at 407-08 (Powell, J., dissenting). *Compare* TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974) (third felony conviction mandates life imprisonment) *with id.* §§ 19.02, 12.32 (murder conviction may be punished by 99 years sentence) *and id.* §§ 20.04, 12.32 (aggravated kidnapping may result in 99 year year sentence). The dissent further noted assessing life imprisonment for such crimes demonstrated a legislative scheme to proportion punishment to the relative seriousness of the offenses. The operation of the statute without regard to the severity of the underlying offenses was found to be at odds with this scheme. *See id.* at ___, 100 S. Ct. at 1153, 63 L. Ed. 2d at 408 (Powell, J., dissenting).

67. *See id.* at ___, 100 S. Ct. at 1154-56, 63 L. Ed. 2d at 409-11 (Powell, J., dissenting).

68. *See id.* at ___, 100 S. Ct. at 1149-50, 63 L. Ed. 2d at 403-04 (Powell, J., dissenting). The Court cited statistics to demonstrate the speculative nature of Rummel's parole chances. The Governor of Texas had rejected 33% of all parole board recommendations for early release during the six-month period between January and June, 1979 and, rejected 79% of the board's recommendations made in June, 1979. *Austin American-Statesman*, A-1, col. 4 (Sept. 23, 1979), *quoted in* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1150 n.11, 63 L. Ed. 2d 382, 404 n.11 (1980) (Powell, J., dissenting). *See* Trop v. Dulles, 356 U.S. 86, 102 (1958) ("It is no answer to suggest that all the disasterous consequences of this fate may not be brought to bear on . . . [the petitioner] . . . . The threat makes the punishment obnoxious.").

no enforceable right to parole,[69] the dissent maintained the punishment must be considered as one for life imprisonment.[70] Applying its proposed test to Rummel, the dissent found although Rummel's life sentence was not inherently barbarous, it was grossly disproportionate to the severity of his crimes, thereby violating the eighth amendment.[71]

In conceding sentences imposed within statutory limitations are subject to eighth amendment proportionality challenges,[72] the *Rummel* Court implicitly acknowledged legislative discretion in determining punishment for crimes is not absolute.[73] This circumscription of legislative power by the judiciary has been all but decimated by the Supreme Court's treatment of Rummel's eighth amendment claim.[74] The Court's paramount concern was that eighth amendment judgments be "informed by objective factors to the maximum possible extent."[75] By justifying dismissal of Rummel's proportionality challenge on grounds no suitably objective criteria were available for such a determination,[76] however, the Court rejected the traditional standards of proportionality analysis which had been employed by state and lower federal courts for years when assessing disproportionality challenges to sentences imposed within statutory limits.[77] The Court repudiated, as insufficiently subjective, the factors pro-

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69. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1149-50, 63 L. Ed. 2d 382, 403-04 (1980) (Powell, J., dissenting).

70. *See id.* at ___, 100 S. Ct. at 1150, 63 L. Ed. 2d at 404 (Powell, J., dissenting).

71. *See id.* at ___, 100 S. Ct. at 1153, 63 L. Ed. 2d at 408 (Powell, J., dissenting).

72. *See id.* at ___, 100 S. Ct. at 1138, 63 L. Ed. 2d at 389.

73. *See* Furman v. Georgia, 408 U.S. 238, 268 (1972) (Brennan, J., concurring). "Judicial enforcement of the . . . [eighth amendment] . . . cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the . . . [eighth amendment] . . . appears in the Bill of Rights." *Id.* at 269 (Brennan, J., concurring); *see* Trop v. Dulles, 356 U.S. 86, 103 (1958) ("Courts must not consider the wisdom of the statutes but neither can they sanction as being merely unwise that which the Constitution forbids.").

74. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1156, 63 L. Ed. 2d 382, 411 (1980) (Powell, J., dissenting).

