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In 1967 George Wanstreet was convicted of forging a forty-three dollar check and received a life sentence under West Virginia’s recidivist statute. This statute, one of the two harshest in the nation, requires life imprisonment for persons convicted of three felonies. Wanstreet had been convicted in 1951 for forging an eighteen dollar check and in 1955 for arson of a barn valued at $490. He had been in prison more than ten years for the 1967 conviction when the West Virginia Supreme Court of Appeals held, in Wanstreet v. Bordenkircher, that his sentence violated the proportionality clause of the West Virginia Constitution.

The facts and issues in Wanstreet paralleled those faced by the United States Supreme Court a year earlier. In Rummel v. Estelle, the Court found that a life sentence imposed under a habitual criminal statute did not violate the eighth amendment’s prohibition of “cruel and unusual punishment.” The Rummel Court refused to apply the proportionality

1. W. VA. CODE § 61-11-18 (1977). The statute requires a five-year sentence enhancement on a second felony conviction and life imprisonment on the third felony conviction. It states in relevant part: “When it is determined . . . that such person shall have been twice before convicted in the United States of a crime punishable by confinement in a penitentiary, the person shall be sentenced to be confined in the penitentiary for life.” Id. See generally Brown, West Virginia Habitual Criminal Law, 59 W. VA. L. REV. 30 (1956) (discussing and critiquing the enforcement of West Virginia’s recidivist statute). The terms “recidivist” and “habitual criminal” are interchangeable; this Note generally uses the terminology of the statute being discussed.


5. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence.” W. VA. CONST. art. III, § 5.


7. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend VIII.
doctrine, which mandates that the sentence imposed be proportional to the crime, to Rummel’s life sentence. Rather, it suggested that the applicability of this doctrine was limited to capital sentences. The opposing results of Rummel and Wanstreet indicate a split between federal and state courts on the reach of the proportionality doctrine, a split based on conflicting views of the doctrine’s role as a constitutional principle.

This Note begins by reviewing the proportionality doctrine and its application by the courts. It describes the Wanstreet court’s reasoning and analyzes the proportionality test used by the court. The Note concludes that West Virginia’s recidivist statute should be declared unconstitutional under the state’s proportionality clause because it fails to differentiate between crimes of differing moral culpability.

I. LEGAL BACKGROUND

A. The Theory: Retribution

The doctrine of proportionality was part of English common law. As early as 1215, the Magna Carta contained a clause insuring that “[a] free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity.” Modernly, the proportionality doctrine concerns “the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender.” Under the doctrine, punishment is justified on the grounds that the offense deserves punishment and not on the grounds that the punishment serves a utilitarian goal. Thus, the severity of the punishment depends on the moral gravity of the act.

The Supreme Court first recognized proportionality as a constitutional principle in Weems v. United States. Although the United States Consti-

8. See 445 U.S. at 272.
10. Rummel, 445 U.S. at 288–89 (Powell, J., dissenting) (quoting J. Holt, MAGNA CARTA 323 (1965)).
12. Id.; Rawls, Two Concepts of Rules, 64 PHIL. REV. 3. 4–5 (1955); see notes 17–21 and accompanying text infra.
13. 217 U.S. 349 (1910). Weems was convicted of falsifying Philippine government records. He apparently had no intent to defraud and no loss occurred to the Philippine government. Id. at 363. The statute in question required:
stitution does not explicitly incorporate the proportionality doctrine, the Weems Court found it implicit in the eighth amendment's "'cruel and unusual punishment'" clause. In addition, many states have adopted proportionality as a state constitutional principle either by following the Weems approach or by explicitly including the proportionality principle in their constitutions as West Virginia has done.

The proportionality doctrine has its roots in the retributive, or "'just-deserts,'" theory of punishment. Under the retributive theory only the moral culpability of the defendant, not public safety or law enforcement necessity, justifies punishing an individual. Moral culpability is the measure of the criminal's personal guilt and derives from the "'moral egre-
giousness" of the crime. This egregiousness arises from two aspects of the crime: the harmfulness of the act and the personal culpability of the defendant in committing the act. In the case of a recidivist, the personal culpability results in great part from the defendant's having ignored the laws of society for a third time. Because the retributive theory demands that moral culpability derive only from a person's acts, deterrence of future acts is not a legitimate justification for individual punishment under the theory.

The retributive theory has been incorporated into federal constitutional law in some areas. For example, in *Robinson v. California*, the United States Supreme Court held that the defendant's status as a drug addict lacked sufficient culpability to justify punishment; therefore punishment for that status was unconstitutional. Nevertheless, the reach of the retributive doctrine as applied to sentence length in the form of "proportionality" has been limited.

**B. The Traditional Proportionality Test**

Application of the proportionality doctrine should not be based on a judge's personal beliefs about the fitness of a punishment to a crime. To
avoid such personal judgments courts have developed two safeguards. First, any failure to comport with the proportionality doctrine must be "gross" before it is unconstitutional.26 "Gross" refers to the burden of proof, which requires that the defendant show the punishment differs "from the appropriate amount [of punishment] sufficiently that the Court can feel reasonably satisfied that the legislature was wrong in its action and that the judiciary is correct."27 In determining "grossness," courts usually defer to legislative decisions of what constitutes proper punishment.28 One reason for this deference is that courts often have difficulty finding evidence of the relative seriousness of different offenses outside of the existing statutory scheme. For example, widely varying types of crimes, such as drug crimes, sex crimes, and crimes of violence, are difficult to rank against one another on a scale of moral culpability.29

For the second safeguard, courts have adopted a three-part test based on objective factors to determine whether disproportionality exists.30 First, the court examines the nature of the offense to see whether a discrepancy exists between its culpability and the punishment.31 Among the factors a court uses to measure culpability are the violent or potentially violent nature of the crime and the actual or potential property damage involved.32 Second, the court compares the sentence imposed with the
punishment the defendant would receive for the same crime in other jurisdictions. A sentence considerably more severe than that imposed in a vast majority of other jurisdictions indicates disproportionality. Last, the court compares the defendant’s sentence with the punishment imposed for other crimes within the same jurisdiction. If a crime of greater moral culpability carries a lesser punishment, disproportionality is indicated. Some courts also use a fourth test: they examine the legislative, or penal, purpose of the statute.

