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Commentary: Rummel v. Estelle: Mockingbirds Among the Brethren

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In this commentary Professor Lasson discusses the Supreme Court's decision in Rummel v. Estelle *and reveals a poignant personal memorandum that reflects the analysis of human values necessarily performed by whichever Justice cast the deciding vote.*

More than eight years ago, William James Rummel, having been convicted of his third felony and thus run afoul of the Texas habitual-offender statute,[1] was given a mandatory life sentence. He spent most of the intervening time in a maximum-security cell at the state penitentiary while all of his legal appeals, including one heard by the Supreme Court of the United States,[2] were being exhausted.[3]

That Mr. Rummel's offenses were but small larcenies totalling less than $230 did not seem to impress the Court which, in a five to four decision written by Mr. Justice Rehnquist last Term, supported the state's right to punish habitual offenders in any manner it deemed appropriate and affirmed the life sentence.[4] Few will ever know for certain, of course, which man among the majority was the swing vote in this controversial case. But knowledgeable

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1. "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." TEX. PENAL CODE ANN. art. 63 (Vernon 1925) (*recodified at* TEX. PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon)). For a comparison of habitual-offender statutes in other states, see note 13 *infra*.

2. Rummel v. Estelle, 445 U.S. 263 (1980). Justice Powell, joined by Justices Brennan, Marshall, and Stevens, wrote a blistering dissent. *Id.* at 285.

3. Rummel first exhausted his opportunities for direct appeal and collateral attack. *See* Rummel v. State, 509 S.W.2d 603 (Tex. Crim. App. 1974); *Ex parte* Rummel, Writ Nos. 298 & 304 (Tex. Bexar County Dist. Ct. July 25, 1975), *reprinted in* Petition for Writ of Certiorari at 45a-48a, *application denied without written order on findings of the trial court without hearing,* Writ Nos. 298 & 304 (Tex. Crim. App. Sept. 23, 1975), *reprinted in* Petition for Writ of Certiorari at 44a. A petition for habeas corpus was filed in the District Court for the Western District of Texas and relief was denied. *See* Rummel v. Estelle, No. SA-76-CA-20 (W.D. Tex. May 13, 1976), *reprinted in* Petition for Certiorari at 40a-43a. A divided panel of the Fifth Circuit reversed the District Court and granted habeas relief on the ground that a life sentence was grossly disproportionate to the crimes committed. Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978). On rehearing en banc, the Court of Appeals vacated its earlier decision and affirmed the District Court opinion denying habeas relief, while remanding the case in part to a panel on the issue of ineffective assistance of counsel. Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978) (en banc). The case was subsequently remanded to the District Court for a full evidentiary hearing on the ineffective assistance of counsel issue. Rummel v. Estelle, 590 F.2d 103 (5th Cir. 1979) (per curiam). The Supreme Court granted certiorari to address Rummel's eighth amendment claim. Rummel v. Estelle, 441 U.S. 960 (1979). For the final disposition of Rummel's ordeal, *see* note 21 *infra*.

4. The Court's decision generated sharp criticism. *See generally The Supreme Court, 1979 Term,* 94 HARV. L. REV. 1, 87 (1980); Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling*

Court-watchers point toward Mr. Justice Blackmun as the most likely to have vacillated and agonized[5] over the central issue: whether the sentence imposed upon Rummel amounted to cruel and unusual punishment in violation of the eighth and fourteenth amendments.

Herewith is an unsigned, personal memorandum—an ode, perhaps, to judicial frustration—that may shed further light on the question of just who did hold Rummel's future in his palm or pen:

> Once upon a midnight dreary while I pondered, wise but weary,
> Over many a quaint and curious volume of forgotten lore,[6]
> While I plodded, wisdom sapping, suddenly there came a tapping
> As of someone gently rapping, rapping at my chamber door,
> " 'Tis the cleaning maid," I muttered, "mopping 'round my chamber floor,
> Just a maid and nothing more."
>
> Still entranced I started mulling all the facts, which was like falling
> Prey to lawyers' logic lulling listeners toward a lonely lure:
> "Look! Appellant misused credit, then a check he'd tried to edit
> Failed, and then" (the People said) "it happened still again—once more
> Did this man choose cheating, did he chisel on a promised chore?[7]
> Three times guilty! Nevermore. . . .
>
> "No! We shall not let the criminal mind, no matter how subliminal,
> Win the war against the minimal standards of the state; Wherefore
> Anyone who's been convicted more than twice shall be evicted
> From his freedom, e'er restricted to the Pen, to err no more."
> With that sentence came the sound of rapping at my chamber door—
> Then, stark quiet, as before.
>
> Once again I started drawing my decision, hemming, hawing,
> Still the burning question gnawing: Does *res ipsa loquitor*?
> Does it stand to reason plainly that all felons (seasoned) sanely
> Do again misfeasance mainly 'cause their freedom we restore?
> Or is it cruel to brand *all* three-time losers nothing but "hard-core"?
> Cruel, unusual furthermore?[8]

