CRIMINAL PROCEDURE—SENTENCING—OBJECTIVE CRITERIA MUST BE USED IN EVALUATING PROPORTIONALITY OF SENTENCE—*Solem v. Helm*, 103 S. Ct. 3001 (1983).

The scope and applicability of the eighth amendment's[1] proscription of "cruel and unusual punishment" has been an area of continuing controversy.[2] One facet of eighth amendment protection concerns the proportionality[3] of punishments to crimes. Recently, in *Solem v. Helm*,[4] the United States Supreme Court narrowly extended the boundaries of proportionality analysis and indicated avenues of future development. The Court found that objective factors must be used to evaluate the constitutionality of a given sentence, including one for a term of years, because no penalty is per se unconstitutional.[5]

In 1979, Jerry Helm, a 39-year-old alcoholic[6] who had spent most of his adult life in the South Dakota Penitentiary,[7] pleaded guilty to the felony offense of uttering a "no account" check for one hundred dollars.[8] The maximum sentence for such an offense under South Dakota's law at the time was a term of five years imprisonment and/or

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[1] U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

[2] *See, e.g.*, Clapp, *Eighth Amendment Proportionality*, 7 AM. J. CRIM. L. 253 (1979); Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969); Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639 (1979); Note, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975).

[3] *See infra* notes 39-47 and accompanying text.

[4] 103 S. Ct. 3001 (1983).

[5] *Id.* at 3009-10.

[6] Since Helm waived a pre-trial investigation, this fact never was conclusively established. However, both the lower court and the Supreme Court referred to Helm's alcohol problem several times, indicating that it figured heavily in all the offenses. *See, e.g., id.* at 3013 n.22; State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980), *rev'd sub nom.* Solem v. Helm, 684 F.2d 582 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3001 (1983). Helm's own statement to the state trial court was the strongest indication admitted into the record:

> "I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places."

Helm, 287 N.W.2d at 501 (Henderson, J., dissenting).

[7] State v. Helm, 287 N.W.2d 497, 499 (S.D. 1980) (Morgan, J., dissenting), *rev'd sub nom.* Solem v. Helm, 684 F.2d 582 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3001 (1983).

[8] S.D. CODIFIED LAWS ANN. § 22-41-1.2 (1979). The statute reads in relevant part:

> Any person who, for himself or as an agent or representative of another for present consideration with intent to defraud, passes a check drawn on a financial institution knowing at the time of such passing that he or his principal does not have an account with such financial institution, is guilty of a Class 5 felony.

id.

a fine of five thousand dollars.[9] Helm, having pleaded guilty to six prior felony convictions,[10] refused a pre-sentence investigation and requested immediate sentencing.[11]

The South Dakota Circuit Court had the option of sentencing Helm under its recidivist statute,[12] which provides that a defendant convicted of at least three prior offenses in addition to the principal felony for which he is being tried may have his sentence enhanced to that of a Class 1 felony. Persons convicted of Class 1 felonies may be sentenced to life imprisonment without parole.[13] Once this sentence is imposed, they can be released only through gubernatorial commutation or pardon.[14] The trial judge, concluding that Helm was "an habitual criminal . . . beyond rehabilitation," chose to apply the statute, and Helm then was sentenced to life imprisonment without parole.[15]

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[9] S.D. COMP. LAWS ANN. § 22-6-1 (1967 & Supp. 1978) (amended 1979 and 1980).

[10] Helm was informed on three occasions that his guilty plea would trigger the habitual offender statute, and that he could be sentenced to life imprisonment. Solem v. Helm, No. 82-482 (S.D. Sup. Ct. Dec. 2, 1981) (memorandum opinion denying application for habeas corpus). The prior convictions consisted of three counts of third-degree burglary, obtaining money under false pretenses, grand larceny, and a third offense of driving while intoxicated.

[11] State v. Helm, 287 N.W.2d 497, 498 (S.D. 1980), *rev'd sub nom.* Solem v. Helm, 684 F.2d 582 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3001 (1983).

[12] S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended 1981). Although it is within the prosecutor's discretion to invoke this statute, in South Dakota the sentence is mandatory on conviction. For a comprehensive breakdown of the recidivist laws which were in effect in 1980, see Supplementary Brief for the Petitioner, table III, Rummel v. Estelle, 445 U.S. 263 (1980). For a discussion of the range and constitutionality of these laws, see Katkin, *Habitual Offender Law: A Reconsideration*, 21 BUFFALO L. REV. 99 (1971); Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356 (1975); *see also infra* notes 171-90 and accompanying text.

[13] S.D. CODIFIED LAWS ANN. § 22-15-4 (1979). The section reads: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." *Id.*

[14] S.D. CONST. art. IV, § 3. Commutation is not equivalent to pardon; rather, it is the substitution of a lesser punishment for the one originally imposed. *See* BLACK'S LAW DICTIONARY 254 (rev. 5th ed. 1979). Under the South Dakota statute, the Governor may authorize the board to hear applications for parole, and to make its recommendations to him. S.D. CODIFIED LAWS ANN. § 24-14-1 (1979). He is not, however, bound by those recommendations. *Id.* § 24-14-5.

Twenty-two prisoners serving life terms in the South Dakota Penitentiary had their sentences commuted between 1964-1975; not a single life sentence was commuted after 1975. Solem v. Helm, 684 F.2d 582, 585 n.6 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3001 (1983).

[15] The trial judge's full explanation for invoking the statute was as follows:

> Well, I guess most anybody looking at this record would have to acknowledge that you have a serious problem, if . . . your prior imprisonments have not had any effect on . . . motivating you for change. If you get out in the near future, you're going to be committing further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence. It will be up to you and the parole board to work out when you finally get out, but I think you certainly earned this and certainly have proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent

Helm appealed his sentence to the Supreme Court of South Dakota, contending that it constituted cruel and unusual punishment. A divided court affirmed the judgment, holding that the sentence was constitutional.[16] After serving two years in the penitentiary, and having requested commutation without success,[17] Helm petitioned for a writ of habeas corpus in federal district court in South Dakota.[18] He again invoked the eighth amendment, and argued further that the sentencing procedure, without a pre-sentence investigation, had violated his right to due process by imposing the maximum sentence upon him.[19] The district court denied the request, ruling that Helm had waived his right to a hearing and that the recent holding of *Rummel v. Estelle*[20] precluded his eighth amendment claim.[21]

Helm appealed the district court's decision to the Court of Appeals for the Eighth Circuit.[22] After reviewing the evidence, the panel reversed the lower court and remanded Helm's case for resentencing.[23] The Eighth Circuit pointed out that the absence of any possibility of parole distinguished *Helm* from other recidivist cases that raised eighth amendment claims.[24] The court of appeals found that life imprisonment without parole was analogous to the death penalty because both totally reject rehabilitation as a basic goal of the criminal justice system.[25] The court considered the proportionality of such a sentence to the underlying offense for which it was imposed and determined that Helm's sentence was unconstitutional.[26] The Eighth

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thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes. . . . You'll have plenty of time to think this one over.

State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting) (quoting Parker, J., S.D. Circuit Court, 7th Cir. Pennington County), *rev'd sub nom.* Solem v. Helm, 684 F.2d 582 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3001 (1983).

The court of appeals, noting the sentencing judge's reference to the parole board, questioned whether he had simply misread the statute, or whether he considered the board's role in making nonbinding recommendations a primary one. Helm v. Solem, 684 F.2d 582, 583 n.3 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3001 (1983).

[16] State v. Helm, 287 N.W.2d 497, 498 (S.D. 1980), *rev'd sub nom.* Helm v. Solem, 684 F.2d 582 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3001 (1983). Three justices affirmed and two dissented.

[17] *Helm*, 103 S. Ct. at 3002.

[18] *Id.* at 3006.

[19] Brief for Respondent, Solem v. Helm, 287 N.W.2d 497 (S.D. 1980).

[20] 445 U.S. 263 (1980).

[21] Solem v. Helm, No. 82-492 (Oct. 1, 1982) (supplemental appendix).

[22] Solem v. Helm, 684 F.2d 582 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3001 (1983). The case was decided by a four-judge panel and the decision was unanimous.

[23] *Id.*

[24] *Id.* at 584.

[25] *Id.* at 585.

[26] *Id.* at 586.

Circuit directed that a writ be issued if, within sixty days, the trial court had not resentenced Helm.[27]

The State of South Dakota petitioned the United States Supreme Court for a writ of certiorari. By a narrow majority, the Supreme Court affirmed the decision of the court of appeals,[28] holding that the length of Helm's sentence was not in proportion to his crime, and thus violated the eighth amendment.[29]

The eighth amendment's proscription of "cruel and unusual punishment" can be traced to an almost identically worded provision of the English Declaration of Right of 1689.[30] The principle which it enunciates, however, antedates the English document. Before 1689, a number of American colonial charters provided that punishment be neither excessive nor cruel.[31] The Magna Carta and the Laws of Edward the Confessor also invoke this concept.[32] Even the ancient

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[27] *Id.* at 587.

[28] Five justices affirmed; four dissented. The majority opinion was written by Justice Powell, who was joined by Justices Brennan, Marshall, Stevens, and Blackmun. Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissented. *See infra* note 119.

[29] 103 S. Ct. at 3001.

[30] Section 10 of the Declaration of Right reads: "That excessive Baile ought not to be required not excessive Fines imposed not cruell or unusuall Punishments inflicted." SOURCES OF OUR LIBERTIES 245-47 (R. Perry ed. 1959) [hereinafter cited as R. PERRY]. Other commentators discussing the connection between the eighth amendment and the Declaration of Right include: D. HUTCHISON, THE FOUNDATIONS OF THE CONSTITUTION 316-17 (1975); Clapp, *supra* note 2, at 256; Granucci, *supra* note 2, at 852-64; Mulligan, *supra* note 2, at 640; Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636 (1966). But see Note, *supra* note 2, at 783 in which the authors argue that, while the English influence cannot be discounted, the real philosophical progenitors of the amendment are the French philosophers Voltaire and Montesquieu, and the Italian jurist Cesare Beccaria.

Until recently most scholars believed that the Declaration of Right was designed to prevent certain forms of punishment, such as disembowelment, beheading, and quartering that James II meted out in 1685 at the "Bloody Assize," the famous treason trial which followed the abortive rebellion of the Duke of Monmouth. *See, e.g.*, Mulligan, *supra* note 2, at 640. *But see* Granucci, *supra* note 2, at 850, 859 (impetus for enactment came from punishment of Titus Oates, minister of the Church of England whose perjury conviction resulted in sentence of life imprisonment, accompanied by defrocking, pilloring, whipping, and other indignities).

