Solem v. Helm: Extending Judicial Review under the Cruel and Unusual Punishments Clause to Require "Proportionality" of Prison Sentences

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SOLEM v. HELM: EXTENDING JUDICIAL REVIEW UNDER THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE TO REQUIRE “PROPORTIONALITY” OF PRISON SENTENCES

The eighth amendment to the United States Constitution proscribes the infliction of “cruel and unusual punishments.” The language of the amendment was borrowed directly from the Virginia Constitution of 1776, which had employed the wording found in the English Bill of Rights of 1689. Consequently, there is sparse legislative history from which its meaning may be ascertained.

Under the American interpretation, it was generally assumed by courts and commentators that the cruel and unusual punishments clause was addressed solely to the mode or method of punishment imposed upon one convicted of a crime. It was more than a century after the amendment’s adoption when the United States Supreme Court first recognized that punishments that were disproportionate in their severity to the crime committed might violate the cruel and unusual punishments clause. The Court has applied a proportionality analysis to clearly unusual modes of punishment and, more recently, to sentences of death.

Until 1980, however, the Court had never expressly determined whether a term of imprisonment by its excessive length could violate principles of proportionality and thereby trigger the proscriptions of the eighth amend-

1. U.S. CONST. amend. VIII. The eighth amendment reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
3. United States v. Weems, 217 U.S. 349, 368, 378 (1910). The Weems Court noted that although the scope of the clause had never been clearly defined, the amendment could be interpreted to proscribe, at a minimum, torturous and barbarous punishments. Id. at 368. See generally Granucci, “Nor Cruel and Unusual Punishments Inflicted”: The Original Meaning, 57 CAL. L. REV. 839 (1969).
5. Id.; see infra note 22 and accompanying text.
ment. In *Rummel v. Estelle*, the Court rejected the argument that the imposition of a life sentence on a third time offender violated principles of proportionality and thus abridged eighth amendment guarantees. The Court deferred to the judgment of state legislators on the appropriateness of prison terms to particular offenses. Because the Court appeared to premise its holding on the rationale that the death penalty is different in kind from other forms of punishment, it appeared following *Rummel* that, except in extreme circumstances, proportionality analysis would necessarily be limited to capital cases.

In *Solem v. Helm*, decided only three years after *Rummel*, the Supreme Court in a five-to-four decision applied the proportionality principle to circumstances remarkably similar to those before the Court in *Rummel*. Helm was convicted under a recidivist statute and sentenced to life imprisonment without possibility of parole. As in *Rummel*, none of Helm's six prior felony convictions involved violent crimes. Justice Powell, who wrote for the dissent in *Rummel*, wrote for the majority in *Solem v. Helm*. He distinguished the two cases by emphasizing that Helm's sentence precluded all possibility of parole, while Rummel would be eligible for parole in approximately twelve years.

This note will examine the majority and dissenting opinions in *Solem v. Helm*, comparing them with prior Supreme Court and lower court rulings. It will discuss the proportionality principle as it has evolved in eighth amendment jurisprudence and demonstrate that, although the rationale in *Helm* is just and finds support in prior Supreme Court decisions, it cannot rationally be reconciled with *Rummel v. Estelle*. Despite its broad language, the *Helm* decision does not clarify the approach to be followed in future eighth amendment cases. The opinion leaves open the question of whether the proportionality test applied in *Helm* is applicable to all sentences of imprisonment or only to terms of life imprisonment without possibility of parole. Although the opinion suggests that where a review of

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8. Rummel was convicted under a Texas recidivist statute which provided that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." 445 U.S. at 264. The statute itself had been previously upheld as constitutional in Spencer v. Texas, 385 U.S. 554 (1967). Rummel sought only to challenge the statute's application to his case as cruel and unusual.
10. 445 U.S. at 272. See infra notes 129-60 and accompanying text.
12. Id. at 3012-13; but see id. at 3017 (Burger, C.J., dissenting). The Chief Justice maintained that Helm's crimes had the potential for violence.
13. Id. at 3015-16.
proportionality is mandated, extended judicial review will not be required in all cases, the Court does not promulgate adequate standards for determining when the three-part proportionality test articulated in *Helm* is properly invoked.

I. EVOLUTION OF THE PRINCIPLE OF PROPORTIONALITY

A. Historical Justification

Because the language of the eighth amendment is derived from the English Bill of Rights of 1689, the amendment is presumed to afford the individual at least those protections embodied in its English counterpart.\(^{14}\) It is widely believed that at the time of its adoption the framers of the United States Constitution intended primarily to prohibit punishments that were cruel in their method, rather than excessive in relation to the crime.\(^{15}\) American courts virtually ignored the cruel and unusual punishments clause for nearly 100 years.\(^{16}\) *United States v. Weems*\(^{17}\) was the first United States Supreme Court decision to articulate the notion that the eighth amendment required a penalty to be in proportion to the crime for

14. Id. at 3007 n.10 and accompanying text. The *Helm* Court noted that historical commentators have maintained that the American colonists sought guarantees that would protect the same liberties enjoyed by English citizens. The Court contended that it was “a longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged” (quoting R. Perry, Sources of Our Liberties 236 (1959)). Id. at 3007.

15. Granucci, supra note 3, at 842. The author maintains, however, that this limited interpretation of the English law was manifestly incorrect. He stated a fresh look at the history of punishment in England, and especially the framing of the English Bill of Rights of 1689, indicates that the framers [of the American Constitution] themselves seriously misinterpreted English law. Not only had Great Britain developed, prior to 1689, a general policy against excessiveness in punishments, but it did not prohibit “barbarous” punishments that were proportionate to an offense.

Id. at 843-44. See Comment, The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine, 24 Buff. L. Rev. 783 (1975). The authors contend the American framers did, in fact, recognize that the cruel and unusual punishments clause barred disproportionate penalties and that the American judiciary misread their intent. Id. at 831. They note that Thomas Jefferson’s letters support a finding that the framers intended to prohibit disproportionately severe punishments. These letters, they maintain, constitute “an American reference which recognized that both the mode of punishment and the duration of it must be proportioned to the crime in order that the penalty be just and legitimate.” Id. at 818.

16. Cf. Hobbs v. State, 133 Ind. 404, 409-10, 32 N.E. 1019, 1020-21 (1893); Granucci, supra note 3, at 842 (“Attempts to extend the meaning of the clause to cover any punishment disproportionate to the crime were rebuffed throughout the nineteenth century and commentators believed the clause to be obsolete.”).

17. 217 U.S. 349 (1910).
which it was imposed.\textsuperscript{18}

The \textit{Weems} case involved peculiar facts. The case arose under the Philippine Bill of Rights, which had incorporated certain provisions of the United States Constitution, among them the language of the eighth amendment.\textsuperscript{19} Weems had been convicted of falsifying an official document, and, pursuant to Philippine law, the penalty of “cadena temporal” was imposed.\textsuperscript{20} This punishment included imprisonment for a term of ten to twenty years, at hard and “painful” labor, chained by the wrists and ankles.\textsuperscript{21} In addition, various civil disabilities attached that remained in force throughout the offender’s lifetime.\textsuperscript{22} Because the Court determined the punishment to be inherently cruel and alien to Anglo-Saxon law, it did not rely exclusively on a proportionality theory in order to find an eighth amendment violation.\textsuperscript{23} The Court maintained, however, that although it had not previously determined the exact scope of the cruel and unusual punishments clause, included within its ambit was the requirement that the punishment be proportionate to the crime committed.\textsuperscript{24} In determining

\textsuperscript{18} The principle of proportionality had been advanced previously by Justice Field, dissenting in \textit{O'Neill v. Vermont}, 144 U.S. 323 (1892). In \textit{O'Neill}, the defendant was convicted for selling liquor in Vermont (a dry state) 307 times, and each sale was deemed an individual offense for which a separate penalty was imposed. The defendant was fined $20 per offense, and if the judgment was not satisfied within a specified period of time, he was to be jailed three days for every dollar of the total fine. The cumulative sentence amounted to approximately 54 years of confinement. The majority, perceiving no federal question before the Court, dismissed the case. Justice Field, however, in his dissent, squarely addressed the eighth amendment issue, asserting that the amendment applied to the states as well as to the federal government. He compared the penalty inflicted with punishment, prescribed throughout the state for other, more serious crimes, noting that O’Neill’s punishment was “six times as great as any court in Vermont could have imposed for manslaughter, forgery, or perjury,” and that had O’Neill “been found guilty of . . . highway robbery, he would have received less punishment.” 144 U.S. at 339 (Field, J., dissenting). Justice Field concluded that the cruel and unusual punishments clause “is directed, not only against [barbarous and torturous punishments] but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.” \textit{Id.} at 339-40.

\textsuperscript{19} \textit{Weems}, 217 U.S. at 367.

\textsuperscript{20} \textit{Id.} at 363.

\textsuperscript{21} \textit{Id.} at 364.

\textsuperscript{22} \textit{Id.} at 364-65. The Court noted that the collateral penalties included “civil interdiction,” which deprived the person punished of “rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts \textit{inter vivos}.” The prisoner, upon his release from confinement, would remain subject to the “penalty of perpetual disqualification,” which included “deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to public office, the disqualification to acquire honors, etc., and the loss of retirement pay, etc.” \textit{Id.}

\textsuperscript{23} \textit{Id.} at 365-66, 377.

\textsuperscript{24} \textit{Id.} at 380-81. The Court adopted the rationale of Justice Field’s dissent in \textit{O'Neill v. Vermont}. See supra note 18.
whether Weems' sentence was proportionate to his crime, the Court employed a comparative analysis. It first compared "cadena temporal" with punishments for similar offenses in the United States and other nations. It then examined the penalties inflicted for more severe crimes in the Philippines. Additionally, the Court examined the nature of the offense. The crime committed by the petitioner was not one that posed a great threat to society since it was nonviolent in nature. The Court concluded that the offense committed did not warrant the infliction of the disproportionately severe punishment, noting that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." While conceding that normally "prominence is given to the power of the legislature to define crimes and their punishment," the Court observed that legislative action is clearly limited by the eighth amendment.

The Weems decision was the first to recognize proportionality as a constitutional requirement and to apply a comparative test to determine whether a given penalty was excessive in relation to the offense. The Court examined the nature of the crime, and compared the penalty inflicted with those imposed both in other jurisdictions for the same offense, and in the same jurisdiction for more serious offenses. It held that the punishment suffered by Weems was "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. [The] punishments come under the condemnation of the bill of rights, both on account of their degree and their kind." In succeeding years, however, not all American courts employed the Weems rationale in their analysis of issues raised under the eighth amendment. In part this may have been because the opinion was issued by a six member rather than a nine member

25. Id.
26. See Granucci, supra note 3, at 843. Weems' offense was wholly nonviolent in nature. It involved merely the falsification of a public document.
27. 217 U.S. at 367. The Court observed that a Massachusetts court had recognized the proportionality principle when it had acknowledged "the possibility that imprisonment in the state prison for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment." Id. at 368 (quoting McDonald v. Commonwealth, 173 Mass. 322 (1899)).
28. Id. at 378.
29. Id. Where legislative power encounters a constitutional limitation, it then becomes the legal duty of the judiciary to review that power. Id. at 378-79.
31. 217 U.S. at 380-81.
32. Id. at 377.
33. Some courts interpreted Weems narrowly and maintained that absent unusual accessory penalties, the Court would not have held Weems' sentence to be disproportionate. See, e.g., Rummel v. Estelle, 445 U.S. 263, 294 (1980). Other courts recognized in Weems a
Court.\textsuperscript{34} The next opportunity for the Court to expand its definition of the cruel and unusual punishments clause arose fifty-two years after \textit{Weems} in \textit{Robinson v. California}.\textsuperscript{35} In \textit{Robinson}, a drug addict was convicted under a statute that classified drug addiction as a misdemeanor, punishable by imprisonment for ninety days to one year.\textsuperscript{36} Careful to avoid treading on traditional state authority in the area of drug abuse, the Court stressed that the status of being an addict was considered a criminal offense by the California courts in their interpretation of the statute,\textsuperscript{37} and it was this manner of applying the statute that the Court found objectionable. Because the constitutional requirement that a punishment be proportionate to the offense. \textit{See, e.g.,} Hart \textit{v. Coiner}, 483 F.2d 136 (4th Cir. 1973), \textit{cert. denied}, 415 U.S. 983 (1974).