Case of William Rummel, 71 J. CRIM. L. & CRIMINOLOGY 378 (1980).

5. The Justices themselves were concerned about Justice Blackmun:

> 'If he doesn't learn to make up his mind, he's going to jump off a bridge someday,' Black remarked to his clerks. Black tried to help and he would occasionally wander down the hall to Blackmun's chambers to provide encouragement. 'Now Harry,' Black once said, 'you just can't agonize over it. You have just got to vote.'

R. WOODWARD AND S. ARMSTRONG, THE BRETHREN 121 (1979) [hereinafter cited as THE BRETHREN]. *See also* Lasson, Book Review, 9 U. BALT. L. REV. 375 (THE BRETHREN) (1980).

6. Perhaps F. DOSTOEVSKY, CRIME AND PUNISHMENT (1866), or THE BASEBALL ENCYCLOPEDIA (1st ed. 1969). *See also* Flood v. Kuhn, 407 U.S. 258, 262 (1972).

7. Rummel was convicted of obtaining $120.75 by false pretenses in 1973. He had promised an acquaintance he would fix an air conditioner and took a check for $120.75 in return for a new compressor; Rummel spent the money but never purchased the compressor. Rummel also had two prior convictions; together the three non-violent felonies netted him a grand total of $229.11. Rummel v. Estelle, 445 U.S. 263 (1980). *See also* note 9 *infra*.

8. *See generally* Mergargee, *Ex-Offenders and the "Monster" Myth*, 44 FED. PROBATION 24 (1980); Fishman, *An Evaluation of Criminal Recidivism in Projects Providing Rehabilitation and Diversion Services in New York City*, 68 J. CRIM. L. & CRIMINOLOGY 283 (1977).

Could the State of Texas truly think Defendant more unruly
Than the killers, rapists, robbers in its prisons kept secure?
All the evidence indicated that the crimes had been created
By a creature so ill-fated by his lonely life before—[9]
All the social workers stated that they thought the problem pure
("Life in prison's not the cure.")[10]

But the judges and the juries were not buying poor men's stories
'Specially where the Texas mores way-back-when had been so sure:
Legislature's clear intention was that there must be no mention
Of the reason for detention save the convict's final score—
Was Defendant an offender who'd offended twice before?
"*That's* the test; and nothing more!"[11]

With such principles recited, all their darkness had seemed lighted—
All potential error righted, since the juries need explore
Only one consideration, just that lone interrogation,
But that simple calculation uttered often heretofore—
Whether twice had turned to thrice was not the issue that they bore.[12]
Verdict: "Guilty." (Nothing more.)

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9. Rummel moved to San Antonio with his parents while in the seventh grade. He dropped out of high school in the tenth grade and worked with his father on a soda water route, earning $1 an hour loading trucks. Although his parents left San Antonio shortly thereafter, Rummel stayed behind and rented an apartment on his own.

Rummel's problems with the law began at age 16 with his involvement in an incident resulting in three misdemeanor violations; Rummel himself admits he sometimes ran with a fast crowd. He earned a salary through a succession of jobs in the construction field and developed skills repairing air-conditioners.

The first of his three convictions leading toward the mandatory life sentence came in 1964 when, at age 22, Rummel purchased four new tires (worth about $80) for his car with a stolen credit card. He spent the next 21 months in prison. In 1969, at age 27, he forged a check for $29.36 to prevent eviction from the San Antonio motel in which he was living. Rummel returned to prison for four years. In 1973, at age 31, he was convicted of the third felony and sentenced to life imprisonment. *See* text accompanying note 1 *supra*. Rummel is now 37 years old (correspondence with William Rummel and Scott Atlas (Rummel's attorney)).