75. Id. at ___, 100 S. Ct. at 1139, 63 L. Ed. 2d at 391. Both the Court and its dissenters cite the admonition of the Court in *Coker v. Georgia,* that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of the individual Justices; judgment should be informed by objective factors to the maximum possible extent." Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1139, 63 L. Ed. 2d 382, 391 (1980); *id.* at ___, 100 S. Ct. at 1149, 63 L. Ed. 2d at 402-03 (Powell, J., dissenting); *see* Coker v. Georgia, 433 U.S. 584, 592 (1977).

76. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1140-43, 63 L. Ed. 2d 382, 391-97 (1980).

77. *See id.* at ___, 100 S. Ct. at 1154-56, 63 L. Ed. 2d at 410-11 (Powell, J., dissenting). Enumeration of applications of *Hart v. Coiner* standards demonstrate objective criteria can be and have been utilized by the judiciary with careful discretion. *See, e.g.,* Hart v. Coiner, 483 F.2d 136, 140-43 (4th Cir. 1973), *cert. denied,* 415 U.S. 983 (1974) (used consideration of

posed by the dissent,[78] thereby implicitly overruling the *Hart* test used by the Fourth Circuit since 1973.[79] The entire Court had acknowledged the validity of proportionality analysis in eighth amendment claims by the time of its 1976 decision in *Coker v. Georgia.*[80] The *Rummel* Court, there-

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nature of offense, legislative purpose, comparison of punishment with that in other jurisdictions for same crime, and comparison of punishment for other crimes in same jurisdiction to find life sentence imposed for recidivist convicted of three non-violent felonies excessive); *In re* Lynch, 503 P.2d 921, 933-39, 105 Cal. Rptr. 217, 229-35 (1972) (applied consideration of nature of offense, comparison of punishment with that in other jurisdictions for same crime, and comparison of punishment for other crimes in same jurisdiction to find recidivist convicted of indecent exposure excessive); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (employed consideration of nature of offense, proportionality of penalty to offense, and legislative purpose to find life imprisonment imposed on fourteen-year old for rape excessive).

78. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1140-44, 1143 n.27, 63 L. Ed. 2d 382, 391, 394-97, 396 n.27 (1980). Without making any direct reference to the *Hart* opinion, the *Rummel* majority addressed and dismissed three prongs of the *Hart* test: consideration of the nature of the offense, comparison of the penalty to that assessed for the same crime in other jurisdictions, and comparison of penalties imposed for other crimes in the same jurisdiction. *See id.* at ___, 100 S. Ct. at 1140-44, 63 L. Ed. 2d at 391-97. The Court determined a consideration of the nature of an offense and its punishment to be merely a "societal decision" effected through the legislature and inappropriate for judicial review. *See id.* at ___, 100 S. Ct. at 1140-41, 63 L. Ed. 2d at 391-92, 394. The Court deemed comparison of a punishment to that imposed for the same offense in other jurisdictions fraught with too many variables to allow effective results. *See id.* at ___, 100 S. Ct. at 1141-44, 63 L. Ed. 2d at 394-97. Finally, the majority found comparison of a penalty with that imposed for other crimes in the same jurisdiction to be "inherently speculative" due to the differing societal interests implicated. *See id.* at ___, 100 S. Ct. at 1143 n.27, 63 L. Ed. 2d at 396 n.27.

79. *See id.* at ___, 100 S. Ct. at 1140-43, 63 L. Ed. 2d 391-97; Hart v. Coiner, 483 F.2d 136, 140-42 (4th Cir. 1973), *cert. denied,* 415 U.S. 983 (1974). As the objective criteria proposed by the dissent and rejected by the majority in *Rummel* was substantially the same as that in *Hart,* the Court has presumably proscribed further federal review of state recidivist claims in the Fourth Circuit's jurisdiction, as well as in Texas. *Compare* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1145, 63 L. Ed. 2d 382, 398 (1980) (considerations of nature of offense, comparison of penalty imposed for same crime in other jurisdictions, and comparison of penalties for different crimes in same jurisdiction are too subjective to be used as criteria in judicial review of sentence imposed within statutory limits of recidivist law) *with* Hart v. Coiner, 483 F.2d 136, 140-43 (1973), *cert. denied,* 415 U.S. 983 (1974) (consideration of nature of offense, comparison of penalty imposed for same crime in other jurisdictions, and comparison of penalties for other crimes in same jurisdiction are valid objective criteria for use in judicial review of sentence imposed within statutory limits of recidivist law).

