Constitutional Law - Eighth Amendment - Cruel and Unusual Punishment - Length of Prison Sentences

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CONSTITUTIONAL LAW—EIGHTH AMENDMENT—CRUEL AND UNUSUAL PUNISHMENT—LENGTH OF PRISON SENTENCES—The Supreme Court of the United States has held that a mandatory life sentence imposed under a state recidivist statute on a defendant convicted of three non-violent felonies totaling $229 does not constitute cruel and unusual punishment.


In 1964 William James Rummel pleaded guilty to a Texas felony indictment charging him with fraudulent use of a credit card to obtain $80.00 worth of goods or services, a crime for which he was sentenced to three years imprisonment.¹ Five years later, in 1969, Rummel was sentenced to a four-year prison term after pleading guilty to the felony of passing a forged check in the amount of $28.36.² Again, in 1973, the State of Texas charged Rummel with another felony for allegedly obtaining $120.75 by false pretenses.³ This time, however, the state proceeded under its recidivist statute.⁴ After the jury found Rummel guilty

¹ Rummel v. Estelle, 100 S. Ct. 1133, 1134 (1980). TEX. PENAL CODE ANN. art. 1555(b)(1) (Vernon Supp. 1973) (recodified at TEX. PENAL CODE ANN. tit. 7, § 32.31 (Vernon 1974)), provided that it shall be unlawful to present a credit card with the intent to defraud to obtain an item of value or service of any type. TEX. PENAL CODE ANN. art. 1555(b)(4)(d) (Vernon Supp. 1973) (recodified at TEX. PENAL CODE ANN. tit. 7, § 32.31 (Vernon 1974)), set the threshold amount at $50 and provided for punishment from two to ten years.

² 100 S. Ct. at 1135. TEX. PENAL CODE ANN. art. 996 (Vernon 1961) (recodified at TEX. PENAL CODE ANN. tit. 7, § 32.31 (Vernon 1974)), provided that passing or attempting to pass a forged instrument in writing is punishable by confinement in the penitentiary from two to five years.

³ 100 S. Ct. at 1135. TEX. PENAL CODE ANN. art. 1413 (Vernon 1953) (recodified at TEX. PENAL CODE ANN. tit. 7, § 31.03 (Vernon 1974)), provided that the taking must be wrongful or, if originally lawful, must be obtained by false pretext or with the intent to deprive the owner thereof. Section 1410 which defines theft, has also been recodified and can now be found at TEX. PENAL CODE ANN. tit. 7, § 31.03 (Vernon 1974).

Rummel was accused of accepting the funds to obtain and install a compressor in an air conditioner. Instead, he endorsed the check with the names “Service Supply and William Rummel,” cashed it, and failed to obtain the compressor or to do the work. Rummel v. State, 509 S.W.2d 630, 631 (Tex. Crim. App. 1974). Because the amount in question was over $50, the act constituted a felony. See TEX. PENAL CODE ANN. art. 1421 (Vernon 1953). Thus, Rummel’s three felonies totaled $229.11.

⁴ 100 S. Ct. at 1135. TEX. PENAL CODE ANN. art. 63 (Vernon 1925) provided: “Whoever shall have been three times convicted of a felony less than a capital offense shall on such third conviction be imprisoned in the penitentiary for life.” The Code now 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 hav-
of theft by false pretenses and found that he had been convicted of two
prior felonies, the court imposed the mandatory life sentence required
by Article 63 of the Texas Penal Code. On appeal the Texas Court of Criminal Appeals affirmed the conviction. Rummel then sought a writ of habeas corpus which was denied without a hearing by both the state district court and the Texas Court of Criminal Appeals. Rummel next sought collateral relief in the United States District Court for the Western District of Texas where he contended that his life sentence was so disproportionate to his crimes as to constitute cruel and unusual punishment prohibited by the eighth amendment. The district court, however, denied habeas corpus relief on the eighth amendment claim. In March of 1978, a divided panel of the United States Court of Appeals for the Fifth Circuit reversed the district court's decision and held that application of Article 63's automatic life sentence to Rummel was cruel and unusual because it was grossly disproportionate to his crimes. On rehearing by the court en banc, the majority vacated the panel's opinion, affirmed the district court's denial of habeas corpus relief, and held that application of the state's habitual criminal statute to Rummel did not constitute cruel and unusual punishment. After denial of his petition