10. Rehabilitation, according to the conventional assumptions of penology, is the preeminent goal:

> [Even] a second or third offense ought not be deemed serious unless the harm done or risked by that offense was great. . . . Repetition of an offense that does comparatively little harm cannot justly be made the occasion for severe punishment, as is true under multiple offender statutes in force in many states today.

A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 86-87 (1976).

For an interesting dialogue concerning the effects of socio-economic problems on rehabilitation, compare Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976) with Morse, *The Twilight of Welfare Criminology*, 49 S. CAL. L. REV. 1247 (1976).

11. The Texas recidivist statute operates on a bifurcated system. The jury first renders a verdict on the charge for which the defendant stands accused. A punishment hearing follows a guilty verdict at which the defendant may choose to have either the judge or the jury assess his punishment. TEX. CRIM. CODE PROC. ANN. arts. 36.01 and 37.07 (Vernon 1978). At that hearing, the prosecution must prove that the defendant had received two prior convictions, Franklin v. State, 154 Tex. Crim. 375, 376, 227 S.W.2d 814, 815 (Crim. App. 1950), and that each succeeding conviction was subsequent to both the commission of and conviction for the preceding offense. Tyra v. State, 534 S.W.2d 695, 697-98 (Tex. Crim. App. 1976). If the prosecution meets this burden, the defendant must be sentenced to life in the penitentiary; neither judge nor jury has discretion in the sentencing. Lujan v. State, 157 Tex. Crim. 338, 339, 248 S.W.2d 477, 478 (Crim. App. 1952); Tristan v. State, 510 S.W.2d 329, 333 (Tex. Crim. App. 1974); Blackwell v. State, 510 S.W.2d 952, 955 (Tex. Crim. App. 1974). *See also* notes 12 and 13 *infra*.

12. TEX. CODE CRIM. PROC. ANN. art. 36.01 (Vernon 1978):

Then the judge (a little queasy?) rendered sentence,[13] which was easy
Once the jury had determined the full guilt Defendant bore
'Cause the musty law mandated that the felon must be fated
To a term that's ne'er pro-rated: Life in Prison was in store
For the fellow, the poor fellow, whom the State had twice forebore.
"Thrice a felon? Nevermore!"

So bemused by this decision, dummied by my own derision,
Blinded by a better vision of Law now than Law before,
That just then to still the beating of my heart, I stood repeating
" 'Tis some barrister entreating entrance at my chamber door;
Some late barrister[14] entreating entrance at my chamber door.
This it is and nothing more."

Soon my soul was slightly stronger; hesitating then no longer,
"Barrister," said I sincerely, "your forgiveness I implore;
But in fact I was law-lapping and so gently you came rapping
With such faint judicious tapping, tapping at my chamber door,
That I hardly thought I heard you"—here I opened wide the door—
Whence a whisper: "Nevermore!"

Nothing but that phrase kept burning, so to chambers I was turning
When again I heard a tapping (somewhat louder than before).
"Surely," said I, "surely that is something at my window lattice,
Let me see, then, what thereat is and this foolishness[15] explore.
Let my heart be still a moment and I'll soon be at the core;
'Tis but fantasy, no more!"

A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged, for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Art. 37.07.

See also Castillo v. Texas, 494 S.W.2d 844, 845 (Tex. Crim. App. 1973) (defendant not entitled to have jury informed of part of indictment charging prior convictions and effect of prior convictions, despite his claim that jury would have been less likely to resolve evidence against him had it been aware of mandatory life sentence); *but cf.* ARK. STAT. ANN. § 41-1005 (1-3) (1977) (Arkansas juries have discretion to choose a sentence between that provided for the offense before them and that provided by sentence enhancement for repeating offenders).

13. *See* notes 11 and 12 *supra*. *But see* Brief for Petitioner at 39, 40, Rummel v. Estelle, 445 U.S. 263 (1980):

> An examination of punishment in other jurisdictions for the same offense reveals that currently only one other state—Washington—retains the statutory authority to impose a mandatory life sentence upon those convicted of any three felonies, and the Washington Supreme Court has indicated that it probably would not permit application of the statute in a case like Rummel's. Every other state and territorial habitual offender statute requires commission of more offenses, at least one violent crime, or both; imposes a sentence substantially less than life; or grants discretion to the sentencing authority.

