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Constitutional Law--Eighth Amendment: Sentences within Legislatively Determined Limits Are Not Cruel and Unusual Punishments

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CASENOTES

CONSTITUTIONAL LAW—EIGHTH AMENDMENT: SENTENCES WITHIN LEGISLATIVELY DETERMINED LIMITS ARE NOT CRUEL AND UNUSUAL PUNISHMENTS

*Rummel v. Estelle*¹

William Rummel was convicted of obtaining \$120.75 under false pretenses. He had two prior felony convictions for fraudulent use of a credit card to procure \$80.00 worth of goods or services and for passing a forged check for \$28.36. Rummel was prosecuted under the Texas recidivist statute² and sentenced to mandatory life imprisonment.³ In a five-to-four decision, the United States Supreme Court held that the mandatory life sentence Rummel received did not constitute cruel and unusual punishment.⁴

Rummel attacked neither the constitutionality of the Texas recidivist statute in general nor the authority of Texas to punish his offenses as felonies by imprisonment.⁵ He challenged only the result of applying the

1. 445 U.S. 263 (1980).

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

3. 445 U.S. at 265-66. The Texas Court of Criminal Appeals affirmed his convictions. *Rummel v. State*, 509 S.W.2d 630 (Tex. Crim. App. 1974). Rummel then filed a writ of habeas corpus in the United States District Court for the Western District of Texas, claiming, *inter alia*, that his sentence constituted cruel and unusual punishment because it was disproportionate to the crime. The district court denied him relief. A panel of the United States Court of Appeals for the Fifth Circuit reversed, holding that the sentence violated the eighth amendment. *Rummel v. Estelle*, 568 F.2d 1193, 1200 (5th Cir. 1978). Rehearing the case en banc, the court of appeals rejected the panel's holding and affirmed the district court's denial of habeas corpus relief. 587 F.2d 651, 662 (5th Cir. 1978), *aff'd*, 445 U.S. 263 (1980).

4. 445 U.S. at 285.

5. *Id.* at 268. In 35 states Rummel's conviction of obtaining \$120.75 by false pretenses would have been a felony at the time Rummel committed his crime. *Id.* at 269 n.9. In 49 states his forged check conviction and in 12 states his credit card conviction could have been punished by imprisonment. *Id.* at 270 n.10.

recidivist statute to his particular case, arguing that the severity of the life imprisonment sentence was unconstitutionally disproportionate to the gravity of his felonies.⁶ While the Court recognized that the eighth amendment proscribes a sentence that is "grossly disproportionate" to the offense, it pointed out that most of the recent decisions expressing that view involved the death penalty. Stressing the "unique nature" of the death penalty, the Court found the recent decisions prohibiting several methods of imposing capital punishment as cruel and unusual of only "limited assistance" in determining whether Rummel's punishment was constitutional.⁷ A "bright line" distinguishes capital punishment from imprisonment; the line between a constitutionally acceptable length of imprisonment and a cruel and unusual length is not nearly so clear.⁸

The decision in *Rummel* is based primarily on two propositions: (1) judges should decide eighth amendment cases on objective grounds, avoiding subjective line-drawing whenever possible;⁹ and (2) legislatures, not courts, should determine the length of prison sentences.¹⁰ These propositions are closely related. The Court argued that there is no objective line between felonies and petty crimes, *e.g.*, between felony theft and petty larceny.¹¹ Nor is there an objective point past which a recidivist has shown himself incorrigible. Thus, it is purely a "societal decision" whether recidivists such as Rummel should be incarcerated for life.¹² The appropriate body to make such nonobjective, societal decisions is the legislature: the "basic line-drawing process . . . is pre-eminently the prov-

6. *Id.* at 270-71. Ironically, Texas has since reclassified Rummel's third offense of theft by false pretenses as a misdemeanor. *Id.* at 295 (Powell, J., dissenting). This change of law was a factor in the plea bargaining which resulted in Rummel's release from prison on November 14, 1980.

Rummel had charged that his court-appointed attorney rendered ineffective assistance of counsel. On remand from the United States Court of Appeals for the Fifth Circuit, 590 F.2d 103, 105 (5th Cir. 1979), the United States District Court for the Western District of Texas found Rummel received ineffective counsel and ordered him retried or released. 498 F. Supp. 793, 798 (W.D. Tex. 1980). In the resulting plea bargaining, Rummel pleaded guilty to theft by false pretenses under the old law. In exchange, the District Attorney for Bexar County agreed not to seek enhanced punishment under the recidivist statute and to recommend a punishment of seven years. Since Rummel had served more than seven years, the agreement entitled him to immediate release. *State v. Rummel*, No. 73-CR-214 (187th Dist. Ct. Tex., Nov. 14, 1980) (settlement agreement).

7. 445 U.S. at 272.

8. *Id.* at 275.

9. *Id.* at 274-75, 282 n.27.

10. *Id.* at 274, 282 n.27, 284.

11. *Id.* at 275-76, 284. The Court even argued against the view that there is an objective difference between property-related offenses and violent crimes which might warrant lighter sentences for the former. *Id.* at 275, 282 n.27.