1. TEX. PENAL CODE ANN. tit. 7, § 12.42(d) (Vernon 1974).
3. 100 S. Ct. at 1135.
4. Rummel v. State, 509 S.W.2d 630 (Tex. Crim. App. 1974). Rummel's appeal primarily challenged the sufficiency of the evidence and the propriety of the court's withdrawal of the question from the jury. The issue of cruel and unusual punishment was not raised. Id. at 632-34.
5. The writ was denied by the District Court for the 187th Judicial District of Bexar County, Texas. Petition for Certiorari, Appendix A at 45A.
6. The writ was denied, without written order, on findings of the trial court. Id. at 44A.
10. Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978) (en banc). The court of appeals voted 8-6 in vacating the decision of the panel. The case was then remanded to the panel for reconsideration of a sixth amendment issue. The panel held that Rummel's petition was legally sufficient to require a federal evidentiary hearing. Rummel v. Estelle, 590 F.2d 103, 105 (5th Cir. 1979) (panel opinion) (per curiam).
for rehearing by the court of appeals,” Rummel appealed to the United States Supreme Court which granted certiorari. The Supreme Court held that the mandatory life sentence imposed on the petitioner did not constitute cruel and unusual punishment under the eighth and the fourteenth amendments.

Speaking for the five-justice majority, Justice Rehnquist addressed Rummel’s challenge of the state’s authority to levy a sentence of life imprisonment, as opposed to a lengthy jail term, upon his conviction of the third felony. Relying on Weems v. United States, Rummel contended that mandatory imposition of the life sentence was so disproportionate to the offense for which he was convicted that it constituted cruel and unusual punishment under the eighth and fourteenth amendments. Notwithstanding this argument, the majority narrowly interpreted the Weems decision and ruled that the finding of disproportionality there could not be wrenched from the extreme facts of the case. Because the Weems opinion referred both to the length of the prison term and to the punishment which accompanied it, the Court rejected Rummel’s assertion that the length of Weems’ imprisonment formed an independent basis for that Court’s decision.

18. 100 S. Ct. at 1136. Rummel did not challenge the constitutionality of the Texas recidivist statute per se, an issue put to rest in Spencer v. Texas, 385 U.S. 554 (1967). In Spencer the defendants argued unsuccessfully that the use of prior convictions in their subsequent criminal trials violated fourteenth amendment due process. Id. at 559. Nor did Rummel challenge the state’s authority to label each of his offenses as felonies and punish him by imprisonment. 100 S. Ct. at 1136.
19. 217 U.S. 349 (1910). In Weems the defendant was sentenced to the penalty of 15 years of cadena temporal for the crime of falsifying a public record. At a minimum, Weems’ sentence amounted to imprisonment for 12 years and a day, a chain at the ankle and wrist of the offender, hard and painful labor with “no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council.” Id. at 366.
20. 100 S. Ct. at 1138. Rummel argued that although the Weems Court based its decision in part on the inherent cruelty of the punishment, it also relied on the separate ground that the eighth amendment prohibits excessively cruel punishment as well as inherently cruel forms of punishment, and that the length of punishment must be proportioned to the offense. Petition for Certiorari at 21-22. The eighth amendment’s guarantee against cruel and unusual punishment applies to the states through the fourteenth amendment due process clause. See, e.g., Louisiana v. Resweber, 329 U.S. 459, 463 (1947).
21. 100 S. Ct. at 1138.
22. Id. at 1139.
The Court likewise rejected Rummel's argument that the indices of disproportionality set forth in *Coker v. Georgia*, against which he measured the proportionality of his sentence, are applicable to a case not involving the death penalty. The unique and irrevocable nature of the death penalty, reasoned the majority, sets it apart from all other forms of punishment, including prison sentences of any length. Therefore, *Coker* and other cases in which death sentences were set aside as violating the eighth amendment were determined to be inapplicable to the fact situation presented in *Rummel*. The Court concluded that *Weems* and the death penalty cases form a body of law so unique as to make it readily distinguishable from cases involving prison terms alone. The Court then reached the nucleus of its decision, that for crimes concededly classifiable as felonies, principles of federalism demand that the length of prison sentence actually imposed be purely a matter for the respective state legislatures to decide.