See also Brief for Petitioner at 39 n.27, Rummel v. Estelle, 445 U.S. 263 (1980) (listing and categorizing habitual offender statutes in federal law and every state and territory); Hart v. Coiner, 483 F.2d 136, 143 (4th Cir. 1973) (W. Va. habitual offender statute unconstitutional as applied to *Rummel*-type offenses).

14. Perhaps Scott Atlas, Esquire, currently with Vinson & Elkins of Houston, Texas, whom the fifth circuit appointed as Rummel's attorney in 1977. Atlas's work on Rummel's behalf has been entirely *pro bono*.

15. Perhaps "irrationality." *See* Rummel v. Estelle, 445 U.S. 263, 307 (1980) (Powell, J., dissenting)

Open then I flung the shutter, when, with many a flirt and flutter
In there stepped a curious creature—lo! a mockingbird?* For sure!
Of austerely antique bearing, wings inflexible but flaring,
In he stepped while I kept staring as he perched above my door.
Perched upon the Scales of Justice just above my chamber door—
Perched, as spellbound, little more.

Then this balky bird beguiling my dissention, by not smiling—
By the staid and stern decorum of the countenance it wore—
"Though thou art a beast unbending, could," I asked, "could thou be lending
Counsel to opinions pending in my chambers, at my door?
If so," I said, my heart rending—"inspiration I implore!"
Quoth the Mockingbird: "No more!"

Much I marvelled this ungainly fowl to hear discourse so plainly,
Though its answer little sympathy, little solace for me bore,
But I cannot help agreeing that no Judge, Appellate Being,
Ever yet was blessed with seeing *bird* above his chamber door . . .
Mockingbird above the Scales of Justice on his chamber door,
With that dictum, "Nevermore!"

"Give me peace," I prayed, beseeching, "Peace of mind, for I am reaching
Toward the Truth, for it's the Truth that mortal men cannot ignore—
What is 'cruel' and the true meaning of 'unusual'?[16] I am leaning
Toward the notion that you're screening Truth by what you've said before.
If Life isn't cruel and unusual, tell me what is, I adjure—
Tell me this and nothing more!"

But the beast still sitting lonely on the door above spoke only
That one word as if its soul in that one word it did outpour
Nothing further then he uttered—not a feather then he fluttered—
'Til I scarcely more than muttered, "No—I shall affirm no more!
No—I can't concur, I won't belittle my imprimatur!"
Then the bird prayed, "Nevermore."

*The mockingbird is the state bird of Texas.

("objective criteria clearly establish that a mandatory life sentence for defrauding persons of about $230 *crosses any rationally-drawn line* separating punishment that lawfully may be imposed from that which is proscribed by eighth amendment") (emphasis added).

16. The Supreme Court has concluded that the eighth amendment bar against cruel and unusual punishment extends not only to punishments that are "barbaric," but also to those that are "excessive" in relation to the crime committed. Coker v. Georgia, 433 U.S. 584, 592 (1977).

According to the Court in Gregg v. Georgia, 428 U.S. 153, 173 (1976), a penalty is "excessive" and unconstitutional if it imposes needless pain and suffering, or if the penalty is grossly out of proportion to the severity of the crime.

In Weems v. United States, 217 U.S. 349 (1910), where the defendant had been sentenced to twelve years at hard labor for falsifying a public document, the Court quoted with approval the observation made by the Massachusetts Supreme Court in McDonald v. Commonwealth, 173 Mass. 322 (1899), that imprisonment "for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." 217 U.S. at 368 (quoting *McDonald*, 173 Mass. at 328).

Startled in the stillness broken by reply so aptly spoken,
"Doubtless," said I, "what he utters is his only stock and store:
Caught by some unyielding master fearful of the Law's disaster
Should the rules not be kept faster, be the Law not as *before*;
"Surely," I soliloquied, "yes, surely Justice would deplore
Law unchanging, Law of yore."[17]

But the Mockingbird bewitching my opinion—swaying, switching—
My once strong dissenting voice now indecisive and unsure,
Still! into tradition sinking I betook myself to linking
Precedent to folly thinking what this leery bird of lore
What this cold and calculating, dumbly brilliant bird of lore
Meant in mocking "Just once more!"