12. *Id.* at 278, 285.

ince of the legislature."¹³ An important part of the line-drawing process is determining sentence length, a matter which is purely a "legislative prerogative."¹⁴

To understand *Rummel*, a brief history of the concept of "cruel and unusual punishment" is necessary. The imprecise phrase "cruel and unusual punishment"¹⁵ went virtually untouched until 1879 when the Court declared that torture is forbidden under the eighth amendment.¹⁶ The Court expanded the concept of cruel and unusual punishment in 1910 to forbid excessive punishment, as well, thus requiring that punishment be proportioned to the offense.¹⁷ In 1962 the Court recognized that the eighth

13. *Id.* at 275.

14. *Id.* at 274. Justice Rehnquist, who wrote the majority opinion in *Rummel*, has explained extensively his reasoning behind this view. See *Furman v. Georgia*, 408 U.S. 238, 465-70 (1972) (Rehnquist, J., dissenting); Rehnquist, *Government by Cliché: Keynote Address of the Earl F. Nelson Lecture Series*, 45 MO. L. REV. 379 (1980); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

15. The English Bill of Rights, 1 Gul. 3 & Mar. 2, c.2, § 1(10) (1689), contained the provision "[t]hat excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." From that passage came the wording of the eighth amendment. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969). See MO. CONST. art. 1, § 21.

For an analysis and history of the phrase "cruel and unusual punishment," see *Furman v. Georgia*, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring); *id.* at 375-84 (Burger, C.J., dissenting); *Weems v. United States*, 217 U.S. 349, 389-409 (1910) (White, J., dissenting); Granucci, *supra*, *passim*; Note, *Judicial Limitations on the Constitutional Protection against Cruel and Unusual Punishment*, 1960 WASH. U.L.Q. 160.

16. *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879). The Court unanimously concluded in *Wilkerson*, however, that executing a convicted murderer by shooting him did not constitute cruel and unusual punishment.

17. *Weems v. United States*, 217 U.S. 349, 367 (1910). According to the Court in *Rummel*, *Weems* is a case too closely tied to its specific facts to have much significance. 445 U.S. at 274. *Accord*, Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1076 (1964); Comment, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine in the Supreme Court*, 16 STAN. L. REV. 996, 1006-07 (1964). *Contra*, *Furman v. Georgia*, 408 U.S. at 325 (Marshall, J., concurring). The fact situation in *Weems* was unusual. The case was appealed from the Supreme Court of the Philippine Islands, where *Weems* was stationed as an officer in a United States bureau. For falsifying an item in a public document, he was sentenced to "*cadena temporal*"—imprisonment, chains around the wrists and ankles, and painful labor for 15 years, followed by a life of perpetual surveillance. 217 U.S. at 362, 365-66. The Court rejected this punishment as unconstitutionally excessive. *Id.* at 367. For commentary and cases on excessive punishment, see Annot., 33 A.L.R.3d 335 (1970).

amendment places substantive limits on what may be classified as a crime. The Court also held for the first time that the constitutional prohibition against cruel and unusual punishment applies to the states through the fourteenth amendment.¹⁸ In 1972, in a per curiam decision in *Furman v. Georgia*, the Court struck down discretionary death sentences as a violation of the eighth and fourteenth amendments.¹⁹ Only two Justices rejected the death penalty outright; the three other concurring Justices stressed the discriminatory manner in which the death penalty was being applied.²⁰ Not surprisingly, the decision left confusion in its wake.²¹ Thirty-five states changed their death sentencing procedures to try to comply with the decision.²² In 1976 the Court upheld Georgia's death penalty, which utilized a new bifurcated sentencing procedure with the jury first deciding guilt and then determining the sentence in a separate proceeding.²³ But in 1977 the Court struck down the death penalty when it

18. *Robinson v. California*, 370 U.S. 660 (1962). The Court held that a California state law which made drug addiction a crime was cruel and unusual punishment violating the fourteenth amendment. *Id.* at 667. The Court was not concerned with the length of the sentence, which was only ninety days, but with the illness nature of the offense. *Id.* See Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 645-55 (1966).

19. 408 U.S. 238 (1972) (per curiam).

20. For two analyses of *Furman*, see Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974); Comment, *Finding the Death Penalty Cruel and Unusual*, 43 U.M.K.C. L. REV. 162 (1974).

21. At the time the Court vacated the death sentences in *Furman*, there were more than 100 other such petitions for writ of certiorari pending. On a case-by-case basis, the Court reviewed and vacated each. Scurlock, *Basic Principles of the Administration of Criminal Justice with Particular Reference to Missouri Law*, 44 U.M.K.C. L. REV. 139, 223 (1975). Two of these cases were Missouri cases, *Terry v. Missouri*, 408 U.S. 940 (1972) and *Duisen v. Missouri*, 408 U.S. 935 (1972). The Missouri Supreme Court viewed *Furman* as holding not that all death sentences were void, but that all were subject to review to determine if they had been imposed under discretionary statutes such as those that were struck down. Thus, the court reviewed Missouri death penalty cases and reduced them to life imprisonment. Scurlock, *supra*, at 223. See *State v. Cuckovich*, 485 S.W.2d 16 (Mo. En Banc 1972); *State v. Granberry*, 484 S.W.2d 295 (Mo. En Banc 1972); *State v. Cobb*, 484 S.W.2d 196 (Mo. En Banc 1972).