34. \textit{See Comment}, supra note 15, at 796 n.55. Thus, the \textit{Weems} opinion was subscribed to by only a four member "majority." At the time of argument there were seven members; one died in the interim. \textit{Id}. The deceased member, Justice Brewer, was sympathetic to the majority rationale, having joined the dissent in \textit{O'Neill}. Granucci, supra note 3, at 843. The Supreme Court's decision in \textit{Badders v. United States}, 240 U.S. 391 (1916), clouded the issue of \textit{Weems}' intended scope. Significantly, Justice Holmes, who joined the dissent in \textit{Weems}, wrote the opinion for a unanimous Court. In \textit{Badders}, a defendant challenged a sentence of five years imprisonment on each of seven counts of mail fraud. Each count arose from the mailing of a separate letter. Although the respective prison terms were to be served concurrently, the sentence also imposed a $1,000 fine for each offense, totaling $7,000. \textit{Id}. at 393. The Court barely acknowledged the eighth amendment challenge to the sentence, concluding that Congress has authority to regulate the mails \"[a]nd there is no ground for declaring the punishment unconstitutional." \textit{Id}. at 394. The Court engaged in no proportionality analysis at all. In part, this may have been because five year concurrent sentences do not appear to be disproportionate in relation to the crimes involved. \textit{Badders} may have contributed to the confusion that resulted in the split of authority among later courts. Some courts have since held that the Constitution requires that punishments may not be excessive in relation to the crime, see infra notes 56-75 and accompanying text; others have adhered to the view that the cruel and unusual punishments clause addresses only those punishments cruel, torturous, or barbarous in the method in which they are inflicted; see infra notes 76-85 and accompanying text.

35. 370 U.S. 660 (1962). In the intervening years, the Supreme Court did, however, keep the proportionality principle alive in dicta. In \textit{Trop v. Dulles}, 356 U.S. 86 (1958) (plurality opinion), petitioner lost his American citizenship for desertion during wartime. Because desertion under these circumstances was punishable by death and the petitioner had received the lesser penalty of denationalization, the Court maintained that he was precluded from raising the argument that his punishment was excessive in comparison to the nature of his offense. \textit{Id}. at 99. Instead, the Court looked to "the principle of civilized treatment guaranteed by the Eighth Amendment." \textit{Id}. It employed a comparative analysis noting that very few nations utilized denationalization as a punishment for any crime. \textit{Id}. at 102. In holding that the punishment was by its very nature cruel, the Court postulated that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." \textit{Id}. at 101. The Court rejected a static interpretation of the amendment's inhibitions, preferring to leave open the approach to be followed in future eighth amendment adjudication.


37. The Court observed that it would be possible to construe the statute so as to demand
some act, and thus avoid imposing a criminal sanction for the "status" of being addicted to drugs. \textit{Id}. at 665.

38. \textit{Id}. at 664, 666.
40. \textit{Id}. at 676.

41. \textit{See}, e.g., Comment, \textit{supra} note 15, at 802. Some commentators suggest that the Robinson decision was improperly decided on eighth amendment grounds. \textit{See} Comment, \textit{Making the Punishment Fit the Crime}, 77 \textit{HARV. L. REV.} 1071 (1964). The author speculates that \textit{Robinson v. California} may have established in the eighth amendment a basis for invalidating legislation that is thought inappropriately to invoke the criminal sanction, despite an entire lack of precedent for the idea that a punishment may be deemed cruel not because of its mode or even its proportionality but because the conduct for which it is imposed should not be subjected to the criminal sanction. \textit{Id}. at 1071.

42. Moreover, \textit{Robinson} affirmatively established the application of the cruel and unusual punishments clause to the states. 370 U.S. at 675.

43. The first case was Furman v. Georgia, 408 U.S. 238 (1972). In \textit{Furman}, Georgia's capital punishment statute was attacked on essentially procedural grounds. The decision was made up of five separate opinions in support of the judgment, which reversed the penalty of death. Four Justices dissented. The Court invalidated the statute because it vested in the jury virtually unlimited discretion to decide whether to impose death for certain crimes. \textit{See} Comment, \textit{supra} note 15, at 805-06. It was therefore primarily the procedure followed in arriving at the death penalty that was at issue in \textit{Furman}.

The various \textit{Furman} opinions further developed the comparative approach to analyzing proportionality that would later be discussed fully in \textit{Solem v. Helm}. Justice Brennan's concurring opinion focused on "objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable." 408 U.S. at 278 (Brennan, J., concurring). To avoid blurring the line between judicial and legislative prerogative, Justice White, in his concurring opinion, commented that judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, the Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the
Court undertook an extensive review of capital punishment statutes applying eighth amendment principles. In *Coker v. Georgia*, a plurality of the Supreme Court reaffirmed the principle of proportionality as inherent in eighth amendment analysis. The Court expressly struck down a death sentence as being disproportionate, and thus "cruel and unusual" in nature. The question before the Court was whether a death sentence was an excessive penalty for a conviction of rape, and therefore forbidden by the cruel and unusual punishments clause. The Court examined historical and objective evidence in an effort to avoid the danger of deciding...
eighth amendment violations on the basis of subjective values. Accordingly, the Court inquired into the nature of the crime, the punishment imposed in other jurisdictions for rape, and the penalties available in the same jurisdiction for other offenses. Additionally, the Court examined the frequency with which juries actually imposed the death penalty when it was available, as indicia of "evolving standards of decency that mark the progress of a maturing society." In concluding that the death penalty for the crime of rape was disproportionate and violated the cruel and unusual punishments clause, the Court impliedly counseled caution when it recognized that the death penalty "is unique in its severity and irrevocability."

The Coker Court did not address whether proportionality principles could be properly applied to cases involving sentences of imprisonment. The Court's emphasis on the unique nature of the death penalty, however, could be interpreted as limiting the application of proportionality analysis only to capital cases. While some courts subsequently adopted this view, lower court response was by no means uniform.

49. Id. at 592. The Court cautioned that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices. Judgment should be informed by objective factors to the maximum possible extent."

50. Id. at 593-600.

51. Id. at 596. See Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); see also supra note 35.

52. 433 U.S. at 598 (quoting Gregg v. Georgia, 428 U.S. at 165-66). In a dissenting opinion, Chief Justice Burger contended that the Court was "overstepp[ing] the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature." 433 U.S. at 604 (Burger, C.J., dissenting). Chief Justice Burger, who wrote the Helm dissent, thus reiterated the conflict that historically had characterized eighth amendment jurisprudence.

Enmund v. Florida, 458 U.S. 782 (1982), is a further illustration of this ideological split. In Enmund, the Court held the death penalty to be unconstitutionally disproportionate for felony murder, where the petitioner "neither took life, attempted to take life, nor intended to take life." Id. at 787, 801. The Court employed a comparative proportionality analysis, and although "current legislative judgment" was inconclusive, determined that capital punishment was excessive for felony murder. Id. at 793. The petitioner's lack of intent to kill was significant in the Court's evaluation of the nature of the crime and of the criminal. The Enmund dissent addressed the potential for interjecting subjective values of judges that inhered in the Court's rule, and maintained that the petitioner "failed to show that contemporary standards, as reflected in both jury determinations and legislative enactments, preclude imposition of the death penalty for accomplice felony murder." Id. at 826 (O'Connor, J., dissenting). Moreover, the dissent understood the holding to raise "intent to kill" to the level of a constitutional requirement for the imposition of the death penalty, and maintained that by superseding state judgment, the holding violated the constitutionally mandated separation of powers in our federal system. Id. at 802.
B. Lower Court Decisions: Conflicting Interpretations of Supreme Court Precedent in Applying Proportionality Principles

One commentator has suggested that "[t]he clear constitutional acceptance of the principle of proportionality should not be mistaken for certainty as to its content." These words find support in lower court decisions which have vacillated widely in their interpretation of the meaning and scope of proportionality principles. Prior to the Supreme Court's decision in *Rummel v. Estelle*, some courts restricted proportionality analysis to instances where the punishment imposed is attacked as either cruel in its method, or irrevocable and thus different in kind, such as capital punishment. Other courts have applied a proportionality analysis to sentences of imprisonment, and have held that a punishment may be found to be cruel and unusual solely on the basis of excessive length.

1. An Expansive View of the Proportionality Principle

The first significant federal court decision to extend the proportionality rationale to a term of years in prison was *Hart v. Coiner*. The petitioner in *Hart* was sentenced to life imprisonment pursuant to a West Virginia recidivist statute. He did not contest the constitutional validity of the statute itself; rather he maintained that the sentence as applied to his case was grossly disproportionate to the underlying offenses and, therefore, constituted cruel and unusual punishment. The United States Court of Appeals for the Fourth Circuit interpreted Supreme Court decisions under the eighth amendment broadly, as advocating a flexible approach to a de-

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56. 483 F.2d 136 (4th Cir. 1973).

57. The statute imposed a mandatory life sentence for "anyone who has been convicted three separate times of offenses punishable by confinement in a penitentiary," *Id.* at 138. Hart's three convictions consisted of writing a $50 check on insufficient funds in 1949, transporting forged checks totalling $140 across state lines in 1955, and perjury. *Id.*

58. *Id.* at 139. Some courts hold that a challenge to a sentence necessarily attacks the statute itself, assuming the law is valid and the penalty is within the maximum specified. See, e.g., United States v. Washington, 578 F.2d 256 (9th Cir. 1978); Downey v. Perini, 518 F.2d 1288 (6th Cir.), *vacated on other grounds*, 423 U.S. 993 (1975); United States v. Dawson, 400 F.2d 194 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969).

