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NOTES

SOLEM V. HELM: PROPORTIONALITY REVIEW OF RECIDIVIST SENTENCING IS REQUIRED BY THE EIGHTH AMENDMENT

The eighth amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] In construing the cruel and unusual punishments clause, the United States Supreme Court has long recognized that a punishment should be proportional to the crime for which it is imposed.[2] Recently, in *Solem v. Helm,*[3] the Court applied this principle of proportionality to the length of a prison sentence imposed under a recidivist statute.[4] The *Helm* Court announced a three-part test for determining whether

1. U.S. CONST. amend. VIII.

2. The principle of proportionality is derived from the theory of retribution. W. LAFAVE & A. SCOTT, CRIMINAL LAW 24 (1972). Retribution is the oldest of the six generally recognized theories of punishment, which include prevention, isolation, rehabilitation, deterrence of others, and public education. *Id.* at 22-24. Under the retributive theory, an offender is punished because he deserves punishment. *Id.* at 24. Opponents of the retributive theory characterize it as mere revenge or retaliation. *Id.* Supporters of retribution maintain that punishment restores the victim's peace of mind and balances the harm caused by the offender's criminal act. *Id.*

The corollary of retribution is proportionality. *See* Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1121 (1979) [hereinafter cited as Note, *Disproportionality*]. An offender deserves some punishment, but this principle requires that the punishment be commensurate with the crime. *Id.* The ancient law recognized the principle of proportionality: an eye for an eye, a tooth for a tooth. Under the proportionality theory, the most severe punishments must be reserved for the most grievous offenses, lest an offender be punished more than he deserves.

Some commentators urge that utilitarian justifications of punishment, such as rehabilitation of past offenders, isolation of criminals to protect society, and deterrence of potential wrongdoers, are incompatible with the principle of proportionality. *Id.* Under this principle, the moral gravity of the offense determines the severity of punishment. *Id.* at 1121-22. Thus, an individual convicted of manslaughter would be punished much more severely than a first-time shoplifter. *Id.* A shoplifter incarcerated until he is judged to be rehabilitated, however, may serve a sentence longer than that of the individual convicted of manslaughter, if it is determined that the shoplifter cannot be rehabilitated as quickly. *Id.* at 1122. Similarly, imposing longer sentences on first-offender shoplifters than on those convicted of manslaughter might be justified on the utilitarian grounds that shoplifting is more difficult to deter and that shoplifters are more likely to be repeat offenders and thus need to be isolated from society. *Id.*

3. 103 S. Ct. 3001 (1983).

4. A recidivist statute authorizes enhanced punishment for an offender who previously has been convicted of another crime or crimes. The enhanced punishment is imposed because of these previous convictions, not because of any circumstances of the principal, or most recent, offense. The enhanced punishment may be imposed either instead of, or in addition to, punishment otherwise authorized for the most recent offense. Under some recidivist statutes,

a prison sentence is disproportionate. Under that test, reviewing courts must consider the gravity of the offense and harshness of the penalty, the penalties imposed in the same jurisdiction for other crimes, and the penalties imposed in other jurisdictions for the same offense.[5] The *Helm* Court, however, overlooked several potential difficulties in applying the test. Furthermore, the *Helm* decision is marred by ambiguities and internal inconsistencies.

Focusing on *Helm,* this Note reviews the Supreme Court's development of the proportionality concept. Although the *Helm* decision provides lower courts with some guidelines for analyzing eighth amendment challenges, an examination of the *Helm* Court's own application of these criteria shows that the guidelines are riddled with confusion. As a result, this Note suggests that the constitutionality of most state recidivist statutes is now suspect. Until the Court resolves the ambiguities and inconsistencies of the *Helm* analysis, the three-part test will be of limited usefulness.

THE EIGHTH AMENDMENT AND PROPORTIONALITY IN THE SUPREME COURT

Exactly what the framers intended by the phrase "cruel and unusual punishments" has been a matter of lively debate.[6] The Supreme Court first

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the offender must have been convicted of several previous crimes; other statutes permit enhanced punishment upon a second conviction. When several convictions are required to trigger the statute, typically a court must determine if the person is an habitual offender. *See infra* Statutory Appendix, which lists the recidivist statutes currently in effect in various jurisdictions and describes their essential characteristics. As used in this Note, the term "recidivist statute" refers to a criminal statute that permits a sentencing court to consider any prior convictions and to impose enhanced punishment for the most recent offense because of those prior convictions.

5. 103 S. Ct. at 3010-11.

6. There are two prevailing views of the framers' intent. Some writers have argued that the cruel and unusual punishments clause prohibits only torture and barbaric forms of punishment. Members of the Court have occasionally asserted this view. Other writers have maintained that, while barbarous punishments may have been the framers' primary concern, the cruel and unusual punishments clause was meant to go farther and ban all punishments that are excessive in relation to the particular crime. This view has been endorsed by the Court on several occasions.

The language of the eighth amendment is identical to a provision of the 1689 English Bill of Rights. *Helm*, 103 S. Ct. at 3007. Some commentators have argued that the framers of the eighth amendment used identical words because they intended the eighth amendment to provide the same protection against governmental oppression as was provided by its English counterpart. *Id.*; 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, 788 (1974) [hereinafter cited as Note, *Eighth Amendment*]; Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846, 846-47 (1961) [hereinafter cited as Note, *Effectiveness*]. Unfortunately, it is not entirely clear what the English meant by their proscription. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 242-45 (1972) (Douglas, J., concurring); *id.* at 274 & nn.16-17 (Brennan, J., concurring); *id.* at 316-19 (Marshall, J., concurring); *id.* at 376-77 (Burger, C.J., dissenting). The English Bill of Rights was enacted shortly after the Bloody Assizes and the perjury trial of Titus Oates. *See* Note, *Effectiveness, supra*, at 788. Historians have, therefore, interpreted the Bill of Rights as Parliament's reaction to these monarchical abuses. *See* Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. &

held that disproportionate punishments were proscribed by the eighth amendment in *Weems v. United States*.[7] Weems, a disbursing officer in the

CRIMINOLOGY 378 (1980); Note, *Eighth Amendment, supra*; Note, *Effectiveness, supra*. Some writers have contended that the English cruel and unusual punishments provision banned only those penalties not authorized by Parliament. *See, e.g., Furman*, 408 U.S. at 376 (Burger, C.J., dissenting); Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 852-60 (1969). Others have argued that the provision also banned barbarous punishments. *See, e.g.*, Weems v. United States, 217 U.S. 349, 389-90 (1910) (White, J., dissenting); Note, *Effectiveness, supra*, at 847. Some English courts apparently interpreted the provision as simply enacting the common law requirement of proportionality between punishments and crimes. *See Helm*, 103 S. Ct. at 3006-07.

A number of commentators have suggested that the English interpretation of cruel and unusual punishment is only part of the meaning the framers attached to that phrase. *See, e.g.*, Note, *Eighth Amendment, supra*, at 808-19. The drafters of the eighth amendment were also influenced by the writings of Enlightenment philosophers, such as Cesare Beccaria, who advocated a "just proportion" between the crime committed and the severity of punishment. *Id.* According to many observers, the principle of proportionality was incorporated into the eighth amendment. *See, e.g., Helm*, 103 S. Ct. at 3007; Note, *Eighth Amendment, supra*, at 808-30.

The Court, however, has not always limited itself to the framers' intent when interpreting and applying the cruel and unusual punishments clause. *See infra* notes 145-51 and accompanying text. A number of decisions have indicated that the meaning of the eighth amendment is flexible and depends upon the prevailing views of contemporary society. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) (eighth amendment draws its meaning "from the evolving standards of decency that mark the progress of a maturing society"); Weems v. United States, 217 U.S. 349, 378 (1910 (eighth amendment acquires meaning as "public opinion becomes enlightened by a humane justice").