The source of the Act casts light on its meaning. The Framers of the United States Constitution, taking the "Bloody Assize" as the reason for the Declaration, understood the clause "cruel and unusual punishment" to refer only to the method of punishment. Granucci, *supra* note 2, at 860. Granucci argues that the Framers misunderstood the import of the Act. He claims that because it was based on the Oates trial, it was meant to prevent not only torture, but any penalty that was excessive, unauthorized, or not within the jurisdiction of the court to impose. *Id.* at 859.

[31] Carmona v. Ward, 576 F.2d 405, 425 n.1 (2d Cir. 1978) (quoting R. PERRY, *supra* note 30, at 107). For example, The Massachusetts Body of Liberties, drafted in 1641 stated that " '[f]or bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel,' " while the Charter of Rhode Island (1663) permitted " 'the imposing of lawfull and reasonable ffynes, mulcts, imprisonments. . . .' " *Id.*

[32] Granucci, *supra* note 2, at 846. Chapter 14 of the Magna Carta provides that " '[a] free man shall not be amerced for a trivial offense, except in accordance with the degree of the

Biblical precept of *lex talionis*, equal or equivalent punishment, has been viewed as the historical basis of the amendment.[33]

The original intent of the English Declaration of Right is ambiguous.[34] It is clear, however, that one hundred years later the Framers of the Constitution understood the phrase "cruel and unusual punishment" to mean barbarous forms of punishment rather than sentences of excessive duration.[35] That torture had fallen into disuse by this time may explain why the eighth amendment was dormant for the first century of the nations's history.[36] In its early decisions, the Supreme Court determined whether a challenged sentence was unconstitutionally "cruel and unusual" by examining only the mode, and not the length, of the punishment.[37] This construction robbed the amendment of any real force, and severely limited its applicability.[38]

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offense; for a serious offence he shall be amerced according to its gravity. . . .' " *Id.* at 844 (quoting J. HOLT, MAGNA CARTA 323 (1965)).

The Laws of Edward the Confessor, a 14th century document, applies the prohibition of excessiveness to physical as well as monetary punishment: "We do forbid that a person shall be condemned to death for a trifling offense. But for the correction of the multitude, extreme punishment shall be inflicted according to the nature and extent of the offense." *Id.* (quoting B. BARRINGTON, THE MAGNA CARTA AND OTHER GREAT CHARTERS OF ENGLAND 181, 199 (1900)).

[33] The biblical principle of *lex talionis* limited punishment to that which was identical to the offense. The best known example of an identical talion, "an eye for an eye, a tooth for a tooth," occurs in slightly different forms in *Exodus* 21:23-24 and *Leviticus* 24:19-20. Other expressions of the concept can be found in *Genesis* 9:6 and *Deuteronomy* 19:19.

[34] *See supra* note 30.

[35] *See* Clapp, *supra* note 2, at 256-57; Mulligan, *supra* note 2, at 642. Granucci, *supra* note 2, at 860, argues that this was a misunderstanding on the part of the Framers.

[36] Hobbs v. State, 13 Ind. 404, 409-10, 32 N.E. 1019, 1021 (1893) (primitive forms of punishment no longer inflicted and hence eighth amendment obsolete).

[37] The Supreme Court directly addressed the eighth amendment for the first time in Wilkerson v. Utah, 99 U.S. 130 (1878), in which the Court refused to find that execution by shooting constituted "cruel and unusual punishment." The Court found that, although the parameters of the eighth amendment were difficult to define with precision, it was "safe to affirm" that its sole purpose was to prohibit punishments that involved unnecessary cruelty. *Id.* at 135-36. As illustrative examples of punishments which would contravene the eighth amendment, the Court enumerated public dissection, beheading, and burning alive. *Id.* The *Wilkerson* Court, in finding that death by shooting was not cruel or unusual, pointed to similar practices used in the military and in other countries. *Id.* at 134.

Eleven years later, in the case of *In re* Kemmler, 136 U.S. 436 (1890), the Court similarly construed the eighth amendment in evaluating a new form of execution, electrocution. Referring to the English Declaration of Right as its authority, the *Kemmler* Court explicitly stated that the death penalty per se was not open to challenge. "Punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies . . . something more than the mere extinguishment of life." *Id.* at 446-47. Later, in Furman v. Georgia, 408 U.S. 238 (1972), the Court would limit the use of the death penalty. *See infra* notes 77-83 and accompanying text.

[38] *See supra* note 37.

There was an early indication, however, that a more expansive interpretation was possible.[39] In the landmark case of *Weems v. United States*,[40] the Court first confronted the question of whether, in addition to forbidding harsh forms of punishment, the eighth amendment also required courts to proportion the penalty to the nature of the crime. Weems, a disbursing officer for the Coast Guard in Manila, was convicted of falsifying official records.[41] The sentence imposed was a minimum of twelve years imprisonment in chains at hard labor, along with the loss of parental, marital, and property rights during imprisonment, the permanent loss of political rights, and the forfeiture of retirement pay.[42] Weems also was required to pay a large fine, and to submit to official surveillance for the rest of his life.[43]

The *Weems* Court described the sentence as "cruel in its excess of imprisonment and that which accompanies and follows imprisonment [and] unusual in its character." The Court went on to note that "[i]ts punishments come under the condemnation of the Bill of Rights, both on account of their degree and their kind."[44] In reaching this conclusion, the Court applied a comparative approach which weighed Weems' sentence against sentences imposed in other American jurisdictions for crimes which the Court regarded as at least as serious as the one under scrutiny.[45] Finally, the Court found that the meaning of

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[39] In O'Neil v. Vermont, 144 U.S. 323 (1892), a proportionality concept was enunciated in connection with the eighth amendment for the first time. The defendant was convicted of 307 sales of liquor without a license. *Id.* at 327. Because he was unable to pay the required fine, he was sentenced to 54 years imprisonment—three days imprisonment for each dollar owed. He appealed on the grounds that this penalty was so excessive that it constituted cruel and unusual punishment. *Id.* The Court dismissed the case on procedural grounds and therefore never reached the constitutional issue. *Id.* at 334-35. The Court also stated that the eighth amendment does not apply to the states. *Id.* at 442. It was not until Robinson v. California, 370 U.S. 660 (1962), that incorporation formally took place. *See infra* note 76.

In his dissenting opinion, however, Justice Field found the punishment "cruel and unusual" within the meaning of the Constitution. *O'Neil*, 144 U.S. at 339. Conceding that its original intent was to prohibit torturous forms of punishment, Justice Field found that the scope of the amendment was broad enough to encompass punishments that were excessive or disproportionate to the offense. *Id.* at 339-40.

[40] 217 U.S. 349 (1910). The case was argued before seven justices. Justices White and Holmes dissented.

[41] *Id.* at 357-58.

[42] *Id.* at 364.

[43] *Id.* at 364-65. Weems was sentenced to 15 years imprisonment and a fine of 4000 pesos, both elements well within statutory limits.

[44] *Id.* at 377. The Court found the statute was per se unconstitutional, since even the minimum sentence it mandated constituted cruel and unusual punishment. *Id.* at 382.

[45] *Id.* at 380. The Court compared Weems' crime to forgery, robbery, larceny, misprison of treason, inciting rebellion, and conspiracy to overturn the government by force, and found them all to carry lesser penalties than he had received.

the eighth amendment was not static, but must be constantly reinterpreted and adapted to meet the changing conditions.[46]

The scope of the holding in *Weems* has been a matter of great debate.[47] The circuit courts have generally adopted a broad interpretation of *Weems*, thereby incorporating into the eighth amendment the precept that the punishment must be proportionate to the crime. For example, in the 1970 decision of *Ralph v. Warden*,[48] the Court of Appeals for the Fourth Circuit invoked the eighth amendment to overturn the death sentence of a defendant convicted of rape.[49] Relying on *Weems*, the court did not find that the death penalty was cruel and unusual punishment per se, but held that its disproportion to a

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[46] *Id.* at 372-73 (citing O'Neil v. Vermont, 136 U.S. 436 (1890) (Fields, J., dissenting)). The *O'Neil* dissent stated:

> It must have come to [the Framers of the Constitution] that there could be exercises of cruelty by laws other than those which inflicted bodily harm or mutilation. . . . [The eighth amendment's] general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Times works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.

Weems, 217 U.S. at 372-73.

[47] Justice White, dissenting in *Weems*, unequivocally regarded the majority opinion as a proportionality analysis. *Weems*, 217 U.S. at 385 (White, J., dissenting). He characterized it as "an interpretation of the cruel and unusual punishment clause of the eighth amendment, never before announced. . ." and concluded that such interpretation imposes on the legislature "the duty of proportioning punishment according to the nature of the crime, and casts upon the judiciary the duty of determining whether punishments have been properly apportioned in a particular statute. . . ." *Id.* It was on this basis that he refused to support the decision. *Id.*

Legal commentators are also divided in their evaluation of *Weems*. For the view that the *Weems* Court identified proportionality as an essential component of the eighth amendment guarantee, see Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After* Rummel v. Estelle, 1980 DUKE L.J. 1103, 1113-14 (1980) ("[In *Weems*] the Court broadened its prior eighth amendment analysis. . ."); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 839 (1972) ("[I]n *Weems v. United States* the United States Supreme Court rejected [a] narrow interpretation").

The more conservative approach regards *Weems* as simply another instance of an impermissible form of punishment. *See* Mulligan, *supra* note 2, at 643 ("While the language of *Weems* arguably does support the doctrine of proportionality . . . [it] is difficult . . . to believe that the Supreme Court would have held a fifteen year term of imprisonment unconstitutional had it not been for the barbarous terms which had accompanied and, indeed, followed its service."); Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075 (1964) ("The case is much closer to the conventional view that cruel and unusual punishment is a matter of mode not proportion than it is usually thought to be.").

[48] 438 F.2d 786 (4th Cir. 1970). The fact pattern is similar to that of Coker v. Georgia, 433 U.S. 584 (1977), decided several years later in much the same way. Both cases involved a death penalty for rape.