"What of Man's progressive learning—Knowledge grows," pled I, not turning
From the eerie visage of Persuasion perched upon my door;
"Does not Law," I asked beseeching, "recognize its goal of reaching
Truth! and is not Law impeaching Truth by failing to explore
If the legislative doctors killed the patient with their cure?
Mustn't laws all be *de jure*?[18]

"Society's sometimes satiated, cases can be demonstrated,
When a frequent felon's fated to be locked behind the door
For life, but can we fairly pummel petty thieves like this man Rummel
With a punishment so compelling that our consciences are impure?
With archaic laws so totally out of date they hold no more?
Is your wisdom so secure?

17. "Law must be stable and yet it cannot stand still . . . The social interest in the general security has led men to seek some fixed basis . . . But continual changes . . . demand continual new adjustments. . . . Thus the legal order must be flexible as well as stable." Pound, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

18. Chief Justice Vanderbilt, dissenting in Fox v. Snow, 6 N.J. 12, 27, 76 A.2d 877, 885 (1950), stated:

> We should not permit the dead hand of the past to weigh so heavily upon the law that it perpetuates rules of law without reason. Unless rules of law are created, revised, or rejected as conditions change and past errors become apparent, the common law will soon become antiquated and ineffective in an age of rapid economic and social change.

Cf. Rummel v. Estelle, 568 F.2d 1193, 1201 (5th Cir. 1978) (Thornberry, J., dissenting). Justice Thornberry stated:

> Perhaps, if I were the prosecutor, I would not have sought an indictment charging the defendant with an habitual count; if I were a state lawmaker I would vote to amend the statute so it would not be applied as has been done here; or if I were governor of the state of Texas, I would consider the petitioner a prime candidate for clemency. But I do not hold these offices and my decision must be guided by the eighth amendment rather than my feelings of compassion and justice.

"Are you worse than senseless blocks caught 'twixt hard stones and harder rocks[19]
While Brother Wren quests, laughs and mocks and flies his right wing, so cock-sure
Of his majority, oh so moral, of his votes so nicely jural,
Of his cocky logic, of his starkly dark judicature,
That he misses the real meaning of the Eight Amendment's core?
Just a right-winged bird, no more?"[20]

Now! Methought the bird had risen from his catatonic prison,
From the ball and chain of his enslavement to a cause obscure;
Now he blinked a glassy eye and raised a wing as if to try
Escape, and then in silent cry, he bared his beak as if to roar—
But he barely more than muttered what he'd stuttered oft before,
Uttering only, "Nevermore."

Lo! M*ethought* the bird had started, but my hopes were hopes half-hearted,
Still he sat, perhaps the wiser, high above my chamber door.
Little could I fight a power so tall in his ivory tower,
Caught by his imposing glower: was *I* right, *his* logic poor?
Could I wipe his test, his rule, his law, his form from off my door,
While he whispered, "Nevermore?"

No. The Mockingbird, unsearching, still is perching, *still* is perching
On the sightless Scales of Justice just above by chamber door.
Still, unfeeling, coldly staring straight ahead, his eyes still glaring
With cold reason as if caring for the Past and nothing more.
Still he sits there lacking logic, bound by but what went before,
Gravely uttering, "Nevermore."[21]

19. *Cf.* W. SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR, Act 1, Scene 1, line 35 ("You blocks, you stones, you worse than senseless things!").

20. Justice Rehnquist's record of favoring the prosecutor has been particularly apparent in his attempts to limit the application of the exclusionary rule. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 516-17 (1978) (Rehnquist, J., dissenting) (evidence found by police during search to find and seize evidence in burned building several days after fire should be admissable because search routine and regulatory); Rakas v. Illinois, 439 U.S. 128, 143 (1978) (extension of exclusionary rule protection limited from those legitimately on searched premises to those with legitimate expectation of privacy in searched area). *See also* THE BRETHREN, *supra* note 5, at 221 (1979) (The liberals "weren't surprised when Rehnquist began promptly to live up to his advance billing as a solid conservative vote, siding invariably with the prosecutor in criminal cases.").

21. On October 3, 1980, the District Court for the Western District of Texas granted Rummel's petition for habeas corpus, on the grounds of incompetency of counsel at his third trial. Rummel v. Estelle, 498 F. Supp. 98 (W.D. Tex. 1980). Rummel was thus released from prison after, by his own count, seven years, nine months, and fourteen days (conversation between author and William Rummel).