22. *Gregg v. Georgia*, 428 U.S. 153, 179 n.23 (1976) (plurality opinion). Missouri enacted RSMO §§ 559.005, .009 (Supp. 1975), but following *State v. Duren*, 547 S.W.2d 476 (Mo. En Banc 1977), which held that the Missouri procedure for imposing the death sentence was not constitutionally acceptable under the eighth and fourteenth amendments, the statutes were repealed and replaced by RSMO §§ 565.001, .006 (1978 & Cum. Supp. 1980).

23. *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). The Court used the following factors for testing whether death sentences are cruel and

was applied to rape instead of murder. The Court concluded that death was a "grossly disproportionate and excessive punishment" for rape.²⁴

Although the disproportionality argument had been accepted in the past, the Court rejected it when applied to Rummel under the Texas recidivist statute. Instead, the court emphasized the legislative prerogative to set sentence lengths and make nonobjective, societal decisions such as who should be punished as an incorrigible recidivist.²⁵ The Court consistently has upheld the right of states to punish recidivists with enhanced sentences over a variety of attacks on the constitutionality of those statutes.²⁶ The combined histories of cases dealing with cruel and unusual punishments and recidivist statutes, however, easily could have supported a decision either for or against the constitutionality of Rummel's sentence;²⁷ this historical ambiguity is reflected in the close five-to-four decision in *Rummel*.

unusual: contemporary standards, the "dignity of man," and the prohibition of excessive punishments, whether excessive from infliction of unnecessary pain or from gross disproportionality to the crime. *Id.* at 172-73. See also *Furman v. Georgia*, 408 U.S. at 270-82 (Brennan, J., concurring). The Court in *Gregg*, however, cautioned that the validity of punishments selected by elected representatives must be presumed, thus placing a heavy burden on anyone attacking the judgment of a legislature. 428 U.S. at 174.

Other post-*Furman* death penalty cases include *Godfrey v. Georgia*, 446 U.S. 420 (1980) (plurality opinion) (broad, vague construction struck down); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion) (mandatory death penalty struck down); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (mandatory death penalty struck down); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion) (quasi-mandatory death penalty upheld); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion) (bifurcated procedure for determining death penalty upheld).

24. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). The dissent in *Rummel* said that *Coker* and *Rummel* posed the same question: whether a punishment which is constitutional for one offense is "grossly disproportionate" for another. 445 U.S. at 293 (Powell, J., dissenting).

25. See notes 9-14 and accompanying text *supra*.

26. See, e.g., *Spencer v. Texas*, 385 U.S. 554 (1967).

27. The cases included in the historical development are *Wilkerson v. Utah*, 99 U.S. 130 (1879) (torture forbidden; execution by shooting not cruel and unusual); *In re Kemmler*, 136 U.S. 436 (1890) (execution by electrocution unanimously upheld); *O'Neil v. Vermont*, 144 U.S. 323 (1892) (54 years for 307 counts of selling intoxicating liquor upheld over challenge of disproportionality); *Weems v. United States*, 217 U.S. 349 (1910) (15 years at hard labor in irons for falsifying a public document held unconstitutionally excessive); *Graham v. West Virginia*, 224 U.S. 616 (1912) (life sentence for three-time horse thief under West Virginia's recidivist statute not a violation of due process or equal protection nor a cruel and unusual punishment); *Badders v. United States*, 240 U.S. 391 (1916) (\$7,000 fine and seven concurrent five-year prison terms for seven counts of mail fraud not cruel and unusual punishment); *Louisiana ex rel. Francis v. Resweber*,

The dissent in *Rummel* emphasized the disproportionality of Rummel's sentence and relied heavily on a case which the Court earlier had refused to hear, *Hart v. Coiner*.²⁸ The facts in *Hart* were similar to the facts in *Rummel*: Hart was sentenced to mandatory life imprisonment under the West Virginia recidivist statute.²⁹ Like Rummel, Hart did not attack the validity of the statute itself, but maintained that in his case the sentence was disproportionate and excessive.³⁰ The United States Court of Appeals for the Fourth Circuit agreed and reversed Hart's conviction.³¹

329 U.S. 459 (1947) (plurality opinion) (upholding second attempt to electrocute a condemned prisoner after the first attempt inadvertently failed); *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (expatriation for wartime desertion held cruel and unusual punishment); *Oyler v. Boyles*, 368 U.S. 448 (1962) (West Virginia recidivist statute upheld over challenge that discretion placed in prosecutor's hands denied due process and equal protection); *Robinson v. California*, 370 U.S. 660 (1962) (law making drug addiction a crime unconstitutional; eighth amendment applicable to states through fourteenth amendment); *Spencer v. Texas*, 385 U.S. 554 (1967) (Texas recidivist statute upheld over challenge that use of prior convictions during trial so unfair that it offended due process clause); *McGautha v. California*, 402 U.S. 183 (1971) (death sentence for first degree murder upheld where life or death left to absolute discretion of jury); *Furman v. Georgia*, 408 U.S. 328 (1972) (per curiam) (discretionary death penalties struck down); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion) (death penalty under bifurcated sentencing procedure upheld); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (mandatory death penalty struck down); *Estelle v. Gamble*, 429 U.S. 97 (1976) ("deliberate indifference" to prisoner's serious medical needs held cruel and unusual punishment); *Ingraham v. Wright*, 430 U.S. 651 (1977) (paddling high school students not cruel and unusual punishment as eighth amendment only applies to people convicted of a crime); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (death penalty for rape struck down as excessive punishment); *Hutto v. Finney*, 437 U.S. 678 (1977) (conditions in Arkansas prison system, including punitive isolation for indeterminate periods of time, held cruel and unusual punishment).