The Court explained that its reluctance to review legislatively mandated sentences is reflected in recent decisions such as *Coker* where

23. 433 U.S. 584 (1977) (plurality opinion). The *Coker* Court indicated that punishment exceeds the limits of the eighth amendment 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." Id. at 592. In holding capital punishment for rape invalid on the second ground, the Court focused on three indices of disproportionality: (1) the penalty for comparable offenses in the same jurisdiction; (2) the nature of the offense; and (3) the punishment for the same crime in other jurisdictions.

With reference to these criteria Rummel argued that: (1) the nature of his offense lacked the element of violence, threat of harm, skill in crime, or moral depravity necessary to justify the sentence; (2) with the exception of one other jurisdiction, the law "in no other American jurisdiction mandates a life sentence upon conviction of any three felonies," because all either require at least one violent crime, impose a sentence less than life, or grant sentencing discretion to the judge or jury; (3) except for murder, Texas does not impose a life sentence "on even the most violent or depraved single or two-time offenders." Moreover, argued Rummel, his third offense was made a misdemeanor eight months after his trial, carrying a maximum sentence of only one year. Petition for Certiorari at 8-11.

24. 100 S. Ct. at 1138.


26. Crimes concededly classifiable as felonies include those punishable by significant terms of imprisonment in a state penitentiary. 100 S. Ct. at 1139.

27. *Id.* As an example of the diverse results which federalism can yield, Justice Rehnquist noted that in Arizona it is a felony to steal any “neat or horned animal,” regardless of its value. *Id.* at 1143. See *Ariz. Rev. Stat. Ann.* § 13-663(a) (Supp. 1978) (repealed 1978). California, on the other hand, considers the theft of “avocados, citrus or deciduous fruits, nuts and artichokes” a crime. 100 S. Ct. at 1143. See *Cal. Penal Code* § 487(1) (Deering 1970).
Justice White observed that eighth amendment judgments should not be merely the subjective views of the individual Justices, but should be informed by objective factors. In attempting to provide the Court with such objective criteria, Rummel repeatedly emphasized the triviality of his crimes and their absence of violence. The Court pointed out, however, that the presence or absence of violence does not always reflect the strength of society's interest in deterring a particular crime. Nor is the small amount of money taken in each of Rummel's crimes determinative, reasoned the majority, because to recognize that Texas could have imprisoned him for stealing a larger sum is to concede that the line-drawing process is within the province of the state legislature. Moreover, the Court concluded that Rummel, by acknowledging the validity of recidivist statutes in general, conceded Texas has a valid interest in so dealing with him and others who fall into the class of persons circumscribed by those statutes.

Finally, Rummel attempted to objectify the application of Article 63 to him by comparing Texas' scheme with recidivist statutes in other states, and by offering evidence that the national trend is away from mandatory life sentences and toward lighter, discretionary ones. The Court did not immediately evaluate this evidence; instead it examined the operation of Article 63 as interpreted by the Texas courts, finding it to be a societal decision that when a person commits three felonies he should be incarcerated for life. The majority then rejected Rummel's interjurisdictional analysis, finding that although a comparison of states that impose capital punishment for a specific offense with those that do not is possible, a similar comparison where a noncapital offense is concerned is far too complex.

The Court noted that Texas' relatively liberal policy of granting good time credits to prisoners adds to the complexity. Although the majority recognized that Rummel has no enforceable right to parole, it reasoned that a proper assessment of Texas' treatment of him could not

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28. 100 S. Ct. at 1140 (citing Coker v. Georgia, 433 U.S. at 592).
29. 100 S. Ct. at 1140.
30. Id.
31. Rummel offered detailed charts and tables documenting the history of recidivist statutes in the United States in support of his proposition that "no jurisdiction in the United States or free world punishes habitual offenders as harshly as Texas." Petition for Certiorari at 39.
32. 100 S. Ct. at 1143-44.
33. Id. at 1140. To invoke Article 63 the following events must occur: (1) a defendant must be convicted of a felony and must be sent to prison; (2) after the defendant has been convicted of the first felony, he must be convicted of a second felony, and again serve a prison term; (3) after conviction and imprisonment for the second time, the defendant must be convicted of a third felony. Rummel v. Estelle, 587 F.2d at 656.
34. 100 S. Ct. at 1142-43.
ignore the possibility that he will not actually be imprisoned for the rest of his life. As a second complicating factor the Court pointed to prosecutorial discretion which, in the invoking of recidivist statutes, operates to screen out the truly petty offender. Not only do such considerations prevent an objective analysis by the Court, but even a finding that Texas' statute was the most stringent of the fifty states would not render Rummel's punishment unconstitutionally disproportionate, reasoned Justice Rehnquist. Thus, the Court upheld the constitutionality of Article 63 as applied to Rummel, ruling that the mandatory life sentence imposed on him did not constitute cruel and unusual punishment under the eighth and fourteenth amendments.