7. 217 U.S. 349 (1910). The Court rejected earlier challenges under the cruel and unusual punishments clause but intimated that proportionality was incorporated in the eighth amendment. *See* Wilkerson v. Utah, 99 U.S. 130, 134-36 (1878); Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 480 (1867). In *Pervear v. Commonwealth*, Pervear was convicted by a state court for illegally selling intoxicating liquors and was sentenced to three months imprisonment at hard labor and a $50 fine. Pervear challenged the conviction on the grounds that, inter alia, the punishment imposed was cruel, excessive, and unusual and, thus, violated the eighth amendment. *Id.* at 476. The Court rejected this challenge, holding that the eighth amendment did not apply to the states. *Id.* at 479-80. Nevertheless, the *Pervear* Court indicated that even if the eighth amendment was applicable, the penalty would not have violated the cruel and unusual punishments clause. *Id.* at 480. A valid state interest, protecting the community, justified the punishment. Furthermore, the penalty was "the usual mode adopted in many, perhaps, all of the States." *Id.*

In Wilkerson v. Utah, 99 U.S. 130 (1878), the defendant was convicted of murder and sentenced to public execution by firing squad. Employing a proportionality analysis, the Court upheld the penalty. Execution by firing squad was a widely accepted mode of inflicting the death penalty and was common in the military. *Id.* at 134-35. The punishment, therefore, could be labeled neither cruel nor unusual. *Id.*

In O'Neil v. Vermont, 144 U.S. 323 (1892), the Court again dismissed an appeal, on eighth amendment grounds, from a sentence of fine and imprisonment. The majority held that it lacked jurisdiction because no federal question was presented. *Id.* at 331-32. In a powerful dissent, Justice Field argued that the eighth amendment was applicable and prohibited the punishment imposed. *Id.* at 339-41. The defendant, O'Neil, was convicted of 307 counts of selling liquor without authority and was fined $20 plus court costs for each offense. If the fine and costs were not paid, O'Neil was required to serve three days in prison for each dollar fined (more than 54 years). *Id.* at 330. Justice Field maintained that the cruel and unusual punishments clause prohibited "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.* at 339-40. Because this punishment was far greater than any that would have been imposed for manslaughter or other serious crimes, Justice Field con-

Philippines, was convicted of making two false entries in cash books he kept for the United States government.[8] He was fined 4,000 pesetas, sentenced to fifteen years imprisonment under exceptionally harsh conditions, and deprived of political and personal rights after release from prison.[9] The *Weems* Court premised its holding on the precept that a punishment should be proportional to the offense for which it is imposed.[10] Considering the fine, imprisonment, and accessory penalties as a whole, the Court concluded that the entire sentence violated the eighth amendment.[11]

After establishing a broad power of judicial review of sentencing statutes in *Weems,*[12] the Court did not invalidate another sentence as cruel and unusual for nearly sixty years. In *Trop v. Dulles,*[13] the defendant was convicted of wartime desertion and dishonorably discharged.[14] Under a provision of the Nationality Act,[15] persons dishonorably discharged under such circumstances lost both the rights of citizenship and citizenship itself.[16] In determining the constitutionality of that provision, the *Trop* Court relied on the *Weems* proportionality principle. Evaluating the proportionality of Trop's penalty, the Court acknowledged that desertion was one of the most

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cluded that it was unconstitutionally severe. *Id.* at 339-41. The *O'Neil* dissent's interpretation of the eighth amendment was later adopted by the Court in *Weems. See* Weems v. United States, 217 U.S. 349 (1910).

8. 217 U.S. at 357-58. Under the criminal statute involved, no fraudulent intent was required. *Id.* at 363. Proof that a false entry was knowingly made was a sufficient basis for conviction. *Id.*

9. The punishment imposed, *cadena temporal,* came from the Spanish civil law and was unknown in the United States. *Id.* at 363-64. Only *cadena perpetua* (same punishment for life) and death were more severe. *Id.* Those sentenced to cadena were required to carry a chain from the wrists and ankle, were put to hard and painful labor during imprisonment, and were forbidden outside assistance while confined. *Id.* at 364. After release from prison, "accessory penalties" were imposed: civil interdiction (deprivation of many personal rights), perpetual absolute disqualification (deprivation of rights to vote and hold public office), and surveillance for life. *Id.* at 364-65.

10. *Id.* at 367.

11. *Id.* at 382. Because the various penalties were not considered separately, it is unclear which were cruel and unusual. The *Helm* dissent asserted that the *Weems* holding was based on all the facts, rather than on a finding of disproportionality. *Helm,* 103 S. Ct. at 3018 (Burger, C.J., dissenting); *see also* Schwartz, *supra* note 6, at 385 (the *Weems* holding is most reasonably interpreted as based upon the combination of all the penalties). The *Weems* Court nevertheless indicated that the eighth amendment was intended as a limitation on legislative power to fix terms of imprisonment. 217 U.S. at 372-73.

12. The *Weems* Court explicitly limited its decision to sentences imposed by statute, not by courts. 217 U.S. at 377.

13. 356 U.S. 86 (1958).

14. *Id.* at 87-88. Trop escaped from a stockade where he had been confined for breach of discipline. The next day he headed back toward his base and willingly surrendered to an Army officer who happened to drive past Trop. *Id.*

15. Nationality Act of 1940, 8 U.S.C. § 1481(a)(8) (1976) (repealed 1978).

16. 356 U.S. at 89. Persons convicted of serious crimes commonly lose certain civil rights, such as the right to hold public office, for the period of their incarceration. The accessory penalties imposed in *Weems* were arguably little more than an extension of this customary loss of rights. In *Trop,* however, the punishment imposed was a step beyond loss of civil rights. An expatriate is not entitled to the protection of any nation and has no "right to have rights" anywhere. *Id.* at 101-02.

serious crimes in military law.[17] Although military tribunals were authorized to impose the death penalty for wartime desertion, Trop had merely been dishonorably discharged.[18] Declaring that the government has unlimited discretion in imposing penalties short of death,[19] the *Trop* majority compared the nationality laws of foreign nations and found that denationalization was not permitted by civilized countries as punishment for a crime.[20] Accordingly, the Court concluded that denationalization was an unusually severe punishment both in an absolute sense and by comparison with contemporary international standards; therefore, it was held unconstitutional.[21]

Subsequently, in *Robinson v. California,*[22] the Court held that the eighth amendment limited the ability of states to define crimes and impose penalties.[23] For the next several years, the Court's scrutiny of proportionality focused primarily on the states' imposition of the death penalty. Although the death penalty was not a disproportionate punishment for murder,[24] the Court determined that it was unconstitutionally excessive when imposed for rape not involving danger to human life.[25]

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17. *Id.* at 90.

18. *Id.* at 99. As a result of his desertion, Trop was court-martialed, dishonorably discharged, and he lost his citizenship. *Id.* at 89-90. Thus, denationalization was an additional penalty imposed under civilian, rather than military, law. *Id.*

19. *Id.* at 99.

20. *Id.* at 102. The *Trop* dissent disagreed: "Many civilized nations impose loss of citizenship for indulgence in designated prohibited activities. . . . Some countries have made wartime desertion result in loss of citizenship. . . ." *Id.* at 126 (Frankfurter, J., dissenting).

21. *Id.* at 102-03.

22. 370 U.S. 660 (1962).

23. *Id.* at 666-67. Robinson had been convicted under a California statute which made it a crime to "be addicted to the use of narcotics." *Id.* at 660-61. The Court held that the statute violated the eighth amendment because it punished status, rather than conduct. *Id.* at 666.

24. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion). The plurality stated that "we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes." *Id.* at 187; *see also* Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion) (state cannot make death sentence mandatory); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion) (mandatory death sentence is unconstitutional, even for first-degree murder); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion) (procedure requiring jury to answer special interrogatories before imposing death sentence is valid); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion) (judges may weigh aggravating and mitigating factors in determining whether death penalty shall be imposed). The Court has recently ruled that the eighth amendment does not require a state appellate court to apply a proportionality analysis before affirming a death sentence. Pulley v. Harris, 104 S. Ct. 871, 879-80 (1984).

25. Coker v. Georgia, 433 U.S. 584, 592 (1977). Relying upon *Gregg,* the *Coker* Court articulated a two-part test for determining whether a punishment is excessive. Under this test, a sentence is unconstitutional if it fails to contribute to the goals of punishment and is, therefore, merely a purposeless imposition of sufferings, or if it is grossly out of proportion to the crime. Proportionality is to be measured, for the purposes of this test, by reviewing public attitudes, history and precedent, legislative opinions, and prior jury sentences. *Id.* at 592; *see also* Enmund v. Florida, 102 S. Ct. 3368 (1982) (death sentence held an unconstitutional penalty for felony murder when defendant did not himself kill or attempt to kill the victim or intend that a killing take place).

Although the eighth amendment requires punishments to be proportional to the crimes for which they are imposed, the Court had never invalidated a sentence of imprisonment solely because its length was excessive.[26] In the past three years, however, the Supreme Court has decided three cases involving allegedly disproportionate prison sentences.[27] The first case, *Rummel v. Estelle,*[28] concerned the constitutionality of a recidivist statute. Rummel had been convicted of three felonies, each involving small amounts of property obtained by fraud,[29] and he was sentenced to life imprisonment[30] as authorized by the Texas recidivist statute.[31] Rummel appealed the sentence, arguing that it was "grossly disproportionate" to the punishment he would have received for each of the three felonies.[32] Although the *Rummel* Court distinguished other eighth amendment precedents as involving punishments "different in kind" from imprisonment,[33] it used a proportionality analysis to uphold the sentence. The Court reasoned that the life sentence simply could not be compared to the typical sentence that would be imposed for the fraudulent acquisition of property, because the state had a valid interest in imposing harsher sentences on offenders who, by repeatedly breaking the law, had clearly demonstrated an inability to conform to society's norms.[34]

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26. Defendants appealing their lengthy sentences have met with more success in state and lower federal courts than in the Supreme Court. *See, e.g.,* Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) (mandatory life sentence which was imposed under state recidivist statute held disproportionate to defendant's three minor offenses), *cert. denied,* 415 U.S. 983 (1974); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978) (48-50 years sentence held disproportionate punishment for safecracking); People v. Brown, 90 Ill. App. 3d 742, 414 N.E.2d 475 (3d Dist. 1980) (four years imprisonment disproportionate to crime of attempted burglary, given defendant's rehabilitative potential); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972) (sentence of 20 years imprisonment for sale of marijuana held excessive, when the goal of punishment is rehabilitation and the court failed to consider defendant's personality and history); People v. Lewis, 113 Misc. 2d 1091, 450 N.Y.S.2d 977 (1982) (reclassification of punishment for daytime burglary of dwelling was held greatly disproportionate to the offense).