28. 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). *See* 445 U.S. at 304-06 (Powell, J., dissenting).

29. His three crimes were writing a \$50 insufficient funds check, transporting forged checks totaling \$140 across state lines, and perjury. 483 F.2d at 138. The West Virginia recidivist statute had been upheld in *Oyler v. Boyles*, 368 U.S. 448 (1962) and *Graham v. West Virginia*, 224 U.S. 616 (1912), but only against attacks based on due process and equal protection grounds. 483 F.2d at 139. The Court in *Rummel*, however, considered *Graham* to be a case involving cruel and unusual punishment. 445 U.S. at 276-77, 277 n.14. *See Graham*, 224 U.S. at 631.

30. 483 F.2d at 139.

31. *Id.* at 138. The court of appeals also questioned the practicality of incarcerating Hart for life and called the life sentence "unnecessary." *Id.* at 141. The dissent in *Rummel* likewise questioned the necessity of life imprisonment for Rummel. 445 U.S. at 302 (Powell, J., dissenting). Questions concerning the social

The dissent in *Rummel* maintained that Rummel's sentence likewise was "grossly disproportionate" based on objective criteria.³² The determination of proportionality should be founded on objective factors, the dissent said, to minimize the danger that judges' "personal predilections" would become constitutionalized. Among these objective factors are (1) the nature of the crime, (2) the sentence for that same crime in other jurisdictions, and (3) the sentences for other crimes in the same jurisdiction.³³ The dissent then analyzed these three factors, making the following observations: (1) none of Rummel's crimes involved violence or threat of violence; (2) only two other states besides Texas—Washington and West Virginia—have recidivist statutes which call for a mandatory life sentence on conviction of a third nonviolent felony;³⁴ and (3) in Texas all receive the same sentence on their third felony conviction, and many first- or second-time offenders receive less severe sentences than Rummel for more serious crimes.³⁵ The majority of the Court, however, maintained that sentence length for crimes is purely the prerogative of the legislature.³⁶ Replying to the argument that Rummel's sentence was "grossly disproportionate," the majority said that "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."³⁷ The dissent conceded the point,³⁸ but was less tolerant of the degree of disparity which is allowable constitutionally and less demanding of "bright line" distinctions³⁹ for declaring a punishment cruel and unusual.

Missouri has a long history of recidivist statutes. In 1895 the United States Supreme Court upheld Missouri's "second offender" statute, rejecting the argument that it violated the fourteenth amendment by, *inter alia*,

utility or wisdom of statutes, raised under the heading of "necessity," however, arguably fall outside the scope of the judiciary's eighth amendment inquiry. See *Furman v. Georgia*, 408 U.S. at 394, 396 (Burger, C.J., dissenting); *Trop v. Dulles*, 356 U.S. at 103. For discussions of utility as well as proportionality, see Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 839, 847-52 (1972); Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1121-24 (1979).

32. 445 U.S. at 306-07 (Powell, J., dissenting).

33. *Id.* at 295 (Powell, J., dissenting).

34. *Id.* at 295-96 (Powell, J., dissenting).

35. *Id.* at 300-01 (Powell, J., dissenting).

36. The Court does make one caveat concerning legislative prerogative: the proportionality principle could be used in the extreme instance posed by the dissent—a statute imposing a mandatory life sentence for overtime parking. *Id.* at 274 n.11.

37. *Id.* at 282.

38. *Id.* at 299 n.19 (Powell, J., dissenting).

39. See note 8 and accompanying text *supra*.

subjecting people to cruel and unusual punishment.⁴⁰ Missouri has retained recidivist statutes, summarily rejecting any attacks on their constitutionality.⁴¹ Mandatory minimum punishments disappeared from Missouri recidivist statutes in 1959, leaving Missouri with discretionary sentencing for repeat offenders.⁴² Rarely have sentences given under Missouri recidivist statutes been attacked specifically as cruel and unusual punishments, but in 1980 such an attack was made. In *State v. Repp*,⁴³ the petitioner, with two previous no-account check convictions, was convicted under Missouri's second-offender statute of six counts of issuing no-account checks. Under this second-offender statute, the trial judge, in his discretion, determined the sentence.⁴⁴ A sentence of five years imprisonment on each count, to be served consecutively, was imposed.⁴⁵ Repp contended that this thirty-year punishment was cruel and unusual. The Missouri Supreme Court rejected this argument, citing *Rummel* and quoting its holding that Rummel's mandatory life sentence under the Texas recidivist statute was not cruel and unusual punishment.⁴⁶ Without the authority of *Rummel*, the argument advanced in *Repp* undoubtedly still would have been rejected on the basis of Missouri case law. *Rummel*, however, is a reaffirmation at the highest judicial level of the validity of recidivist statutes, strengthening Missouri's position on the constitutionality of enhanced sentences for repeat offenders.