In a brief concurring opinion Justice Stewart reiterated his statement in *Spencer v. Texas* that the Constitution gives the Court no power to impose upon the criminal courts of Texas its own notions about recidivist procedures. Accordingly, Justice Stewart joined in the majority opinion.

Justice Powell, writing in dissent, reviewed the history of the eighth amendment and concluded that the scope of the clause extends not only to barbarous methods of punishment but also to those punishments which are grossly disproportionate to the underlying offense. Justice Powell found no historical justification for the majority's application of the disproportionality principle to sentences imposing death but not to noncapital cases. He maintained that in

35. *Id.* at 1142. The majority noted that parole is an established variation on imprisonment of convicted criminals. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

36. 100 S. Ct. at 1143.

37. *Id.* at 1145. Reviewing criminal justice systems of the various states, the Court pointed out that the line dividing felony from petty larceny varies markedly, and that Texas is entitled to make its own judgment about where such line should lie. Further, since Rummel is a repeat offender, Texas is not required to treat him as if this were his first offense. Similarly, the point at which a recidivist is deemed to have demonstrated the propensities that warrant his being separated from society is within the discretion of the punishing jurisdiction. *Id.* at 1144-45.


39. 100 S. Ct. at 1145 (Stewart, J., concurring).

40. *Id.*

41. *Id.* at 1145 (Powell, J., dissenting). Justices Brennan, Marshall, and Stevens joined in the dissenting opinion.

42. *Id.* at 1146 (Powell, J., dissenting). Justice Powell noted that by 1400 the English common law had embraced the principle that punishment should not be excessive either in severity or in length. *Id.* at 1147 (Powell, J., dissenting). See Granucci, "*Nor Cruel and Unusual Punishments Inflicted:* The Original Meaning," 57 CALIF. L. REV. 839 (1969).

43. 100 S. Ct. at 1146 (Powell, J., dissenting). Justice Powell relied largely on *Weems v. United States*, 217 U.S. 349 (1910), for this proposition. *Id.* at 1147 (Powell, J., dissenting).
both capital and noncapital cases the Court has recognized that *Weems* proscribes punishment grossly disproportionate to the severity of the crime. Justice Powell further pointed out that, although Rummel may not spend the rest of his life in jail, he has no right to an early release because parole is an act of executive grace. Thus, the majority's emphasis on good time credits and parole is misplaced, reasoned Justice Powell, because the credits serve only to make Rummel eligible for parole earlier; they do not guarantee release.

Addressing the demand for objectivity in an eighth amendment analysis, Justice Powell cited three factors which would minimize the risk of constitutionalizing the views of individual judges. These include (1) the nature of the offense, (2) the sentence imposed for commission of the same crime in other jurisdictions, and (3) the sentence imposed upon other criminals in the same jurisdiction. Noting the small amount of money involved in each of Rummel's crimes and the lack of physical injury or threat of violence in them, Justice Powell found it difficult to imagine felonies that pose less danger to the peace and good order of society. He maintained that a review of recidivist statutes in other jurisdictions, and of Texas' treatment of other criminals, supports the view that a mandatory life sentence for the commission of three nonviolent felonies is unconstitutionally disproportionate. Finally, Justice Powell observed that first and second time offenders in Texas who commit more serious crimes than Rummel may receive substantially less severe sentences. In its statutory scheme


45. 100 S. Ct. at 1150 (Powell, J., dissenting). Justice Powell noted that in June, 1979, the governor of Texas refused to grant parole to 79% of the state prisoners whom the parole board recommended for release. *Id.*

46. *Id.* at 1149 (Powell, J., dissenting). Citing Greenholtz v. Inmates, 442 U.S. 1 (1979), which held that a convicted person has no constitutional or inherent right to be released prior to the expiration of a valid sentence, Justice Powell argued it would be cruelly ironic to hold that the possibility of parole discounts a prisoner's sentence for purposes of the eighth amendment. 100 S. Ct. at 1149 (Powell, J., dissenting).


48. 100 S. Ct. 1150-52 (Powell, J., dissenting). In none of the jurisdictions currently employing habitual offender statutes could Rummel have received a mandatory life sentence merely upon a showing that he committed three nonviolent property-related offenses. *Id.* at 1152 (Powell, J., dissenting).