27. *See* Solem v. Helm, 103 S. Ct. 3001 (1983); Hutto v. Davis, 454 U.S. 370 (1982); Rummel v. Estelle, 445 U.S. 263 (1980).

28. 445 U.S. 263 (1980). Applying the proportionality analysis is somewhat more complicated when a defendant is sentenced under a recidivist statute. The sentence is imposed for the prior offenses as well as the most recent crime. *See infra* notes 108-14 and accompanying text.

29. In 1964, Rummel was convicted of fraudulent use of a credit card to obtain $80 worth of goods or services. 445 U.S. at 265. Because the value of the items exceeded $50, the offense was a felony under Texas law. *Id.* In 1969, Rummel was convicted of passing a forged check in the amount of $28.36. *Id.* In 1973 Rummel was charged with obtaining $120.75 by false pretenses. *Id.* at 266.

30. Rummel would have been eligible for parole in as little as 12 years. *Id.* at 280. Under the Texas parole system, it was not likely that Rummel would have spent the rest of his life in prison. *Id.* at 280-81.

31. TEX. PENAL CODE ANN. § 12.42 (Vernon 1974). For a description of the Texas recidivist statute, see *infra* Statutory Appendix.

32. 445 U.S. at 265.

33. *Id.* at 272-75.

34. *Id.* at 276.

According to the Court, when considered in light of this state interest, Rummel's sentence was not disproportionate to his crimes.[35]

Although the *Rummel* Court indicated that proportionality requirements did not constrain the length of prison sentences,[36] a proportionality analysis was used to justify Rummel's sentence. As a result, some lower courts continued to require that the length of a prison term be proportional to the crime for which it was imposed.[37] Consequently, in *Hutto v. Davis,*[38] the Supreme Court declared that "federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment,' . . . and . . . 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.' "[39] The *Davis* Court read *Rummel* as having "implicitly disapproved" the proportionality analysis used by the district court in *Davis.*[40] The dissenting Justices thought this reading of *Rummel* was too broad.[41] Justice Brennan, writing for the dissent, asserted that Rummel's sentence was justified by the state's interest in deterring and isolating recidivists.[42] Because Davis was not sentenced under a recidivist statute, Justice Brennan reasoned that *Rummel* was not controlling.[43]

THE *HELM* DECISION

In 1979, Jerry Buckley Helm was convicted of issuing a "no account" check, a felony in South Dakota.[44] For a first offender, the maximum penalty was five years imprisonment and a $5,000 fine.[45] Helm, however, had been

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35. *Id.* at 284-85.

36. The Court cautioned that, in comparing prison sentences of varying lengths, "the lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts." *Id.* at 275-76. Nevertheless, the *Rummel* majority conceded that a proportionality analysis would be appropriate in extreme situations when the criminal statute was facially unconstitutional, such as "if a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at 274 n.11.

37. *See, e.g.,* Terrebonne v. Blackburn, 624 F.2d 1363 (5th Cir. 1980) (interpreting *Rummel* as endorsing the application of proportionality to sentence length); Davis v. Davis, 601 F.2d 153 (4th Cir. 1979) (applying the same proportionality test both before and after *Rummel*), *vacated sub nom.* Hutto v. Davis, 445 U.S. 947 (1980).

38. 454 U.S. 370 (1982).

39. *Id.* at 374 (quoting *Rummel,* 445 U.S. at 272, 274) (brackets in original).

40. *Id.* at 373 & n.2.

41. *Id.* at 382-83 (Brennan, J., dissenting).

42. *Id.* at 383 (Brennan, J., dissenting).

43. *Id.* (Brennan, J., dissenting).

44. The relevant statute provided:

> 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.

S.D. CODIFIED LAWS ANN. § 22-41-1.2 (1979).

45. *Id.* § 22-6-1(6) (1979).

previously convicted of six other felonies[46] and, therefore, was subject to South Dakota's recidivist statute.[47] Helm was sentenced to life imprisonment without possibility of parole.[48]

Helm appealed his sentence on the ground that it violated the eighth amendment's cruel and unusual punishments clause.[49] The South Dakota Supreme Court rejected Helm's challenge and affirmed his sentence.[50] Helm later requested the governor to commute his sentence to a term of years,[51] but his request was denied.[52]

Subsequently, Helm petitioned for a writ of habeas corpus in the United States District Court for South Dakota.[53] Once again, Helm contended that his sentence violated the cruel and unusual punishments clause because it was disproportionate to the crimes for which he had been convicted.[54] The district court concluded that *Rummel* was controlling and, thus, Helm could not challenge the length of his sentence.[55]

The United States Court of Appeals for the Eighth Circuit reversed and remanded.[56] The appellate court held that *Rummel* was not controlling and declared that a proportionality analysis was applicable.[57] The court reasoned that Helm's life sentence was qualitatively different from Rummel's because, while Rummel would have been eligible for parole in a few years,[58] Helm would spend the rest of his life in prison.[59] Applying a proportionality analysis, the Eighth Circuit concluded that Helm's sentence was grossly disproportionate to his offense.[60] Subsequently, a petition for certiorari was granted by the United States Supreme Court.[61]

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46. In 1964, 1966, and 1969, Helm was convicted of third-degree burglary. 103 S. Ct. at 3004. In 1972, he was convicted of obtaining money under false pretenses. In 1973, Helm was convicted of grand larceny. Finally, in 1975, Helm was convicted of third-offense driving while intoxicated. *Id.*

47. South Dakota's recidivist statute provided, "When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended in 1981 to substitute "three prior felony convictions" for "three prior convictions").

48. 103 S. Ct. at 3006. The maximum penalty authorized by South Dakota for Class 1 felonies is life imprisonment and a $25,000 fine. S.D. CODIFIED LAWS ANN. § 22-6-1(3) (1979 & Supp. 1983). South Dakota law provides that "[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." *Id.* § 24-15-4 (1979).

49. State v. Helm, ___ S.D. ___, 287 N.W.2d 497 (1980).

50. *Id.* The Court also rejected Helm's arguments that his sentence was an abuse of discretion and a denial of due process of law. *Id.*

51. 103 S. Ct. at 3006.

52. *Id.*

53. Helm v. Solem, No. CIV81-5148 (D.S.D. Dec. 12, 1981).

54. *Id.*

55. *Id.*

56. 684 F.2d 582 (8th Cir. 1982).

57. *Id.* at 585-86.

58. *Id.* at 584.

59. *Id.* at 585.

60. *Id.* at 587.

61. 103 S. Ct. 339 (1982).

In a five-to-four decision, the Supreme Court affirmed the Eighth Circuit's decision.[62] The Court initially examined the history of the cruel and unusual punishments clause,[63] noting that its language was drawn from the English Bill of Rights and Magna Carta, which English courts had interpreted as prohibiting excessive punishments of all kinds, including imprisonment.[64] After examining the framers' intent, the Court concluded that whether or not the cruel and unusual punishments clause was meant to be broader than its English sources, the framers surely intended to guarantee "at least the same protection."[65] The Court emphasized that the eighth amendment itself provided no explicit exception for imprisonment[66] and concluded that the amendment incorporated the common law prohibition against any excessive punishment.[67]

The *Helm* Court provided objective criteria in the form of a three-part test,[68] for determining whether a punishment is unconstitutionally excessive and disproportionate to a crime.[69] Under this test, a court must first balance the gravity of the offense against the harshness of the penalty.[70] Next, a court should compare the sentence imposed on offenders convicted of similar crimes in the same jurisdiction.[71] Finally, the appellant's sentence must be compared with the sentences imposed in other jurisdictions on those convicted of the same crime.[72]

Before the Court applied this three-part test to the facts presented in *Helm,* it narrowly defined Helm's offense. Helm had been charged both with issuing a "no account" check and with being an habitual offender.[73] The Court recognized that the prior felony convictions were "relevant to the sentencing decision,"[74] but the majority characterized those offenses as nonviolent and relatively minor.[75] Instead of considering Helm's criminal record as a

62. 103 S. Ct. 3001 (1983). Justice Powell wrote the majority opinion, joined by Justices Brennan, Marshall, Blackmun, and Stevens. Chief Justice Burger dissented, joined by Justices White, Rehnquist, and O'Connor. Only Justice Blackmun was in the majority in both *Rummel* and *Helm.*

63. *Id.* at 3006-10.