80. 433 U.S. 584 (1977). Justices Stevens and Stewart joined in the Court's opinion in *Coker* which noted its subscription to the proportionality principle. *See id.* at 592. Justices Brennan, White, and Marshall, in separate concurring opinions, embraced the concept as applicable to eighth amendment claims in *Furman v. Georgia. See* Furman v. Georgia, 408 U.S. 238, 280 (1972) (Brennan, J., concurring); *id.* at 312 (White, J., concurring); *id.* at 331-32 (Marshall, J., concurring). Justices Rehnquist, Burger, and Blackmun joined Justice Powell in his dissent in *Furman* acknowledging the appropriateness of the concept of propor-

fore, attempted to justify its refusal to allow such analysis in the instant case on the grounds that previously developed objective standards turned on questions of punishments differing in nature from sentences for a term of years.[81] In so doing, the Court attempted to dismiss the objective standards developed in its prior decisions,[82] maintaining those cases turned on questions of punishments which differed in nature from sentences for a term of years, and were therefore inapplicable.[83] Such a limitation on proportionality analysis of eighth amendment claims is not warranted by the language in those cases as the emphasis there is wholly on the relative excessiveness of the challenged punishments rather than their unusual nature.[84]

In noting Texas can justifiably deal more harshly with Rummel as a

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tionality in eighth amendment assessments. *See id.* at 457-58 (Powell, J., dissenting).

81. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1138-39, 63 L. Ed. 2d 382, 389-90 (1980).

82. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 593-97 (1977) (objective factors to determine public attitudes concerning particular sentence include history and precedent, legislative attitudes, and response of juries reflected in sentencing decisions); Gregg v. Georgia, 428 U.S. 153, 179-81 (1976) ("index of contemporary values" concerning challenged sanction can be gleaned from legislative response and juries' reluctance to impose same); Furman v. Georgia, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring) (objective indicators of contemporary, moral consensus toward a punishment found in the appearance of the punishment in other jurisdictions, historic usage compared to current use, and acceptance by society).

83. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1138-39, 63 L. Ed. 2d 382, 389-90 (1980). The Court suggested the findings of disproportionality of sentence to offense in the "death penalty" cases and in *Weems* turned on the unique nature of the offenses involved, making the standards developed in those cases inapposite to a determination of a "traditional" sentence of imprisonment. *See id.* at ___, 100 S. Ct. at 1138-39, 63 L. Ed. 2d at 389-91; *cf.* Coker v. Georgia, 433 U.S. 584, 592 (1977) (death penalty); Gregg v. Georgia, 428 U.S. 153, 162 (1976) (death penalty); Furman v. Georgia, 408 U.S. 238, 239-40 (death penalty).

84. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) ("Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed"); Gregg v. Georgia, 428 U.S. 153, 175 (1976) (penalty may not be "disproportionate to the crime involved"); Furman v. Georgia, 408 U.S. 238, 279 (1972) ("the final principle inherent in the Clause is that a severe punishment must not be excessive"); Robinson v. California, 370 U.S. 660, 676 (1962) ("[a] punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments' "); Lambert v. California, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting) ("a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment"); Weems v. United States, 217 U.S. 349, 367 (1910) (it is a "precept of justice that punishment for crime should be graduated and proportioned to offense"); O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (eighth amendment directed "against all punishments which by their excessive length or severity are greatly disproportioned to the offences [sic] charged").