[49] *Ralph*, 438 F.2d at 787.

specific offense could violate the eighth amendment.[50] In 1973, the Fourth Circuit refined this analysis in *Hart v. Coiner*,[51] a case which is factually analogous to *Helm*,[52] and held that a mandatory life sentence as applied to a nonviolent habitual offender was unconstitutionally disproportionate.[53] The *Hart* court used four "objective criteria" to reach its verdict: (1) an interjurisdictional comparison; (2) a "nature of the offense" test similar to that used in *Weems;* (3) a comparison of sentences levied for other felony offenses in the state; and (4) a search for a significantly less severe punishment sufficient to serve the legislative purpose underlying the penalty.[54] Five years later, in *Carmona v. Ward*,[55] the Second Circuit Court of Appeals referred to proportionality analysis as an established procedure used by circuit courts in evaluating eighth amendment questions.[56] Although the *Car-*

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[50] In weighing the nature of the crime, the court held that the fact that the rapist in this case neither took nor endangered the life of his victim should be considered. *Id.* at 783. The court also noted that two-thirds of the states and the majority of foreign nations did not punish rape with death. *Id.* at 791-92. Even in those states whose criminal codes permit execution in rape cases, the court found that it was infrequently applied. This was especially true where there were no aggravating circumstances accompanying the crime. *Id.* at 792-93. The court found these facts all spoke to the progressing standards of society by which eighth amendment requirements must be evaluated. *Id.* at 790-91; *see also* Coker v. Georgia, 433 U.S. 584 (1977).

[51] 483 F.2d 136 (4th Cir. 1973).

[52] In *Hart*, the defendant received a mandatory life sentence under West Virginia's habitual offender statute, W. VA. CODE § 61-11-18 (1977), which does not differentiate between violent and nonviolent crimes. *Hart*, 483 F.2d at 138. Hart's three offenses were: 1) writing a check on insufficient funds for $50; 2) transporting forged checks in the amount of $140 across state lines; and 3) perjury in a murder trial in which his son was the defendant. *Id.* at 138. The court noted that had the bad check which Hart passed in his first offense been for one penny less, it would not have been classified as a felony, and, as a result, the maximum sentence that Hart could have received following the perjury conviction would have been a possible five year enhancement of a one to 10 year term of imprisonment. *Id.* at 138 n.1.

[53] *Hart*, 483 F.2d at 136.

[54] *Id.* at 140-42. Applying the same four criteria, the Sixth Circuit in Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975), *vacated and remanded*, 423 U.S. 993 (1976), carried the process one step further and invalidated the state's statute. The defendant had been sentenced to terms of from 10 to 20 years in prison for possession of marijuana, and from 20 to 40 years in prison for its sale. *Downey*, 518 F.2d at 1288-89. Acknowledging that the Supreme Court had never found a penalty cruel and unusual solely because of its length, the court nevertheless found the mandated penalties so excessive that the statute violated the eighth amendment. *Id.* at 1292. The *Downey* court reasoned that the fact that the Supreme Court had, on occasion, considered length-of-sentence cases on their merits implied that the possibility of an unconstitutionally long sentence existed. *Id.* at 1290; *see also* Hemans v. United States, 163 F.2d 228, 237 (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 eighth amendment]").

[55] 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979).

[56] *Id.* at 409.

mona court upheld sentences of four and six years to life for two hardened and unrepentant drug pushers, it "accepted the proposition that in some extraordinary cases a severe sentence imposed for a minor offense could, solely because of its length, be a cruel and unusual punishment."[57]

State courts also interpreted *Weems* to mean that the length of a sentence, as well as its form, had to be proportionate to the crime in order to conform with eighth amendment standards. For example, in 1952, in *State v. Evans*,[58] the Supreme Court of Idaho found no difficulty in invalidating a statute which permitted life imprisonment for lewd behavior towards a minor.[59] Similarly, in *People v. Lorentzen*,[60] the Supreme Court of Michigan, relying on its evaluation of *Weems*, concluded that a prison term of twenty years was impermissibly disproportionate to a first offense of selling marijuana. The *Lorentzen* court reached this finding by employing a refined, three-tiered version of the comparative test used in *Weems*.[61]

In contrast to the state and circuit courts, the Supreme Court of the United States has consistently read the *Weems* decision narrowly, and therefore has refused to apply a proportionality analysis to those eighth amendment challenges which it has reviewed. For example, in 1911, only one year after *Weems*, the Court in *Graham v. West Virginia*[62] upheld a mandatory life sentence imposed upon a three-time horse thief.[63] Weems was further circumscribed by the 1916 decision of *Badders v. United States*[64] in which the Court rejected the petitioner's argument that concurrent sentences could be so dispropor-

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[57] *Id.* The court acknowledged that it could not find a Supreme Court decision to support its contention, and put great emphasis on the deference which the judiciary should give to the wisdom of the legislature. *Id.* at 416. In his dissent, Justice Oakes expounded the proportionality principle and its application in a careful and detailed manner. *Id.* at 420-25 (Oakes, J., dissenting).

[58] 73 Idaho 50, 245 P.2d 788 (1952).

[59] *Id.* at 55, 245 P.2d at 792. The court applied the state constitutional provision forbidding cruel and unusual punishment. IDAHO CONST. art. 1, § 6 (1890).

[60] 387 Mich. 167, 194 N.W.2d 827 (1972).

[61] First, the court compared the sentence at issue with other penalties imposed under Michigan statutes for similar or more serious crimes. *Id.* at 173-79, 194 N.W.2d at 834. Second, it surveyed other jurisdictions to determine what was generally considered appropriate punishment for this offense. *Id.* at 179, 194 N.W.2d at 832. Finally, it considered whether a lesser punishment could accomplish the same goal. *Id.* at 181, 194 N.W.2d at 833; *see also In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (comparative analysis used to find indeterminate sentence for second offense of indecent exposure offensive to state constitutional provision forbidding cruel and unusual punishment).

[62] 224 U.S. 616 (1911).

[63] *Id.* at 631.

[64] 240 U.S. 391 (1916).

tionately long as to constitute cruel and unusual punishment.[65] Without discussing *Weems* at all, the Court disposed of the constitutional issue by citing *Howard v. Fleming*,[66] a pre-*Weems* case as its authority. That case, which had involved a conspiracy to defraud, rejected the kind of comparative analysis that the *Weems* Court had used to reach its findings of disproportionality.[67]

There were a number of instances, nevertheless, in which the Supreme Court did invalidate sentences under the eighth amendment in the period between the *Weems* and *Helm* decisions. The Supreme Court's approach was significantly different, however, from that of the state and circuit courts during the same time period. Generally, the cases reviewed by the Supreme Court fell into one of two categories: cases which did not recognize a proportionality issue at all but instead focused on the nature of the punishment,[68] or those involving the death penalty.[69]

In *Trop v. Dulles*,[70] an example of the first category of cases, the Supreme Court struck down a sentence because the form of the punishment, rather than its disproportionality to the crime, violated the eighth amendment.[71] Trop, a former private in the United States Army who had been court-martialled for a minor infraction, was

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[65] *Id.* at 393. Justice Holmes, who dissented in *Weems*, wrote the majority opinion in *Badders*. In *Badders*, the defendant had posted seven letters to promote a fraudulent scheme. The Court considered the deposit of each letter a separate offense and imposed a cumulative sentence of five years imprisonment and $7000. *Id.*

Courts consistently have found the aggregate weight of consecutive sentences constitutional. As long as the sentence for a single offense was deemed within reasonable statutory limits, the cumulative effect of multiple penalties does not bring it within the proscription of the eighth amendment. *See, e.g.*, Anthony v. United States, 331 F.2d 687 (9th Cir. 1964) (consecutive sentences totalling 40 years for marijuana sales not cruel and unusual); Smith v. United States, 273 F.2d 462 (10th Cir. 1959) (52 years imprisonment and $30,000 in fines not excessive for 14 violations of narcotics law for first time offender), *cert. denied*, 363 U.S. 846 (1960); United States *ex rel.* Darrah v. Brierley, 290 F. Supp. 960 (E.D. Pa. 1968) (50-100 years imprisonment) for five consecutive sentences for burglary not "arbitrary and shocking to our sense of justice" and therefore constitutional), *aff'd*, 415 F.2d 9 (3d Cir. 1969).

[66] 191 U.S. 126 (1903).

[67] *Id.* at 135-36. Rejecting the defendant's attempt to compare his sentence with others imposed in North Carolina, the *Howard* Court said: "That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another to a cruel one." *Id.*

[68] *See infra* notes 70-76 and accompanying text.

[69] *See infra* notes 77-97 and accompanying text. It is unclear whether, in evaluating the death penalty, the Court applied a proportionality measure or simply viewed the death penalty as a form of punishment which was proscribed in certain circumstances.

[70] 356 U.S. 86 (1958).

[71] *Trop* was the first modern case in which the Court found any punishment to be in violation of the eighth amendment.

sentenced to three years imprisonment at hard labor and given a dishonorable discharge.[72] Trop was later informed that, because of his wartime conviction, he had been deprived of his United States citizenship.[73] Chief Justice Warren, writing for the Court, expressly rejected any implication that denaturalization was unconstitutional because it was disproportionate to Trop's offense, emphasizing that wartime desertion is often punishable by death.[74] Rather, the *Trop* Court's concern was limited to the form of the penalty, and the majority found that denaturalization was an inherently cruel form of punishment.[75] *Trop* was therefore consistent with the Court's previous narrow construction of the eighth amendment which proscribed only certain forms of punishment. In dicta, however, Justice Warren implied that a more far-reaching analysis was possible, stating that "[t]he words of the [eighth] amendment are not precise and . . . their scope is not static. The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[76]

In 1972, the Supreme Court, in *Furman v. Georgia*,[77] did use an eighth amendment proportionality analysis to invalidate a number of state death penalty statutes. Five justices concurred in finding the death penalties under consideration invalid, but only Justices Brennan and Marshall focused on the substantive meaning of the eighth amendment and used a comparative approach to find the death pen-

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[72] *Id.* at 88.

[73] *Id.* at 103.

[74] *Id.* at 99. Justice Frankfurter made this point explicitly in his dissent.

> It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence. . . . Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?

Id. at 125 (Frankfurter, J., dissenting).

[75] *Id.* at 101. "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture. . . ." *Id.*

[76] *Id.* at 100-01 (footnote omitted). The Court heard another eighth amendment case in 1962. In Robinson v. California, 370 U.S. 660 (1962), a narcotics addict was convicted and sentenced to 90 days imprisonment under a California statute which made it a criminal offense for a person to "be addicted to the use of narcotics." CALIFORNIA HEALTH & SAFETY CODE § 1172 (1979). The Court expressly incorporated federal standards of cruel and unusual punishment into state law through the due process clause of the 14th amendment, *Robinson*, 370 U.S. at 666, and invalidated the sentence. It is not clear whether it did so because it found the sentence disproportionate to the offense, or because it viewed imprisonment as a cruel mode of punishing an addict. Justice Stewart seemed to imply that it was unconstitutional to impose any criminal sanction on someone who was ill or subject to an uncontrollable addiction. *Id.* at 667.