49. *Id.* at 1153 (Powell, J., dissenting). Under the TEX. PENAL CODE ANN. tit. 3, § 12.42(a)-(b) (Vernon 1974), a person who commits a second felony is punished as if he had committed a felony of the next higher degree. Since second-degree rape carries a punishment of between 2 and 20 years and first-degree aggravated rape is punished by 5 to 99 years imprisonment, *id.* at § 12.32-33 (Vernon Supp. 1979), a person who is twice convicted of rape may receive a five-year sentence. 100 S. Ct. at 1153 (Powell, J., dissenting).
for the punishment of two-time offenders, Texas recognizes that the punishment should vary with the severity of the offense committed.\(^50\) Yet, because all three-time offenders receive the same sentence, the Texas system assumes they deserve the same punishment whether they commit murder or cash fraudulent checks. Acknowledging that the Constitution creates a sphere of state activity free from federal interference, Justice Powell nevertheless concluded that when the court uses objective criteria to apply the cruel and unusual punishment clause against the states, it merely enforces an obligation created by the Constitution.\(^51\) The dissenting Justice concluded that the sentence imposed on Rummel would be viewed as grossly unjust by lawyers and laymen alike and that it crosses the line separating lawful punishment from that proscribed by the eighth amendment.\(^52\)

*Rummel v. Estelle* is the Supreme Court's most recent interpretation of the eighth amendment's guarantee against cruel and unusual punishment, and the only decision in which it faced squarely the question of whether the length of a prison term in and of itself might violate that guarantee. While few in number, initial eighth amendment challenges centered on the particular manner of punishment imposed rather than the period of incarceration.\(^53\) By 1890 the Court had decided that the imposition of the death penalty by means of public execution, shooting,\(^54\) or electrocution\(^55\) was not cruel and unusual.\(^56\) Then, in 1892, the notion that the length of a prison sentence in relation to the underlying offense might cause it to be unconstitutionally disproportionate received some attention for the first time in *O'Neill v. Vermont*.\(^57\) Although the defendant in *O'Neill* did not specifically argue that a fine for each of 307 offenses of selling intoxicating liquors was cruel and unusual, Justice Field nevertheless wrote in dissent that the

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51. 100 S. Ct. at 1154 (Powell, J., dissenting).
52. Id. at 1156 (Powell, J., dissenting).
56. In these early cases the Court interpreted the eighth amendment by examining whether the punishment or some similar variant was considered cruel and unusual in 1789. The Constitution of the United States of America: Analysis and Interpretation S. Doc. No. 82, 92d Cong., 2d Sess. 1251-52 (1973). Indeed, in In re Kemmler, 136 U.S. 436 (1890), the concern was whether "it is within [the] easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and, therefore, painless, death." Id. at 443.
57. 144 U.S. 323 (1892).
eighth amendment prohibition is directed against punishments which by their excessiveness are greatly disproportionate to the offense charged.\textsuperscript{58} Against this background the prison sentence and attendant punishments in \textit{Weems v. United States}\textsuperscript{59} were struck down. Although it is not clear whether the length of the prison sentence, apart from its "accessories," formed an independent basis for the ruling in \textit{Weems}, it is apparent that the Court's purpose was to release the cruel and unusual punishment clause from the early focus on the manner of punishment and make it applicable to current developments in penology, which less frequently called for the infliction of physical cruelty.\textsuperscript{60} Shortly after \textit{Weems}, a five-year prison term on each of seven counts of mail fraud was found not to violate the eighth amendment.\textsuperscript{61} And in 1958, the use of denaturalization as punishment for desertion from the armed forces was invalidated on eighth amendment grounds.\textsuperscript{62}

More recently the eighth amendment has been used successfully to overturn death sentences. In \textit{Coker v. Georgia}\textsuperscript{63} the Supreme Court applied the criteria established a year earlier in \textit{Gregg v. Georgia},\textsuperscript{64} another capital punishment case, and held the death penalty to be disproportionate to the crime of rape of an adult woman. The eighth amendment was also the basis for striking down the death penalty in three cases in \textit{Furman v. Georgia}.\textsuperscript{65}