The ramifications of *Rummel* extend beyond recidivist statutes, for it reaffirms the legislative prerogative to set sentence length in all areas of crime.⁴⁷ Missouri case law dealing with cruel and unusual punishments

40. *Moore v. Missouri*, 159 U.S. 673, 677-78 (1895) (upholding RSMO ch. 47, § 3959 (1889) (current version at RSMO §§ 558.016-.021 (1978 & Cum. Supp. 1980))). The Court noted that states have had similar statutes "for many years" and that the statutes have been "uniformly sustained." *Id.* at 676.

41. See, e.g., *State v. Maxwell*, 411 S.W.2d 237, 239-40 (1967). For the current Missouri "persistent offender" and "dangerous offender" law and sentencing procedures, see RSMO §§ 558.016-.021 (1978 & Cum. Supp. 1980); Legislative Note, *Criminal Law—Sentencing Provisions in the New Missouri Criminal Code*, 43 MO. L. REV. 549 (1978).

42. For the change from mandatory minimum punishments to discretionary sentencing under Missouri recidivist statutes, compare RSMO § 556.280 (1949) with RSMO § 556.280 (1959).

43. 603 S.W.2d 569 (Mo. En Banc 1980).

44. RSMO § 556.280 (1969) (current version at RSMO § 558.016 (Cum. Supp. 1980)).

45. 603 S.W.2d at 570.

46. *Id.* at 571. Although the Missouri recidivist statute provides discretionary sentences for repeat offenders while the Texas statute provides mandatory sentences, the issue in *Repp* and *Rummel* is nevertheless the same: whether the sentence given was so disproportionate as to violate the eighth amendment.

47. "[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as

embodies this notion that "the fixing of the punishment for crime is legislative and not judicial."⁴⁸ A conclusion that readily can be drawn from Missouri cases on cruel and unusual punishments is that an attack predicated on an excessive sentence will fail if that sentence falls within the statutory limits prescribed by the legislature.⁴⁹ The decision in *Rummel* only strengthens that conclusion.

An alternative to attacking the length of the particular sentence which has been meted out is to attack the validity of the statute itself.⁵⁰ Such attacks on statutes as violating the prohibition against cruel and unusual punishments occasionally have been successful in other jurisdictions,⁵¹ but

punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." 445 U.S. at 274.

48. *State v. Alexander*, 315 Mo. 199, 202, 285 S.W. 984, 985 (1926) (three years for selling "moonshine" upheld).

49. *See, e.g., State v. Repp*, 603 S.W.2d 569, 571 (Mo. En Banc 1980) (six consecutive 5-year sentences for six counts of issuing no-account checks); *State v. Williams*, 603 S.W.2d 562, 569 (Mo. 1980) (two life sentences and two 10-year sentences to be served consecutively for rape, sodomy, kidnapping, and stealing a motor vehicle); *State v. Higgins*, 592 S.W.2d 151, 157 (Mo. En Banc 1979) (life imprisonment for first-degree murder); *State v. Neal*, 514 S.W.2d 544, 549 (Mo. En Banc 1974) (25 years for first-degree armed robbery and assault with intent to kill); *State v. Stephens*, 507 S.W.2d 18, 22-23 (Mo. En Banc 1974) (200 years for second-degree murder); *State v. Grimm*, 461 S.W.2d 746, 754 (Mo. 1971) (three consecutive life sentences for first-degree murder, robbery, and rape); *State v. Cook*, 440 S.W.2d 461, 463 (Mo. 1969) (15 years for rape while two companions got three years); *State v. Thompson*, 414 S.W.2d 261, 268-69 (Mo. 1967) (seven years for first-degree attempted robbery); *State v. Caffey*, 365 S.W.2d 607, 611 (Mo. 1963) (20 years for possession of cocaine); *State v. Motley*, 546 S.W.2d 435, 436 (Mo. App., St. L. 1976) (10 years for two counts of selling marijuana and prior controlled substance felony conviction); *Whitlock v. State*, 538 S.W.2d 60, 61-62 (Mo. App., St. L. 1976) (75 years for forging check while on probation for first-degree robbery); *State v. Kennedy*, 513 S.W.2d 697, 701 (Mo. App., St. L. 1974) (170 years for assault with intent to kill and first-degree robbery); *Griffith v. State*, 504 S.W.2d 324, 330 (Mo. App., Spr. 1974) (30 years for sodomy); *State v. Golightly*, 495 S.W.2d 746, 753 (Mo. App., K.C. 1973) (15 years for selling marijuana).

These sentences pale when compared to sentences upheld in Texas. *See, e.g., Rodriguez v. State*, 509 S.W.2d 625, 627 (Tex. Crim. App. 1974) (1,500 years for robbery by assault); *Angle v. State*, 501 S.W.2d 99 (Tex. Crim. App. 1973) (2,500 years for murder with malice); *Sills v. State*, 472 S.W.2d 119, 120 (Tex. Crim. App. 1971) (1,000 years for robbery by assault).

50. Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 852 (1961).