[77] 408 U.S. 238 (1972).

alties excessive and disproportionate.[78] Justice Brennan concluded that, to conform to the requirements of the eighth amendment, a punishment: 1) cannot by its severity or form be degrading to human dignity;[79] 2) must not be arbitrarily or capriciously inflicted;[80] 3) must be in keeping with contemporary societal standards;[81] and 4) cannot be clearly in excess of what is needed to achieve legislative goals.[82] Justice Marshall, adopting a similar test, found that the eighth amendment precluded execution as a means of punishment under any circumstances.[83] Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented separately,[84] arguing that the concept of separation of powers required judicial deference to legislative prerogatives, and that the Court could therefore invalidate only inherently cruel punishments.[85] Justice Powell emphasized that all other factors, such as the proportion of the crime to the penalty, were solely within the purview of the legislature and thus beyond the scope of the eighth amendment and of the Court's authority.[86]

Following *Furman*, the Supreme Court attempted to clarify the administration of a proportionality standard within the context of

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[78] *Id.* at 240. Three of the justices reached their verdict largely on procedural grounds, determining that the death penalties in this case were cruel and unusual because they were administered in an arbitrary, inequitable, or discriminatory fashion. *Id.* at 240-47 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring). This kind of determination is consistent with the Court's traditional focus on form rather than on proportion.

[79] *Id.* at 244-50 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 314 (White, J., concurring).

[80] *Id.* at 281.

[81] *Id.*

[82] *Id.* at 280. "Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment." *Id.* For further discussion of this requirement, sometimes referred to as "the least drastic alternative" test, see Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618, 637 (1969). *See also* Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51 (1972).

[83] *Furman*, 408 U.S. at 359 (Marshall, J., concurring).

[84] Justice Rehnquist later characterized the *Furman* decision as "glossolalial," a term which connotes a fabricated, nonmeaningful speech, especially as associated with certain schizophrenic syndromes. WEBSTER'S DICTIONARY 595 (2d College ed. 1980); Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (Rehnquist, J., dissenting). Judge Clark of the California court, in no less critical a tone, stated that "[w]here it not a matter of life or death, the entire affair would assume the character of a comedy of errors." Rockwell v. Superior Court, 18 Cal. 3d 420, 437, 556 P.2d 1101, 1118, 134 Cal. Rptr. 650, 657 (1976) (Clark, J., concurring).

[85] *Furman*, 408 U.S. at 383-84 (Burger, C.J., dissenting); *id.* at 431-33 (Powell, J., dissenting); *id.* at 467-70 (Rehnquist, J., dissenting).

[86] *Id.* at 337 (Powell, J., dissenting).

death penalty cases.[87] In the 1976 decision of *Gregg v. Georgia*,[88] the Court held that the death penalty is not cruel and unusual per se,[89] as long as it is subject to a number of procedural safeguards, including an examination of the nature of the offense in question, in order to determine if the penalty imposed is excessive.[90]

Only a year later, in *Coker v. Georgia*,[91] the Court reversed a sentence of death for a convicted rapist on the explicitly stated ground that the punishment was disproportionate to the crime.[92] Although the Court agreed that the crime itself, the rape of an adult woman, was a heinous offense, it noted that no life had been taken.[93] Comparing the sentence to others within the same jurisdiction, the majority observed that Georgia usually reserved the death penalty for prisoners convicted of either murder with malice aforethought or felony murder.[94] The Court also made an interjurisdictional investigation and found that only two other states authorized a death penalty for the rape of an adult.[95] Finally, the Court indicated that evolving social standards were revealed by a showing that a vast majority of juries had refused to impose a death sentence in any but the most extreme cases of rape.[96] On the basis of this analysis, the Court concluded that execution for rape was excessive and contributed nothing toward achieving the acceptable goals of punishment.[97]

In 1980, the Supreme Court had the opportunity to extend its incipient proportionality analysis to a noncapital case,[98] but refused to

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[87] *See, e.g.*, Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). Both these decisions struck down mandatory death penalties.

[88] 428 U.S. 153 (1976).

[89] *Id.* at 178. Justice Marshall dissented, reaffirming his position that the death penalty was unconstitutional in any circumstance. *Id.* at 231 (Marshall, J., dissenting).

[90] *Id.* at 173. The inquiry required consideration of aggravating and mitigating factors in a bifurcated proceeding. *Id.* at 188-95.

[91] 433 U.S. 584 (1977).

[92] *Id.* at 592.

[93] *Id.* at 598.

[94] *Id.* at 600.

[95] *Id.* at 594-95. Three others would execute a rapist when the victim was a child. *Id.*

[96] *Id.* at 597.

[97] *Id.* at 592. Justice Powell concurred with the judgment of the Court in this case, but did not want to foreclose the possibility of a death penalty in all cases of rape. *Id.* at 603 (Powell, J., concurring in part, dissenting in part). Justices Marshall and Brennan concurred, but would find all death penalties unconstitutional. *Id.* at 600 (Marshall, J., concurring). Justices Rehnquist and Burger dissented, and would leave the sentence entirely within the discretion of the legislature. *Id.* at 610-11 (Burger, C.J., dissenting).

[98] In McGautha v. California, 402 U.S. 183 (1972), for example, Justice Black stated the controlling attitude explicitly. Concurring with the ruling that the petitioner had not been denied any constitutional rights, Justice Black reiterated that the eighth amendement was

do so. In *Rummel v. Estelle*,[99] the Court upheld a life sentence imposed on a recidivist.[100] William Rummel was a petty thief who had been convicted of three nonviolent felonies.[101] Texas law provided that anyone convicted of three felonies, regardless of their nature, was subject to its habitual offender statute.[102] As a result, Rummel was sentenced to life imprisonment.[103] Rummel challenged the sentence, contending that in view of the underlying offense, its length rendered it cruel and unusual.[104]

Rummel relied on the decision in *Weems*, arguing that the length of Weems' imprisonment was the basis of the Court's finding of cruel and unusual punishment in that case.[105] The Court found, however, that *Weems* spoke only to unorthodox, not excessively long penalties.[106] Justice Rehnquist, speaking for the Court, drew a "bright line" between the death penalty and all other forms of punishment,[107] and cautioned that prior opinions therefore would be of "limited assistance" in evaluating sentences for terms of years.[108] The Court also rejected the use of comparative or proportional analyses as inapposite to noncapital cases.[109] Finally, the Court ruled that, in light of Rummel's eligibility for parole, the sentence should realistically be viewed

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forms of punishment which the Framers intended to eliminate, and indicated that any other interpretation would constitute a judicial revision of the Constitution. *Id.* at 226 (opinion of Black, J.).

[99] 445 U.S. 263 (1980).

[100] *Id.* at 266-67.

[101] Rummel v. Estelle, 587 F.2d 651, 653 (5th Cir. 1978), *aff'd*, 445 U.S. 263 (1980). Rummel's first conviction resulted from the fraudulent use of a credit card to obtain $80.00 worth of goods. His second conviction was for passing a bad check in the amount of $28.36. His third felony conviction was for obtaining $120.75 under false pretenses. *Id.*

[102] *Id.* Rummel was convicted under TEX. PENAL CODE ANN. art. 63 (Vernon 1925) which states, in pertinent part: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." *Id.*

[103] *Id.* at 266.

[104] *Id.* at 267.

[105] *Id.* at 273.

[106] *Id.* at 273-74.

[107] *Id.* The Court, emphasizing the unique nature of the death penalty for purposes of eighth amendment analysis, quoted Justice Stewart's opinion in *Furman*:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. (quoting *Furman*, 408 U.S. at 306).

[108] *Rummel*, 445 U.S. at 272.

[109] *Id.*

as one for less than life imprisonment.[110] The Court expressed concern that any further evaluation of the offense in question would encroach improperly on the province of the legislature.[111]

In the wake of *Rummel*, some courts felt bound to expunge proportionality considerations from the eighth amendment, except with regard to some death penalty cases.[112] Other courts devised inventive interpretations of *Rummel* which allowed them to continue to scrutinize noncapital sentences. For example, the Third Circuit Court of Appeals held that a punishment could be cruel and unusual by reason of disproportion, as long as it was *more* disproportionate than Rummel's had been.[113] Finally, the Fifth Circuit, in *Terrebonne v. Blackburn*,[114] in the course of upholding a life sentence for distributing heroin, implied that *Rummel* had not foreclosed the use of proportionality in nondeath cases. The court of appeals reasoned that, by weighing the effect of parole on the sentence, the *Rummel* Court had focused on the length of the sentence and had thus, in effect, made its own proportionality analysis.[115] According to *Terrebonne*, because the *Rummel* Court had not adopted the position that the legislature has absolute discretion, the decision implied that some judicial review of individual sentences was still possible.[116]

That possibility became a reality just two years later when, in *Solem v. Helm*,[117] the Supreme Court unexpectedly reversed its prior course and overturned a sentence of life imprisonment imposed under

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[110] *Id.* at 281. The majority asserted that "a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." *Id.*

[111] The Court dismissed the argument that Rummel's offenses were nonviolent with two counterarguments: first, that the "pettiness" of the crime is no measure of the strength of society's interest in deterring it, *id.* at 276; and second, that the offense for which Rummel was being given a life sentence was not the theft of $120, but his recidivism (i.e., his *propensity* for crime). *Id.* at 284. Both interjurisdictional and intrajurisdictional comparisons were rejected as contrary to concepts of federalism and legislative prerogative. *Id.* at 282, 284.

[112] *See, e.g.*, Chapman v. Pickett, 491 F. Supp. 967 (C.D. Ill. 1980) (interprets *Rummel* to exclude judicial intervention in noncapital proportionality cases); State v. Smith, 275 S.C. 164, 268 S.E.2d 276 (1980).

[113] Virgin Islands v. Berry, 631 F.2d 214, 218 (3d Cir. 1980). The court let the sentence stand in this case because it found no "gross disproportionality." *Id.* In State v. McDaniel, 228 Kan. 172, 612 P.2d 1231 (1980), a Kansas court took a different approach. It stated that a court was "not *required*" by *Rummel* to make a proportionality test under the eighth amendment, but implied that it was free to do so. *Id.* at 1242 (emphasis in original). The Kansas court proceeded to do just that, although it found the sentence in question valid.

[114] 646 F.2d 997 (5th Cir. 1981).

[115] *Id.* at 1002.

[116] *Id.* at 1001.