59. 483 F.2d at 139.
termination whether particular punishments were cruel and unusual.\textsuperscript{60} In the Fourth Circuit's view, the eighth amendment, as interpreted by the Supreme Court, impliedly included sentences of imprisonment within its prohibition.\textsuperscript{61} The fact that the statute involved in \textit{Hart} was a recidivist statute did not alter the court's approach. Although the analysis was complicated by Hart's status as an habitual offender, the court reasoned that the punishment must nevertheless bear some reasonable relationship to the gravity of the underlying offenses.\textsuperscript{62}

Thus, the \textit{Hart} court adopted a proportionality analysis and developed a four-part test comprised of "objective factors" to be weighed in the assessment of proportionality. First, the court analyzed the nature of the offense, which necessitated a consideration of the "element of violence and danger to the person."\textsuperscript{63} Hart's three convictions were essentially nonviolent property offenses, and the court therefore found them to be relatively minor.\textsuperscript{64} Second, the court examined the legislative goals sought to be achieved by the statute.\textsuperscript{65} Although the court found that the statute accomplished a legitimate purpose in deterring repeat offenders, it noted that this goal could be served by a less severe punishment that took into consideration the gravity of the underlying crimes.\textsuperscript{66} Third, the court compared the punishments available in other jurisdictions for a similar offense with the penalty imposed upon the petitioner and found that only three other states mandated life imprisonment after three nonviolent felony convictions.\textsuperscript{67} Lastly, the court examined punishments imposed in the same jurisdiction for more serious crimes and determined that life imprisonment was reserved for the most serious offenses.\textsuperscript{68} Application of these objective criteria revealed "irrationally disparate treatment"\textsuperscript{69} of the petitioner, and thus the Fourth Circuit held that the sentence violated the cruel and unusual punishments clause.\textsuperscript{70}

\begin{footnotes}
\footnote{60. \textit{Id.} at 139-40. The court read the \textit{Weems} opinion as recognizing the possibility that a prison sentence "for a long term of years might be so disproportionate" that it would violate the eighth amendment (quoting United States v. \textit{Weems}, 217 U.S. 349, 368 (1910)).}
\footnote{61. \textit{Id.}}
\footnote{62. \textit{Id.} at 142.}
\footnote{63. \textit{Id.} at 140.}
\footnote{64. \textit{Id.}}
\footnote{65. \textit{Id.} at 141.}
\footnote{66. The Court stated that "[a]ssuming the validity of the deterrent theory, and there is room for doubt, then if a life sentence is good for the purpose, surely a sentence of death would be better." \textit{Id.} (footnote omitted).}
\footnote{67. \textit{Id.}}
\footnote{68. \textit{Id.} at 142.}
\footnote{69. \textit{Id.}}
\footnote{70. \textit{Id.} at 143. The Fourth Circuit, in a decision subsequent to \textit{Hart}, sought to limit the
The United States Court of Appeals for the Sixth Circuit adopted the Hart analysis in *Downey v. Perini*. The court in *Downey* held that ten- to twenty-year prison sentences were disproportionate in relation to convictions for possession and sale of marijuana and thus violated the eighth amendment. It concluded that a proportionality analysis, similar to the one applied by the Fourth Circuit in *Hart*, was required by the reasoning, if not the holdings, of earlier Supreme Court opinions as well as prior Sixth Circuit cases. The court stated specifically that “a sentence which is disproportionate to the crime for which it is administered may be held to violate the Eighth Amendment solely because of the length of imprisonment imposed.”

2. **A Restrictive View of the Role of the Judiciary**

Other federal courts have adopted a narrower interpretation of the cruel and unusual punishments clause. *Smith v. United States*, decided by the United States Court of Appeals for the Tenth Circuit, illustrates the deferment of proportionality analysis to cases where the crimes were relatively nonviolent in nature. In *Griffin v. Warden*, 517 F.2d 756 (4th Cir.), cert. denied, 423 U.S. 990 (1975), Griffin, a habeas petitioner, argued that the *Hart* decision required a reversal of his life sentence, imposed pursuant to West Virginia's Habitual Offender Act. *Id.* at 757. Griffin had previously been convicted for breaking and entering, and for burglary. His principal offense was grand larceny. *Id.* Because his underlying offenses posed a threat of danger to persons and property, the court concluded that *Hart* did not mandate granting a writ of habeas corpus. *Id.* The *Griffin* opinion illustrates a cautious approach in reviewing claims of disproportionate prison sentences and provides some evidence of judicial competence and willingness to overturn only those sentences that exceed the clear bounds of constitutional limitations. *See* *Carmona v. Ward*, 676 F.2d 405 (2d Cir. 1978), cert. denied, 439 U.S. 109 (1979); *see infra* notes 92-99 and accompanying text.

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1. *518 F.2d 1288 (6th Cir.), vacated on other grounds, 423 U.S. 993 (1975).*

2. *Id.* at 1292.

3. *Id.* at 1290. The court determined that a review of Supreme Court cases, including *Weems, Furman,* and *Trop*, revealed that the cruel and unusual punishments clause did “not have a rigid and immutable meaning.” *Id.* Additionally, the court observed that prior to *Weems*, the Supreme Court had, in *Howard v. Fleming*, 191 U.S. 126 (1903), addressed an eighth amendment challenge based on the length of a prison sentence but had decided the sentence was not cruel and unusual. *Id.*

4. *See* *Hermans v. United States*, 163 F.2d 228 (6th Cir.), cert. denied, 332 U.S. 801 (1947) (“long-term imprisonment could be so disproportionate to the offense as to fall within the inhibition of the cruel and unusual punishments clause”).

5. *Id.* For examples of state cases following a proportionality principle in sentencing, see *Wanstree v. Bordenkircher*, 276 S.E.2d 205 (W. Va. 1981) (construing a state constitution which expressly requires proportionality, the court found a life sentence constitutionally invalid where a recidivist had committed three nonviolent property offenses); *State v. Lee*, 558 P.2d 236 (Wash. 1976) (life sentence for robbery not cruel and unusual punishment where defendant had several prior violent felony convictions); *In re Lynch*, 503 P.2d 921 (Cal. 1972) (life sentence for second offense of indecent exposure is cruel and unusual).

6. *273 F.2d 462 (10th Cir. 1959), cert. denied, 363 U.S. 846 (1960).*
ence to legislative prerogative stressed by those courts following the narrow view. The facts in Smith were very similar to those before the Sixth Circuit in Downey. The defendant, a first offender, was incarcerated under a fifty-two-year prison sentence for several counts of possession and sale of marijuana and heroin. The court recognized that the sentence was unusually severe but refused to hold that it was cruel and unusual, since "under the federal practice, appellate courts are without power to control or modify a sentence which is within the limits fixed by a valid statute." The Smith court's rationale has been followed in other jurisdictions as well. In large part these courts have concluded that the cruel and unusual punishments clause is directed primarily to the methods of punishment imposed. A term of imprisonment, therefore, as long as it is within statutory limits, generally has not been considered cruel and unusual. The United States Court of Appeals for the Ninth Circuit adhered to this narrow reading in Anthony v. United States. The court held that two consecutive twenty-year prison sentences, imposed for convictions of two sales of marijuana, were not cruel and unusual. The Ninth Circuit focused on the method of punishment when it noted that fines and imprisonment were customary penalties for crime in the United States. In addressing the appellant's claim that his sentences were disproportionate in length, the court agreed that the punishment was severe, but refused to disturb the sentence because it fell within the statutorily prescribed maximum. It maintained that any defects in the statutory scheme should be remedied by the state legislature or Congress, not by the judiciary.

The courts that followed the narrow view have thus generally refused to apply proportionality principles to eighth amendment claims. While the Supreme Court's treatment of the death penalty cases has led some lower courts to employ a proportionality test in capital cases, the courts following

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77. Id. at 464.
78. Id. at 467. The dissent in Smith contended that although a sentence within the statutory limits will not ordinarily be modified on appeal, the appellate court is not without the power to do so when injustice would otherwise result. Id. at 469.
79. See Rener v. Beto, 447 F.2d 20, 23 (5th Cir. 1971), (A 30-year sentence for second offense marijuana possession was held to be constitutionally valid because it was within the statutory limits. The Court found it unnecessary to engage in proportionality analysis), cert. denied, 405 U.S. 1051 (1972). In Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978) (5th Cir. 1978) (panel decision); 587 F.2d 651 (5th Cir. 1978) (en banc), however, the Fifth Circuit did employ a proportionality analysis. See infra notes 104-27 and accompanying text.
80. 331 F.2d 687 (9th Cir. 1964).
81. Id. at 693.
82. Id.
83. Id. at 694.
84. Id.
the restrictive approach have declined to extend that rationale to terms of imprisonment.\textsuperscript{85}

3. The Middle Course: A Cautious Application of the Expansive View

The majority of federal courts have recognized that proportionality analysis is appropriate in certain circumstances. Some courts have extended proportionality review to cases involving prison sentences but have limited its application to avoid extended analysis of all eighth amendment claims.\textsuperscript{86} In \textit{United States v. Wardlaw},\textsuperscript{87} appellants were convicted of possession and importation of cocaine,\textsuperscript{88} and were sentenced to two concurrent ten-year terms in prison.\textsuperscript{89} While the United States Court of Appeals for the First Circuit recognized that proportionality analysis could be appropriately applied to prison sentences,\textsuperscript{90} the court maintained that the defendants' sentences were not grossly disproportionate to the offenses in light of the large quantity of drugs involved.\textsuperscript{91}

The United States Court of Appeals for the Second Circuit recognized the proportionality principle in \textit{Carmona v. Ward},\textsuperscript{92} but attempted to limit its application. In \textit{Carmona}, two habeas corpus petitioners challenged their indeterminate prison sentences imposed for cocaine trafficking convictions. They were serving sentences of four years to life and six years to life.\textsuperscript{93} The Second Circuit acknowledged a trend among courts to apply proportionality principles in cruel and unusual punishment cases.\textsuperscript{94} The court cautioned that excluding capital punishment cases, Supreme Court

\textsuperscript{85} For a narrow view of the role of the judiciary in reviewing criminal sentences, see \textit{Goodloe v. Parratt}, 453 F. Supp. 1380 (D. Neb. 1978). There, the Court rejected a proportionality test as inappropriate in all but capital punishment cases. \textit{Id.} at 1387. Goodloe, a habeas petitioner, was sentenced to 10- to 15-year concurrent sentences following his conviction for reckless driving and attempting to avoid arrest. \textit{Id.} at 1382. The court determined that proportionality analysis was "uniquely applicable to the sentence of death." \textit{Id.} at 1387. While \textit{Smith} and \textit{Anthony} did not address appropriate review of a death sentence, those cases notably were decided before the United States Supreme Court first tackled the many facets of the death penalty problem presented in the Georgia capital cases. \textit{See supra} notes 43-52 and accompanying text.

\textsuperscript{86} \textit{See, e.g.}, discussion of Griffin v. Warden, 517 F.2d 756 (4th Cir. 1975), \textit{supra} note 70.

\textsuperscript{87} 576 F.2d 932 (1st Cir. 1978).

\textsuperscript{88} \textit{Id.} at 932.

\textsuperscript{89} \textit{Id.} at 937.

\textsuperscript{90} \textit{Id.} The court noted that in \textit{Downey} and \textit{Hart} prison sentences had been found to be cruel and unusual. The court also cited Davis v. Zahradnick, 432 F. Supp. 444 (W.D. Va. 1977). \textit{See infra} notes 147-60 and accompanying text.

\textsuperscript{91} The defendants possessed more than 6 lbs of cocaine. 576 F.2d at 937.


\textsuperscript{93} \textit{Id.} at 406-07.

\textsuperscript{94} \textit{Id.} at 408.
decisions such as *Weems, Robinson*, and *Trop*, which employed a proportionality test, involved elements of cruelty. Nonetheless, the court noted that "a severe sentence imposed for a minor offense, could, solely because of its length, be cruel and unusual punishment." The *Carmona* court stressed the deference owed state legislatures in setting penalties, particularly where, as here, drug offenses were involved. The Second Circuit took this deference into account when it employed a three-pronged proportionality test which examined the nature of the offense, the punishments imposed in New York for more serious offenses, and punishments meted out in other jurisdictions for the same crime. Taking into consideration the possibility of parole afforded those sentenced to life imprisonment, the court determined that the sentences imposed did not constitute cruel and unusual punishment.