Although the proportionality test is used primarily to determine the ex cessiveness of sentences, it also reflects a policy favoring just proportions between punishments within a single system. This policy of “relative proportionality” calls for all sentences to be part of a graduated scheme of punishment so that serious crimes receive serious sentences in relation to minor crimes, which should receive minor sentences. Relative proportionality is an independent constitutional requirement and violation of this principle alone may make the sentence imposed unconstitutional.
C. Proportionality in the Courts

1. Federal Courts

Despite its adoption of the proportionality principle in Weems, the Supreme Court has only used the principle twice since then.\textsuperscript{39} It has never applied the principle to overturn a sentence of only imprisonment.\textsuperscript{40} Lower federal courts, however, have found imprisonment sentences disproportionate. In\textit{ Hart v. Coiner},\textsuperscript{41} the Court of Appeals for the Fourth Circuit examined a life sentence imposed under West Virginia’s recidivist statute when the defendant’s three crimes consisted of writing a check on insufficient funds for fifty dollars, transporting forged checks worth $140 across a state line, and perjury at his son’s murder trial. The court found the sentence “wholly disproportionate to the nature of the offenses.”\textsuperscript{42} Other federal courts have also overturned excessive prison sentences on “gross disproportionality” grounds.\textsuperscript{43}

The Supreme Court was again confronted with the issue whether a pri-
son sentence could be constitutionally excessive in *Rummel v. Estelle*.44

In *Rummel*, the Court reviewed a life sentence mandated by the Texas habitual criminal statute.45 The Court examined whether the statute contributed to acceptable goals of punishment and concluded that it did.46 The Court refused to consider whether Rummel's sentence was grossly disproportionate to the crime,47 and based this refusal on principles of federalism and deference to the legislature.48 The Court justified its refusal by stating that the inquiry involved "intrusion into the basic line-drawing process that is pre-eminently the province of the legislature"49 and that no objective standards were available by which to measure proportionality.50

Both these justifications are questionable. The decision whether a sentence is proportionate involves no line drawing whatsoever. Rather, it involves an inquiry into whether the defendant has met the burden of proving the sentence grossly disproportionate. The Court's role is not to specify where the line between constitutionality and unconstitutionality should be, but only to find whether a set of facts meets a legal test. This is the type of decision at which courts are considered most competent.

The lack-of-standards argument is flawed as well. The *Rummel* Court cited numerous examples showing that little differences existed between Rummel's punishment in Texas and that which he would have received in other states in support of its conclusion that objective standards were not available.51 In fact, the examples show something else: the defendant's failure to meet the burden of proof. A defendant's failure to prove a lack of proportionality does not imply that the factors used by the defendant are not objective.52 Nevertheless, because the *Rummel* Court found no

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44. 445 U.S. 263 (1980). Rummel's third conviction was for obtaining $120 by false pretenses; he previously had been convicted of fraudulent use of a credit card to obtain $80 worth of goods and of forging a check for $28. Although all three of Rummel's crimes were felonies in Texas, the total dollar amount involved was only $230. *Id.* at 265–66. Rummel's sentence was for life, but the Court noted that he could be eligible for parole within 12 years. In considering this factor, the Court downplayed the harshness of the sentence. *See id.* at 280–81. *But see id.* at 293–94 (Powell, J., dissenting) (excluding parole as a consideration in undertaking proportionality analysis).

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

46. 445 U.S. at 284.

47. *See id.* at 285.

48. *Id.* at 274–75, 282, 284–85. The Court stated: "Given the unique nature of the punishment considered in . . . the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative." *Id.* at 274; see also *Hutto v. Davis*, 102 S. Ct. 703, 704 (1982) (affirming *Rummel* holding).

49. 445 U.S. at 275.

50. *See id.* at 279–85.

51. *See id.*

52. *See generally* Dressler, supra note 17, at 1098–1106 (arguing that legislative deference was uncalled for in *Rummel* and that proportionality analysis should have been undertaken).
Proportionality and Repeat Offenders

standards satisfactory for objectively measuring the proportionality of imprisonment sentences, review was precluded. Following this reasoning, even if a sentence were grossly disproportionate, the Court would not overturn it.53

In Hutto v. Davis54 the Court confirmed its decision in Rummel to limit the application of the proportionality doctrine in federal courts. In a per curiam opinion, the Hutto Court overturned a court of appeals decision that had held unconstitutional a forty-year sentence for possessing and selling nine ounces of marijuana.55 Contrary to its approach in Rummel, the Court in Hutto refused to review the purposes behind the statute.56 The Court found any comparison of the "excessiveness of one prison term as compared to another . . . invariably . . . subjective."57 Although the Court still espouses proportionality in death penalty cases, imprisonment sentences for felonies, at least under state laws, are not reviewable for disproportionality.58

53. See Dressier, supra note 17, at 1098–99; The Supreme Court, 1979 Term, 94 HARV. L. REV. 75, 94–95 (1980). When the Rummel Court refused to consider independently the proportionality of the sentence, it rejected the second half of a test for excessiveness it had formulated in Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion), at least in the context of terms of years. See generally note 86 and accompanying text infra (discussing Coker). Its refusal to use retribution principles as an eighth amendment standard also shows this rejection. The Court found deterrence and incapacitation principles sufficient to establish a sentence's constitutionality. Further, the Court justified Rummel's life sentence in his "propensity to commit crimes." This violates principles of moral culpability because it justifies the length on a sentence based on a prisoner's status as opposed to his acts and allows punishment for future crimes not yet committed rather than for only past acts. See notes 20–21 and accompanying text supra.

For a compelling argument that courts should use proportionality sparingly, if at all, see Mulligan, Cruel and Unusual Punishment: The Proportionality Rule, 47 FORDHAM L. REV. 639 (1979).

54. 102 S. Ct. 703 (1982).

55. There was also evidence that Davis was a drug dealer and had been convicted on a drug charge in the past. Nevertheless the statute under which he was convicted, unlike that in Rummel, was not aimed at recidivists. Hutto therefore considerably expands and strengthens Rummel. For this reason, Justice Brennan, dissenting, questioned the Court's use of a summary opinion, written without benefit of briefs or argument. See Hutto, 102 S. Ct. at 709–12.

56. Rummel left open the possibility that there could be a rational basis but not a proportionality test for excessiveness of prison sentences. The Court's holding can be read as limited to recidivist statutes, for which a clear rational basis (incapacitation and deterrence) exists. See 445 U.S. at 284–85. The Hutto Court's summary affirmation of Davis's sentence indicates that the Court will refuse to review any felony punishment of imprisonment under any test. Thus, the Court rejected the first half of the test for excessiveness it had formulated in Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion), in the context of imprisonment sentences as well. See note 86–87 and accompanying text infra; see also note 53 supra (Rummel rejected second half of Coker test).

57. 102 S. Ct. at 704.