[117] 103 S. Ct. 3001 (1983). The fact patterns in *Helm* and *Rummel* were similar, *see supra* notes 5-12 & 102-05 and accompanying text, with several variations, some minor and some

a recidivist statute.[118] Justice Powell, writing for the majority,[119] initially focused on the concept of proportionality and its constitutional significance.[120] Reviewing the historical development of the eighth amendment, the Court maintained that, when the Framers adopted the language of the English Bill of Rights prohibiting excessive fines and cruel and unusual punishment, they also were incorporating its

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which the Court considered significant. *See infra* text accompanying note 142. Both defendants were petty criminals, convicted under recidivist statutes.

[118] Recidivist statutes have a long history in America. As early as 1692, the Massachusetts Bay Colony enacted a law aimed at curbing a rash of hog thefts by providing for a more severe penalty for each subsequent offense. Note, *Selective Incapacitation: Reducing Crime through Predictions of Recidivism*, 96 HARV. L. REV. 511 (1982). The rationale behind such laws was enunciated clearly in the Gladstone Committee Report, presented to the House of Commons as part of an effort at prison reform in 1895.

> "There is evidently a large class of habitual criminals—who live by robbery and thieving and petty larceny—who run the risk of comparatively short sentences with comparative indifference. . . . When an offender has been convicted a fourth time or more he or she is pretty sure to have taken to crime as a profession and sooner or later to return to prison. We are, therefore, of opinion that further corrective measures are desirable for these persons. . . . To punish them for the particular offense is almost useless; the real offense is the willful persistence in the deliberately acquired habit of crime.

Katkin, *supra* note 12, at 99-100 (quoting HOUSE OF COMMONS, REPORT OF THE COMM. ON PRISONS 31 (1895)).

This same idea was expounded by the *Rummel* Court which stated explicitly that the defendant was being punished not only for his theft of $120, the crime which was the subject of the trial, but for his underlying propensity for crime. *Rummel*, 445 U.S. at 284; *see infra* text accompanying note 180.

[119] The configuration of the Court was almost a mirror image of the Court in *Rummel*. Justice Powell, who had written the dissent in *Rummel*, delivered the majority opinion in *Helm*. He was joined by Justices Brennan, Marshall, Stevens, and Blackmun. All except Justice Blackmun had been among the dissenters in *Rummel*. Chief Justice Burger filed the dissent in the present case. He was joined by Justices White, Rehnquist (author of the plurality opinion in *Rummel*), and O'Connor (who had joined the Court in the intervening period). Justice Stewart, who had written an opinion in which he reluctantly concurred with the majority in *Rummel*, had retired from the bench, making way for Justice O'Connor's appointment.

Justice Blackmun cast the deciding vote in *Helm*. Justice Blackmun's position on the Court has shifted significantly since he was appointed in 1970. In seven cases involving an eighth amendment challenge decided between 1980 and 1983 (subsequent to *Rummel* but prior to *Helm*), there was a clear division in the positions taken by Justices Brennan and Marshall on one hand, and Chief Justice Burger and Justice Rehnquist on the other. On six of the seven occasions, Justice Blackmun aligned himself with the former group, although he often wrote a separate opinion. *See* Barefoot v. Estellè, 103 S. Ct. 3383 (1983); California v. Ramos, 103 S. Ct. 336 (1983); Barclay v. Florida, 103 S. Ct. 3418 (1983); United States v. Johnson, 457 U.S. 537 (1982); Bullington v. Missouri, 451 U.S. 430 (1981); United States v. Bailey, 444 U.S. 394 (1980). Only once during this period did Justice Blackmun clearly prefer the more conservative position. *See* Pennhurst State School v. Halderman, 451 U.S. 1 (1981). For an interesting study of Justice Blackmun's voting record on social issues, see Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 715 (1983); *see also* Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. Times, Feb. 20, 1983, § 6 (Magazine), at 20.

[120] *Helm*, 103 S. Ct. at 3006-10.

underlying proportionality principle into their new Constitution.[121] The Court further averred that proportionality had been an integral part of constitutional analysis under the eighth amendment for almost one hundred years.[122] Finally, the Court concluded that prison sentences were properly subject to proportionality analysis.[123] The Court reasoned that this holding was the logical result of previous development[124] and that "[i]t would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not."[125] The Court admitted, however, that the occasions for invalidating a sentence for a term of years because of its disproportionality would be rare.[126]

Having reached this conclusion, the Court next sought the standards by which to determine the proportionality of a given sentence to a particular crime. For this purpose, it adopted the comparative approach used in *Weems* and developed in subsequent cases.[127] In enunciating its standard, the Court adopted three objective criteria: the nature of the offense, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed in other jurisdictions for the same crime.[128]

This analysis formed the core of the *Helm* opinion. The Court first evaluated the contours of the offense itself.[129] Recognizing the difficulties inherent in weighing the gravity of different crimes, the Court nevertheless indicated that it is not only possible to reach a consensus on relative seriousness, but that it is one of the Court's

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[121] *Id.* at 3007. The Court reasoned that, since proportionality was clearly an integral part of the English legal system, and since one recurrent theme of the revolutionary period was the American desire for all the rights of English subjects, it would be anomolous if the Framers had taken the words and not the content of the 1688 Bill of Rights. But see supra note 30 on the disagreement among scholars concerning the precise meaning of the English provision, especially as understood by the Framers.

[122] *Helm*, 103 S. Ct. at 3007-08 (citing Weems v. United States, 217 U.S. 349 (1910)); *see* Robinson v. California, 370 U.S. 660 (1962); O'Neil v. Vermont, 144 U.S. 323 (1892); *see also supra* notes 47-61. The Court also relied on several death penalty cases. *See* Enmund v. Florida, 458 U.S. 782 (1982); *Coker*, 433 U.S. at 584; *see also Rummel*, 445 U.S. at 277 n.13 (conceding some prison sentences may be unconstitutionally disproportionate).

[123] *Helm*, 103 S. Ct. at 3009.

[124] The Court did not address Hutto v. Davis, 102 S. Ct. 703 (1982), in which it explicitly found that a sentence for a term of years had never been invalidated solely because of its length.

[125] *Helm*, 103 S. Ct. at 3009.

[126] The Court at this point also gave a deferential nod to the concept of legislative prerogative. *Id.* at 3009 n.16.

[127] *See, e.g., Trop*, 356 U.S. at 86; *supra* note 76 and accompanying text.

[128] *Helm*, 103 S. Ct. at 3010.

[129] *Id.* at 3011.

functions to do so.[130] Some of the elements aiding such a determination are the magnitude of the crime, the violence or threat of violence it presents, the harm likely to follow, and the culpability of the offender.[131] On the basis of all these considerations, the Court held that Helm's crime was a minor one—a property offense which threatened no violence and involved only a small sum.[132] The Court acknowledged that Helm was being punished not only for his latest offense, but also for his recidivism.[133] It held, however, that although the state had the right to punish habitual offenders more severely than

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[130] *Id.*

[131] *Id.*

[132] *Id.* at 3012-13. The Court pointed out that had Helm been convicted of embezzling or stealing the same amount, or of writing a $100 check against insufficient funds, rather than against a nonexistent account, he would have been guilty of a misdemeanor rather than a felony. *Id.* at 3013 n.20.

[133] *Id.* at 3013. Although there have been many challenges to recidivist laws, few have been successful. The constitutionality of such statutes had been acknowledged generally in a number of test cases. *See, e.g.*, Spencer v. Texas, 385 U.S. 554 (1967); Graham v. West Virginia, 224 U.S. 616 (1912); Moore v. Missouri, 159 U.S. 673 (1895). Specifically, recidivist statutes have survived challenges based on a variety of constitutional considerations: the due process clause of the 14th amendment; *see, e.g.*, Oyler v. Boles, 368 U.S. 448 (1962) (due process does not require advance notice of habitual criminal accusation); Ves v. Bomar, 213 Tenn. 487, 376 S.W.2d 446 (1964) (four-time offender not denied due process by indictment as habitual offender); Surrat v. Commonwealth, 187 Va. 940, 48 S.E.2d 362 (1948) (introduction of evidence of former convictions not violative of due process); the equal protection clause of the 14th amendment, Skinner v. Oklahoma, 316 U.S. 535 (1942) (equal protection considerations do not prevent state from marking class of offenders for special treatment); Moore v. Missouri, 159 U.S. 673 (1895) (state may provide that persons previously convicted of crime suffer more severe punishment for subsequent offense without violating equal protection clause of 14th amendment, provided only that such added punishment meted out to all habitual offenders); double jeopardy, Gryger v. Burke, 334 U.S. 728 (1948) (enhanced penalty for fourth offense not new jeopardy or added punishment for earlier crimes); ex post facto, Commonwealth v. Graves, 155 Mass. 163, 29 N.E. 579 (1892) (recidivist statute not ex post facto as to convictions prior to its passage, since criminal cannot be punished under it without conviction of felony after its passage and with presumed knowledge of its provisions); Ves v. Bomar, 213 Tenn. 487, 376 S.W.2d 446 (1964) ("habitual offender statutes are not ex post facto even where prior convictions occurred before effective date of such statute"); and the cruel and unusual clause of the eighth amendment, Graham v. West Virginia, 224 U.S. 616 (1911) (life sentence for third felony not cruel and unusual punishment). South Dakota's own recidivist statute, S.D. CODIFIED LAWS §§ 22-7-8, -7-1(2) (1979) (amended 1981), was upheld in State v. Connor, 265 N.W.2d 709 (S.D. 1978).