It is evident that the lower federal courts were sharply divided on whether proportionality principles governed all forms of punishment, or just the death penalty. A few courts extended proportionality principles to cases arising under the eighth amendment involving excessive prison sentences. Other courts, such as the Tenth Circuit in *Smith*, refused to employ a proportionality test and deferred to the judgment of state legislatures. Still other courts understood the Supreme Court to advocate the notion that proportionality principles inhered in eighth amendment analysis but sought to restrict the instances in which a comparative proportionality test would be invoked. Finally, in 1980, the United States Supreme Court, seeking to resolve conflicting lower court views concerning proportionality principles, issued its decision in *Rummel v. Estelle*.  

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95. Id.
96. Id. at 409.
97. Id. at 410. The New York legislature had enacted a relatively strict law in response to the severe drug problems experienced by the state. The Court observed that over half of the drug addicts in the United States reside in New York City. Id. at 412, 415.
98. Id. at 410-15.
99. Id. at 414. The court placed a great deal of weight on the seriousness of the petitioners' offenses. It noted that the "legislature could reasonably have found that drug trafficking is a generator of collateral crime, even violent crime [and] is a grave offense of the highest rank." Id. at 411.
100. Many courts relied on the same Supreme Court precedent yet arrived at different conclusions. Most courts refer to *Weems, Trop, Robinson*, and the death penalty cases. Those courts refusing to apply a proportionality test have often relied on *Badders v. United States*, 240 U.S. 391 (1916), see supra note 34; and *Graham v. West Virginia*, 224 U.S. 616 (1912), see infra note 123.
101. See supra notes 56-75 and accompanying text.
102. See supra notes 76-85 and accompanying text.
103. See supra notes 86-99 and accompanying text.
C. Rummel and Its Progeny: An Attempt to Limit Increasing Judicial Activism and Accommodate Principles of Federalism

1. The Rummel Decision: Deference to Legislative Judgment

Rummel v. Estelle rejected the notion that a prison sentence, excessive in its term of years to the gravity of the underlying offense, constituted cruel and unusual punishment. The decision expressly stated that, except in extremely rare cases, federal courts should not question whether a given punishment is excessive in relation to the offense. According to the Rummel Court, such analysis is properly left to state legislative bodies, which have superior ability to assess local policies and individual circumstances and thus set criminal penalties accordingly.

William Rummel was convicted and sentenced under a Texas recidivist statute that compelled the imposition of a life sentence upon an individual convicted of a third felony. Under the Texas statute, Rummel was eligible for parole in approximately twelve years. Rummel's two prior offenses included fraudulent use of a credit card, which yielded him $80 worth of goods, and passing a forged check for $28.36. Rummel's most recent offense consisted of obtaining $120.75 by false pretenses. All of these crimes were felony offenses at the time of Rummel's conviction. Rummel petitioned for a writ of habeas corpus, urging that his sentence was grossly disproportionate to his offenses. The United States Supreme Court, in an opinion written by Justice Rehnquist, affirmed the Fifth Circuit's denial of the writ and held that the sentence did not constitute cruel and unusual punishment.

The Court first distinguished the earlier death penalty cases from the factual issues presented by Rummel, contending that because the death penalty was qualitatively different from life imprisonment, the rationale employed in the capital punishment cases was of minimal assistance in

105. The Court noted that "[t]his is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent . . . if a legislature made overtime parking a felony punishable by life imprisonment." id. at 274 n.11.

106. Id. at 284.

107. Id. at 264; see also supra note 8.

108. Id. at 267.

109. Id. at 265-66.

110. Id. at 266.

111. Id.

112. Id. at 267.

113. Rummel was a 5-4 decision. Justice Stewart filed a concurring opinion. Id. at 285. Justice Powell, joined by Justices Brennan, Marshall, and Stevens, dissented. Id.

114. Id. at 285.
determining the constitutionality of Rummel's sentence.\textsuperscript{115} The Court then discussed the proportionality concept as it had been applied in its previous decisions. The Court distinguished \textit{Weems} by maintaining that the rationale of the \textit{Weems} Court could not be isolated from the peculiar facts of that case.\textsuperscript{116} It dismissed Rummel's argument that the \textit{Weems} rationale might be extended to support a determination that prison sentences could violate eighth amendment proscriptions on the basis of length alone.\textsuperscript{117} The \textit{Rummel} Court reasoned that the collateral civil disabilities that attended the prison sentence in \textit{Weems} were inextricably tied to the Court's rationale and holding in that case.\textsuperscript{118}

The Court evaluated, and rejected as unworkable, Rummel's proposed test.\textsuperscript{119} In the Court's view, parole eligibility complicated an objective analysis of Rummel's punishment. While it conceded that there is no enforceable right to early release, the Court concluded that the possibility could not be totally ignored in assessing the severity of Rummel's sentence.\textsuperscript{120} Focusing on the gravity of Rummel's offense, the majority maintained that the recidivist statute further enhanced the difficulty of

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 272.
\item \textsuperscript{116} \textit{Id.} at 273.
\item \textsuperscript{117} \textit{Id.} at 273-74. Rummel argued that the lengthy prison sentence alone provided a basis for the \textit{Weems} Court's finding that Weems' punishment was disproportionate. He also found support for his claim in the death penalty cases in which the Court employed a proportionality test. Moreover, Rummel argued that the nonviolent nature of his offenses and the small amounts of money involved were material factors. He urged the Court to employ these objective criteria to assess proportionality. \textit{Id.} at 272-76.
\item \textsuperscript{118} \textit{Id.} at 273-74. See supra note 22 and accompanying text. The Court maintained that 
\[ \text{[g]iven the unique nature of the punishments considered in} \textit{Weems} \text{and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.} \]
\textsuperscript{445} U.S. at 274. Justice Rehnquist emphasized that, in \textit{Badders}, the Court, only a few short years after deciding \textit{Weems}, found no basis for even addressing the eighth amendment claim raised. See supra note 34. The \textit{Badders} decision, in Rehnquist's view, lent additional support to the argument that the Court had always been reluctant to disturb legislatively prescribed criminal sentences. \textit{Id.} at 274.
\item \textsuperscript{119} \textit{Id.} at 281. Rummel argued that the Court should compare his sentence with recidivist schemes in other jurisdictions. \textit{Id.} at 279-80. He also maintained that his offenses were all minor property offenses rather than violent crimes against the person. \textit{Id.} at 275. The Court responded that there will always be one state that may be singled out for treating particular offenders more harshly than any other state. \textit{Id.} at 282.
\item \textsuperscript{120} \textit{Id.} at 281. The Court did recognize a distinction between the Texas statute under consideration in \textit{Rummel}, and one which precluded the possibility of parole, when it argued that "[i]f nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute . . . which provides for a sentence of life without parole." \textit{Id.}
employing a comparative test. Justice Rehnquist stressed the important state interest behind the statute, reasoning that it was not merely the nature of the underlying offenses Rummel was asking the Court to assess, but Texas' interest in deterring and punishing those who deviate from societal norms by habitually engaging in criminal activity. The Court asserted it had long recognized the danger of replacing legislative judgment with the "subjective views of individual Justices." It maintained that state legislatures are entitled to determine where the lines should be drawn in fixing criminal penalties, subject to those eighth amendment limitations that can be objectively identified. The Court, however, declined to propose an objective test to guide lower courts faced with such challenges in the future.

Justice Powell, writing for the dissent in Rummel, asserted that prior Supreme Court holdings did not limit the application of proportionality principles solely to death penalty cases. Moreover, he contended, the Court erred in considering the possibility of parole as part of its evaluation of the proportionality test outlined by Rummel. Powell would have extended the proportionality concept found in prior Supreme Court cases to Rummel's prison sentence, and applied a comparative test such as that

121. Id. at 276.
122. Id.
123. Id. at 274 (quoting Coker v. Georgia, 433 U.S. at 592; see supra notes 44-52 and accompanying text). The majority also cites in support of judicial restraint, Graham v. West Virginia, 224 U.S. 616 (1912). In Graham, decided two years after Weems, a three-time horse thief received a life sentence under West Virginia's recidivist statute. The Supreme Court gave only cursory recognition to the eighth amendment claim, dismissing it in one sentence as not cruel and unusual punishment. Id. at 631. The Rummel dissent asserted that Graham was not persuasive because it provided no analysis of the eighth amendment issue, and because it was decided before the amendment was held applicable to the states through incorporation into the fourteenth amendment. Rummel, 445 U.S. at 290 n.7 (Powell, J., dissenting).
124. 445 U.S. at 275-76.
125. Id. at 284.
126. Id. at 292-93 (Powell, J., dissenting).
127. Id. at 293-94 (Powell, J., dissenting). Justice Powell prefaced his analysis by outlining the reasons for his dissent: "(i) the penalty for a noncapital offense may be unconstitutionally disproportionate, (ii) the possibility of parole should not be considered in assessing the nature of the punishment, (iii) a mandatory life sentence is grossly disproportionate as applied to the petitioner, and (iv) the conclusion that this petitioner has suffered a violation of his Eighth Amendment rights is compatible with principles of judicial restraint and federalism." Id. at 286-87. Justice Powell contended that a petitioner has no right to be paroled, he will merely be eligible. In Powell's view, parole was thus no more than an act of executive grace. He noted that in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), the Court held "that a criminal conviction extinguishes whatever liberty interest a prisoner has in securing freedom before the end of his lawful sentence." Id. at 293.
enunciated by the Fourth Circuit in *Hart*.\(^{128}\)

For the most part, lower federal courts interpreted the *Rummel* decision as precluding judicial attempts to apply proportionality principles where a term of imprisonment is imposed.\(^{129}\) Some courts, however, were reluctant to abandon proportionality analysis.\(^{130}\)

2. *Lower Court Response: Reading Rummel as Minimizing Judicial Review*

In *United States v. Valenzuela*,\(^{131}\) Jose Guadalupe Valenzuela was given a life sentence without prospect for parole following multiple convictions, all of which arose from his participation in a major drug-dealing enterprise.\(^{132}\) He argued that his sentence violated the cruel and unusual punishments clause of the eighth amendment because it was grossly disproportionate to his offense.\(^{133}\) The United States Court of Appeals for the Ninth Circuit interpreted *Rummel* as “significantly limit[ing] the availability of Valenzuela’s argument that his sentence is disproportionate to the crime of which he was convicted.”\(^{134}\) It noted that the *Rummel* decision precluded a proportionality challenge to a prison sentence in all but the most extreme cases.\(^{135}\) Furthermore, the court refused to accept Valenzuela’s argument that because his life sentence was without possibility of parole, it was akin to a sentence of death.\(^{136}\)

Other federal courts have summarily rejected claims of disproportionate punishment under the eighth amendment in a similar manner. Courts

\(^{128}\) *Id.* at 304-07. The Fourth Circuit in *Hart* relied on the rationale of earlier Supreme Court cases in applying a proportionality test to a claim that a sentence for a term of years in prison violated the cruel and unusual punishments clause. *See supra* notes 56-70 and accompanying text.

\(^{129}\) *See infra* notes 131-38 and accompanying text; *see also* The Supreme Court, 1979 Term, 94 Harv. L. Rev. 75 (1980). (The author remarked that the eighth amendment’s “suspicion of legislative pronouncements extends to all punishments, yet Justice Rehnquist simply immunized the whole class of cases involving prison sentences from constitutional scrutiny.”). *Id.* at 495.