51. *E.g., In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1973) (court found indeterminate prison terms for second conviction of misdemeanor indecent exposure unconstitutional even though petitioner did not attack

not in Missouri. In *State v. Mitchell*,⁵² the defendant appealed a seven-year sentence for a \$5.00 sale of eleven grams of marijuana,⁵³ attacking both the statute⁵⁴ with its five years-to-life imprisonment range for selling marijuana and its application to him as cruel and unusual punishment.⁵⁵ The court held that neither the statute nor its application to Mitchell was cruel and unusual.⁵⁶ The court recognized that opinions differ on whether marijuana use or sale should be proscribed and on the penalties to be imposed for such use or sale, but said that it is a "matter for the legislative branch of government."⁵⁷ *Rummel*, with its emphasis on the legislature as

statute); *Dembowski v. State*, 251 Ind. 250, 240 N.E.2d 815 (1968) (25-year indeterminate sentence for lesser included offense of robbery violates eighth amendment when maximum for armed robbery is 20 years); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968) (life imprisonment without possibility of parole for rape found cruel in relation to juveniles); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972) (20-year minimum penalty for selling marijuana struck down as cruel and unusual punishment); *Cannon v. Gladden*, 203 Or. 629, 281 P.2d 233 (1955) (life imprisonment for assault with intent to commit rape disproportionate when rape has maximum sentence of 20 years).

52. 563 S.W.2d 18 (Mo. En Banc 1978).

53. *Id.* at 21.

54. RSMO § 195.200.1(4) (1978).

55. 563 S.W.2d at 26. Mitchell also attacked the constitutionality of the classification of marijuana with other "hard" drugs such as heroin under RSMO § 195.017 (1978). 563 S.W.2d at 26. In *People v. McCabe*, 49 Ill. 2d 338, 275 N.E.2d 407 (1971), a similar attack on marijuana classification met with more success. For drug cases involving disproportionality arguments, see *Downey v. Perini*, 518 F.2d 1288 (6th Cir.) (disproportionality argument by petitioner receiving statutory minimum and maximum penalties totaling 30 to 60 years for possession and sale of marijuana accepted), *vacated on other grounds*, 423 U.S. 993 (1975); *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978) (disproportionality argument by petitioners receiving mandatory life sentences for cocaine offense rejected), *cert. denied*, 439 U.S. 1091 (1979); *People v. Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (disproportionality arguments by petitioners convicted under statutes making their drug offenses class "A" felonies rejected), *cert. denied*, 423 U.S. 950 (1975). See also Recent Developments, *Eighth Amendment Prohibits Excessively Long Sentences*, 44 *FORDHAM L. REV.* 637 (1975).

56. 563 S.W.2d at 27. The United States Court of Appeals for the Eighth Circuit likewise upholds long sentences for drug offenses. See, e.g., *United States v. Levin*, 443 F.2d 1101 (8th Cir.) (total sentence of 15 years and \$30,000 fine for three counts of selling stimulant drugs), *cert. denied*, 404 U.S. 944 (1971); *McWilliams v. United States*, 394 F.2d 41 (8th Cir. 1968) (total of 25 years and \$8,000 fine for two counts of purchasing heroin and two counts of selling heroin), *cert. denied*, 393 U.S. 1044 (1969); *Stewart v. United States*, 325 F.2d 745 (8th Cir.) (10-year sentence without privilege of parole for narcotic conspiracy), *cert. denied*, 377 U.S. 937 (1964).

57. 563 S.W.2d at 27.

the appropriate body to make nonobjective, societal decisions,⁵⁸ certainly supports the view expressed by the Missouri Supreme Court in *Mitchell*.

The *Mitchell* court expressed the standard in Missouri for reviewing cases involving allegedly excessive sentences when it stated, "[A] punishment which is within the statutory limits for the offense . . . is not cruel and unusual because of its duration *unless so disproportionate to the offense committed so as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances.*"⁵⁹ The Missouri Court of Appeals for the Eastern District, in *Abell v. State*,⁶⁰ followed this standard. *Abell*, like *Mitchell*, rejected the argument that a sentence for a drug violation which was within the limits set by the legislature was cruel and unusual punishment. In a two-to-one decision, the court of appeals reinstated a fifty-year sentence for the sale of 38.5 grams of marijuana⁶¹ and stated that it did not believe the fifty-year sentence was "so disproportionate to the offense committed as to shock the moral sense of *all* reasonable men, in light of the surrounding circumstances."⁶² Emphasis on the word "all" suggests that a unanimity requirement is the standard—a standard which is almost impossible to meet.⁶³ This standard is cited in other

58. See notes 9-14 and accompanying text *supra*.

59. 563 S.W.2d at 26 (quoting *State v. Johnson*, 549 S.W.2d 348, 352 (Mo. App., St. L. 1977)).

60. 606 S.W.2d 198 (Mo. App., E.D. 1980).