58. See Enmund v. Florida, --- S.Ct. --- (1982) (striking down death penalty for non-killer in felony murder case on proportionality grounds). Even if proportionality is not required by the eighth amendment, it may be required by the fifth and 14th amendments because it is a "fundamental right" required by the due process clause. See Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968) (plurality opinion) ("The question thus is whether . . . a procedure is necessary to any Anglo-American regime of ordered liberty."); Palko v. Connecticut, 302 U.S. 319 (1937). See generally G. GUN-
2. West Virginia Cases

Prior to Wanstreet v. Bordenkircher, the Supreme Court of Appeals of West Virginia had never overturned a sentence of imprisonment on proportionality grounds. Since 1910, it had, however, recognized proportionality as a limit on the power of the legislature to set sentences, even for terms of years. It had also twice addressed "cruel and unusual punishment" challenges to its recidivist statute. In Martin v. Leverette, the defendant challenged a five-year enhancement of his sentence for a second felony of burglary when the first conviction was for armed robbery. The court recognized the potential applicability of the proportionality doctrine to the West Virginia recidivist statute. Nevertheless, it found that both crimes were "serious and involve[d] the threat of violence against persons, if not actual violence in the case of armed robbery" and dismissed the claim.

In State v. Vance, the defendant received a life sentence as a recidivist after being convicted of his third felony. The court noted that breaking and entering, the third felony, "carrie[d] the potentiality of violence and danger to life." As in Martin, the court depended on the potential for violence to dismiss the claim and never reached the question of

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59. See State v. Woodward, 68 W. Va. 66, 69 S.E. 385, 389 (1910), where the court stated:
Surely under our Constitution fines so excessive, imprisonment so long, looking to the offense, as to shock our feelings of humanity, conscience, justice, and mercy would be branded by [the proportionality] clause. I suppose that a sentence for years to the penitentiary for assault and battery attended with no serious results, or long imprisonment in jail for profane swearing, would fall under that clause.

Other cases before Wanstreet also gave indications that the court, given a compelling factual situation, would apply the proportionality doctrine to sentences. First, the West Virginia court adopted the Hart v. Coiner proportionality test. See State ex rel. Harris v. Calendine, 233 S.E.2d 318, 330 (W. Va. 1977). Second, the court had incorporated retribution principles into its state constitution, thereby showing its acceptance of proportionality principles. In Woodward, the court determined that punishing a defendant for breaking the no-liquor-on-Sunday law did not violate proportionality. It held that the legislature had the power to create the crime and therefore was empowered to set punishments as well. It thus found inherent in the proportionality doctrine the retribution principle that there can be no punishment without a crime. See 69 S.E. at 389–90. In State ex rel. Harris v. Calendine, the court held that a juvenile who was continually truant—a status offense—could not be confined in the same juvenile facility that housed juveniles convicted of crimes. It reasoned that "no person could be punished unless he had done something which is generally recognized as deserving of punishment." 233 S.E.2d at 324.
whether the proportionality doctrine would prohibit excessive sentences for nonviolent crimes.\textsuperscript{65}

Before \textit{Rummel}, the West Virginia Supreme Court viewed the proportionality clause in the state constitution as coextensive with the federal eighth amendment right, at least for questions of sentence length. It had not relied on the state constitution to grant rights to defendants beyond those granted by the Federal Constitution.\textsuperscript{66} After \textit{Rummel}, in \textit{Wanstreet v. Bordenkircher}, the court had to decide whether West Virginia’s proportionality doctrine made unconstitutional a life sentence for nonviolent crimes when federal law would not. The court found the West Virginia proportionality clause more stringent than the federal doctrine and held \textit{Wanstreet}’s recidivist life sentence excessive.\textsuperscript{67}

\textbf{II. THE COURT’S REASONING}

The court in \textit{Wanstreet} first noted that both it and the United States Supreme Court had upheld the West Virginia recidivist statute against several challenges to its constitutionality, including those based on “cruel and unusual punishment” grounds.\textsuperscript{68} The court further observed that it had strictly construed the statute in past cases because of the statute’s harshness.\textsuperscript{69} With this in mind, the court considered the appropriate standard to determine whether a sentence given under the statute was unconstitutionally excessive.\textsuperscript{70}

Although the court recognized that it had applied the traditional federal proportionality test to its recidivist statute in previous cases,\textsuperscript{71} \textit{Rummel}
now precluded the use of any test based on the eighth amendment in non-capital cases. Nevertheless, the West Virginia court found that the state constitution required a higher constitutional proportionality standard than the federal standard recognized in *Rummel.* It thus reaffirmed its adoption of the traditional, pre-*Rummel* federal test under the state constitution. It noted that the traditional proportionality test contained "'objective standards [which] also ensure that appellate courts will not inject their personal views as to [the] appropriateness of a given sentence.'”

In applying its proportionality test, the court first examined the legislative purpose of the recidivist statute. By finding that this was "'increased confinement for the dangerous criminal,,'" it implied the statute was inapplicable to Wanstreet who had committed only nonviolent crimes. This finding is questionable. Had the legislature intended the statute to apply only to dangerous criminals it could have written the legislation to accomplish that end. Furthermore, the court had previously found the purpose of the statute to be deterrence.

The court then examined the nature of the offense of recidivism and decided that each underlying felony should be considered separately. Looking at the current felony first, the court noted that mandatory life sentences were imposed in West Virginia only for far more serious crimes such as first degree murder, kidnapping with bodily harm, and treason. The court then found that the previous felonies were also nonviolent.

Finally, the court compared Wanstreet's sentence with those he would have received as a recidivist in other jurisdictions. Only two other states imposed such a severe sentence. The court concluded that Wanstreet's life sentence for forging a forty-three dollar check violated the constitutional principle of proportionality because requiring a life sentence regardless of the nature of the underlying crime "'would ignore the ration-

72. See 276 S.E.2d at 210. The court noted that "'[t]he United States Supreme Court has explicitly recognized that a state is free to establish under its own constitution higher standards of protection than are afforded under the United States Constitution."

73. *Id.* at 211. The West Virginia court reached a conclusion opposite from the United States Supreme Court on this issue. See *Hutto v. Davis,* 102 S. Ct. 703, 705 & n.2 (1982); notes 44-58 and accompanying text supra.

74. Although the *Wanstreet* court spoke approvingly of *Hart v. Coiner* it refused to follow the *Hart* court’s methodology and developed its own test for disproportionality. See part IIIA2 infra.

75. 276 S.E.2d at 211.


77. See 276 S.E.2d at 212–13.

78. *Id.* at 212.

79. *Id.* at 213. The court also noted that the defendant had already spent considerable time in prison for the past offenses, treating this as a mitigating circumstance. See note 135 infra.

80. 276 S.E.2d at 213. Washington has since repealed its habitual criminal statute, leaving West Virginia and Texas with the "'most draconian'" statutes. See note 2 supra.
ality of our criminal justice system where penalties are set according to the severity of the offense." In its conclusion, the court suggested a second basis for its holding when it stated that it could "conceive of [no] rational argument that would justify the sentence." This language implies that the court relied on a rational basis test as well.