The Courts in these capital cases reiterated the uniqueness of capital punishment.\textsuperscript{66} Yet, contrary to the Court's reasoning,\textsuperscript{67} the conclusion cannot necessarily be drawn that these cases are of limited utility in deciding the constitutionality of a noncapital punishment such as that inflicted in \textit{Rummel}. Although in \textit{Gregg} the Court reviewed the

\begin{itemize}
\item \textsuperscript{58} Id. at 339-40 (Field, J., dissenting).
\item \textsuperscript{59} 217 U.S. 349 (1910). See note 19 and accompanying text supra.
\item \textsuperscript{60} See 217 U.S. at 372.
\item \textsuperscript{61} Badders v. United States, 240 U.S. 391 (1916). Each count against Badders related to a different letter and for each count he received concurrent five-year sentences and a $1,000 fine. He argued unsuccessfully that making each letter a separate offense constituted cruel and unusual punishment. Id. at 393.
\item \textsuperscript{62} Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion).
\item \textsuperscript{63} 433 U.S. 592 (1977).
\item \textsuperscript{64} 428 U.S. 153 (1976) (death penalty for the crime of murder not per se a violation of the eighth amendment, nor was it applied unconstitutionally to the defendant).
\item \textsuperscript{65} 408 U.S. 238 (1972).
\item \textsuperscript{66} Concurring in \textit{Furman v. Georgia}, 408 U.S. 238 (1972), Justice Stewart stated: The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its total rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. Id. at 306 (Stewart, J., concurring).
\item \textsuperscript{67} 100 S. Ct. at 1138.
\end{itemize}
imposition of the death penalty, the language of that case demonstrates that a punishment, considered in the abstract, is excessive and, therefore, unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment, and (2) is grossly out of proportion to the severity of the crime. Coker recognizes that a given punishment might fail the test on either ground. Thus, taken together, the two cases appear to allow that not only capital punishment but punishment in general might be unconstitutionally excessive if it is found to be grossly out of proportion to the severity of the crime. The Coker Court also addressed the key concern in Rummel that judicial review of legislatively mandated sentences might become merely an imposition on the states of the subjective views of the individual Justices. To avoid this result, Coker demands that to the maximum extent possible such judgments must be based on objective factors. Such factors include a consideration of public attitudes concerning a particular sentence, history, precedent, legislative attitudes, and the response of juries as reflected in their sentencing decisions.

By distinguishing the death penalty cases and by limiting Weems to its peculiar facts, the Court in Rummel left to state legislatures the discretion to set the length of sentences for crimes concededly classified as felonies. That discretion, however, had already been granted to legislatures when recidivist statutes like that of Texas were upheld against due process and equal protection challenges. The

68. By making no measurable contribution to acceptable goals of punishment, such punishment will be nothing more than the purposeless and needless imposition of pain and suffering. 428 U.S. at 173.
69. Id.
70. 433 U.S. at 591-92. In Coker the Court reaffirmed the test established in Gregg v. Georgia, 428 U.S. 153 (1976), then recognized that a punishment might fail on either ground stating:

In sustaining the imposition of the death penalty in Gregg, however, the Court firmly embraced the holdings and dicta from prior cases, [Furman; Robinson; Trop; and Weems] to the effect that the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Under Gregg, a punishment is "excessive" and unconstitutional 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. A punishment might fail the test on either ground.

433 U.S. at 591-92 (citations omitted).
71. Id. at 592.
72. Id.
73. Id.
74. See, e.g., Spencer v. Texas, 385 U.S. 554 (1967). Spencer challenged Texas' then-existing procedure whereby under its habitual criminal statute the jury trying the pending criminal charge was made aware of past convictions. The Spencer Court noted that, in general, such recidivist statutes have withstood due process and equal protection challenges. Id. at 560.
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issue in *Rummel* was not whether, as a general matter, it is within a state's power to enact recidivist statutes. Rather, the question was whether, while recognizing that states have the power to determine the length of sentences for felonies, this same reasoning should prevent the courts from striking down an otherwise valid statute when in a particular situation it conflicts with the eighth amendment. Rummel claimed that imposition of Texas' recidivist scheme on him was cruel and unusual; he did not argue that Texas did not have the power generally to determine the punishment for his crimes. Yet, out of a concern that the views of individual Justices might be substituted for those of the legislature, the Court deferred to the states. However, judicial enforcement of the cruel and unusual punishment clause cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishment for crimes. For to view the eighth amendment in terms of due process or equal protection deprives it of a dimension which is latent in almost all of the previous decisions, that it is an independent, potent moral force which is at the disposal of the judiciary to check the power of the legislature.