61. *Abell* was charged with six felonies and pleaded guilty to two: selling 100 amphetamine tablets and selling 38.5 grams of marijuana. Given a five-year suspended sentence for selling the amphetamines and suspended imposition of sentence on the marijuana charge, *Abell* was placed on five years probation. *Id.* at 199. While on probation, he sold hashish to police on two occasions. *Id.* at 199, 201. The resulting probation revocation hearing was held in front of his trial judge, who revoked *Abell's* probation and sentenced him to fifty years on the marijuana charge to be served consecutively with the five-year sentence for the amphetamine sale. *Id.* at 199. *Abell's* fifty-year sentence was then vacated on a Rule 27.26 motion. MO. R. CRIM. P. 27.26. A ten-year sentence was reimposed on the ground that the fifty-year sentence was so excessive that it constituted cruel and unusual punishment. The court of appeals reversed, stating that "the Rule 27.26 judge either misapplied or ignored the pertinent and existing case law of this state" and thus committed error. 606 S.W.2d at 199.

62. 606 S.W.2d at 200. Another Missouri case, like *Abell*, emphasized the circumstances in upholding a long drug sentence. *State v. Morrison*, 557 S.W.2d 445, 448 (Mo. En Banc 1977) (30 years for sale of 1,000 amphetamine pills as second drug offense).

63. Judge Seiler, dissenting in *Mitchell*, attacked the standard used in Missouri:

To make a constitutional right depend upon whether all reasonable men agree it has been violated is to corrupt the very idea of rights. We have rights to shield us against what the majority view may be . . . To apply the traditional Missouri test . . . means a challenge such as the

Missouri cases, all unsuccessfully charging cruel and unusual punishment.⁶⁴ The same standard has been employed outside of Missouri, and in at least one instance a court found a punishment so disproportionate as to shock the moral sense of all reasonable men.⁶⁵ Generally, however, the standard spells failure for an attack on a sentence or a statute as cruel and unusual punishment.

Rummel does not address directly the issue of what standard should be applied in cruel and unusual punishment cases. Instead, it leaves the

present one will always fail.

563 S.W.2d at 28 n.1 (Seiler, J., dissenting).

64. *E.g.*, *State v. Agee*, 474 S.W.2d 817, 821-22 (Mo. 1971) (99 years for statutory rape); *State v. McCaine*, 460 S.W.2d 618, 621 (Mo. 1970) (17 years for armed robbery); *State v. Brownridge*, 353 S.W.2d 715, 718 (Mo. 1962) (99 years for forcible rape and prior imprisonment on a felony); *State v. Peeler*, 604 S.W.2d 662, 664 (Mo. App., E.D. 1980) (75 years for second-degree murder); *State v. Mazzeri*, 578 S.W.2d 355, 357 (Mo. App., W.D. 1979) (35 years for rape); *State v. Boley*, 565 S.W.2d 828, 832 (Mo. App., K.C. 1978) (five years for forgery); *State v. Motley*, 546 S.W.2d 435, 438 (Mo. App., St. L. 1976) (10 years for two counts of selling marijuana and prior controlled substance felony conviction).

65. In *Cannon v. Gladden*, 203 Or. 629, 281 P.2d 233 (1955), the Oregon Supreme Court found life imprisonment for assault with intent to commit rape unconstitutionally disproportionate since the greater crime of rape carried a maximum sentence of twenty years. The court asked, "[I]s it so disproportioned to the offense as to shock the moral sense of all reasonable men as to what is right and proper? The question answers itself." *Id.* at 632, 281 P.2d at 234-35. *Cannon* attributes the standard which Oregon and Missouri share to *Weems v. United States*, 217 U.S. 349 (1910). 203 Or. at 632, 281 P.2d at 234-35. *Accord*, *Belthea v. Crouse*, 417 F.2d 504, 507 (10th Cir. 1969). *Peebles v. Bishop*, 428 F. Supp. 864, 865 (E.D. Mo. 1977), *aff'd*, 572 F.2d 649 (8th Cir. 1978), cites *Belthea* as the authority for the standard. For other jurisdictions applying this same standard, *see, e.g.*, *Weber v. Commonwealth*, 303 Ky. 56, 64, 196 S.W.2d 465, 469 (1946) (four years and \$5,000 fine for assault and battery not cruel and unusual); *State v. Nance*, 20 Utah 2d 372, 375, 438 P.2d 542, 544 (1968) (statute making insufficient funds check of \$13.32 a felony held constitutional).

Some jurisdictions apply similar, but seemingly less rigid standards than Missouri. *See Faulkner v. State*, 445 P.2d 815, 819 (Alaska 1968) (36 years on eight bad check counts so disproportionate it is "completely arbitrary and shocking to the sense of justice"); *Workmen v. Commonwealth*, 429 S.W.2d 374, 377 (Ky. 1968) (life imprisonment without parole for juvenile for rape "so disproportionate . . . as to shock the moral sense of the community"); *People v. Lorentzen*, 387 Mich. 167, 181, 194 N.W.2d 827, 834 (1972) (20-year compulsory sentence for selling marijuana so excessive it "shocks the conscience"). That these seemingly less rigid standards also derived from *Weems* is supported by *Kasper v. Brittain*, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957), which cited *Weems* for the proposition that a punishment is not cruel and unusual unless so disproportionate that it is "completely arbitrary and shocking to the sense of justice." *Id.* at 96.

determination of what constitutes an acceptable punishment to the unfettered prerogative of the legislature—with the caveat that a life sentence for overtime parking would be cruel and unusual punishment.⁶⁶ By what standard a life sentence for overtime parking would be held cruel and unusual punishment is not revealed. The punishment is arguably one that would be so disproportionate to the offense as to shock the moral sense of all reasonable men, thus meeting the stringent Missouri standard. If so, nothing in *Rummel* presents an argument for lowering the standard in Missouri.