64. *Id.* at 3006-07.

65. *Id.* at 3007.

66. *Id.* at 3009.

67. *Id.* at 3007.

68. Although it seems that the criteria are to be considered as a whole, the Court applied them step by step. *Id.* at 3012-15; *see infra* notes 127-37 and accompanying text.

69. 103 S. Ct. at 3010.

70. *Id.*

71. *Id.*

72. *Id.* Chief Justice Burger, writing for the dissent, maintained that the criteria provided by the majority were not truly objective. *Id.* at 3017 (Burger, C.J., dissenting). According to the Chief Justice, "What the Court means is that a sentence is unconstitutional if it is more severe than five justices think appropriate." *Id.* Before *Helm,* however, the standard used was even more subjective: the cruel and unusual punishments clause was not violated unless a punishment was so excessive that it "shocked the conscience." *See infra* note 101.

73. 103 S. Ct. at 3005.

74. *Id.* at 3013 n.21.

75. *Id.* at 3013. A crime can be both nonviolent and serious. *See infra* text accompanying notes 170-71. Nevertheless, the majority apparently equated "relatively minor" with "nonviolent."

whole, the Court focused on "the principal felony—the felony that triggered the life sentence—since Helm ha[d] already paid the penalty for each of his prior offenses."[76]

Having narrowly defined Helm's crime, the Court applied its test.[77] The majority found that society generally recognized issuance of a "no account" check as "among the less serious offenses."[78] Nevertheless, the sentence imposed on Helm was the harshest sanction authorized by the South Dakota legislature.[79] The Court then compared Helm's sentence to the sentences authorized in South Dakota for other crimes.[80] This comparison revealed that life imprisonment without parole could be imposed for only a few very serious felonies;[81] life sentences could not be imposed for any other crimes, including many violent crimes, unless a defendant was subject to the recidivist statute.[82] The majority therefore concluded that Helm's sentence was equal to, or harsher than, sentences imposed on those convicted of much more serious crimes.[83] Finally, the Court compared the various states' recidivist statutes, and determined that only one other state authorized life imprisonment without parole for Helm's offenses.[84]

After applying its three-part analysis, the *Helm* Court distinguished *Rummel* on the basis of eligibility for parole.[85] The state had argued that although South Dakota did not authorize parole for life sentences, such prison terms could be shortened if commuted by the governor.[86] The majority emphasized that commutation was significantly different from parole,[87] and determined

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The majority labeled Helm's prior offenses as minor because "[h]is record involve[d] no instance of violence of any kind." 103 S. Ct. at 3013 n.22. The Court also appeared to equate serious crimes with crimes against persons, *id.* at 3013, and at no point did it raise the possibility that other kinds of crimes might also be considered serious.

76. 103 S. Ct. at 3013 n.21.

77. *Id.* at 3012-15.

78. *Id.* at 3013.

79. *Id.* Capital punishment is not authorized in South Dakota. *Id.*

80. *Id.* at 3013-14.

81. *Id.* at 3014. Life imprisonment was authorized for murder, treason, first-degree manslaughter, first-degree arson, and kidnapping. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 3014-15. Only Nevada authorizes life imprisonment for commission of the particular offenses for which Helm had been convicted. NEV. REV. STAT. § 207.010 (1981). Neither Nevada nor South Dakota makes a life sentence mandatory. 103 S. Ct. at 3014-15. In addition, the Court noted that no defendant convicted under the Nevada recidivist statute had received a life sentence. *Id.* at 3014.

85. 103 S. Ct. at 3013, 3015-16 & n.32. The dissent maintained that the facts of the two cases were very similar. *Id.* at 3017-18 (Burger, C.J., dissenting). Nevertheless, the majority observed that its conclusion in *Helm* was "not inconsistent" with *Rummel*. *Id.* at 3016 n.32.

86. *Id.* at 3015.

87. *Id.* The *Helm* Court noted that South Dakota had not commuted a life sentence in more than eight years and that Helm had already been denied commutation. *Id.* at 3016 & n.29. Furthermore, if Helm's sentence were commuted, he would simply be eligible for parole; he would not be released. *Id.* at 3016. The Court concluded that the possibility of commutation of a sentence was "nothing more than a hope for 'an *ad hoc* exercise of clemency.' " *Id.*

that the possibility of executive clemency did not mitigate the severity of Helm's sentence.[88] Concluding that the sentence was "significantly disproportionate" to Helm's crime, the Court held that the punishment violated the eighth amendment.[89]

The *Helm* dissent objected to the majority's interpretation of eighth amendment precedent, particularly *Rummel*.[90] According to the dissent, the eighth amendment had previously restricted only the manner in which punishment could be imposed and not the length of a prison sentence.[91] This traditional focus on the mode of punishment was, in the dissent's view, a more practicable test than the majority's three-part analysis.[92] The dissent further contended that attempts by courts to balance the severity of crimes and the harshness of penalties would necessarily result in improper judicial interference with matters of legislative discretion.[93] To support this contention, the dissent stated that "*Hutto* [*v. Davis*] makes crystal clear that under *Rummel* it is error for appellate courts to second-guess legislatures as to whether a given sentence of imprisonment is excessive in relation to the crime. . . ."[94] Furthermore, according to the dissent, comparisons between recidivist statutes of different jurisdictions would "trample on fundamental concepts of federalism"[95] and would lead to judicially imposed uniformity.[96] Finally, the dissent viewed the majority's holding as being overly broad because it could permit every person convicted and sentenced to prison to appeal on eighth amendment grounds.[97]

Parole, on the other hand, was "the normal expectation in the vast majority of cases." *Id.* at 3015.

88. *Id.* at 3016. The underlying assumption of the state's argument was that the possibility of parole mitigated the severity of a prison sentence. *Id.* at 3015. This proposition was not contradicted by the *Helm* Court. *See id.* at 3015-16. Indeed, it can be argued that the Court's refusal to overrule *Rummel* implies that the proposition was accepted as true.

89. *Id.* at 3016.

90. *Id.* at 3017 (Burger, C.J., dissenting). The dissent found no fundamental difference between parole and commutation. *Id.* at 3023 (Burger, C.J., dissenting). Chief Justice Burger asserted that *Rummel* was indistinguishable from *Helm*, and, therefore, a "decent regard" for stare decisis required that *Rummel* be followed or explicitly overruled. *Id.* at 3021 (Burger, C.J., dissenting). The dissent also objected to the majority's characterization of Helm's offenses as nonviolent, and opined that "[b]y comparison, Rummel was a relatively 'model citizen.' " *Id.* at 3017 (Burger, C.J., dissenting).

91. *Id.* at 3021 (Burger, C.J., dissenting). The dissent contended that *Weems*, and other decisions invalidating sentences under the eighth amendment, had involved punishments that differed in kind from imprisonment. *Id.* at 3018 (Burger, C.J., dissenting). According to the dissent, the Court had consistently refused to extend the *Weems* excessive punishment doctrine to a punishment consisting solely of imprisonment. *Id.* at 3021 n.6 (Burger, C.J., dissenting). The dissent, therefore, concluded that the actual length of a prison term was of no constitutional significance provided that imprisonment would be an appropriate punishment. *Id.* at 3021 (Burger, C.J., dissenting).

92. *Id.* at 3022 (Burger, C.J., dissenting).

93. *Id.* (Burger, C.J., dissenting).

94. *Id.* at 3020 (Burger, C.J., dissenting).

95. *Id.* at 3019 (Burger, C.J., dissenting).

96. *Id.* (Burger, C.J., dissenting) (quoting *Rummel*, 445 U.S. at 282).

97. *Id.* at 3022 (Burger, C.J., dissenting).

ANALYSIS AND CRITICISM

The *Helm* decision explicitly adopts a three-part proportionality analysis which has been employed by some lower federal and state courts for several years;[98] prior Supreme Court opinions only implicitly approved such an analysis.[99] Under this approach, courts are directed to consider the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for the same crime in other jurisdictions.[100] It must be noted, however, that several problems with the three-part test and its application remain unresolved.

The Three-Part Proportionality Test

Because it provides specific, objective criteria, the proportionality analysis announced in *Helm* is preferable to the "shock the conscience" standard previously used by most courts in deciding eighth amendment challenges.[101]

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98. *Id.* at 3010-11; *see supra* notes 68-72 and accompanying text. One of the first cases to use a test similar to the one adopted in *Helm* was Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied,* 414 U.S. 983 (1974). The *Hart* court employed a four-part test, which contained the three factors delineated in *Helm. Id.* at 140-41. The *Hart* court also included the legislative purpose underlying the punishment as a necessary consideration. *Id.* at 141. Not all courts applying a proportionality analysis have adopted the legislative purpose prong of the *Hart* test. *See, e.g.,* Terrebonne v. Blackburn, 624 F.2d 1363 (5th Cir. 1980) (requiring the district court to apply the three-part test to determine whether life sentence for distributing heroin was disproportionate); Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978) (three-part test employed; sentences of 4 years to life and 6 years to life for drug felonies not disproportionate); State v. Mulalley, 127 Ariz. 92, 618 P.2d 586 (1980) (three-part test applied; life sentence not disproportionate to crime of deadly assault); People v. Karsai, 131 Cal. App. 3d 224, 182 Cal. Rptr. 406 (1982) (three-part test is appropriate standard; sentence upheld); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972) (three-part test employed to invalidate sentence of 20 years imprisonment for selling marijuana).