It is significant that neither *Rummel* nor *Helm* attacked the validity of such laws generally, but only as applied to them under the circumstances. In at least two cases prior to *Helm*, defendants have prevailed on this basis. *See Hart*, 483 F.2d at 136; *see supra* notes 51-54 and accompanying text; State v. Fain, 94 Wash. 2d 387, 617 P.2d 720 (1980). Whether habitual offender statutes on their face are entirely immune from future challenge is a question that has been raised by a number of observers. *See, e.g.*, Katkin, *supra* note 12, at 105; Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356 (1975); Note, *supra* note 118, at 511; *see also infra* notes 174-91 and accompanying text.

others,[134] that penalty could not be rendered in the abstract.[135] It was also necessary to consider the nature of the prior offenses. Here, the Court found that Helm's previous crimes were also relatively minor and nonviolent.[136]

Examining the penalties that South Dakota imposed for other crimes, the Court found that only murder, treason, first degree manslaughter, first degree arson, and kidnapping were punished with life imprisonment.[137] Other dangerous and violent crimes, such as attempted murder, first degree rape, and aggravated riot, received lesser sentences.[138]

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[134] *Helm*, 103 S. Ct. at 3013. As of 1984, all but five states, Maine, Ohio, Pennsylvania, South Carolina, and Virginia, had recidivist statutes in effect. These statutes can be divided into four main types: mandatory life, discretionary life, mandatory term, and discretionary term. Within these categories, there are further divisions. For example, some states which mandate a life sentence after the final felony impose it after the third felony. *See* TEX. PENAL CODE ANN. tit. 3, § 12.42 (Vernon 1974); WASH. REV. CODE ANN. § 9.92.090 (1977); W. VA. CODE § 61-11-18 (1977). Others require at least four previous felonies. *See* COLO. REV. STAT. § 16-13-101 (1978); NEV. REV. STAT. § 207.010(2) (1981); S.D. CODIFIED LAWS ANN. § 22-7-8 (1979 & Supp. 1982); WYO. STAT. § 6-10-201 (1977). Still others prescribe that the defendant be convicted of at least one violent felony (e.g., armed robbery, aggravated battery) before he is subject to life imprisonment under its recidivist law. *See* ILL. ANN. STAT. ch. 38, § 33B (Smith-Hurd 1981); LA. CODE CRIM. PROC. ANN. art. 15:529.1 (West 1981); MD. ANN. CODE art. 27, § 643B (1976 & Supp. 1981); MISS. CODE ANN. § 99-19-83 (Supp. 1980); N.Y. PENAL § 39-70.10 (McKinney Supp. 1980); TENN. CODE ANN. § 39-1-801 (1982).

Discretionary life habitual offender statutes give the sentencing authority the option of punishing by life or a term of years. These, too, can be subdivided into those laws which impose the penalty after any final felony, or only after the last violent one. Examples of the first type are DEL. CODE ANN. tit. 11,§ 4214 (1979); D.C. CODE ANN. § 22-104 (Supp. 1979). Statutes which come into effect only after a final violent felony include CONN. GEN. STAT. ANN. § 53a-40 (West 1972 & Supp. 1983); N.D. CENT. CODE § 12.1-32-09 (1983).

Recidivist statutes prescribing a term of years which is automatically imposed on the finding of guilt include MASS. GEN. LAWS ANN. ch. 279, § 25 (West 1981); WIS. STAT. ANN. § 939.62 (West 1982). Finally, examples of statutes which permit the sentencing authority to determine the length of imprisonment, as long as it is less than life are IOWA CODE ANN. § 902.8 (West 1979); N.J. STAT. ANN. § 2C:44-3 (West 1981); R.I. GEN. LAWS § 12-19-21 (1979).

There is also a recidivist law on the federal level. *See* Dangerous Special Offender Act, 18 U.S.C. § 3575 (b) (1971) (requiring prosecuting attorney classify offender as dangerous and limiting enhanced sentence to 25 years). This proportionality provision is also part of the ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 18-3.3(a)(i) (1968) ("[a]ny increased term which can be imposed because of prior criminality should be related in severity to the sentence otherwise provided for the offense"); *see also* MODEL PENAL CODE §§ 7.03, 7.04 (1962) (provides for enhanced punishment for habitual offenders).

[135] *Helm*, 103 S. Ct. at 3008-09.

[136] *Id.* at 3012-13. The dissent disagreed vehemently with the characterization of Helm's prior offenses as "non-violent." It cited his three burglaries and drunk driving convictions as potentially violent, and said that, by comparison, Rummel was almost a "model citizen." *Id.* at 3017 (Burger, C.J., dissenting).

[137] *Id.* at 3013-14.

[138] *Id.* at 3014.

Finally, applying the third prong of the analysis, the Court conducted an interjurisdictional survey and concluded that Helm could have received a similar sentence only in Nevada.[139] Moreover, there was no evidence that a Nevada court, which unlike those of South Dakota had the option of providing for parole, had ever actually imposed a life sentence without parole on a nonviolent offender.[140]

The *Helm* Court was careful to emphasize that it was not overruling *Rummel*.[141] It distinguished the two cases by comparing the nature of Helm's punishment to that which the Court had imposed on Rummel. The decision in *Rummel* had relied heavily on the availability of parole. Because the South Dakota statute precluded parole, the *Helm* Court found the two sentences fundamentally different.[142] Weighing all the above criteria, the Court concluded that Helm's sentence was significantly disproportionate to his crimes, and thus was proscribed by the eighth amendment.[143]

Chief Justice Burger wrote a strong dissent. He attacked the majority for disregarding the concept of *stare decisis* by ignoring the Court's recent ruling in *Rummel*.[144] He challenged the majority's interpretation of *Weems*[145] and its view of proportionality gener-

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[139] *Id.*

[140] *Id.*

[141] *Id.* at 3008-09 n.13.

[142] *Id.* at 3015-16. Two questions are presented here: first, the role of parole in the penal system, especially in the sentencing phase; and second, the difference between parole and commutation. Authorities have differed as to whether the possibility of parole should be considered in passing sentence. Some courts consider it a factor in assessing the harshness of a particular sentence. *See Carmona*, 576 F.2d at 413. Some assign it an even more fixed role in the process. For example, in Morrissey v. Brewer, 408 U.S. 471, 477 (1972), the Court posited that "[d]uring the past 60 years, the practice of releasing prisoners on parole before the end of their sentences had become an integral part of the penological system." *See* Wolff v. McDonnell, 418 U.S. 538 (1974) (interests of Nebraska prisoners in earlier parole eligibility was right protected by due process). Other rulings have differed sharply. In Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1 (1978), the Court held that the possibility of parole does not create a due process right to be conditionally released, but only creates a "mere hope" of release which cannot be relied upon in determining a just and proper sentence.

There has been greater consensus for viewing commutation as a peripheral and inconstant part of the criminal process at best. For example, in Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981), the Supreme Court held that since commutation, unlike parole, does not depend on objective factfinding, but solely on subjective evaluations, it formed no fixed part of the process. *Id.* at 464. Therefore, the Court continued, a prisoner's interest in commutation is "simply a unilateral hope," not a right. *Id.* at 465. *But see* California v. Ramos, 103 S. Ct. 336 (1983) (capital sentencing jury may consider governor's power to commute life sentence when reaching verdict).

[143] *Helm*, 103 S. Ct. at 3021.

[144] *Id.* at 3017.

[145] *Id.* at 3018. Justice Burger restricted *Weems* to its bizarre penalty and emphasized that it was this type of unique form of punishment that the Court had sought to prohibit. He quoted from Justice Rehnquist's opinion in *Rummel:*

ally.[146] In support of his view, Chief Justice Burger also reviewed the history of the proportionality analysis under the eighth amendment and determined that it was not applicable outside the context of the death penalty.[147] Most importantly, Chief Justice Burger categorically rejected the majority's methodology. Referring to the plurality in *Rummel*, the dissent found any attempt at a comparison of either crimes or sentences invalid because it involved the kind of judicial review that crossed the line which separates the powers.[148] Justice Burger characterized the majority's decision as an impermissible and dangerous intrusion by the Court into an area properly left to legislative discretion, and cautioned that the result well might be confusion and a flood of cases into the appellate courts.[149]

The *Helm* decision represents a significant departure from the Supreme Court's prior interpretation of the eighth amendment by establishing that the length of a prison sentence which is grossly disproportionate to the crime may constitute cruel and unusual punishment.[150] In extending the reach of the eighth amendment to cases involving a term for years, *Helm* reinforced a strong line of circuit and state court decisions,[151] and gave due weight and meaning to the judicial imperative for an evolving and progressive approach to constitutional interpretation.[152] Furthermore, in direct contradiction to *Rummel*, the *Helm* Court adopted a comparative approach in deciding whether the sentence imposed was proprotionate to the crime that had been committed. The Court considered: (1) the nature of Helm's offense; (2) the types of sentences imposed for other crimes in the same

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> Given the *unique nature* of the punishment considered in *Weems* 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.*

Rummel, 445 U.S. at 274 (emphasis added).

[146] *Helm*, 103 S. Ct. at 3017-18.

[147] *Id.* Even this proposition has been eroded recently in Pulley v. Harris, 104 S. Ct. 871 (1984), in which the Court held that the eighth amendment did not require the court to conduct a comparative proportionality analysis in every capital case.

[148] *Helm*, 103 S. Ct. at 3017-18.

[149] *Id.*

[150] *Id.* at 3009. The Court discussed the concept of proportionality as it relates to the eighth amendment and indicated that it always had embraced the concept that the "punishment should be proportionate to the crime." *Id.* at 3005-06. Nevertheless, *Helm* represents the Supreme Court's first application of this concept to the length of a sentence alone. *Id.* at 3007.

[151] *See supra* notes 48-61 and accompanying text.

[152] *See supra* note 76 and accompanying text.

jurisdiction; and (3) the sentences imposed for the same crime in other jurisdictions.[153]

The three-pronged test which the *Helm* Court selected provides a rational and responsible method of determining proportionality. The first factor which the court examined, the nature of the offense, involved an evaluation of the harm caused or threatened by the crime.[154] In gauging the offense, courts consider the character and record of the individual offender,[155] assess his moral culpability,[156] and distinguish between crimes of violence and those which are nonviolent.[157] The second part of the test entailed an intrajurisdictional survey of crimes and punishments.[158] Far from fettering legislative action, such an approach recognizes the overall societal interests which the state has demonstrated in its enactments, and merely uses them as a guide to determine if the sentence in question is out of line with the parameters which the state itself has set.[159] The final prong of

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[153] *Helm*, 103 S. Ct. at 3011. In *Rummel* the Court rejected the first criterion, stating that "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime." *Rummel*, 445 U.S. at 275. The *Rummel* majority did not undertake an intrajurisdictional analysis, but did explicitly reject any interjurisdictional comparison, believing that "Texas is entitled to make its own judgment as to where [the line between felony theft and petty larceny lies]." *Id.* at 284. The *Rummel* Court's essential objection was that any line drawn by the Court concerning different sentences would involve the Court in "the basic line-drawing process that is pre-eminently the province of the legislature." *Id.* at 275; *see also Helm*, 103 S. Ct. at 3019 (Burger, C.J., dissenting) (drawing lines between different sentences results in judgments which are "no more than the visceral reactions of individual Justices").

[154] *Helm*, 103 S. Ct. at 3012-13.

[155] *Id.* at 3004-05.