The important question, however, is not on what all reasonable men agree; the question is on what the majority of state legislators agree. *Abell*, in rejecting the petitioner's argument that his sentence was constitutionally excessive, cited with approval the proposition in *Rummel* that sentence length is "purely a matter of legislative prerogative."⁶⁷ *Rummel* gives *Abell* the sanction of the United States Supreme Court for deferring to the legislature's determination of what constitutes acceptable sentence length. The thrust of *Rummel* in Missouri is shown clearly in both *Abell* and *Repp*.⁶⁸ *Rummel* has strengthened the traditional position of Missouri courts on cruel and unusual punishment: if a sentence is within the limits mandated by the legislature, then ipso facto it cannot be cruel and unusual punishment. Sentences within legislative limits are constitutional both under recidivist statutes and statutes setting sentence length in all other areas of crime. Missouri federal courts have held some prison conditions to be cruel and unusual punishment,⁶⁹ but have not found punishments cruel and unusual because of the sentence length. So long as punishments are within the legislatively prescribed limits, Missouri courts almost

66. See note 36 *supra*.

67. 606 S.W.2d at 200.

68. *Repp* is discussed at notes 43-46 and accompanying text *supra*.

69. See, e.g., *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (use of whipping strap on prisoners); *Burks v. Walsh*, 461 F. Supp. 454 (W.D. Mo. 1978) (double-celling of inmates in 47.18 square-foot cells and triple-celling in 59.2 square-foot cells), *aff'd sub nom. Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979); *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973) (inadequate facilities and medical care in city jail); *Black v. Ciccone*, 324 F. Supp. 129 (W.D. Mo. 1970) (prisoner with hip condition forced to work in barber shop). See also *Cummings v. Roberts*, 628 F.2d 1065 (8th Cir. 1980) (allegations of failure to provide wheel chair and aid to injured prisoner sufficient for claim of cruel and unusual punishment); *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973) (giving vomit-inducing drugs to nonconsenting mental patients as aversion therapy is cruel and unusual punishment); *Eckerhart v. Hensley*, 475 F. Supp. 908 (W.D. Mo. 1979) (constitutional right to treatment under fourteenth amendment for involuntarily hospitalized mental patients), noted in *The Right to Treatment—A "Fabled" Right Receives Judicial Recognition in Missouri*, 45 MO. L. REV. 357 (1980); *Wheeler*, *supra* note 31, at 864-73 (prisoners and medical conditions); Note, *supra* note 50, at 869-74 (remedies for mistreated prisoner).

certainly will uphold them. Under *Rummel*, the Missouri standard, which says that a punishment is not disproportionate unless it shocks the moral sense of all reasonable men, does not appear replaced or lessened. The status quo in Missouri not only remains intact, but is bolstered; the traditional deference of Missouri courts to legislative decisions on sentence length is supported unequivocally by the United States Supreme Court.

The legislature is the appropriate body to determine sentence lengths; the proposition could not be made more clearly in Missouri case law and in *Rummel*. A corollary to this proposition is that punishments given within those limits cannot be cruel and unusual. Thus, an attack on a sentence as cruel and unusual punishment when that sentence falls within legislatively determined limits seems doomed to fail. Another corollary not expressed by *Rummel*, but easily deduced from it, is that any dissatisfaction with sentence lengths should be directed to legislators, not judges. Legislators make the hard, often subjective decisions on sentence lengths; that is their prerogative. If sentence lengths are to be revised downward, it is legislators who will dictate that revision.⁷⁰

Leaving the determination of sentence lengths in legislators' hands is acceptable so long as sentence lengths are discretionary, not mandatory. Discretionary sentences give needed flexibility to aid in achieving just results. Further flexibility is provided, for example, by prosecutorial discretion, probation, concurrent sentences, and parole.⁷¹ Injustice, however, can still result because an individual could receive the maximum sentence allowable even though circumstances did not warrant it. The limits of sentence lengths given by the legislature merely represent a *range* of punishment; it does not follow that because the maximum sentence would be warranted under some circumstances, it would be warranted in a particular case. So long as sentences are not being handed down by one central authority in order to ensure that similar offenses receive similar sentences, a judge could dispense a sentence disproportionate to those given by other judges. In such a case, it would not be appropriate for an appellate court to respond automatically that a punishment given within the statutory limits cannot be cruel and unusual. Appellate review must be honed more finely in order to allow meaningful review of the disproportionate-sentence claim.

Legislators legislate for all, painting the legal landscape with a large brush. Legislators do not have the particular case in front of them when they determine the range of sentence lengths. An appellate court does. Thus, a court is in the position to paint in the fine lines on sentencing that

70. See 445 U.S. at 283-84.

71. *Rummel* discusses parole and prosecutorial discretion as complicating factors in making comparisons of punishments between jurisdictions. *Id.* at 280-81. According to the dissent, it is unacceptable to use the possibility of parole as a reason not to review a sentence. *Id.* at 294 (Powell, J., dissenting).