Indeed, it has been argued that the principle of proportionality is irrelevant if the sole justification for punishment is its usefulness in attaining a legislature's penological goals. *See* Note, *Disproportionality, supra* note 2, at 1146. For example, even a sentence of life imprisonment for a parking violation could be justified on the basis of the legislative purpose of deterring others from illegal parking, although such a punishment would clearly be disproportionate. *See* Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980). The Supreme Court, therefore, considers legislative purpose separately from proportionality. The court has held that the eighth amendment proscribes two types of excessive punishments: "[A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 592 (1977).

99. The Court, in *Weems* and *Trop,* applied portions of the test without explicitly requiring the three-part analysis. *See* Trop v. Dulles, 356 U.S. 86, 102 (1958) (punishment of denationalization compared with punishment imposed in other nations); Weems v. United States, 217 U.S. 349, 380 (1910) (punishment imposed on defendant compared with penalties imposed for more serious crimes).

100. 103 S. Ct. at 3010-11.

101. Before *Helm,* courts generally found the length of a prison sentence in violation of the eighth amendment only if the sentence was so excessive as to "shock the conscience." *See, e.g.,* Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) (only in an extreme example, such as life imprisonment for overtime parking, would proportionality come into play); Cepulonis

Yet, the criteria that constitute the first prong of the test are inadequately defined. Further, it is not entirely clear whether each prong is an independent requirement, or whether all three prongs should be considered collectively in determining whether a punishment is unconstitutionally disproportionate. If courts are to make objective decisions, however, the latter interpretation of *Helm* seems more reasonable.

Balancing the gravity of the offense against the harshness of the penalty is the first step in the *Helm* Court's eighth amendment analysis.[102] Although this initial step is the crux of any proportionality analysis, the majority's approach to measuring both the gravity of the offense and the harshness of the penalty is inadequate. The *Helm* Court recognized that the gravity of an offense could be measured in terms of either the harm caused or threatened to the victim or society, or the culpability of the offender.[103] According to the majority, the gravity of the harm is measured by comparing the crime committed with other crimes.[104] Harm may be immediate and limited, such as a robbery victim's loss of property, or it may be continuing in its impact on society as a whole, such as a sale of narcotics that is part of a larger pattern of crime.

A court also may look to the offender's moral blameworthiness in measuring the gravity of the offense. The *Helm* Court noted that a defendant's motive or mental state may be relevant in fixing appropriate punishment.[105] A person who committed premeditated murder would deserve greater punish-

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v. Commonwealth, ___ Mass. ___, ___, 427 N.E.2d 17, 20 (1981) (recognizing that imprisonment could be disproportionate solely on the basis of length if so excessive as to shock the conscience); People v. Lorentzen, 387 Mich. 167, 181, 194 N.W.2d 827, 834 (1972) (holding that 20 years imprisonment for sale of marijuana was "so excessive that it 'shocks the conscience' "). *But see supra* note 98 and accompanying text for a discussion of courts using the three-part test prior to the *Helm* decision. Since this "shock the conscience" standard does not require a court to specify any objective basis for its decision, *Helm*, 103 S. Ct. at 3016 n.32, it is more subjective than the *Helm* test. It is, therefore, puzzling that the *Helm* dissent would prefer this traditional standard, *see id.* at 3020 n.3 (Burger, C.J., dissenting), to the criteria established by the majority. The fact that courts have specific criteria upon which to base eighth amendment decisions is not, in and of itself, likely to result in more appellate court reversals of sentences. *See id.* at 3009 (challenges to the proportionality of particular sentences rarely succeed); People v. Karsai, 131 Cal. App. 3d 224, 241, 182 Cal. Rptr. 406, 416-17 (1982) (the three-part test simply determines whether the punishment shocks the conscience).

102. *Helm*, 103 S. Ct. at 3010.

103. *Id.* at 3011. The second consideration focuses on the offender, rather than the offense. It appears that the *Helm* Court considered both measures. While the Court focused primarily on Helm's offenses, it also noted that Helm was an alcoholic, but "not a professional criminal." *Id.* at 3013 n.22. The Court relied partially on these facts in determining that Helm's crimes were "relatively minor." *Id.* at 3013. Other courts have considered the criminal's potential for rehabilitation in evaluating whether the sentence imposed furthered the public policy underlying criminal punishment. *See* People v. Brown, 90 Ill. App. 3d 742, 751, 414 N.E.2d 475, 482 (3d Dist. 1980); People v. Lorentzen, 387 Mich. 167, 179-80, 194 N.W.2d 827, 832 (1972).

104. 103 S. Ct. at 3011. The Court observed that crimes against persons were generally accepted as more serious than property crimes, that violent crimes were more serious than nonviolent crimes, that greater offenses were more serious than lesser included offenses, and so forth. *Id.*

105. *Id.*

ment than one who merely committed reckless or negligent homicide, even though the harm caused is the same.[106] Similarly, one who commits a crime for compensation is more culpable than one who does not.[107]

In listing factors used to measure the gravity of an offense, the majority omitted any consideration of the offender's past criminal record. Despite its recognition that "prior convictions are relevant to the sentencing decision,"[108] the Court focused primarily on the felony for which the defendant, Helm, received a life sentence.[109] It is anomalous to weigh a sentence imposed for a course of criminal conduct against only a portion of that conduct. Prosecution under South Dakota's recidivist statute required Helm's past crimes to be considered part of the "offense." Harsher penalties are generally imposed on recidivists because their criminal records demonstrate that they are neither reformed nor deterred by normal sanctions.[110] A recidivist, such as Helm, is perceived as incorrigible and more blameworthy than a first offender.[111] Thus, Helm's past crimes were logically an element of culpability or blameworthiness, and they should have been included in measuring the gravity of his offense.

Helm's past criminal convictions also could have been included in assessing the harm caused by his offense. Courts have rejected due process challenges to recidivist statutes on the ground that no separate crime is charged.[112] Rather, these statutes have been interpreted as merely identifying aggravating circumstances that justify enhanced punishment for the principal offense.[113] Under this approach, Helm's past offenses would not be fundamentally different from other aggravating circumstances, such as use of a deadly weapon or commission of the offense for compensation.[114] Harsher penalties are usually imposed when aggravating circumstances are present because the potential harm to the victim and society is perceived to be greater. Helm, and other offenders who have committed crimes in the past, may present a greater threat to society and, therefore, deserve greater

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106. *Id.*

107. *Id.*

108. *Id.* at 3013 n.21.

109. *Id.*

110. *See* Rummel v. Estelle, 445 U.S. 263, 276 (1980).

111. As Chief Justice Burger noted, "Surely seven felony convictions warrant the conclusion that respondent is incorrigible." *Helm,* 103 S. Ct. at 3023 (Burger, C.J., dissenting).

112. *See* Sherman v. United States, 241 F.2d 329, 335-36 (9th Cir.), *cert. denied,* 354 U.S. 911 (1957); Beland v. United States, 128 F.2d 795, 797 (5th Cir.), *cert. denied,* 317 U.S. 676 (1942).

113. *See* Goodman v. Kunkle, 72 F.2d 334, 336 (7th Cir.), *cert. denied,* 293 U.S. 619 (1934).

114. Some state criminal codes specifically include past convictions among aggravating circumstances to be considered when determining the length of a sentence. *See, e.g.,* ALA. CODE § 13A-5-48, 49(2) (1981) (prior conviction of another capital felony or a felony involving the use of, or threat of, violence is relevant to determining sentence of defendant convicted of capital offense); ILL. REV. STAT. ch. 38, § 1005-5-3.2 (b)(1) (Supp. 1983) (longer sentence can be imposed if defendant is convicted of a felony after having been previously convicted of the same or a greater class felony).

punishment. Past criminal conduct cannot be ignored completely in measuring the gravity of an offense.

The *Helm* Court balanced the gravity of the offense against the harshness of the penalty as the initial step of its proportionality determination. The majority, however, overlooked the relationship between recidivism and the gravity of the offense. Furthermore, the Court overstated the relationship between parole and the harshness of the penalty. When an offender is sentenced to prison with the possibility of parole, a court is faced with a choice in measuring the harshness of the penalty. The length of time that such an offender will spend in prison is not always determinable, as the offender may obtain an early release. Although no choice was necessary in *Helm,*[115] the Court intimated that the sentence would have been found less harsh had parole been available. Yet, this approach is logically inconsistent with a requirement of proportionality in sentencing. If the possibility of parole is made a factor in proportionality analysis, offenders might receive longer sentences than they deserve.