[156] *Id.*

[157] *Id.* at 3012-13; *see also* Griffin v. Warden, 517 F.2d 756 (4th Cir.) (only violence is clear enough ground on which to differentiate between crimes), *cert. denied*, 423 U.S. 990 (1975). The *Helm* dissent denied the validity of this distinction, citing *Rummel* to the effect that "the absence of violence does not always affect the strength of society's interest in deterring a particular crime, or in punishing a particular individual." *Helm*, 103 S. Ct. at 3019 (citing *Rummel*, 445 U.S. at 275). Although it is true that certain crimes which are technically characterized as nonviolent (such as narcotics offenses) can present problems which the state has a special interest in preventing, it does not follow that the presence or absence of violence is irrelevant in evaluating offenses in general. *Id.* at 3014 n.26; *see also* Note, *Drug Abuse, Law Abuse, and the Eighth Amendment: New York's 1973 Drug Legislation and the Prohibition Against Cruel and Unusual Punishment*, 60 CORNELL L. REV. 638 (1975).

[158] *Helm*, 103 S. Ct. at 3013-14.

[159] *See In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).

> [C]omparison between punishments imposed for more serious crimes with the punishment in question is based upon the assumption that although isolated excessive penalties may occasionally be enacted through honest zeal . . . generated in response to transitory public emotion, the vast majority of punishments may be deemed to have been enacted with due regard for constitutional restraints.

Id. at 927, 519 P.2d at 1084, 112 Cal. Rptr. at 659-60

the *Helm* test, an interjurisdictional comparison, allows the court to examine how other states punish a particular offense.[160] The rationale behind this method rests in the conviction that a majority of jurisdictions will have enacted statutes which are constitutionally sound, and that a consensus of the legislative judgments of sister states is the best indication of current norms of decency.[161] Although used alone, an interjurisdictional test might be suspect as "inimical to traditional notions of federalism,"[162] the three criteria used together do not impose uniformity on the states, but only seek to ascertain that the punishment under review is within constitutional boundaries.[163]

The narrowness of the *Helm* decision, however, both in terms of the size of its plurality[164] and the ground on which it was distinguished from *Rummel*, limits its usefulness as a basis for future eighth amendment challenges. Because of its failure to overrule *Rummel*, the Court's decision in *Helm* can be confined to its facts. The only basis on which the Court distinguished *Helm* from *Rummel* was on the issue of parole: the statute under which Helm was convicted did not provide for parole, while the applicable law in *Rummel* made parole available.[165] In making this the keystone of its decision, the Court seemed merely to indicate that Helm's punishment was invalid because it was even more disproportionate than Rummel's punishment

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[160] *Helm*, 103 S. Ct. at 3014.

[161] *See Furman*, 408 U.S. at 436-37 (Powell, J., dissenting); *id.* at 384 (Burger, C.J., dissenting). Two other possible methods for assessing societal standards are to examine jury nullification and public opinion polls. Public antipathy in applying a penalty is strong evidence that it no longer conforms with contemporary mores. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 312 (1966). There is some disagreement about the value of public opinion polls. Professor Wheeler feels that such surveys are useful because "the severity of punishments is subjective, measurable only by ascertaining their effect upon individuals." Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 860 (1972). Justice Marshall in his dissent in *Furman*, however, indicated that to be worthy of consideration, public attitudes must be "informed." *Furman*, 408 U.S. at 361 (Marshall, J., Dissenting). In this context he hypothesized that if the public were fully aware of the ramifications of the death penalty, they would be against it. For an interesting study examining that theory, see Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171. One court has also criticized reliance on public opinion as investing the population with the power to make evaluations properly left to the judiciary. State v. Mitchell, 563 S.W.2d 18, 28, 29 n.1 (Mo. App. 1978). This is what Professor Packer criticized in another context as "due process by headcount." Packer, *supra* note 47, at 1074.

[162] *Rummel*, 445 U.S. at 282; *see Helm*, 103 S. Ct. at 3019 (Burger, C.J., dissenting).

[163] *Helm*, 103 S. Ct. at 3010 n.17 (noting "the inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences").

[164] *See supra* note 119.

[165] *Helm*, 103 S. Ct. at 3015.

had been. The logical inference, therefore, is that if Helm had been entitled to parole his sentence would not have been unconstitutional.[166]

The possibility of parole, however, is not a meaningful rationale on which to predicate a determination of cruel and unusual punishment.[167] Several courts, including the Supreme Court itself, have noted that parole is not an enforceable expectation of any prisoner;[168] therefore, "to condition the lawfulness of a defendant's incarceration . . . on the chance of a reduced sentence or parole would place a decision of constitutional dimensions within the unreviewable discretion of correctional authorities."[169] Therefore, if *Helm* is to stand for more than its particular fact pattern,[170] clarification and further action by the Court is required.

There are several options open to the Court in the future. The first option which the Court could pursue is to reexamine the constitutionality of the kind of recidivist statute used to sentence Helm. The *Helm* majority made only a passing reference to South Dakota's habitual offender law: It did not question the validity of the statute itself, but only its application to the individual defendant.[171] Because recidi-

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[166] This seemed to be the proposition which a Seventh Circuit court took from *Helm*. In United States v. Zylstra, 713 F.2d 1332 (7th Cir. 1983), the court, citing *Helm*, refused to find unconstitutional a sentence of 210 years imprisonment for 39 counts of drug smuggling because the defendant was eligible for parole in 10 years. *Id.* at 1341.

[167] The spuriousness of using parole as the basis of the decision is emphasized by the fact that both those in the majority and those in the dissent seem to have reversed themselves on this issue. The majority in *Rummel* had asserted that parole was a determining and pivotal factor. *Rummel*, 445 U.S. at 279-80. These same justices, with the single exception of Justice Blackmun, contended that its absence was not fatal in *Helm*. *Helm*, 103 S. Ct. at 3022. Conversely, the dissent in *Rummel*, which had argued vigorously that parole was inapplicable to length of sentence review, *Rummel*, 445 U.S. at 294, subsequently seemed to find it extremely relevant. *Helm*, 103 S. Ct. at 3013, 3015-16.

[168] *See Helm*, 103 S. Ct. at 3015; Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 466 (1981); Greenholtz v. Nebraska Penal Inmates, 422 U.S. 1 (1979).

[169] *See* Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1130 (1979).

[170] The few cases that have cited *Helm* evince an uncertainty as to the breadth of its holding. United States v. Zylstra, 713 F.2d 1332 (7th Cir. 1983), cited it for the proposition that the availability of parole is a crucial factor in determining proportionality. Commonwealth v. Diatchenko, 387 Mass. 718, 443 N.E.2d 397 (1982), however, found that a sentence for life imprisonment without the possibility of parole did not constitute cruel and unusual punishment. Two cases, United States v. DeBright, 710 F.2d 1404, 1409 n.8 (1983) and People v. Dillon, 34 Cal. 3d 441, 478 n.25, 668 P.2d 697, 719 n.25, 194 Cal. Rptr. 390, 411-12 n.25 (1983), used *Helm* to support the broader concept that the length of a sentence must be proportionate to the offense if it is to pass constitutional muster.

[171] *Helm*, 103 S. Ct. at 3013 n.24.

vist statutes have withstood constitutional scrutiny in the past,[172] the wholesale invalidation of such laws would be the most radical, and consequently, the most unlikely course for the Court to take. Many commentators, nevertheless, feel that the time has come for a general reevaluation and challenge of habitual offender laws both because they fail to serve the legitimate goals of penology and because they lack procedural standards.[173]

The goals of penology traditionally have been divided into retribution,[174] deterrence,[175] incapacitation,[176] and rehabilitation.[177] Opponents of habitual offender statutes contend that enhancement of sentences on the basis of recidivism does nothing to further these goals.[178] Retribution, for example, involves punishment only for the offense committed, without reference to past or future conduct.[179] Recidivist laws, however, punish a defendant not only for his past offenses, or even for the cumulative effect of such crimes, but for the likelihood that he will commit future offenses—an evaluation that the

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[172] *See supra* note 133.

[173] *See, e.g.*, Katkin, *supra* note 12. For discussions of the philosophical underpinnings of punishment. *See generally* Dressler, *Substantive Criminal Law: Through the Looking Glass of* Rummel v. Estelle: *Proportionality and Justice as Endangered Doctrines*. 34 Sw. L. Rev. 1063, 1073-79 (1981); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Clause*, 126 U. Pa. L. Rev. 989, 1049-52 (1978).

[174] The classic presentation of the doctrine of retribution is I. Kant, The Metaphysical Elements of Justice 99-102 (J. Ladd trans. 1965). *But see* Williams v. New York, 337 U.S. 241, 248 (1949) (retribution no longer dominant objective of criminal law).

[175] Bentham, *Principles of Penal Law, Pt. II*, bk.1, ch.3, in J. Bentham's Works 396, 402 (J. Bowring ed. 1843); *see also* American Law Institute, Model Penal Code and Commentaries, § 1.02(1)(a)(1981) [hereinafter cited as Model Penal Code]. Deterrence, which is essentially utilitarian in nature, has been criticized as violating the sanctity of the individual, by allowing him to be used as an "object lesson." In theory, at least, any punishment can be sanctioned by a deterrence rationale, since the punishment is inflicted not only because the offender merits it, but *because it serves the needs of society*. *See* Dressler, *supra* note 173, at 1076.

[176] Model Penal Code, *supra* note 175, at § 1.02(2)(b); N.Y. Penal Law § 1.05(5) (West 1980). Professor Katkin points out that one of the early recidivist statutes in New York, the Baume's Law, was enacted with the express purpose of deterring potential repeat offenders. Katkin, *supra* note 12, at 104 (referring to Baume's Law, 1926 N.Y. Laws, ch. 457).

[177] Williams v. New York, 337 U.S. 241, 248 (1949) (importance of reformation and rehabilitation as goals of criminal jurisprudence); *see also* Model Penal Code, *supra* note 175, at § 1.02(2)(b); N.Y. Penal Law § 1.105(5). The rehabilitative model had its greatest vogue among penologists in this country following the publication of an influential work by Radzinowitcz & Turner, *A Study of Punishment I: Introductory Essay*, 21 Canadian B. Rev. 91 (1943). In recent years, however, there has been a general disenchantment with rehabilitation. While still recognizing it as the ideal, many penology experts now tend to reemphasize other goals, such as deterrence. *See generally* F.A. Allen, The Decline of the Rehabilitative Ideal—Penal Policy and Social Policy (1981).

[178] *See supra* note 133.