III. ANALYSIS

The opinion in *Wanstreet* raises three issues concerning the application of the proportionality doctrine to recidivists. First, the court's conclusion contains potential for confusion in its failure to distinguish between the proportionality and rational basis tests. Second, the court, by modifying past proportionality tests, brings to light issues about the method to be used to measure the culpability of a recidivist's criminal act. Last, the opinion stresses the recidivist statute's "failure to differentiate," indicating that the statute may be overly broad. An analysis of the overbreadth doctrine shows the West Virginia recidivist statute to be unconstitutional.

A. Proportionality Versus the Rational Basis Test

The *Wanstreet* court had two justifications for its conclusion that the sentence was unconstitutional: the sentence violated proportionality principles, and the sentence had no rational basis. Close analysis shows that the opinion rests solely on the disproportionality ground. The court relied exclusively on proportionality principles throughout its analysis. Only after finding the sentence disproportionate did the court consider rationality. This suggests that the West Virginia court would find any disproportionate sentence "not rational."

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81. 276 S.E.2d at 214.
82. Id. Possible rational bases are the legitimate purposes of punishment: deterrence, incapacitation, reformation, and retribution.

The presence of the proportionality clause in the West Virginia Constitution did not dictate a state proportionality test as strict as the one that was adopted. The court could have followed the United States Supreme Court's approach in *Rummel*, focusing on the fact of recidivism to the preclusion of examining the underlying crime. It could also have followed the en banc court of appeals opinion in *Rummel* which used an expansive version of the rational basis test to measure proportionality. See *Rummel v. Estelle*, 587 F.2d 651, 655–56 (5th Cir. 1978) (en banc), aff'd, 445 U.S. 263 (1980); see also *McMahan v. State*, 269 Ind. 566, 382 N.E.2d 154 (1978) (holding life sentence for three-time forger did not violate state proportionality clause); People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (using a rational basis test to measure proportionality), cert. denied, 423 U.S. 950 (1975).

83. See text accompanying notes 81 & 82 supra.
84. See *Wanstreet*, 276 S.E.2d at 210–14. The court had, however, relied on a rational-basis type test in earlier opinions. See e.g., *State ex rel. Harris v. Calendine*, 233 S.E.2d 318, 330 (W. Va. 1977).
Nevertheless, the West Virginia court's framing of its conclusion is potentially confusing. Although both the proportionality doctrine and the rational basis test are relevant in determining whether punishment is excessive, they are independent tests. Each has different standards for constitutionality, and each is based on different theories of punishment. The United States Supreme Court distinguished the doctrines in *Coker v. Georgia*, stating:

> [P]unishment 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.

Because violation of either test may cause unconstitutionality, *Wanstreet* is misleading for lower courts because it appears to require that both tests be met before declaring excessive punishment unconstitutional. While

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85. The rational basis test encompasses a utilitarian theory that holds a sentence constitutional if it is justifiable under any theory of punishment. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183–87 (1976) (using retribution and deterrence to justify and uphold death penalty); *Rummel v. Estelle*, 587 F.2d 651, 661 (5th Cir. 1978) (en banc), aff'd, 445 U.S. 263 (1980). Because long sentences may rationally meet a state's interest in deterrence, incapacitation, and reformation, and yet be totally out of proportion to the defendant's culpability, a sentence may be grossly disproportionate and still be rational. See *Furman v. Georgia*, 408 U.S. 238, 246 n.9 (1972) (example of argument favoring the death penalty for minor theft); Note, *Disproportionality in Sentences*, supra note 17, at 1122.


87. *Id.* at 592 (plurality opinion). The first part of the *Coker* test has also been referred to as a "necessity" test. See Note, *Disproportionality in Sentences*, supra note 17, at 1124. Under this test, "[i]f there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, ..., the punishment inflicted is unnecessary and therefore excessive." *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring). See also *Hart v. Cointer*, 483 F.2d 141, and *Wanstreet*, 276 S.E.2d at 214, with *Rummel*, 445 U.S. at 284–85. But see *Rummel v. Estelle*, 587 F.2d 651, 659 (5th Cir. 1978) (en banc) (had no right of parole existed the sentence would have been disproportionate), aff'd, 445 U.S. 263 (1980).

88. Cf. *Carmona v. Ward*, 576 F.2d 405, 415 (2d Cir. 1978) (court confusing two parts of *Coker* test), cert. denied, 439 U.S. 1091 (1979). The distinction between doctrines is also important because the adoption of proportionality potentially incorporates the retributive theory of punishment into the Constitution.

This is important, in turn, because the retributive theory can act as an effective constitutional limit on the extent to which a state may punish its citizens. Note, *Disproportionality in Sentences*, supra note 17, at 1122. The rational basis test—and the utilitarian theories it incorporates—cannot. First, retribution effectively limits what a state may declare criminal by its requirement of defendant culpability. This, for example, bars any status from being classified as a crime. See *Robinson v. California*.
the distinction may no longer be important under the Federal Constitution after Rummel and Hutto, it is still important in states where stricter state constitutional standards prevail.

B. Measuring Moral Culpability of Repeat Offenders

1. The Wanstreet Test and Other Approaches

The Wanstreet court developed a new method of measuring a recidivist's moral culpability to determine whether a punishment is disproportionate to the crime. Under this method, the court treats the sentence in question as triggered primarily by the third felony and compares that sentence to punishment for other crimes in the same jurisdiction. The Wanstreet court reasoned that "the third felony is entitled to more scrutiny than the preceding felony convictions since it provides the ultimate nexus to the sentence." The court next examines the prior convictions to determine their effect on the cumulative moral culpability. While the presence of prior convictions is given some weight, the focus of this inquiry is to determine if they involved actual or threatened violence. A court is also to consider mitigating circumstances such as time already served. The moral culpability of the current crime receives the heaviest emphasis; the past crimes are

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90. 276 S.E.2d at 212.
91. Id. at 214. The court claimed the purpose behind the West Virginia recidivist statute was to increase confinement of offenders "who repeatedly [commit] serious crimes." Id. at 211. See generally notes 75 & 76 and accompanying text supra (discussing the court's characterization of the statute's purpose).
92. 276 S.E.2d at 213; see note 135 infra.
viewed as aggravating the culpability for the current crime rather than providing independent culpability.

This test differs from those of other courts. One approach is typified by the Fourth Circuit's opinion in *Hart v. Coiner*.

The court examines each of the recidivist's crimes individually with no special weight given to the current offense. Courts using this test usually give some emphasis to the status of recidivist. The moral culpability of the crimes in question is then compared to the moral culpability of major crimes such as kidnapping or murder. Thus, courts add together the culpability of the recidivist's crimes in making the comparison—for example, they compare three forgeries to one murder.

This approach has several problems. Recidivist statutes do not punish for the past crimes but only for the current crime. This means that the presence of previous convictions can only be used to aggravate the recidivist's culpability for the latest offense. The *Hart* methodology, however, treats the moral culpability from the past crimes as still existing and punishes for it. It also requires that the court compare the culpability of one offense to that of three. This task is difficult and is avoided by increased focus on the third felony.