If the objective criteria outlined in *Gregg* and *Coker* would permit Court review of Rummel's noncapital punishment, the remaining issue is whether the possibility of parole so complicates the analysis that any interjurisdictional comparison of prison sentences is made impractical. The possibility of parole based on good time credits does complicate such an analysis. But since a convicted person has neither a constitutional nor an inherent right to be conditionally released before expiration of a valid sentence, such possibilities should not be taken into account. In Texas, good conduct time applies only to eligibility for parole, and otherwise does not affect an inmate's term. It is a

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75. *Furman v. Georgia*, 408 U.S. at 269. The Court in *Trop v. Dulles*, 356 U.S. 86 (1958), stated, "it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." *Id.* at 99.


77. See 100 S. Ct. at 1142-43. The *Rummel* Court stated:

Nor do Rummel's extensive charts even begin to reflect the complexity of the comparison he asks this Court to make. Texas, we are told, has a relatively liberal policy of granting "good time" credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years . . . . We agree with Rummel that his inability to enforce any "right" to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years. Nevertheless . . . a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life.

*Id.*


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privilege and not a right, and may be forfeited by rules violations while in prison.\textsuperscript{60} Similarly, parole is not a right but an act of grace by the state.\textsuperscript{61} It is classified as a conditional pardon in Texas\textsuperscript{62} and is not considered as a reduction in sentence by the state.\textsuperscript{63} Because the court considered mere possibilities of parole, Rummel's eighth amendment challenge failed in part because of the existence of an expectation of early release which he has no constitutional right to enforce.

Prior to \textit{Rummel}, federal courts appeared willing to review prison sentences under the eighth amendment.\textsuperscript{64} Although the Supreme Court had not previously invalidated a prison sentence solely because of its length, earlier cases implied that judicial review under the eighth amendment was permissible.\textsuperscript{65} Now, determinations of prison terms by state legislatures will not be disturbed on eighth amendment grounds,\textsuperscript{66} for the cruel and unusual punishment clause has merged in-

\textsuperscript{60. Id.}


\textsuperscript{62. Ex parte Lefors, 165 Tex. Crim. 51, 303 S.W.2d 394 (Crim. App. 1957).

\textsuperscript{63. Tex. CODE CRIM. PROC. ANN. art. 42.12, § 22 (Vernon 1979) provides, "When the Governor revokes a person's parole ... that person may be required to serve the portion remaining of the sentence on which he was released, such portion remaining to be calculated without credit for the time from the date of his release to the date of revocation."

\textsuperscript{64. Federal courts have indicated a willingness to review state law in this area, at times striking down as excessive both death sentences and prison terms. The court in Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), cert. denied, 439 U.S. 1091 (1979), considered a provision of the New York Penal Code which levied a sentence of six years to life for possession of a controlled substance. Although finding the provision not to be unconstitutional as applied, the court recognized that in some extraordinary circumstances a severe sentence for a minor offense could, solely because of its length, be cruel and unusual. \textit{Id.} at 409. A Maryland statute authorizing capital punishment for rape was invalidated in Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972), on the basis that it was disproportionate to the crime when the victim's life was neither taken nor endangered. And in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974), a case virtually identical to Rummel, a defendant successfully attacked on an eighth amendment basis West Virginia's recidivist statute's mandatory life imprisonment as applied to him.


\textsuperscript{66. Outside the legal community some thought that concern about federalism should not have prevented the Court from overturning Rummel's sentence. One editorial recognized judicial deference to the views of legislatures but nevertheless argued that "when punishment is as out of proportion as it was here, the danger is not that federalism will be imperilled, or that justices will become roving commissioners. It is that law, not to mention federalism, will be made contemptible." Washington Star, March 20, 1980, § A, at 13, col. 1. Other editorials appearing shortly after the \textit{Rummel} decision adopted Justice Powell's position that the punishment was grossly disproportionate. See N.Y. Times,
to the fourteenth amendment's due process and equal protection clauses and has no independent existence to be used to review lengthy sentences for comparatively minor crimes.

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March 22, 1980, at 20, col. 1 ("Would any sentence be so out of line as to violate the Court's sense of decency?"); 230 THE NATION 387-88 (1980) ("One would have thought that preventing such cruel aberrations is just what the Supreme Court and the Eighth Amendment were created to do.").