\(^{130}\) *See, e.g.,* Hayes v. Bordenkircher, 621 F.2d 846 (6th Cir. 1980); *see also infra* notes 139-47 and accompanying text.

\(^{131}\) 646 F.2d 352 (9th Cir. 1980).

\(^{132}\) He was convicted of conspiracy, several counts of drug distribution and ongoing criminal enterprise. It was the latter offense for which he received the life imprisonment sentence. *Id.* at 353. The court stressed the gravity of the crime: Valenzuela was involved in “a long-term, large-scale, highly profitable drug operation.” *Id.* at 354 n.1.

\(^{133}\) *Id.* at 354.

\(^{134}\) *Id.*

\(^{135}\) *Id.; see supra* note 105 and accompanying text.

\(^{136}\) The court interpreted Supreme Court decisions as “never indicat[ing] that a life sentence without parole is constitutionally different from other imprisonment sentences.” 646 F.2d at 352.
have dismissed with little or no analysis both claims in which the punishment imposed was less severe than Rummel's and claims based on offenses arguably more serious. Moreover, some courts have appeared less inclined to review prison sentences within statutorily defined limits, and have cited Rummel in support for a finding that such sentences are virtually immune to a proportionality attack.

Some courts, however, have displayed considerable reluctance in discarding the proportionality analysis articulated in Weems and Hart. In Hayes v. Bordenkircher, the Sixth Circuit continued to engage in a review of sentences of imprisonment based on proportionality principles. Hayes was convicted of cashing a forged check under a recidivist statute in effect at the time of his trial, but repealed before appellate review. Hayes' prior felonies included attempted rape and robbery. The court concluded that Rummel required the judiciary to refrain from second guessing the determinations of state legislatures and courts. It noted that "Justice Rehnquist [writing for the majority in Rummel] concluded that American citizens do not have an eighth amendment constitutional right to have punishment proportionate to the severity of the crime." Nevertheless, the court discussed Justice Powell's dissenting opinion in

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137. See, e.g., United States v. Nichols, 695 F.2d 86, 93 (5th Cir. 1982) (in light of Rummel, a 40 year sentence for mail fraud prescribed by statute is not excessive); United States v. Schell, 692 F.2d 672, 675 (10th Cir. 1982) ("Rummel decision puts into question whether any sentence short of death for [serious] felony convictions . . . is cruel and unusual punishment . . ."); Fowler v. Parratt, 682 F.2d 746, 747, 752-53 (8th Cir. 1982) (in light of Rummel, a sentence of 10- to 15-years for issuing an insufficient check for $40, possessing a forged instrument in the amount of $40 and embezzling $433 is not unconstitutionally disproportionate); Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980) (life sentence for rape is not unconstitutionally disproportionate under Rummel rationale), cert. denied, 451 U.S. 939 (1981).

138. For examples of cases finding punishments valid because within statutory limits, see United States v. Compton, 704 F.2d 739 (5th Cir. 1983); United States v. Wylie, 625 F.2d 1371 (9th Cir.), cert. denied, 449 U.S. 1080 (1980).

139. 621 F.2d 846 (6th Cir. 1980).

140. For a discussion of prior Sixth Circuit cases arising under the cruel and unusual punishments clause, see supra notes 71-75 and accompanying text.

141. 621 F.2d at 847-48. Under the statute, Hayes received life imprisonment after three felony convictions. The statute as revised would have changed one of his felony convictions, uttering a forged instrument, to a misdemeanor. Additionally, the new statute provided that a felony conviction would not be counted toward the requisite three convictions unless the defendant actually served time in prison for it. Id. at 849. Because Hayes had served time for only two felony convictions, the court observed that "[h]ad Mr. Hayes waited to utter the forged instrument until after Kentucky modernized its recidivist statute, he would not now be faced with the mandatory life imprisonment." Id. at 850.

142. Id. at 850.

143. Id. at 849.

144. Id. at 848.
Rummel and recounted the proportionality analysis he advanced. The court, in dicta, concluded that even if it could permissibly review the proportionality of Hayes' sentence, under Powell's analysis, life imprisonment was not grossly disproportionate under the circumstances. In view of the seriousness of Hayes' prior offenses, the court refused to find his mandatory life sentence disproportionate to the gravity of his crimes. Thus, though the Hayes court found Rummel to be dispositive, the opinion suggested an unwillingness to completely abandon proportionality principles.

Davis v. Davis, which generated a complex series of remands and appeals, is particularly instructive. In Davis v. Davis, the United States Court of Appeals for the Fourth Circuit reviewed an eighth amendment claim complicated by the intervention of the Rummel decision during the course of appellate review. The case arose from a habeas corpus petition filed before the United States Supreme Court decided Rummel. The District Court for the Western District of Virginia invoked a Hart proportionality test to invalidate Davis' sentence of forty years in prison and $20,000 in fines for offenses involving possession and distribution of small amounts of marijuana. A panel of the United States Court of Appeals for the Fourth Circuit reversed. On rehearing en banc, however, this decision

145. Id. at 849.
146. Id. at 849-50. Similarly, in West Virginia, state courts have continued to adhere to proportionality principles. In Wanstreet v. Bordenkircher, 276 S.E.2d 205 (W. Va. 1981), the Supreme Court of Appeals of West Virginia invoked a Hart proportionality test and invalidated a habeas petitioner's life sentence. Id. at 211-14. Wanstreet was sentenced to life imprisonment under West Virginia's recidivist statute. Id. at 207. His prior convictions included forging a check for $18.62 and arson (burning a barn). Id. While on parole, he was convicted for driving without a license and his parole was revoked. Id. The offense triggering the statute was forging a check for $43.00. Id. The court construed West Virginia's constitution, which included a clause requiring that "[p]enalties shall be proportioned to the character and degree of the offense." Id. at 206. The court recognized that Rummel had restricted proportionality review under the United States Constitution. Id. at 209-10. Nonetheless, it maintained that "[w]hile the Eighth Amendment to the United States Constitution contains no such explicit statement of the proportionality principle, the Supreme Court has recognized that the principle is implicit in its prohibition against cruel and unusual punishment." Id. at 209.
147. 621 F.2d at 849-50.
148. 646 F.2d 123 (4th Cir. 1981).
150. Id. at 451-52. Hart, also decided in the Fourth Circuit, was considered by the district court to represent the "prevailing law." Davis, 432 F. Supp. at 452. The court similarly stressed the absence of violence associated with Davis' convictions, as the Fourth Circuit had done previously in Griffin v. Warden. See supra note 70.
151. Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978). The court stated that the Hart four-pronged test was not mandatory, and that such a "broad inquiry" was not required where the sentence was for a term of years, rather than life. Id. at 1232.
was vacated and the district court’s holding was affirmed.\textsuperscript{152} The Supreme Court vacated the en banc decision and remanded the case for reconsideration in light of its recent decision in \textit{Rummel}.\textsuperscript{153} Upon remand, the Fourth Circuit could not agree on the effect of the \textit{Rummel} holding.\textsuperscript{154} An equally divided court affirmed the district court judgment.\textsuperscript{155} The Supreme Court reversed the Fourth Circuit’s affirmance of the district court opinion.\textsuperscript{156} The Court struck down the Fourth Circuit’s proportionality test, asserting that the court of appeals “failed to heed our decision in \textit{Rummel}.”\textsuperscript{157} The Fourth Circuit, the Court stated, “could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress.”\textsuperscript{158} The Court found Davis’ arguments indistinguishable from those advanced by Rummel, and maintained that in \textit{Rummel}, it clearly had rejected the application of proportionality principles to claims of cruel and unusual punishment involving only sentences of “excessive” imprisonment.\textsuperscript{159} The Court maintained that proportionality analysis might properly be undertaken with respect to capital punishment cases because the death penalty is qualitatively different from all other forms of punishment.\textsuperscript{160}

\textsuperscript{152} 601 F.2d 153 (4th Cir. 1979) (per curiam). The Fourth Circuit affirmed both the district court’s holding and rationale. The district court’s holding rested on a finding that Davis’ sentence was disproportionate in light of the nonviolent nature of the crime. The court employed a \textit{Hart} proportionality test.

\textsuperscript{153} 646 F.2d 123 (4th Cir. 1981) (per curiam).

\textsuperscript{154} Id. at 124; see also Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981) (en banc). The \textit{Terrebonne} court was divided on whether \textit{Rummel} precluded further application of any proportionality analysis. The majority found \textit{Rummel} to be controlling, and determined that if the sentence “serve[s] an obvious and substantial state interest,” it does not violate the cruel and unusual punishments clause. \textit{Id.} at 1001-02. The minority argued that the proportionality test was viable after \textit{Rummel}. It contended that the \textit{Rummel} Court merely found the test to be inappropriate under the facts of that case. Moreover, the minority maintained that the \textit{Rummel} Court in fact relied on a proportionality analysis. \textit{Id.} at 1004.

\textsuperscript{155} Id. at 372.

\textsuperscript{156} Id. at 372-73.

\textsuperscript{157} Id. at 374-75.

\textsuperscript{158} Id. at 372-73.

\textsuperscript{159} Id. at 372-73. The Court’s opinion was not joined by all members of the Court. Justice Powell concurred only in the judgment, conceding that Davis’ offenses could be viewed as more serious than Rummel’s, while Davis’ sentence was less severe. \textit{Id.} at 379-80 (Powell, J., concurring in the judgment). Although he found \textit{Rummel} to be controlling, Justice Powell nonetheless asserted that Davis’ sentence was “unjust and disproportionate to the offense.” \textit{Id.} at 375. Powell noted that the Virginia legislature, since Davis’ conviction, had reduced the maximum penalty for possession and distribution of marijuana to 10 years in prison for each offense, which would be half the number of years Davis was serving. \textit{Id.} at 379. Justice Powell found a letter from the state prosecutor in Davis’ case to be persuasive. The letter urged suspension of Davis’ sentence and expressed the belief that the sentence was “grossly unjust.” \textit{Id.} at 377 n.7. Justice Brennan, joined by Justices Marshall and Stevens,
While members of the Supreme Court substantially disagreed on the correctness of the *Rummel* holding, the lower court response was fairly uniform. Because most lower courts interpreted *Rummel* as precluding, other than in capital cases, judicial review of arguably disproportionate punishment, the United States Supreme Court accepted an opportunity to clarify the proper scope of proportionality review in *Solem v. Helm*.  

II. *SOLEM V. HELM*: EXPANDING THE SCOPE OF PROPORIONALITY ANALYSIS UNDER THE EIGHTH AMENDMENT

A. The Eighth Circuit's Analysis: Circumventing Rummel

Jerry Helm was convicted under a South Dakota recidivist statute and sentenced to life imprisonment without possibility of parole. The facts in *Helm* closely approximated those in *Rummel*. Helm’s principal felony offense was uttering a $100 “no account” check. He had six previous felony convictions, which triggered a state recidivist statute that provided for a maximum punishment of life imprisonment. The trial judge imposed a life sentence. Under South Dakota law, no prospect for parole attached to sentences of life imprisonment, although commutation of sentence was possible at the governor’s discretion. The Supreme Court accepted an opportunity to clarify the proper scope of proportionality review in *Solem v. Helm*.  


162. *Id.* at 381.