A second approach to measuring a recidivist's culpability, adopted in *Rummel*, focuses on the fact of recidivism rather than on the underlying crimes. It treats recidivism as a status and justifies punishment on incapacitation and deterrence principles, not on moral culpability principles. Underlying this method are assumptions that recidivism creates culpability per se and that it is not proper for courts to compare the culpability of recidivism and individual crimes. This method necessarily does not

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94. For example, the Washington Supreme Court stated in *State v. Fain*, 94 Wn. 2d 387, 402, 617 P.2d 720, 728 (1980): "[W]e must and do defer to the legislative decision to impose an enhanced penalty on recidivists." The *Hart* court failed to mention whether the fact of recidivism, in itself, allowed for additional punishment.

95. *E.g.*, *Hart*, 483 F.2d at 142.


97. The *Rummel* Court noted the difficulty of this comparison. 445 U.S. at 282 n.27: accord *Note, Disproportionality in Sentences, supra note 17, at 1165*.

98. *See Rummel*, 445 U.S. at 284: Having twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal laws of the State.

The purpose[s] of a recidivist statute . . . are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses . . . to segregate that person from the rest of society for an extended period of time.

99. *See id.* at 282 n.27.
measure moral culpability because moral culpability can attach only to acts and not to a status. Although punishment based solely on a person's status is unconstitutional,¹⁰⁰ this method justifies sentence length on the basis of status.

A third approach, endorsed by several legal theorists¹⁰¹ and rejected by the Wanstreet court,¹⁰² limits the moral culpability of a recidivist to that attaching to the latest conviction. It rejects any special punishment based on recidivism. Advocates of this approach note that the defendant presumably has already paid his or her debt to society for the prior convictions and has thus expunged his or her moral culpability.¹⁰³

Nevertheless, this theory presumes that the main culpability that a state should consider in setting punishment is the culpability attaching to the actual or potential harmfulness of the act. This fails to sufficiently consider the culpability of the actor in committing the crime.¹⁰⁴ Most people would presume that a repeat offender is more blameworthy and should be punished not only for the culpability of the act but also for willfully continuing to disobey the laws of society despite past reproof.¹⁰⁵ Further-

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¹⁰². Wanstreet, 276 S.E.2d at 212 & n.12. Moreover, this theory has been implicitly rejected by courts other than the Wanstreet court because it is inconsistent with cases holding that recidivist statutes do not create double jeopardy. No double jeopardy occurs because the defendant is not being punished for the earlier crimes. "The sentence as a . . . habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." Gryger v. Burke, 334 U.S. 728, 732 (1948); see Graham v. West Virginia, 224 U.S. 616, 631 (1912).
¹⁰³. See Dressler, supra note 17, at 1108. Washington, which formerly had a harsh habitual criminal law, is adopting such an approach. It is changing from an indeterminate sentencing system, based on rehabilitation principles, to a determinate sentencing system, based on retribution principles. Under the new system, the maximum term for the current offense is the maximum punishment a defendant can receive; recidivism cannot be used to enhance sentences. Absence of a previous offense is treated as a potential mitigating circumstance that will lessen the sentence. See Sentencing Reform Act of 1981, ch. 137, § 12(5), 1981 Wash. Laws 519, 526 (effective 1984).
¹⁰⁴. An actor's culpability comes from his or her mental state as well as from the harm done. See note 19 and accompanying text supra. While traditional concepts of mental state, or mens rea, are properly considered by these theorists, recidivism should be considered an aggravating circumstance, contrary to the arguments of these theorists.
¹⁰⁵. E.g., A. von Hirsch, supra note 19, at 85. This commentator states: "[The criminal's] first conviction . . . should call dramatically and personally to his attention that [criminal] behavior is condemned. A repetition of the offense following that conviction may be regarded as more culpable, since he persisted in the behavior after having been forcefully censured for it through his prior punishment." See also Spencer v. Texas, 385 U.S. 554, 571 (1967) (Warren, C.J., dissenting) (stating that recidivism aggravates culpability of crimes).

Von Hirsch later rejected this view. He now argues that being a first-time offender makes the defendant less blameworthy and is a punishment-mitigating circumstance. While the culpability for
more, courts should avoid infringing on legislative decisions where possible; and a legislative determination of what creates moral culpability deserves considerable deference.\textsuperscript{106}

The \textit{Wanststreet} court’s test for moral culpability measures a recidivist’s moral culpability more accurately than the other proposed tests. First, it places primary emphasis on the latest crime in determining the culpability and thus avoids the pitfall of comparing one crime to three. It treats prior crimes as aggravating culpability for the latest crime rather than contributing directly to culpability. Also, it avoids justifying the punishment on the basis of recidivist status. This creates a retribution-based proportionality test separate and independent from the utilitarian-based rational basis test.

Although the \textit{Wanststreet} test improves on the other approaches, it contains problems. For example, the amount of culpability the prior offenses add to the latest offense is unclear. Nor can retribution principles alone justify the West Virginia court’s belief that a prior conviction for a “dangerous” crime creates enormous culpability for the subsequent crime while a prior nondangerous crime creates little.\textsuperscript{107} This result must rest on the utilitarian ground of locking up dangerous criminals.\textsuperscript{108} These problems spring from the \textit{Wanststreet} court’s failure to analyze the basis of a recidivist’s per se moral culpability. Therefore, like previous courts, it was unable to compare the culpability deriving from the act of recidivism to that of other crimes.

2. \textit{Measuring Repeat Offenders’ Culpability: A Suggested Approach}

For a court to determine accurately whether the punishment fits the crime, it must first determine which qualities of the crime create moral culpability. It must also, as far as possible, rely on objective factors to measure that culpability. The three-part test proposed below improves the \textit{Wanststreet} test in an effort to measure a repeat offender’s culpability accurately. The parts of this proposed test, which is based on the traditional proportionality test, are: the nature of the crime, the punishment for other crimes in the same jurisdiction, and the punishment for the same crime in other jurisdictions.

\footnotesize{the current crime acts as a limit to the amount a state may punish, a state may punish less if it chooses. Von Hirsch, \textit{supra} note 101, at 613–15.


107. \textit{Compare Wanststreet}, 276 S.E.2d at 214, \textit{with} State v. Beck, 286 S.E.2d 234, 244 (W. Va. 1981); \textit{and} State v. Vance, 262 S.E.2d 423, 432 (W. Va. 1980) (once a violent crime is present, the court refuses even to apply the \textit{Hart} test to see if disproportionality is present).

108. \textit{See} 276 S.E.2d at 211.}
In the first part of the test, the nature of the crime, courts should examine how a recidivist's acts create culpability. The moral culpability that accrues when a recidivist commits a crime comes from the one act, but that act has two components: the culpability of the current crime, and the recidivism. The culpability of the act can usually be determined by reference to the state's criminal code. Primary emphasis is given to the actual or potential violence of the latest crime, with the degree of personal injury or property loss acting as an additional consideration.