recidivist than were he a first-time offender,[85] the Court supports its rejection of Rummel's eighth amendment claim with cases dating from 1901 to 1916, all of which had dismissed the eighth amendment claims summarily.[86] Noticeably absent from the list of cases cited by the *Rummel* Court are the more recent eighth amendment cases in which objective criteria were developed.[87] The Court's reliance on old cases is inconsistent with the proportionality concept that the scope of the eighth amendment is not static, but must draw its meaning from the "evolving standards of decency that mark the progress of a maturing society."[88]

More in keeping with the proportionality requisite of delineating eighth amendment strictures in light of "evolving standards" than the approach taken by the Court in *Rummel* would be to assess contemporary values concerning the challenged penalty as suggested in *Gregg v. Georgia*.[89] One method of accomplishing such an assessment is to consider the general trend of recidivist statutes, as evidenced by the current status of recidivist statutes in other jurisdictions.[90] It is initially significant to note only

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85. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1140-41, 63 L. Ed. 2d 382, 392-94) (1980).

86. *See id.* at ___, 100 S. Ct. at 1140-41, 63 L. Ed. 2d at 392-93; Badders v. United States, 240 U.S. 391, 394 (1916) ("there is no ground for declaring the punishment unconstitutional"); Graham v. West Virginia, 224 U.S. 616, 623 (1912) ("[t]his legislation [recidivist statute] has uniformly been sustained in the State Courts"); McDonald v. Massachusetts, 180 U.S. 311, 313 (1901) ("[t]he statute does not . . . impose a cruel or unusual punishment").

87. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 593-97 (1977) (objective factors to determine public attitudes concerning particular sentence include history and precedent, legislative attitudes, and response of juries reflected in sentencing decisions); Gregg v. Georgia, 428 U.S. 153, 179-81 (1976) ("index of contemporary values" concerning challenged sanction can be gleaned from legislative response and juries' reluctance to impose same); Furman v. Georgia, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring) (objective indicators of contemporary, moral consensus toward a punishment found in the appearance of the punishment in other jurisdictions, historic usage compared to current use, and acceptance by society).

88. *Compare* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1139-41, 63 L. Ed. 2d 382, 391-93 (1980) (Court analyzes eighth amendment claim using cases dating from 1901 to 1916) *with* (Estelle v. Gamble, 429 U.S. 97, 102-06 (1976) (Court uses cases dating from 1910 to 1976 to adjudge eighth amendment claim). The proportionality concept of "evolving standards" was developed in *Trop v. Dulles* and has been frequently utilized in eighth amendment determinations since that time. Trop v. Dulles, 356 U.S. 86, 100-01 (1958); *see* Estelle v. Gamble, 429 U.S. 97, 103 (1976); Roberts v. Louisiana, 428 U.S. 325, 336 (1976); *cf.* Gregg v. Georgia, 428 U.S. 153, 171 (1976) (eighth amendment to be interpreted in a "flexible and dynamic manner"); Weems v. United States, 217 U.S. 349, 373 (1910) ("a principle to be vital must be capable of wider application than the mischief which gave it birth").

89. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976).

90. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 594-95 (1977) (interjurisdictional comparison of penalties for rape); Trop v. Dulles, 356 U.S. 86, 102-03 (1958) (interjurisdictional comparison of penalties for wartime desertion); Hart v. Coiner, 483 F.2d 136, 141-42 (1973)

twelve jurisdictions in the United States have ever enacted a recidivist statute mandating life imprisonment upon the conviction of three undifferentiated felonies.[91] The trend away from this harsh scheme is evident, as of these twelve, nine jurisdictions have since amended their statutes.[92] Two of the jurisdictions have made the sentences lighter;[93] one now requires sentencing discretion;[94] two relate the term assessed to the severity of the triggering offense;[95] two require a specified number of designated violent crimes;[96] and two jurisdictions have abandoned the concept of recidivist statutes altogether.[97] Other jurisdictions enacting recidivist statutes require more than three felony convictions, or at least one violent crime to trigger the imposition of their statute.[98] These statutes either

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(interjurisdictional comparison of penalties for recidivism), *cert. denied*, 415 U.S. 983 (1974).

91. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1150-51, 63 L. Ed. 2d 382, 407 (1980). The twelve jurisdictions which enacted such statutes include: 1) California, 1927 Acts, ch. 634, § 1, at 1066; 2) Indiana, 1907 Acts, ch. 82, § 1, at 109; 3) Kansas, 1927 Acts, ch. 191, § 1, at 247; 4) Kentucky, 1881 Acts, ch. 29, art. 1, § 12, at 318; 5) Massachusetts, 1817 Acts, ch. 176, §§ 5-6, at 447; 6) New York, 1796 Acts, ch. 30, at 669; 7) Ohio, 1885 Acts, H.R. No. 751, § 2, at 236; 8) Oregon 1921 Acts, ch. 70, § 1, at 97; 9) Texas, TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974); 10) Virginia, 1848 Acts, § 26, at 752; 11) Washington, WASH. REV. CODE ANN. § 9.92.090 (1977); 12) West Virginia, W. VA. CODE § 61-11-18 (1977). *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1150-51, 1151 n.13, 63 L. Ed. 2d 382, 404, 405 n.13 (1980).

92. *See* CAL. PENAL CODE § 667.5 (Deering Supp. 1980); IND. CODE ANN. § 35-50-2-8 (Burns 1979); KAN. STAT. ANN. § 21-4504 (Supp. 1979); KY. REV. STAT. § 21-4504 (Supp. 1979); MASS. GEN. LAWS ANN. ch. 279, § 25 (Michie/Law Co-op 1980); N.Y. PENAL LAW §§ 70.04, .06-.10 (McKinney Supp. 1979); OHIO REV. CODE ANN. §§ 2929.01, .11-.12 (Baldwin 1979); OR. REV. STAT. § 161.725 (1979); VA. CODE § 53-296 (1978) (repealed by 1979 VA. ACTS, ch. 411 (Supp. 1980)).

93. *See* CAL. PENAL CODE § 667.5 (Deering Supp. 1980) (statute requires no more than three additional years for each prior felony conviction); IND. CODE ANN. § 35-50-2-8 (Burns 1979) (thirty years additional sentence on conviction of third felony).

94. *See* KY. REV. STAT. ANN. § 532.080 (Baldwin Supp. 1978).

95. *See* KAN. STAT. ANN. § 21.4504 (Supp. 1979) (up to three times maximum penalty may be given upon conviction of third felony); MASS. GEN. LAWS ANN. ch. 279, § 25 (Michie/Law Co-op 1980) (third time offender gets maximum term for the felony for which he is being sentenced).

96. *See* N.Y. PENAL LAW §§ 70.04, .06-.10 (McKinney Supp. 1979) (mandatory life imprisonment on conviction of third violent felony); OR. REV. STAT. § 161.725 (1979) (30 additional years if felony threatened life or safety of another).

97. *See* OHIO REV. CODE ANN. §§ 2929.01, .11-.12 (Baldwin 1979) (no mandatory habitual offender statute); VA. CODE § 53-296 (1978) (repealed by 1979 VA. ACTS, ch. 411 (Supp. 1980)) (no habitual offender statute for felonies).

98. *See, e.g.*, COLO. REV. STAT. § 16-13-101(2) (Supp. 1979) (mandatory life sentence on conviction of fourth felony); DEL. CODE ANN. tit. 11, §§ 4214-4215 (Supp. 1979) (mandatory life sentence for one previously convicted twice of felonies when convicted of a third specified felony involving violence or threat of violence); MISS. CODE ANN. § 99-19-83 (Supp. 1979) (mandatory life sentence on conviction of third felony when at least one involves

have a mandatory penalty of less than a life sentence,[99] or allow the sentencing authority some discretion in invoking the statute.[100] The federal recidivist statute[101] requires proof the felon is a "dangerous special offender," limits the maximum sentence to twenty-five years, and urges the sentencing authority to proportion the sentence to the triggering offense.[102] As indicated by the preceding survey, Rummel received a more severe sentence in Texas than he would have in all but two other jurisdictions in the United States.[103] Though not dispositive of the question whether Rummel's life sentence constitutes cruel and unusual punishment forbidden by the eighth amendment,[104] the above data provides a clear and objective demonstration that the recidivist scheme utilized in

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violence).