163. *Id.* at 583. The Governor may choose to commute the sentence, pursuant to a recommendation from the board. The relevant South Dakota law provided: “[t]he Governor may, by executive order, delegate to the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.” *State v. Helm*, 287 N.W.2d 497, 499 n.1 (S.D. 1980). “The Governor is not bound to follow a recommendation returned by the board.” *Id.* at 499 n.2.
Court of South Dakota affirmed the sentence, finding that it was within the permissible statutory limits and therefore did not constitute cruel and unusual punishment. Helm's petition for writ of habeas corpus was denied without hearing by the United States District Court for the District of South Dakota, and he appealed. The United States Court of Appeals for the Eighth Circuit reversed, concluding that Helm’s punishment was so disproportionate in relation to his underlying offenses as to be cruel and unusual.

The Eighth Circuit distinguished Rummel by noting that under the Texas recidivist statute, Rummel would have been eligible for parole. In the court’s view, this fact was material to the Rummel Court’s holding. The Eighth Circuit maintained that, like the death penalty, a life sentence without parole “totally rejects rehabilitation as a basic goal of our criminal justice system” and is therefore different “in kind” from life imprisonment with a possibility of parole. The court contended that its analysis was consistent with Rummel because the Rummel majority had conceded that rare situations might arise which present cognizable claims outside the context of capital punishment. Reasoning that a life sentence under the South Dakota statute was manifestly different from the sentence upheld in Rummel because it precluded all possibility of parole, the court invoked a comparative test employing “objective criteria” to determine whether the sentence was commensurate with Helm’s crimes. Because the court found the crimes to be nonviolent and the punishment to be substantially more severe than would be imposed in nearly all

166. 287 N.W.2d at 499.
167. Id. at 498. Three Justices comprised the majority. Two Justices dissented; they would have held that, although it was the policy of South Dakota courts to defer to legislative judgments unless a penalty “should shock the conscience of the court,” there are instances, though rare, where in the interest of justice, departure from this precedent is mandated. Id. at 500 (Henderson, J., dissenting).
170. Id. at 587.
171. See supra notes 120, 125-27 and accompanying text.
172. 684 F.2d at 584, 585 n.5.
173. Id. at 585.
174. Id.
175. Id. at 585 n.6. The court noted that the Rummel majority recognized a proportionality test would be appropriate in an extraordinary situation. See supra note 105 and accompanying text.
176. The court maintained that neither Rummel nor Davis had addressed the exact question presented by Helm because both Rummel and Davis were eligible for parole. The Court employed the three-part test enunciated by the Supreme Court in Coker. See supra notes 44-52 and accompanying text.
177. 684 F.2d at 586.
other jurisdictions,\textsuperscript{178} it determined that Helm's life sentence without parole violated the eighth amendment's prohibition against cruel and unusual punishments. The United States Supreme Court, in a decision written by Justice Powell, affirmed.\textsuperscript{179}

\textbf{B. The Supreme Court's Rationale: Justifying a Return to Equitable Considerations}

Justice Powell prefaced his analysis with an historical review of the cruel and unusual punishments clause and its judicial application. He noted that the concept of proportionality of sentences originated in the Magna Carta, in which "three chapters . . . were devoted to the rule that 'amercements' may not be excessive."\textsuperscript{180} Powell contended that the Court had long recognized the proportionality principle, from its earliest application in \textit{Weems}\textsuperscript{181} to its most recent invocation in the death penalty cases.\textsuperscript{182} He reasoned that since the punishment of a fine and the death penalty were both subject to proportionality analysis, a sentence of imprisonment should also bear a reasonable relationship to the underlying offense.\textsuperscript{183} He noted that no United States Supreme Court decision had ever excluded terms of years in prison from the requirement of proportionality.\textsuperscript{184} The Powell Court thus expressly expanded the application of proportionality analysis under the eighth amendment to include Helm's sentence and held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."\textsuperscript{185}

The majority opinion in \textit{Helm} was shaped by equitable considerations. The Court was particularly concerned with the rigid approach to eighth amendment analysis adopted by many courts.\textsuperscript{186} The Court noted that historically it had advocated a flexible method of analyzing cases arising

\begin{itemize}
  \item \textsuperscript{178} \textit{Id.} at 587.
  \item \textsuperscript{179} Solem v. Helm, 103 S. Ct. 3001 (1983). Justice Powell wrote the dissenting opinion in \textit{Rummel}. Like \textit{Rummel}, \textit{Helm} was a five to four decision. Joining the majority opinion were Justices Brennan, Marshall, Blackmun (who subscribed to the majority opinion in \textit{Rummel}), and Stevens. Chief Justice Burger dissented; he was joined by Justices White, Rehnquist, and O'Connor.
  \item \textsuperscript{180} \textit{Id.} at 3006.
  \item \textsuperscript{181} \textit{Id.} at 3007-08. He also cited with approval Justice Field's dissenting opinion in \textit{O'Neill v. Vermont}. See supra note 18 and accompanying text.
  \item \textsuperscript{182} 103 S. Ct. at 3008.
  \item \textsuperscript{183} \textit{Id.} at 3009.
  \item \textsuperscript{184} \textit{Id.} Although it has recognized the unique quality of the death sentence, the Court noted that it has never "drawn a distinction with cases of imprisonment." \textit{Id.}
  \item \textsuperscript{185} \textit{Id.}
  \item \textsuperscript{186} \textit{Id.} at 3010. The Court attempted to establish guidelines for use by lower courts in adjudicating eighth amendment claims.
\end{itemize}
under the cruel and unusual punishments clause.\textsuperscript{187} It also pointed to the absence of any rehabilitative purpose in the imposition of a life term without possibility of parole on a repeat offender whose habitual criminal activity was largely the product of alcoholism.\textsuperscript{188}

The Court necessarily assumed a defensive posture. Since it apparently was unwilling to overrule \textit{Rummel}, the Court was required to engage in extended analysis in an attempt to distinguish \textit{Helm} from \textit{Rummel} and \textit{Davis}. In the Court's view, its holding in \textit{Helm} flowed logically from its pre-\textit{Rummel} opinions.\textsuperscript{189} The \textit{Helm} Court stressed that its holding did not mandate extensive appellate review of all prison sentences. Courts were still obligated to "grant substantial deference" to legislative judgment and trial court determinations when undertaking an assessment of proportionality.\textsuperscript{190} Such deference, however, should not preclude judicial inquiry in those cases where a sentence may be so disproportionate as to raise a legitimate eighth amendment claim.\textsuperscript{191} The inquiry should apply "objective factors" that have aided courts in the past in determining whether a punishment is excessive in relation to the offense.\textsuperscript{192} The Court suggested that relevant criteria comprising an objective analysis of a given punishment would include an assessment of the gravity of the offense in relation to the severity of the punishment, a comparison of the punishment with sentences imposed in other jurisdictions for the same crime, and a comparison of the punishment with other criminal penalties imposed in the same jurisdiction.\textsuperscript{193} The Court observed that in \textit{Weems} it had applied a comparative test\textsuperscript{194} in determining that the imposition of "cadena temporal" was not only disproportionate to the gravity of Weems' offense, but also unique to

\begin{footnotes}
\item[187] \textit{Id.} at 3007-08.
\item[188] \textit{Id.} at 3005, 3013 n.22. Helm argued that his felonies "involved nonviolent crimes and were due to a severe drinking problem." 287 N.W.2d at 498. The Eighth Circuit had emphasized that "[a]lthough Helm's alcoholism does not excuse his failure to bring his conduct within the social norms prescribed by the criminal law, it is nonetheless a condition amenable to treatment." 684 F.2d at 587.
\item[189] 103 S. Ct. at 3008-10. The Court conceded that death is qualitatively different from other punishments, and that "outside the context of capital punishment, \textit{successful} challenges to the proportionality of particular sentences [will be] exceedingly rare." \textit{Id.} (emphasis in original) (quoting \textit{Rummel} v. \textit{Estelle}, 445 U.S. at 272). This distinction did not mean, however, that there would never be successful challenges when prison terms were attacked as cruel and unusual. \textit{Id.} at 3009.
\item[190] \textit{Id.} at 3009 n.16. Appellate court review should only consider whether a given sentence is within the bounds of "constitutional limits."
\item[191] \textit{See id.} at 3009-10.
\item[192] \textit{Id.} at 3010. The Court maintained that no single factor will be determinative. \textit{Id.} at n.17.
\item[193] \textit{Id.} at 3011.
\item[194] \textit{Id.} at 3010. \textit{See supra} notes 17-32 and accompanying text.
\end{footnotes}
the Philippine jurisdiction. Additionally, the *Weems* Court had examined
the punishments imposed in the Philippines for more serious offenses and concluded that in light of Weems' offense, the punishment imposed was excessive.

The Court further observed that in *Robinson*, where it had invalidated a ninety-day prison sentence as cruel and unusual punishment for drug addiction, there had been no challenge to the mode of punishment. The issue presented in *Robinson* was whether imprisonment was excessive in relation to the offense. Therefore, in the *Helm* Court’s view, *Robinson* supported the application of proportionality principles to cases in which neither the death penalty, nor a particular method of punishment, were at issue. More recently, in *Coker*, the Court employed a proportionality analysis that relied on objective factors similar to those now advanced by Helm. The *Coker* Court, relying on *Weems* for authority, used a comparative test to determine whether the punishment of death was excessive in relation to the offense. The Court determined that the crime of rape did not warrant the imposition of the death penalty which normally was imposed only where a life had been taken.

Thus, while the Court had never invalidated a prison sentence solely on the basis of excessive length, the *Helm* majority observed that neither had the Court expressly determined that sentences of imprisonment were excepted from proportionality analysis. On the contrary, the Court noted that when it had applied proportionality principles in capital cases, it had not drawn a distinction with cases involving prison sentences.

195. *Id.*
196. *Id.* at 3008.
197. *Id.* at 3008. See *supra* notes 35-42 and accompanying text.
199. *Id.*; see *supra* notes 44-52 and accompanying text.
201. 103 S. Ct. at 3010. See *Coker*, 433 U.S. at 592-93. Similarly in *Enmund v. Florida*, 458 U.S. 782 (1982), the Court employed the same proportionality analysis and determined that death was disproportionate punishment for felony murder. See *supra* note 52.
203. In *Robinson*, the Court did not address whether the length of the prison sentence was excessive. The *Robinson* Court had focused on the nature of the offense, and whether any prison sentence would be appropriate. The language employed in *Robinson*, however, suggested that a prison sentence could be excessive in its duration. See *supra* notes 36-42 and accompanying text.
204. 103 S. Ct. at 3009. Indeed, even *Rummel* and *Davis* specifically noted that in some circumstances prison sentences could violate the eighth amendment. See *supra* note 105.
205. 103 S. Ct. at 3009.
C. Adopting the Expansive View: Applying a Three-Part Proportionality test to Prison Sentences

Borrowing the rationale applied in prior Supreme Court cases, the *Helm* majority proposed a three-part proportionality test. The Court concluded that relevant factors to be considered included: (1) the nature of the offense and the severity of the punishment; (2) the penalties prescribed in the same jurisdiction for other, more serious, offenses; and (3) the punishment imposed in other jurisdictions for the same crime. The Court acknowledged that assessing the gravity of the offense and the severity of the penalty raises the danger of interjecting the subjective views of judges. It thus devoted a portion of its discussion to defending judicial competence to make this determination. The Court maintained that in weighing the nature of the offense, "comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender." Recognizing that comparing prison terms is substantially more difficult than comparing the death penalty with other modes of punishment, the Court contended that such "line-drawing" was not unknown to the courts, which have adequately addressed such complex issues in other contexts while maintaining the integrity of the federal system of government. Justice Powell then applied a three-pronged proportionality test to the circumstances of Jerry Helm's sentence and concluded that

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207. 103 S. Ct. at 3010-11.