The "recidivism" component aggravates the personal culpability of the defendant in committing the crime. With a repeat offender, additional culpability accrues because he or she has willfully disregarded society's values. Although a state need not punish for recidivism, when it does, the punishment must be related to the culpability and the usual punishment for the latest crime. Recidivism must be treated as an aggra-

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110. Degree of harm has commonly been used by courts and commentators as one measure of moral culpability. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion) (stating that rape carries less culpability than murder); Weems v. United States, 217 U.S. 349, 363 (1910) (noting that Weem's transgression of the statute was minor); In re Grant, 18 Cal. 3d 1, 8, 553 P.2d 590, 595, 132 Cal. Rptr. 430, 435 (1976); H. PACKER, supra note 17, at 266–67. Furthermore, violent crimes have consistently been considered as carrying far greater culpability than nonviolent crimes. See, e.g., Grant, 18 Cal. 3d at 8, 553 P.2d at 595, 132 Cal. Rptr. at 435; Griffin v. Warden, W. Va. State Penitentiary, 517 F.2d 756 (4th Cir.) (Hart not followed where crimes violent), cert. denied, 423 U.S. 990 (1975); note 107 supra. These distinctions are also reflected in criminal codes. Compare note 107 and accompanying text supra with notes 111–19 and accompanying text infra (violent nature of past crimes is important to but not determinative of issue of aggravation of culpability caused by those crimes).

But see Rummel, 445 U.S. at 275–76, 282 n.27. Justice Rehnquist refused to admit that any principled distinction could be made on the basis of amount of harm or presence of violence. Some of the statements made in support of this thesis are questionable. For example, he compared Julius Caesar's death by stabbing at the hands of Brutus—a violent crime—to the death of Hamlet's father, poisoned by Claudius—a "nonviolent" crime. Id. at 282 n.27. Murder by any means is heinous. Justice Rehnquist's analysis confuses one meaning of violent, the use of brute force, with the common meaning of "violent" in the criminal law context, crime directed against a person.

111. Only past convictions are constitutionally permitted to enhance a sentence beyond the statutory maximum for the current crime. A state cannot give additional punishment based on a factor or an act for which it could not criminally punish in the first place. Otherwise additional sentences, not independently available, could be based on acts for which there had been no finding of guilt. This is impermissible. See generally von Hirsch, supra note 101, at 607–13 (arguing that prior convictions are the only personal history relevant to setting sentences).

112. See notes 104 & 105 and accompanying text supra.

113. The Model Sentencing and Corrections Act adopts this approach. Under the Act, which adopts a "just-deserts" theory of punishment, recidivists cannot receive more than double the punishment for the underlying crime. See MODEL SENTENCING AND CORRECTIONS ACT §§ 3–104 & 105 (1979). This preserves the nexus between crime and punishment. See id. § 3–105 comment. Furthermore, under the Act, "[t]he prediction of the potential for future criminality by a particular defendant, unless based on prior criminal conduct or acts designated as a crime under the law, should not be considered in determining . . . the length of [the sentence] to be imposed." Id. § 3–102(6).
vating, not an independent, source of culpability. The *Wansstreet* court's approach, giving primary emphasis to the current crime, is proper.

For the following reasons, one consequence of treating recidivism as a culpability-aggravating circumstance is that the amount of punishment resulting from the recidivism cannot overshadow the amount resulting from the crime. First, the amount of harm caused is one measure of moral culpability. The harm to society attributable to the crime itself, that is, the actual forgery or robbery, is direct, while the harm from the willful disobedience is speculative. Second, the current offense is the ultimate nexus between crime and punishment; to disconnect the recidivism from the crime may cause the court to cross over the thin line and punish for status. Third, passage of time and the past punishment received militate against weighing the past crimes more heavily than the current crime. Last, the state must ultimately punish acts and not solely states of mind. Because punishing disobedience separately is punishing for state of mind, a state cannot focus on the disobedience to the point of eclipsing the crime constituting the act of disobedience.

In looking at the second part, the punishment for other crimes in the same jurisdiction, the court first compares the total punishment for the latest crime—including the enhancement for recidivism—to that nor-

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114. That recidivism is only an aggravating circumstance follows from propositions established earlier in this Note. First, culpability from past crimes cannot be punished without creating double jeopardy. See notes 95 & 102 *supra*. Second, to punish for a propensity to commit crime is, in violation of proportionality principles, to punish for status. See notes 21 & 100 and accompanying text *supra*. Third, a recidivist's culpability in fact arises from his or her willful disobedience of society's values. See note 104 and accompanying text *supra*.

115. The Supreme Court adopted this line of reasoning in *Coker*. The Court refused to consider the defendant's prior convictions for rape, murder, and kidnapping as aggravating circumstances sufficient to justify capital punishment for rape. It concluded that the "instant crime" of rape was to be used as the ultimate measure of moral culpability in determining whether the sentence was deserved. 433 U.S. at 598–99.

116. "[W]hen a sentence . . . no longer bears any reasonable relationship to the event which triggered its possibility . . . [t]he major thrust of the proceeding has shifted from the offense to the status of the offender." *In re Lynch*, 8 Cal. 3d 410, 435, 503 P.2d 921, 938, 105 Cal. Rptr. 217, 234 (1972) (quoting A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 139 (1967)).

117. See, e.g., *In re Grant*, 18 Cal. 3d 1, 17, 553 P.2d 590, 601, 132 Cal. Rptr. 430, 441 (1976).

118. "[T]he law of attempts requires a high order of proof that the actor really was engaged in conduct that would have led to an offense . . . ." H. PACKER, *supra* note 17, at 100–01; see California v. Robinson, 370 U.S. 660 (1962); H. PACKER, *supra* note 17, at 96–102; Dressler, *supra* note 17, at 1106.

119. The seriousness and the number of past crimes may increase the willfulness of the disobedience. However, no "bright line" can be drawn between violent and nonviolent felonies; the relationship between the nature of the past crime and the willfulness involved in the current one is too attenuated to allow this. See von Hirsch, *supra* note 101, at 615–16.
Proportionality and Repeat Offenders

mally allowable for the latest crime. If the total punishment greatly exceeds what the punishment would be for a first offense, and if the total punishment is also equivalent to punishment for more serious crimes, disproportionality is indicated.\textsuperscript{120} The court then compares the enhancement resulting from the recidivism to that allowable under other recidivist statutes in the state.\textsuperscript{121} In applying the third part, the sentences allowed for the same crime in other jurisdictions, the court examines the punishment that would be received elsewhere for the same kind of recidivism.\textsuperscript{122}

The second and third parts of the test, although modified, remain similar to those in the traditional proportionality test. The modifications are designed to avoid comparing the culpability and punishment for recidivism to that of nonrecidivist crimes because of the difficulty of this comparison. The modifications also implement the policy, detailed above, that recidivism should be treated as an aggravating and not an independent source of culpability.