[179] *See* I. Kant, *supra* note 174, at 99.

defendant has a propensity for crime.[180] There is evidence to indicate that recidivist statutes also are not effective as deterrents, especially against serious offenders.[181] Third, although habitual offender laws do incapacitate criminals, studies indicate that they isolate only petty offenders who constitute more of an annoyance than a danger to society.[182] Finaly, as with the death penalty, life imprisonment without parole totally rejects rehabilitation as a goal of the criminal justice system.[183] Many recidivists, like Helm, are social misfits, chronic alcoholics or drug abusers[184] for whom rehabilitation would be most effective. This is the ultimate basis on which recidivist laws can be attacked.

class, the Court could address their lack of procedural standards.[185] Following the tack it took in *Furman*, the Court could require certain safeguards which would allow for gradations of culpability among habitual offenders.[186] Several possible methods are suggested by recidivist statutes currently in effect: require at least one violent crime before a habitual offender statute can be applied;[187] prescribe a minimum sentence proportioned to the most recent offense and allow the courts to impose additional punishment at their discretion;[188] key punishment to the triggering offense by imposing a multiple of the sentence provided for that crime, or the sentence plus a fixed term of years;[189] or put a cap on the possible enhancement.[190] Any one of these methods would provide some measure of protection for a defendant like Helm, and would at least preclude the most egregious kinds of disproportionality that can now take place under recidivist statutes.

Further clarification of this area could come about if the Court overrules *Rummel* and either (1) permits review of all prison sentences

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[180] *Rummel*, 445 U.S. at 284.

[181] Several studies are cited by Professor Katkin, among them P. TAPPAN, ORGANIZED CRIME AND LAW ENFORCEMENT (1952); D. WEST, THE HABITUAL PRISONER 13-14 (1963); Lynch, *Parole and the Habitual Criminal*, 13 MCGILL L.J. 632, 638 (1967).

[182] Katkin, *supra* note 12, at 99, 106-08.

[183] Even Chief Justice Burger, who wrote the dissenting opinion in *Helm*, rejects the policy of "lock them up and throw the keys away." Burger, *Our Options Are Limited*, 18 VILL. L. REV. 165 (1972).

[184] Katkin, *supra* note 12, at 106-08; *see* Powell v. Texas, 392 U.S. 515, 562 (1968) (Fortas, J., dissenting).

[185] *See* Katkin, *supra* note 12, at 117-18; Lynch, *supra* note 181, at 633; Note, *supra* note 12, at 358.

[186] *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

[187] *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-40 (West 1972 & Supp. 1983).

[188] *See, e.g.*, IOWA CODE ANN. § 747.1, 902.8-9 (West 1956 & Supp. 1980).

[189] *See, e.g.*, R.I. GEN. LAWS § 12-19-21 (1981 & Supp. 1983).

[190] 18 U.S.C. § 3575(b) (1976) (enhancement not to exceed 25 years and proportionate to maximum term which can be imposed for underlying offense.).

to ascertain their proportionality, or (2) limits such review to life sentences. The rejection of *Rummel* would end the validation and invalidation of life sentences for habitual offenders based on meaningless distinctions, such as the opportunity for parole, and would establish clear standards for eighth amendment adjudication in noncapital cases. Moreover, the objections which have been raised against the abandonment of the *Rummel* rationale are not meritorious.[191] One objection voiced by the *Helm* dissent, which believed that the *Helm* majority was ignoring *Rummel*, was that the Court should be bound by *stare decisis*.[192] Although precedent is a valid and time-honored consideration in guiding judicial decisions, it is not an "inexorable command."[193] Every major judicial innovation is by definition a break with earlier rulings. Moreover, when a constitutional issue is involved, the Court has explicitly stated that it need not adhere rigidly to *stare decisis*.[194]

Another objection to the overruling of *Rummel* is that by undertaking a review of the proportionality of sentences, the Court would overstep its proper role and invade the province of the legislature. The *Helm* majority, in distinguishing *Rummel* and invalidating the sentence, denied any interference with legislative prerogative since the Court was not attempting to set a specific sentence for Helm, but rather to evaluate whether the sentence imposed was within constitutional limits.[195] Legislative prerogative in any case does not preclude judicial review, since, as Justice Brennan stated in *Furman:* "Judicial

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[191] These objections are duly noted by the *Helm* dissent. *See supra* notes 144-47 and accompanying text; *supra* note 154.

[192] Chief Justice Burger accused the majority of "blithely discard[ing] any concept of 'stare decisis.' " *Helm*, 103 S. Ct. at 3017 (Burger, C.J., dissenting).

[193] Erie R.R. v. Tompkins, 304 U.S. 64 (1938). This is only one example of the willingness of the Court to overturn its previous decisions when it feels an important issue is at stake, or the time is ripe for change. While this is not common practice, and the Court prefers to distinguish rather than overrule prior holdings, it does occur in all areas of the law, substantive as well as procedural. *See, e.g.*, United States v. Darby, 312 U.S. 1000 (1941), wherein the Court expanded the federal government's reach under the commerce clause by explicitly overruling Hammer v. Dagenhart, 247 U.S. 251 (1918) and Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) by construing section one of the Civil Rights Act of 1866 as creating a cause of action against a party who refused to sell real property to blacks, despite an earlier case, Hodges v. United States, 203 U.S. 1 (1906), which held that Congress lacked power to legislate against private racial discrimination.

[194] *See, e.g.*, United States v. Johnson, 451 U.S. 537 (1981); Roberts v. Louisiana, 431 U.S. 633 (1976); United States v. Smith Buffalo, 333 U.S. 771, 774-75 (1947). Even the citation used by Chief Justice Burger in support of his position, City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983), acknowledged that *stare decisis* is "perhaps never entirely persuasive on a constitutional question." *City of Akron*, 103 S. Ct. at 2487.

[195] *Helm*, 103 S. Ct. at 3009-10.

enforcement of the Clause [prohibiting cruel and unusual punishment] cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights."[196] In the end, as is true in many areas of the law, a balance must be struck between the province of the legislature and the responsibility of the judiciary.[197] One method might be to presume the constitutionality of recidivist statutes, subject to rebuttal through judicial review.

The rejection of *Rummel* could permit the Court to review all prison sentences to determine their proportionality. Appellate review of sentencing has been a regular practice in England for most of this century.[198] Sentiment in favor of adopting the English procedure is growing in this country, so that now more than half of the states permit review of sentences in some circumstances.[199] This option has the merit of leaving a duly enacted statute intact, so that interference with legislative prerogative is limited only to those instances in which the punishment prescribed is disproportionate to the particular offender and his offense, and thus is in contravention of the eighth amendment.[200]

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[196] *Furman*, 408 U.S. at 269 (Brennan, J., concurring.) Justice Brennan continued: The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. *Id.*

[197] Professor Radin advocates a "risk of error principle" as a means of achieving this balance. She says:

> In a case involving individual interests, if it is preferable to risk error on the side of the government, then a deferential stance is proper; if it is preferable to risk error on the side of the individual, then an activist stance is called for . . . . When crucial individual interests are at stake, many of which are enumerated in the Bill of Rights, our system recognizes that it is often better to risk error on the side of the individual.

Radin, *supra* note 173, at 1020-21.

[198] *See* Meador, *The Review of Criminal Sentences in England* (1965), *published in* A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES, APPENDIX C, 94 (1967).

[199] A.B.A. STANDARDS FOR CRIMINAL JUSTICE, APPELLATE REVIEW OF SENTENCES §§ 20-1.1, 20-1.2 commentary at § 20.7, § 20.14-16 (2d ed. 1980). It is interesting to note that at the Virginia convention, Patrick Henry advocated a kind of appellate review of sentences. Commenting on Congress' power to define crimes and set punishments, he said, "But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." 3 J. ELLIOT'S DEBATES 447 (2d ed. 1876), *quoted in* Clapp, *supra* note 2, at 272.

[200] One commentator argues that this does not constitute interference at all; rather, supervision over the lower courts "serves to further legislatively chosen goals, and any precedential effect of a decision is subject to legislative correction in future cases." Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1120 n.6 (1979). By contrast, if the Court invalidates a statute, the legislatures have no recourse short of a constitutional amendment. *Id.*

Rather than subject all prison sentences to appellate review, however, the Court could overrule *Rummel* and limit its scope of review to life sentences. This more moderate approach would entail moving the "bright line" that the Court has drawn between the death penalty and all other punishments to include sentences of life imprisonment as well. In *Furman* the Court determined that because the death penalty is unique, protective measures aimed at eliminating arbitrary, irrational, or discriminatory imposition of the ultimate punishment must be applied.[201] Drawing a new "bright line" would involve application of the same kind of precautionary procedures that are now used in capital cases.[202]

The time has come to make these requirements applicable to the administration of life imprisonment. It is clear that a sentence such as Helm's, life imprisonment without parole, is analogous to the death sentence in that it approaches the irrevocability of the latter.[203] But a strong argument can be made that every life sentence, just like every death sentence, is different from any other mode of punishment. In many jurisdictions, life imprisonment in fact now stands in the place where the death sentence stood earlier in this century: it is the most severe punishment which the law provides.[204] As such, it should be reserved for the most serious and abhorrent crimes. Even where the death penalty is still in force, imprisonment for life is the penultimate penalty. To use it to punish trivial, albeit repetitive, offenses is inimical to the idea of "evolving standards of decency."[205]

The Court frequently is called upon to make difficult and complex evaluations. The decision in *Helm*, although narrow and tentative, opened the door which *Rummel* had closed. In the future, however, the Court must face the issue of cruel and unusual punish-

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[201] *Furman*, 408 U.S. at 238; *see also* Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

[202] The procedures now generally required in capital cases include evaluation of aggravating and mitigating circumstances and a bifurcated trial. These, or similar procedures, could be adopted before a life sentence is imposed. Under such a scheme, a defendant's recidivism might be considered as one factor among many in evaluating whether life imprisonment was appropriate.

[203] *Helm*, 103 S. Ct. at 3013.

[204] Hale v. McKenzie, 537 F.2d 1232, 1235-36 (4th Cir. 1976); Wood v. South Carolina, 483 F.2d 149 (4th Cir. 1973). It should be noted that 36 states currently allow for capital punishment, and that there is a decided trend toward the reimposition of the death penalty in many jurisdictions. *See* Pulley v. Harris, 104 S. Ct. 871 (1984).

[205] Packer, *supra* note 47, at 1081. Aside from the constitutional consideration, imposing life sentences on petty criminals is not a practical course of action. It is too costly, and there are simply not enough prisons to hold all the Helms and Rummels.

ment as it relates to habitual offender laws directly and set clear contemporary standards for adjudicating such cases which are consistent with the mandate of the eighth amendment.

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