208. See id. at 3011.

209. Id. at 3011.

210. Id. at 3011. For example, the Court suggested that this analysis include, if appropriate, whether the crime committed was violent or nonviolent, whether the crime was against a person or property, whether the offense was a lesser included offense, and the value of the property if a property offense. Id.

211. Id. at 3011-12. In illustration, the Court pointed out that pursuant to sixth amendment rights to a speedy trial and trial by jury, courts have engaged successfully in line-drawing. The Court referred to cases involving the right to a speedy trial, which "identified some of the objective factors that courts should consider in determining whether a particular delay is excessive." Id. at 3012. See, e.g., Barker v. Wingo, 407 U.S. 514, 530 (1972). In *Barker*, a unanimous Supreme Court concluded that the determination was best made within the context of each case by employing a balancing test. The Court noted that such an approach "necessarily compels courts to approach speedy trial cases on an ad hoc basis." Id. at 530. The factors identified by the Court included: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) any
the sentence constituted cruel and unusual punishment under the eighth amendment.

First, in focusing on the nature of the crime, the majority determined that the offenses committed by Helm were relatively minor. Helm’s most recent crime was neither violent nor potentially violent. Moreover, the Court noted that the amount of the “no account” check was so insubstantial that had Helm stolen the money he would have been guilty only of a misdemeanor.

Because Helm was convicted as an habitual offender, the Court examined all of his prior convictions and noted that they were non-violent as well. Turning to the severity of the punishment, the Court adopted the Eighth Circuit’s finding that Helm’s sentence was harsher than Rummel’s life sentence because Helm would be ineligible for parole.

Second, in comparing Helm’s sentence to those prescribed for graver offenses, the Court observed that life imprisonment without parole was normally reserved for the most heinous crimes. Third, when the Court compared Helm’s sentence with those imposed in other jurisdictions, it observed that in virtually any other state Helm would have received a less

prejudice to the defendant. The Court recognized that the determination involved a “difficult and sensitive balancing process.”

Additionally, the constitutional right to a trial by jury has necessitated judicial line-drawing, as the Court’s decision demonstrates in Baldwin v. New York, 399 U.S. 66 (1970) (plurality opinion). Because “petty” offenses were generally not considered to require a jury trial, the Court had to determine what constitutes a petty, as opposed to a serious offense for the purpose of trial by jury. The plurality adopted a flexible approach, noting that in the past the Court had “sought objective criteria reflecting the seriousness with which society regards the offense.” It was appropriate to examine “the existing laws and practices of the nation.” The Court compared the practices in various jurisdictions and observed that the “near uniform judgment of the nation furnishes us with the only objective criteria by which a line could ever be drawn.”

Chief Justice Burger, dissenting in Baldwin, maintained that “what may be a serious offense in one setting . . . may be considered less serious in another area, and the procedures for finding guilt and fixing punishment in the two locales may rationally differ from each other.”

The South Dakota statute imposes mandatory life sentences for “murder, and on a second or third conviction for treason, first degree manslaughter, first degree arson, and kidnapping.” Life sentences are discretionary on the second or third conviction for attempted murder, placing explosives on aircraft, and first degree rape. In the majority’s view, Helm’s crimes were relatively minor. See infra note 241. Moreover, the Court distinguished Rummel by determining that the possibility of commutation is not commensurate with a system of parole. The Court stated that parole “is the normal expectation in the vast majority of cases.” “Commutation, on the other hand, is an ad hoc exercise of executive clemency.” Helm had in fact requested commutation and was denied.
severe punishment. The Court concluded that Helm's sentence was “significantly disproportionate to his crime” and therefore violated the eighth amendment.

The dissenting opinion, written by Chief Justice Burger, asserted that the Court's “holding cannot rationally be reconciled with Rummel.” The dissent noted that the objective test proposed by Helm and adopted by the Court was identical to the test rejected by the Rummel Court. Similarly, the Court had rejected Rummel's argument that Weems and the death penalty cases required a proportionality assessment of his punishment, yet it embraced the same proposition when it was advanced by Helm. In the dissent's view, extending proportionality review to Helm's sentence was a “bald substitution of individual subjective moral values for those of the legislature.” Chief Justice Burger asserted that the essentially arbitrary lines between various sentences of imprisonment under proportionality analysis must be drawn by the legislature. The Court's holding, therefore, was tantamount to a transgression of the traditional role of the judiciary in the federal system.

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217. Id. at 3014-15. The only state in which Helm could have received a similar sentence was Nevada, and the Court noted that it did not appear that the Nevada statute had ever been applied to offenses as trivial as Helm's.

218. Id. at 3016. Interestingly, the test had previously been articulated by the Court as “grossly disproportionate” rather than “significantly.” See supra note 47.

219. 103 S. Ct. at 3017 (Burger, C.J., dissenting).

220. Burger noted that the Court had rejected Rummel's proposed distinction between serious or violent crimes and petty nonviolent offenses for the reason that the absence or presence of violence does not always indicate the degree of society's interest in punishing the offender. Id. at 3019. See Rummel, 445 U.S. at 275-76. The dissent asserted that the second prong of Rummel's test, requiring his sentence to be compared with sentences imposed for the same offense in other jurisdictions, invited speculation on the motives of state legislatures and thus threatened fundamental concepts of federalism. 103 S. Ct. at 3019. This comparison was rendered more difficult by the fact that both Rummel and Helm involved consideration of recidivist statutes. Id. See Rummel, 445 U.S. at 280-81. The third objective factor urged by Rummel, that his sentence be compared with criminal penalties imposed in the same jurisdiction for other crimes, was also rejected by the Rummel Court. The Court had determined that such a comparison was “inherently speculative.” 103 S. Ct. at 3019. See Rummel, 445 U.S. at 282.

221. 103 S. Ct. at 3017-18 (Burger, C.J., dissenting). The Rummel Court had emphasized the “bright line” that could be drawn between bizarre punishments such as that suffered by Weems, and traditional criminal sanctions. It was also possible to draw a line between the ultimate sanction of death and any other punishment. Id. at 3019. See Rummel, 445 U.S. at 275.

222. 103 S. Ct. at 3022 (Burger, C.J., dissenting).

223. Id. at 3019. The dissent pointed out that certain crimes may be deemed more serious in some states than in others, thus warranting the imposition of a more severe penalty in some cases. Id.
vided a valid basis for distinguishing Rummel was without merit. The dissent maintained that if Rummel had left unanswered questions concerning the proper scope of proportionality review, such questions were conclusively resolved by Davis. The dissent reasoned that the Rummel and Davis decisions were consistent with the “prevailing view” that the eighth amendment “reaches only the mode of punishment and not the length of imprisonment.” Chief Justice Burger predicted that by extending proportionality review to sentences such as Helm’s, the Court’s holding would result in flooding the appellate courts with claims of disproportionate punishment.

D. An Undeclared Overruling of Rummel v. Estelle?

In holding that a proportionality review of Helm’s sentence was required by the Constitution, the Court clearly expanded judicial review in eighth amendment cases well beyond the scope contemplated by the Rummel Court. Nevertheless, the Helm Court, in a strained reading of its recent Rummel decision, concluded that the two cases could be reconciled.

224. Id. at 3023. The dissent maintained that because a sentence of death is irrevocable, there is need for greater reliability. In Chief Justice Burger’s view, however, heightened judicial scrutiny is not justified where a prison sentence is involved, whether or not there is potential for parole. Id. at 3021 n.4.

225. See supra notes 148-60 and accompanying text.

226. 103 S. Ct. at 3021 (Burger, C.J., dissenting).

227. Id. at 3022. The dissent maintained that the Court’s holding provided no guidance for lower courts faced with eighth amendment claims of disproportionate prison sentences. Chief Justice Burger inquired “[t]oday [the Court] holds that a sentence of life imprisonment, without possibility of parole, is excessive punishment for a seventh ‘non-violent’ felony. How about the eighth ‘non-violent’ felony? The ninth? The twelfth?” Id.

228. Id. at 3016. The constitutional requirement that the punishment be proportional to the crime, as determined by the Helm Court, is distinct from a requirement that courts undertake extended comparative analysis in every case.

In Pulley v. Harris, 52 U.S.L.W. 4140 (Jan. 23, 1984), the Supreme Court addressed whether courts reviewing a capital sentence must compare the sentence imposed with penalties imposed in all similar cases. Id. at 4142. According to the Court, the proportionality review sought

presumes that the death sentence is not disproportionate to the crime in the traditional sense . . . . The issue in this case . . . is whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. Harris insists that it does and that this is the invariable rule in every case. . . . We do not agree. Id. at 4143. The Court emphasized that the statute under which Harris was sentenced provided adequate constitutional protections. Id. at 4145. It declined to address the question whether “there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.” Id.
Rummel, the Court maintained, "should not be read to foreclose proportionality review of sentences of imprisonment."229 This determination, however, clearly distorts both the holding and the underlying rationale of Rummel.

Chief Justice Burger's dissent in Helm stated that the Court's holding was completely at odds with Rummel.230 This assertion has a great deal of merit, especially since the Court's conclusion in Helm turned largely on the fact that Helm's sentence precluded any possibility of parole. While past Supreme Court cases have, as the majority noted,231 recognized a substantive difference between parole and commutation in other contexts,232 the Helm Court couched its analysis in far broader language. It held that proportionality, as embodied in the cruel and unusual punishments clause of the eighth amendment, not only applied to sentences of imprisonment, but was required by the Constitution.233 Moreover, Justice Powell, in his dissenting opinion in Rummel, had expressly stated that the possibility of parole should not be a factor in a court's attempt to assess the proportionality of a given punishment.234 In Helm, Justice Powell's majority opinion purported to distinguish Rummel on the ground that Helm would never be eligible for parole, thus suggesting that a life sentence without possibility

229. Id. at 3016 n.2. The Court maintained that Rummel rejected a proportionality approach under the facts of Rummel, but since the Rummel Court "offer[ed] no standards for determining when an eighth amendment violation had occurred; it is controlling only in a similar fact situation." Id.

230. 103 S. Ct. at 3017 (Burger, C.J., dissenting).

231. Id. at 3015.

232. See, e.g., Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981). In Dumschat, a prisoner was denied commutation of his sentence in a state where three-fourths of the sentences were commuted, and he claimed the denial violated the fourteenth amendment. The Court recognized a "vast difference" between parole and commutation, but its rationale was based on the fact that there are different provisions in state statutes. The Court reasoned that a statistical probability of clemency does not, by itself, create a constitutional right. "The ground for a constitutional claim . . . must be found in statutes or other rules defining the obligations of the authority charged in exercising clemency." Id. at 465; see also Morrissey v. Brewer, 408 U.S. 471 (1972), in which the petitioners claimed parole revocation without a hearing violated their due process rights. Chief Justice Burger, writing for the majority, observed that "the practice of releasing prisoners before the end of their sentences has become an integral part of the penological system. Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals." Id. at 477. The Court noted that systems of parole vary from jurisdiction to jurisdiction.