There has been substantial disagreement among judges and commentators over whether parole should be considered in proportionality analysis.[116] Some consider it unrealistic to presume that an offender will serve his full sentence.[117] Although an offender has no legally enforceable right to parole,[118] it is routinely granted in many jurisdictions. Others point out that parole is merely a conditional release and is not to be equated with liberty. An offender remains liable for the balance of his sentence[119] and may be imprisoned again without benefit of trial for violating any conditions of his parole.[120] Furthermore, parole boards base their recommendations largely

115. Under South Dakota law, Helm was ineligible for parole unless his sentence was first commuted to a term of years. *See* S.D. CODIFIED LAWS ANN. § 24-15-4 (1979).

116. Several courts have favored including the possibility of parole in their proportionality decisions. *See* Terrebonne v. Blackburn, 624 F.2d 1363, 1368-69 (5th Cir. 1980); Carmona v. Ward, 576 F.2d 405, 413-14 (2d Cir. 1978). Parole was considered in *Rummel v. Estelle,* although the Court was not explicitly applying a proportionality analysis. 445 U.S. 263, 280-81 (1980). Other courts, however, have found the appropriate measure of proportionality to be the maximum length of a challenged sentence. *See In re* Lynch, 8 Cal. 3d 410, 419, 503 P.2d 921, 926, 105 Cal. Rptr. 217, 222 (1972); People v. Broadie, 37 N.Y.2d 100, 111, 332 N.E.2d 338, 341, 371 N.Y.S.2d 471, 475, *cert. denied,* 423 U.S. 950 (1975). One writer reported that courts consider the maximum sentence as the relevant punishment in proportionality analysis and observed that the choice of presumptions with respect to whether the criminal will serve the entire sentence will, in practice, be determinative of the proportionality issue. Note, *Disproportionality, supra* note 2, at 1129.

117. *See* Note, *Disproportionality, supra* note 2, at 1128-29.

118. Parole is generally viewed as a matter of legislative grace. Rummel v. Estelle, 445 U.S. 263, 280 (1980). *See generally* G. KILLINGER, H. KERPER & P. CROMWELL, JR., PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM (1976) (examination of various methods of mitigating prison sentences in the United States).

119. *See* G. KILLINGER, H. KERPER & P. CROMWELL, JR., *supra* note 118, at 200-02; Note, *Disproportionality, supra* note 2, at 1130.

120. G. KILLINGER, H. KERPER & P. CROMWELL, JR., *supra* note 118, at 281-87. A parolee is, however, entitled to a hearing before revocation of parole. *See* Morrissey v. Brewer, 408 U.S. 471, 485-89 (1972).

upon an offender's conduct subsequent to sentencing and incarceration. Consideration of the crime committed generally plays a minor role in parole decisions.[121] Thus, there is a real possibility, ignored by the *Helm* Court, that an offender could actually be required to serve a sentence that is disproportionate to his crime, even though at the time of sentencing, the likelihood of parole diminished the apparent harshness of the sentence and rendered it proportional.

A court should always measure proportionality by the full sentence imposed, even when parole is available. Otherwise, the offender's right to proportionality in sentencing would not be guaranteed.[122] In *Helm,* the Court was not required to decide whether the possibility of parole should be a factor in measuring proportionality because parole was unavailable to Helm.[123] Nevertheless, the Court explicitly refused to overrule *Rummel* and distinguished it from *Helm* on the issue of parole.[124] As a result, the Court implies that the likelihood of parole is an appropriate, perhaps even a necessary, consideration in analyzing proportionality. Although both Helm and Rummel received sentences of life imprisonment, the Court viewed Rummel's sentence as less harsh because of the possibility that he would be paroled.[125] It necessarily follows that if a case similar to *Rummel* were to arise, a sentence of life imprisonment with the possibility of parole would be upheld. Such a sentence would be constitutional, even though the offender might eventually serve the full sentence, and even though *Helm* held that life imprisonment is a disproportionate punishment for minor property offenses.[126] Thus, considering the possibility of parole in a proportionality analysis may thus produce an incorrect result.

Another fundamental defect in the *Helm* decision is the Court's failure to specify the intended relationship between the three prongs of its proportionality analysis.[127] One possible interpretation is that each prong is an in-

121. *See,* Note, *Disproportionality, supra* note 2, at 1130. For example, the circumstances of the present offense comprise only one of ten major factors in the parole selection process outlined by the United States Board of Parole. G. KILLINGER, H. KERPER & P. CROMWELL, JR., *supra* note 118, at 248-49.

122. *See* Note, *Disproportionality, supra* note 2, at 1130. One commentator has noted that:

> The essence of the prohibition against undeserved punishment is the legal right of the offender to be free from all restraints on his liberty after a period of time proportional to the severity of his offense. . . . To condition the lawfulness of a defendant's incarceration, therefore, on the chance of a reduced sentence or parole, as the realists propose, would place a decision of constitutional dimensions within the unreviewable discretion of correctional authorities.

Id.

123. 103 S. Ct. at 3005.

124. *Id.* at 3015-16. The *Helm* Court compared the "liberal" parole policy of Texas, relevant in *Rummel,* to the South Dakota procedure under which the governor could commute a life sentence, thereby making a prisoner eligible for parole but subject to the stringent requirements of the South Dakota parole system. *Id.*

125. *Id.*

126. *Id.* at 3016.

127. The dissent questioned whether "all these factors [must] be present in order to hold

dependent requirement under the eighth amendment. Alternatively, the test could be viewed as balancing a number of factors, requiring consideration of all the criteria as a whole.[128] This alternative interpretation is bolstered by the *Helm* Court's characterization of its analysis as objective. Under the second prong of the *Helm* test, the challenged sentence must be compared with punishments imposed in the same jurisdiction for other crimes. Then, under the third prong of the *Helm* test, the challenged sentence is compared with sentences imposed in other jurisdictions for the same crime.[129] These comparisons produce an objective basis for analyzing proportionality[130] and distinguish the *Helm* test from the subjective "shock the conscience" standard.

Nevertheless, the *Helm* Court applied its criteria sequentially, as though each step were to be considered independently.[131] If this is the correct interpretation, then *Helm* requires two distinct types of proportionality in sentencing. Under this view of the *Helm* test, a court first determines whether, standing alone, the punishment fits the crime. This analysis may be labeled *absolute proportionality;* it lacks any frame of reference.[132] Next, a court determines whether the punishment imposed is comparable to punishments authorized for similar crimes within the same jurisdiction. This analysis may be labeled *relative proportionality;* it is viewed with reference to a state's penological scheme as a whole. A rational theory of retribution, based upon the concept that it is unfair to punish a person more than he deserves, would include both absolute and relative proportionality. This concept of fairness would be violated if one offender were punished more harshly than another who was guilty of a similar or more serious offense.[133]

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a sentence excessive under the Eighth Amendment" and, if so, "[h]ow are they to be weighed against each other?" *Id.* at 3022 (Burger, C.J., dissenting).

128. Such an approach would be analogous to the "totality of conditions" doctrine the federal courts have developed in cases challenging prison conditions under the cruel and unusual punishments clause. *See, e.g.,* Ruiz v. Estelle, 679 F.2d 1115, 1139-40 (5th Cir. 1982) (in determining whether prison conditions violate eighth amendment, test to be applied is "totality of circumstances"); Stewart v. Winter, 669 F.2d 328, 335-36 (5th Cir. 1982) (court must consider totality of conditions to determine if prison conditions violate eighth amendment); Dawson v. Kendrick, 527 F. Supp. 1252, 1285 (D.W. Va. 1981) (courts often employ totality of conditions analysis when reviewing challenges to the overall conditions and practices at a prison or jail).

129. *See supra* notes 68-72 and accompanying text.

130. As stated by the court in State v. Mullalley, 127 Ariz. 92, 96, 618 P.2d 586, 590 (1980), interjurisdictional comparisons provide "evidence of what sanctions are currently acceptable in our society for the crime committed." *See also supra* note 101.

131. *See* 103 S. Ct. at 3012-15.

132. It seems impossible to make an objective determination of absolute proportionality without comparing punishments imposed in other jurisdictions. Consequently, the first and third steps of the test cannot be separated if *Helm* is read as rejecting a subjective, "shock the conscience" standard. Treating each step of the *Helm* test as a separate determination is, thus, inconsistent with the Court's characterization of the test as objective.

133. For example, if *X* was sentenced to 30 years imprisonment for petty theft, while *Y* was sentenced to only 5 years for the same or a similar crime, *X* would have been unfairly punished. Similarly, if *Z* was sentenced to 30 years for murder, *X* would again have been

Despite the logical arguments favoring relative proportionality, the Supreme Court has generally limited its importance in eighth amendment analysis. If a great disparity were found between punishments imposed for similar crimes within a single jurisdiction, the Court has intimated that this alone would support a finding of disproportionality.[134] The Court, however, has been unwilling to displace legislative judgments on the relative severity of crimes, except when a lesser included offense is compared with the greater offense.[135] Even in this limited class of cases, the Court has not actually required relative proportionality, and it has only required that the penalty imposed for the included offense not be more severe than the sanction authorized for the greater offense.[136] Moreover, in *Helm* the sentence clearly was relatively disproportionate to the principal offense,[137] yet the Court appeared to rely on the disparity within the jurisdiction simply as an indication of absolute disproportionality.[138] It therefore seems unreasonable to interpret *Helm* as requiring an independent finding of relative proportionality, without more explicit language to that effect.