99. *See, e.g.*, NEB. REV. STAT. § 29-2221 (1975) (third-time felon receives sentence of ten to sixty years or statutory sentence for third crime, whichever is greater); N.M. STAT. ANN. § 31-18-17 (Supp. 1979) (sentence of one found to be habitual criminal enhanced by an additional year on proof of a prior felony conviction, four additional years on proof of two prior felony convictions, and eight additional years on proof of three or more prior felony convictions); WIS. STAT. ANN. § 939.62 (West Supp. 1979) (one convicted of offense punishable by term greater than ten years may be sentenced to additional ten years upon proof of prior felony conviction within previous five years).

100. *See* ALASKA STAT. § 12.55.050 (1972) (life discretionary on conviction of fourth felony); D.C. CODE ENCYCL. § 22-104a (West Supp. 1978) (life discretionary after third felony); HAWAII REV. STAT. §§ 706-661 to -662 (1976) (life discretionary on conviction of third specified violent felony).

101. 18 U.S.C. § 3575 (1976).

102. *See id.*

> If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony.

Id. § 3575(b).

103. *Compare* TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974) (life imprisonment mandatory on third conviction of any felony) *with* WASH. REV. CODE ANN. § 9.92.090 (1977) (life sentence mandatory on third conviction of felony or crime implicating petit larcency or fraud) *and* W. VA. CODE § 61-11-18 (1977) (life term mandatory on third conviction of unspecified felony). *But see* Hart v. Coiner, 483 F.2d 136, 140-42 (4th Cir. 1973) (disproportionality claims reviewed under West Virginia recidivist statute), *cert. denied*, 415 U.S. 983 (1974); State v. Lee, 558 P.2d 236, 239-40, 240 n.4 (Wash. 1976) (en banc) (court will view disproportionate sentences under Washington's recidivist statute).

104. *Cf., e.g.*, Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (constitution "is made for people of fundamentally different views"); Howard v. Fleming, 191 U.S. 126, 136 (1903) ("[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one"); Baltimore & O. R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting) (constitution "recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments").

Texas is all but uniformly rejected in American justice systems.[105]

Another indication of the current status of the "evolving standard" by which eighth amendment claims are to be judged is demonstrated by the recent action taken by the Texas Legislature. Texas has determined the crime for which Rummel was most recently convicted does not warrant punishment as a felony,[106] and has reduced the penalty for the crime to misdemeanor classification.[107] An objective assessment of the nature of at least the last of Rummel's offenses, therefore, could have been made by the Court without any danger of unduly subjective speculation.[108]

An interjurisdictional comparison of recidivist statutes[109] and the recent expression by the Texas Legislature of its comprehension of the severity of Rummel's crime[110] provide readily available objective indicia of contemporary values. These accessible, but unemployed, gauges of current sentiment strongly undercut the Court's contention in *Rummel* that no suitably objective criteria exist to assess proportionality challenges to a sentence for a term of years.[111]

The *Rummel* decision signals a return to the approach taken by the Court in its early proportionality analyses limiting eighth amendment determinations to considerations of barbarous and unusual punishments.[112] This result is inferrable from the Court's insistence that objective criteria

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105. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1150-53, 63 L. Ed. 2d 382, 405-07 (1980) (Powell, J., dissenting).

106. *Compare* TEX. PENAL CODE ANN. § 31.03(d)(3) (Vernon Supp. 1980) (theft of property valued from fifty to two hundred dollars is Class A misdemeanor) *with id.* art. 1421 (Vernon 1953) (repealed 1974) (theft of property valued fifty dollars or over a felony). As Rummel's third conviction was for taking $120.75 under false pretences, today he would no longer be subject to a life sentence in Texas. TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 1980); Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1135, 63 L. Ed. 2d 382, 386 (1980).