C. Overbreadth: The Requirement to Differentiate

Disproportionality in a sentence or statute may result not only from excessiveness but from overbreadth as well. A statute on which a sentence is based is overly broad if it fails to differentiate between crimes of vastly differing moral culpability. The \textit{Wanstreet} court discussed only the issue of excessiveness. It did note, however, that the statute's problems were "not in the underlying criminal penalties but in [its] undifferentiated nature."\textsuperscript{123}

To date, courts have not adopted the overbreadth doctrine as a separate constitutional requirement. Nevertheless, the doctrine is compelled by a

\textsuperscript{120} See \textit{Wanstreet}, 276 S.E.2d at 212; notes 114–119 and accompanying text \textit{supra}.

\textsuperscript{121} In \textit{In re Lynch}, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972), the California court compared punishment received under different recidivist statutes within the state. \textit{Id.} at 434–35, 503 P.2d at 937, 105 Cal. Rptr. at 233–34.

\textsuperscript{122} See \textit{id.} at 436–37, 503 P.2d at 938–39, 105 Cal. Rptr. at 234–35.

\textsuperscript{123} 276 S.E.2d at 213. In an overbreadth challenge, the statute itself is being challenged and must be struck down if the challenge is successful. See note 138 \textit{infra}.

Other recent challenges to recidivist sentences, where the statutes have not been overturned, involved attacks for excessive sentencing and not overbreadth. In these cases, defendants attacked only the individual sentence involved rather than the statute itself. See, \textit{e.g.}, \textit{Rummel}, 445 U.S. at 268; \textit{Hart}, 483 F.2d at 139; State v. \textit{Fain}, 94 Wn.2d 387, 390–91, 617 P.2d 720, 722 (1980); \textit{Wanstreet}, 276 S.E.2d at 207, 214. Courts have been split on whether to allow attacks on sentences without attacks on the statute as well. Several courts have refused to allow such challenges. United States v. Washington, 578 F.2d 256, 258 (9th Cir. 1978); Downey v. Perini, 518 F.2d 1288, 1291 (6th Cir.), \textit{vacated on other grounds}, 423 U.S. 993 (1975); United States v. Dawson, 400 F.2d 194, 200 (2d Cir. 1968), \textit{cert. denied}, 393 U.S. 1023 (1969). \textit{Contra Hart}, 483 F.2d at 139 ("[A] concededly valid statute may be applied \textit{in a particular case} in such a way as to violate various constitutional provisions."); \textit{Fain}, 94 Wn. 2d at 390, 402, 617 P.2d at 722, 728.
system of proportionality. Statutory overbreadth violates proportionality not because it leads to excessive punishment but because it violates a fundamental principle of our criminal justice system: the punishment must fit the crime. Furthermore, several courts, including the *Wanstreet* court, implicitly recognize the doctrine when they refer to a statute’s "failure to differentiate."

While courts have never adopted the overbreadth doctrine, they have upheld the principles necessary for such an adoption. First, courts have adopted the relative proportionality principle. The overbreadth doctrine derives from relative proportionality; it requires that relative proportionality exist not only between statutes but within a given statute as well. Courts have applied relative proportionality in "lesser-included offense" cases. They have held sentences for a lesser-included offense of a crime unconstitutional when the offense carried a longer sentence than the crime itself.124

Those cases in which courts have required differentiated punishments for different crimes show support for the relative proportionality doctrine as well. For example, courts reviewing sentences under statutes allowing a broad range of punishment for conduct of widely-differing culpability have held that maximum sentences authorized under the statute may not be applied to some conduct outlawed by the statute.125 In *Thacker v. Garrison*,126 the defendant was convicted under a safecracking statute that allowed sentences from ten years to life. Because the defendant’s acts showed only a "minor" violation of the statute, the court held his fifty-year sentence disproportionate. Courts have also held statutes requiring high minimum sentences unconstitutional for their failure to differentiate.


Proportionality and Repeat Offenders

Thus, in *In re Grant*, the California Supreme Court held unconstitutional statutes that set a five-year minimum term before repeat drug offenders could be paroled.

By invalidating excessively long sentences for the less culpable conduct proscribed by a statute, courts "have implied that every defendant has a constitutional right to a sentence proportionate to his particular violation of the statute, even if the sentence is less than the maximum authorized for the offense." Thus, gradation of punishment beyond that established by a statute may be required. These cases establish another proposition as well: equal punishment for a broad range of crimes may violate proportionality.

The second prerequisite to establishing an independent overbreadth doctrine is to hold that the requirement to differentiate does not depend on the presence of excessive punishment. The "lesser-included offense" cases show that excessiveness, in fact, need not be required. In those cases, the sole basis for overturning the sentences was the relative disproportionality of the sentence for the lesser-included offense to the sentence for the "including" crime. The sentences for the lesser-included offenses were not excessive standing alone; absent the relative proportionality requirement, they would have been upheld.

*In re Grant* supports not requiring excessiveness to find disproportionality; in fact, the case appears to have been decided primarily on overbreadth grounds. In *Grant*, the challenged statutes required only five-year minimum sentences for repeat drug offenders, scarcely excessive sentences on their face. Although the *Grant* court noted that the five-year minimum punishment was excessive for certain of the acts prohibited, the court's primary complaint was that the statutes were overly broad because they failed to differentiate among defendants' moral culpability. The

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127. 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976).
129. 18 Cal. 3d at 10, 12-13, 17, 553 P.2d at 596, 598, 601, 132 Cal. Rptr. at 436, 438, 441.

The court stated:

The current provisions which are disapproved herein constitute cruel and unusual punishment because they fail to discriminate between those offenders on the one hand whose prior offenses were recent, serious or similar to the new offense and whose criminal motivations pose serious threats to society, and those offenders on the other hand who pose a lesser threat to society because their prior . . . convictions were remote in time, relatively trivial in scope or unrelated to the new conviction . . . . The penalties currently provided are cruel and unusual as to the latter group of offenders and, because they cannot be severed to eliminate application to such group, must be struck down in their entirety.