Application of the Helm *Test*

Certain problems with the *Helm* decision arise more from the Court's application of its three-part test than from the test itself. The decision is incompatible with recent precedent and suffers from two critical infirmities. First, the *Helm* Court failed to clarify the bounds of legitimate legislative discretion and the appropriateness of judicial restraint. Second, *Helm* failed to strike a decisive balance between a state's interest in imposing more severe punishment upon recidivists, and the Constitution's requirement of proportionality in sentencing. The majority's attempts to resolve these infirmities are confusing and inadequate. For example, the Court's distinction between violent and nonviolent crimes contradicts its definition of gravity of an offense. Consequently, although *Helm* furnishes an objective test, it is unclear how that test should be applied to eighth amendment challenges to prison sentences.

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unfairly punished because *Z*'s crime was far more serious than *X*'s. A logically consistent theory of retribution requires that an offender be punished in accordance with the relative severity of his crime. *See* Note, *Disproportionality, supra* note 2, at 1131-32.

134. *See* Weems v. United States, 217 U.S. 349, 380-81 (1910).

135. *See* Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976), *cert. denied,* 430 U.S. 973 (1977). A lesser included offense is defined by its elements. If the state must prove *A, B,* and *C* to obtain a conviction for crime 1, and it must prove *A, B, C,* and *D* to obtain a conviction for crime 2, then crime 1 is a lesser included offense of crime 2. Thus, an attempted offense is a lesser included offense of the completed crime. In *Roberts v. Collins,* simple assault was held to be a lesser included offense of assault with intent to kill. *Id.* at 169-70.

136. *See Helm,* 103 S. Ct. at 3011 (dicta).

137. The *Helm* Court's comparison of the punishments imposed in South Dakota indicated that Helm's sentence was harsher than sentences authorized for many more serious crimes, such as attempted murder or first-degree rape. *Id.* at 3013-14.

138. The *Helm* Court held that the sentence imposed was "significantly disproportionate" and made no further distinction. *Id.* at 3016.

Many court decisions involving different types of punishments have applied a proportionality analysis similar to the three-part test enunciated in *Helm*.[139] The *Helm* decision, however, represents the first case in which the Supreme Court concluded that the length of a prison sentence, by itself, violated the cruel and unusual punishments clause. Case law supporting this result is sparse for two reasons. First, until fairly recently, the eighth amendment was not held applicable to the states,[140] thus preventing any challenge of state sentencing procedures on federal constitutional grounds.[141] Second, the judiciary's traditional deference to legislatively determined sentence lengths further decreased the number of successful eighth amendment challenges.[142] Such deference seemed to be prudent in light of the Court's failure to provide clear and objective criteria with which to review sentencing.

According to the *Helm* dissent, the fact that the majority's position was unprecedented proved that no constitutional significance attached to the difference between the lengths of prison sentences for similar crimes.[143] The

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139. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (death penalty); Trop v. Dulles, 356 U.S. 86 (1958) (denationalization); Weems v. United States, 217 U.S. 349 (cadena temporal) (1910); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973) (life imprisonment).

140. *See* Robinson v. California, 370 U.S. 660 (1962).

141. Prior to Robinson v. California, 370 U.S. 660 (1962), the Court had intimated, but had never explicitly held, that the eighth amendment restricted states' sentencing procedures. *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878). State constitutional provisions prohibiting cruel and unusual punishments, however, have been relied upon to invalidate disproportionate prison sentences imposed pursuant to recidivist statutes. *See* State v. Fain, 94 Wash. 2d 387, 617 P.2d 720 (1980); State v. Buck, ___ W. Va. ___, 294 S.E.2d 281 (1982); Wanstreet v. Bordenkircher, ___ W. Va. ___, 276 S.E.2d 204 (1981). For discussions of proportionality based on state constitutional prohibitions against cruel and unusual punishments, see Comment, *The Eighth Amendment: Judicial Self-Restraint and Legislative Power*, 65 MARQ. L. REV. 434, 458-61 (1982); Note, *Recidivist Statutes—Application of Proportionality and Overbreadth Doctrines to Repeat Offenders*—Wanstreet v. Bordenkircher, 57 WASH. L. REV. 573 (1982).

142. The federal judicial power to review state sentencing statutes is constrained by two constitutional doctrines. Under the doctrine of separation of powers, which restricts all three branches of the federal government, a court may lack authority to decide a question involving a matter peculiarly within the province of the legislature. Under the doctrine of federalism, federal courts are also incompetent to review certain state actions because the states retain their sovereignty in all matters not constitutionally delegated to the federal government. U.S. CONST. amend. X; *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 17-18 (1978) (many disputes involve both separation of powers and federalism concerns).

These two constitutional concerns produced a traditional policy of judicial restraint in cases challenging the proportionality of prison sentences imposed under state statutes. *See generally Helm*, 103 S. Ct. at 3020-21 (Burger, C.J., dissenting) (Court typically has abstained from proportionality review, applying it only in extraordinary cases). Determining the relative severity of crimes and the appropriateness of punishments has been likened to arbitrary line-drawing and, therefore, viewed as a decision for legislatures, rather than courts. *See id.* at 3019-20, 3022-24 (Burger, C.J., dissenting); Hutto v. Davis, 454 U.S. 370, 374 (1982); Rummel v. Estelle, 445 U.S. 263, 274-76 (1980). Federal judicial review of state sentencing statutes is also thought to be antithetical to a federal system because of the danger of "constitutionality imposed uniformity." *Helm*, 103 S. Ct. at 3019 (Burger, C.J., dissenting) (quoting Rummel v. Estelle, 445 U.S. 263, 282 (1980)); *see also* Hutto v. Davis, 454 U.S. 370, 373-74 n.2 (1982).

143. 103 S. Ct. at 3018-19.

dissent argued that the line-drawing process involved in the majority's approach could not be accomplished objectively; moreover, it merely substituted judges' subjective beliefs for legitimate legislative determinations.[144] But the Court has held that the cruel and unusual punishments clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[145] Therefore, as society's views on appropriate punishment change, the Court can, and should, abandon inconsistent case law. If society now perceives extremely long prison sentences as cruel and unusual punishment for petty crimes, legislative imposition of such punishments is prohibited by the eighth amendment.[146]

Cases decided long ago, when society's views were different,[147] may have lost much of their vitality and, as a result, may be considered inapplicable today. Recently decided cases, however, cannot be explained away in a similar manner. In *Rummel* and *Davis,* the Court explicitly rejected challenges to prison sentences by declaring that the "length of the sentence actually imposed is purely a matter of legislative prerogative."[148] Yet, the *Rummel* and *Davis* Courts neither engaged in any survey of contemporary societal attitudes toward lengthy prison sentences, nor explored the current acceptance of excessive imprisonment. In both cases, the Court simply condoned previous Supreme Court decisions that held that proportionality was inapplicable to the length of prison sentences.[149]

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144. *Id.* at 3017.

145. Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also* Weems v. United States, 217 U.S. 349, 378 (1910) (eighth amendment standards progress as public opinion changes).

146. Society's views on the appropriateness of punishments can be determined by comparing the punishments imposed in the various jurisdictions. Changes in moral values may alter these views over time, even if the punishments remain the same. Imprisonment may be perceived as harsher because prison conditions have worsened in comparison to the general standard of living. In reality, prison conditions may actually have worsened. For example, severe prison overcrowding is a problem in most states and may lead to increased personal danger to inmates. Changes in prison conditions could foster a change in society's attitudes toward punishment in general. Finally, better, more effective alternatives to imprisonment may now be available, making lengthy prison sentences less acceptable. For example, the Governor's Task Force on Prison Overcrowding in Illinois estimates that one third of those convicted of crimes were under the influence of an illegal drug when they committed their offenses, and another third drank heavily just before committing their offenses. Tybor, *Task Force Studies Alternatives to Jail,* Chicago Tribune, Aug. 29, 1983, § 1, at 9, col. 4. Alcohol or drug abuse treatment may be more beneficial for such offenders than imprisonment. Public attitudes concerning criminal punishment have changed, whatever the reason, meriting judicial notice.

147. Punishments imposed over the past 200 years have changed markedly, indicating that contemporary societal views differ from those of the framers' society. During the eighteenth century, even trivial offenses were punishable by hanging or long imprisonment, thereby limiting any recidivism problem. Katkin, *Habitual Offender Laws: A Reconsideration,* 21 BUFFALO L. REV. 99 (1971). Today, the death penalty is reserved for the most serious offenses, and prison sentences are generally shorter. If the *Trop* definition of cruel and unusual punishments is accepted, then the debate over the framers' intent and lack of case law is irrelevant; anything presently unacceptable to society is prohibited.