107. *See* TEX. PENAL CODE ANN. § 31.03(d)(3) (Vernon Supp. 1980).

108. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 598 (1977) (crime of rape did not warrant death penalty); Weems v. United States, 217 U.S. 349, 381 (1910) (offense of falsifying public document did not allow punishment of twelve years at hard labor); Hart v. Coiner, 483 F.2d 136, 140-41 (4th Cir. 1973) (recidivist's underlying crimes did not permit life imprisonment), *cert. denied*, 415 U.S. 983 (1974).

109. *See* Trop v. Dulles, 356 U.S. 86, 102-03 (1958); Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

110. *See* TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974).

111. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1143-44 n.27, 63 L. Ed. 2d 382, 396 n.27 (1980).

112. *See, e.g.*, Francis v. Resweber, 329 U.S. 459, 464 (1947) (amendment protects against cruelty inherent in methods of punishment); *In re* Kemmler, 136 U.S. 436, 447 (1890) (amendment prevents "inhuman and barbarous" treatment); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) (amendment forbids tortures, such as, disemboweling while alive, beheading, burning alive).

be used in judicial review of eighth amendment claims,[113] while dismissing as indefensibly subjective traditional modes of eighth amendment analysis.[114] These irreconcilable commands necessarily limit future eighth amendment challenges to punishments differing in kind, rather than degree, from traditional penal sanctions of fines and imprisonment when clear, objective lines can be drawn.[115] While it is not to be disputed principles of federalism and judicial restraint command the judiciary to give great deference to the validity of statutes enacted under the states' police power,[116] the *Rummel* Court avoided its constitutional obligations[117] by wholly demurring to the legislature's line-drawing in this case.[118]

The Supreme Court's rejection of traditional standards with which to estimate the fairness of sentences for a term of years indicates eighth amendment challenges in the future will be restricted to those punishments differing in kind, rather than degree, from the traditional penal sanctions of fine and imprisonment.[119] Legislatures now are given a free rein to impose any penal sanctions within the limits of fine and imprisonment, as it is inferrable from the *Rummel* decision the Court will not consider any proportionality claim when the punishment is for a term of years imposed within statutory limits. By choosing to disregard the body of eighth amendment law emphasizing the ban on excessively harsh punishments and entirely deferring to legislative discretion, the Court, as

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113. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1139, 63 L. Ed. 2d 382, 390-91 (1980).

114. *See id.* at ___, 100 S. Ct. at 1141-43, 1143 n.27, 63 L. Ed. 2d at 394-96, 396 n.27.

115. See id. at ___, 100 S. Ct. at 1143 n.27, 63 L. Ed. at 396 n.27. "Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging [disproportionate sentences]." *Id.* at ___, 100 S. Ct. at 1143 n.27, 63 L. Ed. 2d at 396 n.27.

116. *See* Gregg v. Georgia, 428 U.S. 153, 175 (1976); Gore v. United States, 357 U.S. 386, 393 (1958); Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

117. *See* Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring). "Judicial enforcement of the [eighth amendment], . . ., cannot be evaded by the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the [amendment] appears in the Bill of Rights." *Id.* at 269; *see* Trop v. Dulles, 356 U.S. 86, 103 (1958) "Courts must not consider the wisdom of the statutes but neither can they sanction as being merely unwise that which the Constitution forbids." *Id.* at 103.

118. *See* Rummel v. Estelle, ___ U.S. ___, ___, 100 S. Ct. 1133, 1139-40, 63 L. Ed. 2d 382, 391-92 (1980). "[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concedely classified and classifiable as felonies, . . ., the length of sentence actually imposed is purely a matter of legislative perogative." *Id.* at ___, 100 S. Ct. at 1139, 63 L. Ed. 2d at 391. *But see id.* at ___, 100 S. Ct. at 1139 n.11, 63 L. Ed. 2d at 391 n.11.

119. *See id.* at ___, 100 S. Ct. at 1143 n.27, 63 L. Ed. 2d at 396 n.27.