233. Helm, 103 S. Ct. at 3016. The Powell majority contended that "[t]he common law principle incorporated into the Eighth Amendment clearly applied to prison terms." Id. at 3009. In support of this contention, Powell cited the English case Hodges v. Humkin, 2 Bulst. 139, 140 (K.R. 1615), in which that court had maintained "imprisonment ought always to be according to the quality of the offense." 103 S. Ct. at 3007.

234. See supra note 127 and accompanying text.
of parole is qualitatively different from a prison sentence for a term of years, or life imprisonment with parole. In making this distinction, the Court seemed to accept the very premise it rejected in *Rummel*: that such imprisonment is akin to a sentence of death. This attempt to reconcile the two cases may have opened the door for the Court to expand explicitly the proportionality concept, but it is doubtful that such a distinction is truly defensible. The death penalty is, after all, completely irrevocable, and even a life sentence without possibility of parole may be commuted, or the offender pardoned. Justice Powell noted that parole is the "normal expectation" in most cases of imprisonment, and commutation is merely an "ad hoc exercise of clemency." Indeed, this normal expectation prompted the *Rummel* majority to take parole possibilities into account when it addressed whether Rummel's life sentence was disproportionate to his offenses. However, as Powell observed in his dissenting opinion in *Rummel*, one does not have a right to parole.

The *Helm* Court sought to achieve an equitable end through strained reasoning. By distinguishing *Rummel* on the parole issue, the Court justified the invocation of a proportionality test to determine whether Helm's severe sentence was "fair" in relation to his crimes and thus undermined seriously the continued viability of *Rummel*. Applying this test, the Court concluded that Helm's sentence was sufficiently "disproportionate" to trigger eighth amendment protections. On closer scrutiny, however, the circumstances surrounding Helm's felony convictions do not establish grounds for such a distinction. As the dissent pointed out, "[b]y comparison [to Helm], Rummel was a relatively 'model citizen.'" Rummel's three convictions were not only fewer in number but were clearly less serious than Helm's. There is much to be said in equity for the majority's conclusion in *Helm*, and it finds substantial support in Supreme Court pre-

236. *Id.*
238. *Id.* at 293. See supra note 127.
239. *Helm*, 103 S. Ct. at 3016.
240. *Id.* at 3017 (Burger, C.J., dissenting).
241. Rummel's three convictions included fraudulent use of a credit card, passing a forged check, and obtaining money by false pretenses. Helm's seven convictions included third degree burglary, grand larceny, driving while intoxicated, and obtaining money under false pretenses. Helm v. Solem, 684 F.2d at 582 n.1 (8th Cir. 1982). Justice Powell does observe, however, that "there was no minimum amount in either the burglary or the false pretenses statutes . . . and the minimum amount covered by the grand larceny statute was fairly small." *Helm*, 103 S. Ct. at 3013. "[T]he third degree burglary statute covered entering a building with the intent to steal a loaf of bread. It appears that the grand larceny statute would have covered the theft of a chicken." *Id.* at 3013 n.23; see *id.* at 3004 nn.1-3.
cedent as well as circuit court interpretations, but it cannot be rationally reconciled with *Rummel*.242

The Burger dissent misreads precedent, however, in contending "the Court blithely discards any concept of *stare decisis*, trespasses gravely on the authority of the States, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases."243 A close reading of the capital cases does not support Burger's view that proportionality analysis has been confined exclusively by the Court to the imposition of the death penalty. Although the capital punishment cases recognized a qualitative difference between a penalty of death, "irrevocable in its finality,"244 and other forms of punishment, they did not expressly limit proportionality analysis to capital punishment. Further, no decision, other than *Rummel* and *Davis*, can be read to preclude application of such an analysis to prison sentences.245 Until *Helm*, the Court had left open the question of whether the principle of proportionality recognized in other cases could be applied to invalidate prison sentences excessive in length.246 This uncertainty was evident in the disparate views of lower courts on this issue.247 The analyses employed in Supreme Court cases prior to *Rummel* support the *Helm* majority's view that the cruel and unusual punishments clause prohibits *any* punishment that is significantly disproportionate in relation to the gravity of the offense. Rather than re-

242. Indeed, review of federal court decisions issued since *Helm* reveals the difficulty encountered by those courts in attempting to reconcile the two cases. Within a few months after *Helm*, there was evidence of diverse response from lower courts. In United States v. Zylstra, 713 F.2d 1332 (7th Cir. 1983), the United States Court of Appeals for the Seventh Circuit accepted the distinction drawn by the Supreme Court in *Helm* between a life sentence that offered the defendant a possibility of parole and one that did not. *Id.* at 1341 n.2. In Schwartzmiller v. Gardner, 567 F. Supp. 1371 (D. Idaho 1983), a district court discussed the *Helm* proportionality test but determined that Schwartzmiller's sentence of slightly over eleven years, imposed for committing lewd and lascivious acts with a minor, was commensurate with punishments meted out in several other jurisdictions. *Id.* at 1381. The court also reasoned that the state legislature had rationally determined that Schwartzmiller's crime was relatively serious. *Id.* The court thus concluded that the sentence was not disproportionate to the offenses.


244. *Coker*, 433 U.S. at 598 (quoting Gregg v. Georgia, 428 U.S. 153, 165-66 (plurality opinion)).

245. See supra notes 35-43 and accompanying text.

246. *Rummel* left open the possibility, albeit remote, that under extraordinary circumstances a prison sentence might violate the eighth amendment on the basis of its excessive length. See supra note 105 and accompanying text.

stricting the scope of the cruel and unusual punishments clause, United States Supreme Court decisions prior to *Rummel* adopted a broad, flexible view of its application, dependent upon factual circumstances. Excluding the capital cases, the Court has stressed the flexibility of eighth amendment analysis and has refused to pin down the scope of the amendment in any prior opinions.  

It has emphasized that the amendment's proscriptions should be viewed in light of "evolving standards of decency." Viewed in this manner, the conclusion of the *Helm* dissent, that precedent prevents the application of eighth amendment protections to excessive prison sentences, lacks substance.

In view of the historical background of the amendment, it is *Rummel*, rather than *Helm*, that appears to be anomalous. As the *Helm* Court noted, "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Rummel* and *Davis* were the first cases to impose expressly a substantive limitation on the scope of the cruel and unusual punishments clause. It is likely, therefore, that the *Helm* Court sought to restrict the scope of those decisions, and though the circumstances in *Helm* were not ideal, they provided a vehicle for the Court to retreat from its recent narrow interpretation of the eighth amendment.

In a practical sense, the three-pronged test set forth by the *Helm* majority is not without its flaws. Courts, in comparing punishments imposed in various jurisdictions for the same crime, must take into consideration the peculiar factors present in a given state or locality, for, as the dissent observes, horse thievery in Texas might be a far more serious crime than the same offense would be in Rhode Island. Marijuana trafficking is likely to pose special problems for Texas, New York, and other states that encounter large scale drug dealing operations. An inquiry into the legitimate goals sought to be achieved by particular legislation necessitates a consideration of all such relevant circumstances, so that a court can correctly ascertain the "nature" of the crime for which a given penalty is imposed. The task is not an impossible one; it has been undertaken

248. *See supra* note 35.
250. 103 S. Ct. at 3006.
251. As the *Helm* dissent correctly pointed out, Helm's seven felony offenses were "far more severe than Rummel's three." 103 S. Ct. at 3020 n.2. *See supra* note 241.
252. *Id.* at 3019 (Burger, C.J., dissenting).
253. For a discussion of these regional discrepancies in assessing the nature of the offense, see Note, *supra* note 30, at 1142; *see also* Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 109 (1979); *see supra* notes 92-99 and accompanying text.
successfully in a variety of contexts, and the *Helm* dissent offered no persuasive reason why it cannot be undertaken with respect to prison sentences.

The dissent in *Helm* also maintained that the holding "trespasses gravely on the authority of the States." However, many eighth amendment claims do not attack the facial validity of statutes, only their application to particular facts. A statute that provides for life imprisonment for three felony convictions could conceivably give rise to the imposition of a life sentence on an individual convicted three times for writing bad checks, if that offense is a felony in the jurisdiction. A life sentence for such an offense may never have been contemplated by the legislators who enacted the statute.

The eighth amendment protects individuals against the infliction of cruel and unusual punishments by the states as well as the federal government. As the *Helm* majority aptly observed, "[n]o penalty is *per se* constitutional." Federalism problems arise whenever a court must rule on the constitutionality of a state legislative enactment, but these problems can be minimized if courts employ objective criteria in analyzing constitutional claims. The three-part test articulated by the Court provides guidelines for state and federal courts to observe in making a determination of proportionality. In many cases, an eighth amendment claim attacking a prison sentence will require only the most cursory review by a court before a finding of constitutionality is made. Frivolous challenges need not consume the time of the court. Where a claim raises genuine issues of "cruel and unusual punishment," courts applying a proportionality test will, under the *Helm* ruling, have the opportunity and the means for discovering and remedying the defect.

254. See supra note 211.

255. 103 S. Ct. at 3017 (Burger, C.J., dissenting).

256. See, e.g., *Hart*, 483 F.2d at 138; see supra notes 56-70 and accompanying text; see also supra notes 104-28 for a discussion of *Rummel v. Estelle*.

257. Moreover, requiring proportionality of prison sentences will not necessarily result in reversal of state court judgments. As Justice Powell pointed out in his *Rummel* dissent, the Fourth Circuit, since its decision in *Hart*, had only twice invalidated prison sentences as disproportionate under the cruel and unusual punishments clause. *Rummel*, 445 U.S. at 304 (Powell, J., dissenting). In Justice Powell's view, the Fourth Circuit's experience was "evidence that federal courts are capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy." *Id.* at 306; see also supra note 70 and accompanying text.

258. 103 S. Ct. at 3009-10.

259. *Id.* at 3009 n.16.
III. Conclusion

Until the Supreme Court decided *Solem v. Helm*, the Court had never expressly determined whether the eighth amendment's prohibitions extended to sentences of imprisonment excessive in duration. The holding in *Helm* extended proportionality concepts expressly to life imprisonment without parole and impliedly to excessive prison sentences. The history of the Supreme Court's treatment of the eighth amendment's "cruel and unusual punishments" clause permits the *Helm* Court's conclusion that punishment should be proportionate to the offense committed, regardless of the mode of punishment. The decision is firmly rooted in equitable considerations. *Helm* cannot, however, rationally be reconciled with the Supreme Court's three-year old *Rummel* decision. As lower courts are faced with future challenges to prison sentences, they will be forced to consider both *Rummel* and *Helm* and attempt to determine the boundary between the two.

Additionally, practical problems may arise in making the necessary factual determinations under *Helm*: "drawing the line" between constitutionally permissible sentences and those that violate the cruel and unusual punishments clause. It is uncertain after *Helm* whether life imprisonment for a third, fourth, seventh, or tenth nonviolent felony violates the eighth amendment. Moreover, while life imprisonment imposed for overtime parking would clearly be cruel and unusual, sentences imposed for other types of offenses may be more difficult to evaluate. It will be the close cases that require the indepth analysis of courts, not the cases that clearly fall within conventional experience. Courts have exhibited competence, however, at making such difficult factual determinations. The proportionality test articulated in *Helm* will assist courts in making more objective, less arbitrary, determinations under the eighth amendment and will serve to promote the equitable concerns that prompted the amendment's passage.

*Nancy Keir*