*Id.* at 17, 553 P.2d at 601, 132 Cal. Rptr. at 441; see also *Id.* at 8 n.6, 553 P.2d at 595 n.6, 132 Cal. Rptr. at 434 n.6 (“[o]ur disapproval of the instant provisions is based on their overbreadth . . . ”); *In re Rodriguez*, 14 Cal. 3d 639, 647, 537 P.2d 384, 390, 122 Cal. Rptr. 552, 558 (1975). *But see Grant*, 18 Cal. 3d at 13, 553 P.2d at 598, 132 Cal. Rptr. at 438 ("the standard is whether the manda-
court specifically noted that the statute encompassed conduct of widely differing culpabilities without consideration of particular defendants’ circumstances.130

The Supreme Court’s opinion in Weems— the opinion that originally adopted proportionality as a constitutional principle— also supports adopting overbreadth as an independent constitutional principle. The Court observed that “the law in controversy seem[ed] to be independent of degrees,” noting that the law only allowed sentences between twelve and twenty years for acts with great differences in culpability.131 It stated: “It must be confessed that [the law in question] excite[s] wonder in minds accustomed to a more considerate adaption of punishment to the degree of crime.” 132

West Virginia’s recidivist statute is similarly overbroad and should be held unconstitutional because of its failure to differentiate punishments for crimes of vastly differing moral culpability.133 The statute provides neither gradation nor court discretion in sentence length for a remarkably broad range of offenses. The statute requires the same sentence for a person convicted of second-degree murder, with past convictions for rape and first-degree assault, as for someone convicted for forgery with two past convictions for other minor crimes. The statute also fails to consider any individual circumstances that may mitigate or aggravate culpability within offenses.134 This further increases the wide range of culpability which must be treated identically within the terms of the statute.

The unconstitutionality of a nondifferentiated statute that requires defendants committing crimes of vastly different moral culpabilities to re-
Proportionality and Repeat Offenders

cieve the same sentence is supported by West Virginia Supreme Court decisions. First, the court has relied heavily on retribution principles on which the proportionality doctrine rests.135 Second, the court has said that situations may arise when proportionality will require gradation of punishment beyond that required by the terms of a statute. In State v. Houston,136 the court found that some sentences under the West Virginia robbery-by-violence statute,137 which allowed sentences from ten years to life, could be disproportionate.138

Last, Wanstreet supports a holding that the statute is unconstitutionally overbroad. Implicit in the court’s ruling is the conclusion that elemental unfairness results from treating those convicted of three minor crimes identical to those convicted of three major crimes. This is because while a life sentence may be appropriate for a criminal guilty of a lifetime of violent crime, it is unfair for someone like Wanstreet. Furthermore, Wanstreet shows that the West Virginia statute’s overbreadth leads to exces-

135. The proportionality analysis used by the Wanstreet court shows a reliance on retribution principles. The court’s finding that Wanstreet’s past long prison sentences were mitigating factors is an example. 276 S.E.2d at 213. Although not expressed by the court, there are two reasons why retribution principles should lead to this result. First, punishment atones for past crimes—the prisoner pays his or her debt to society—and therefore reduces any remaining moral culpability. Second, the overall retributive effect of the punishment depends on the total punishment received for past and present crimes; the long punishment for the past crimes increases the cumulative punishment the prisoner receives. The court also displayed “retribution” reasoning when it noted that a major problem with the recidivist statute is its undifferentiated nature. 276 S.E.2d at 213. See also note 59 supra (discussing West Virginia’s adoption of retribution reasoning in other cases).


138. 273 S.E.2d at 376-77. The court stated: “With the exception of the life recidivist statute . . . , we do not believe that the disproportionality principle can have any significant application other than to [the robbery-by-violence] type of sentencing statute. Id. at 391, But see State ex rel. Harris v. Calendar, 233 S.E.2d 318 (W. Va. 1977) (proportionality principle used to overturn incarcerations for non-criminal juveniles).

The Houston court found the robbery-by-violence statute constitutional even though the statute had the potential for excessive sentences. The holding was based on the open-ended nature of the statute’s sentencing provisions. Open-ended sentencing statutes traditionally have been upheld, despite their breadth, because they have the flexibility to allow a judge to give constitutional sentences. See Wanstreet, 276 S.E.2d at 212; Thacker v. Garrison, 445 F. Supp. 376, 380 (W.D.N.C. 1978); In re Rodriguez, 14 Cal. 3d 639, 647-48, 537 P.2d 384, 390-91, 122 Cal. Rptr. 552, 558-59 (1975); State v. Evans, 73 Idaho 50, 245 P.2d 788 (1952). Unlike an open-ended statute, West Virginia’s recidivist statute fails to allow for any flexibility in sentencing.

As an alternative to holding the statute unconstitutional, the court can draw a line between the constitutional and unconstitutional portions of the statute. See Grant, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976). The best “bright line” in West Virginia’s recidivist statute would be between violent and nonviolent crimes. The West Virginia court has already relied heavily on this distinction. Nevertheless, the court should be wary of involving itself in limiting the statute because this involves line drawing, which is the legislature’s province.
sive sentences, and that the court therefore need not rely solely on "overbreadth" to overturn the statute.\footnote{Another serious constitutional difficulty with West Virginia's recidivist statute is that it de facto punishes lesser offenses more than greater ones. This occurs because the statute enhances the sentences received by petty criminals far more than it enhances sentences of dangerous criminals, who already receive substantial sentences. A major complaint with broad statutes of the type West Virginia has is that they have their harshest effect on the less dangerous criminal. \textit{See} Katkin, \textit{Habitual Offender Laws: A Reconsideration}, 21 Buffalo L. Rev. 99, 106–08 (1971).}

IV. CONCLUSION

\textit{Wanstreet} and other recent state opinions show both a divergence between state and federal courts on the use of proportionality and dissatisfaction in some states with \textit{Rummel}. They also show that, so long as principles of federalism prevent the federal courts from reviewing state sentencing, the burden rests on the state courts to ensure that punishments fit crimes. Recent cases indicate that it is likely that a number of state courts will do so.\footnote{See \textit{State v. Fain}, 94 Wn. 2d 387, 617 P.2d 720 (1980); \textit{Wanstreet}, 276 S.E.2d 205 (W. Va. 1981). Because the California court has based many of its decisions on its state constitution, the California standard also is likely to differ from the federal. \textit{See}, e.g., \textit{Grant}, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976); \textit{In re Foss}, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974). \textit{See also} \textit{People v. Lorentzen}, 387 Mich. 167, 194 N.W.2d 827 (1972) (calling for strong proportionality test based on state constitution).} The result will be a system of judicial federalism—at least in eighth amendment analysis—with widely disparate standards existing at the federal and state levels.

With the repeal of Washington's habitual criminal statute,\footnote{\textit{See note 2 supra.}} West Virginia's recidivist statute becomes one of the two broadest and harshest in the country. Only West Virginia and Texas now demand life imprisonment for three nonviolent felonies. The steady trend has been away from these sweeping statutes with draconian punishments.

The West Virginia court should, based on its state constitution, reconsider the constitutionality of its recidivist statute. \textit{Wanstreet} established moral culpability and proportionality as constitutional standards. The court should take the next step and apply proportionality to hold its recidivist statute unconstitutionally broad for its failure to differentiate among crimes of widely varying culpability.

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