148. Hutto v. Davis, 454 U.S. 370, 373 (1982); Rummel v. Estelle, 445 U.S. 263, 274 (1980).

149. *See Davis,* 454 U.S. at 372-73; *Rummel,* 445 U.S. at 272-75.

If contemporary society finds lengthy imprisonment to be a cruel and unusual punishment for a petty crime, then legislatures are not free to impose such a penalty. The *Rummel* and *Davis* decisions, therefore, exhibit inappropriate judicial restraint. Refusing to exercise such restraint, the *Helm* Court correctly adopted a new approach to eighth amendment challenges of prison sentences. Because the eighth amendment prohibits the imposition of disproportionate sentences, the length of prison sentences can no longer be purely a matter of legislative discretion. By invalidating statutes that impose excessive penalties, a court is not interfering with legitimate legislative decision making. Rather, that court is simply enforcing the Constitution and preventing legislatures from usurping power.

If the *Rummel* and *Davis* rationale is based upon an erroneous perception of current societal attitudes, it should not be viewed as controlling. The *Helm* Court, though, refused to abandon completely the judicial restraint espoused by *Rummel* and *Davis,* insisting that it did not endorse unfettered appellate review of prison sentences. *Helm* establishes only a limited power of judicial review and courts should continue to grant "substantial deference" to "the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes. . . ."[150] Nevertheless, the *Helm* Court's application of its own analysis does not display much deference to the South Dakota legislature. On the contrary, by examining neither the purpose nor the rationale for the legislature's determination, the Court appeared to arrive at its own independent conclusion of the propriety of Helm's sentence.[151] Consequently, lower courts are left with virtually no guidance as to the legislative bounds of legislative discretion and the proper limits of judicial review of prison sentences challenged under the eighth amendment.

By refusing to overrule *Rummel,* the *Helm* Court also created considerable confusion regarding the question of enhanced punishment for recidivists. The facts of *Rummel* and *Helm* were similar in most respects;[152] the only significant difference between the two cases was the availability of parole. The decision in *Rummel,* however, rested primarily upon a state's substantial interest in punishing recidivists, and not upon the existence of parole.[153] Although it noted that this state interest was "justified" and should not be ignored,[154] the *Helm* Court completely disregarded it when weighing the

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150. 103 S. Ct. at 3009.

151. Some writers have maintained that an examination of the legislative purpose of a sentencing statute is not appropriate in a proportionality analysis. *See supra* note 98.

152. Helm's last felony involved passing a "no account" check for $100. *Helm,* 103 S. Ct. at 3005. The last felony committed by Rummel involved obtaining $120.75 under false pretenses. *Rummel,* 445 U.S. at 266. Thus, the principal felony in each case was a minor property offense. Both defendants had been convicted of other felonies against property, although Rummel had fewer convictions than Helm. Neither had been convicted of any crime involving a direct threat of harm to a person. Both had received life sentences under statutes authorizing such penalties for recidivists. *See Helm,* 103 S. Ct. at 3017-18 (Burger, C.J., dissenting).

153. *Rummel,* 445 U.S. at 276, 284-85.

154. *Helm,* 103 S. Ct. at 3013.

crimes against the punishment.[155] This significant departure from precedent was explained in a footnote: "We must focus on the principal felony—the felony that triggers the life sentence—since Helm has already paid the penalty for each of his prior offenses."[156] This statement effectively overruled a series of cases, culminating with *Rummel,* that recognized a state's right to consider an offender's prior criminal conduct and to punish more harshly those persons who had demonstrated that they were incorrigible.[157]

Standing alone, this statement might also completely undermine all recidivist statutes.[158] Unfortunately, *Helm* is internally inconsistent as to the relevance of prior convictions in a proportionality analysis, so it is unclear whether such undermining was intended. The *Helm* Court acknowledged that a recidivist, because of his criminal record, could be punished more severely than a first offender.[159] At the same time, the Court declared that it would not consider Helm's prior crimes in reviewing the length of his sentence because those crimes were "relatively minor."[160] Thus, in applying the first prong of its test, the *Helm* Court failed to adhere to its articulated standard. Despite the Court's acknowledgment that an offender's criminal record should be "relevant,"[161] it did not actually consider Helm's prior offenses in determining the gravity of his crime. Yet, when the majority compared other crimes and punishments in the second and third prongs of its test, Helm's recidivist status was taken into account.[162] The Court did not compare Helm's sentence to other states' penalties for issuing a "no account" check; his sentence was compared to other states' penalties for committing seven nonviolent felonies.[163] This internal inconsistency may indicate either

155. *See supra* notes 108-14 and accompanying text.

156. 103 S. Ct. at 3013 n.21.

157. *Rummel,* 445 U.S. at 284. The Supreme Court upheld state recidivist statutes challenged under the eighth amendment in Spencer v. Texas, 385 U.S. 554 (1967); Oyler v. Boles, 368 U.S. 448 (1962); Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895). Broad prosecutorial discretion in deciding whether to invoke a recidivist statute was upheld in Bordenkircher v. Hayes, 434 U.S. 357 (1978).

158. By definition, prior offenses are necessarily considered under a recidivist statute. *See supra* note 4. A defendant usually has already paid the penalties for his prior offenses, and recidivist statutes typically require that the convictions arise from separate and distinct criminal episodes; many states also require that a subsequent felony be committed after a conviction for the preceding offense. *See, e.g.,* COLO. REV. STAT. § 16-13-101 (1973 & Supp. 1982); ILL. REV. STAT. ch. 38, §§ 33B-1, 1005-5-3 (1981); N.C. GEN. STAT. §§ 14-7.0, -7.2 (1981). Some states require the defendant to have been sentenced for a prior offense before commission of the subsequent felony. *See, e.g.,* N.Y. PENAL LAW §§ 70.04-.10 (McKinney 1975 & Supp. 1983-84); S.C. CODE ANN. § 17-25-45 (Law. Co-op. Supp. 1983). A defendant, therefore, cannot be prosecuted under the typical recidivist statute unless he has already paid the penalty for his prior offenses.

159. 103 S. Ct. at 3013.

160. *Id.*

161. *Id.* at 3013 n.21. Helm's prior offenses should logically have been considered in the first step of the test. *See supra* notes 108-14 and accompanying text.

162. 103 S. Ct. at 3013-15.

163. *Id.* at 3014-15.

disagreement or confusion among members of the Court as to the validity of recidivist statutes.

The *Helm* Court's application of its own test is confusing and inconsistent. In considering the relevance of Helm's prior offenses, the Court drew a distinction between violent and nonviolent crimes.[164] Helm's prior offenses were labeled "relatively minor" criminal conduct because none of them involved a threat to a person.[165] The implication is clear: had Helm been previously convicted of violent crimes, the Court would have accorded a greater weight to those convictions in its proportionality analysis.[166]

Although it emphasized that the proportionality of prison sentences must be reviewed objectively, the *Helm* Court's definition of "relatively minor" crimes was based on only one objective factor: the absence of physical violence. While Helm's most recent offense involved a small amount of money, not all of his other equally minor prior offenses could be similarly quantified.[167] The Court noted that Helm was an alcoholic, but it is difficult to understand how this could have mitigated the seriousness of his offenses since intoxication does not usually excuse crime.[168] Finally, the conclusion that Helm was "not a professional criminal"[169] was inadequately substantiated and, in any event, was not particularly relevant to the severity of the crimes he had committed. Consequently, it appears that the only objective reason for ignoring Helm's prior offenses was their nonviolent nature.

If *Helm* mandates a distinction between violent and nonviolent crimes, then a significant limitation is placed upon the three-step proportionality test. Violent crimes must always be considered more serious when measuring the gravity of the offense. Yet, as the *Helm* dissent correctly observed, "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."[170] Some crimes commonly designated as property offenses, such as burglary and arson, often involve significant risk of harm to persons. Other crimes involving no use of force, such as criminal conspiracy, prostitution, and narcotics trafficking, may cause substantial and widespread harm to society.

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164. *Id.* at 3013.

165. *Id.* The dissent disagreed on this point and noted that Helm had been convicted of three burglaries and was convicted three times of drunk driving. *Id.* at 3017 (Burger, C.J., dissenting).

166. The West Virginia Supreme Court of Appeals has adopted this approach in reviewing challenges to the state recidivist statute, brought under the state cruel and unusual punishments clause. State v. Beck, ___ W. Va. ___, ___, 286 S.E.2d 234, 244 (1981); Wanstreet v. Bordenkircher, ___ W. Va. ___, ___, 276 S.E.2d 205, 214 (1981).

167. In *Rummel,* on the other hand, each of the crimes could be viewed in terms of the dollars involved. 445 U.S. 263, 265-66 (1980).

168. 103 S. Ct. at 3013 n.22. *See generally* W. LAFAVE & A. SCOTT, *supra* note 2, at 341-51 (discussing when intoxication is a defense).

169. 103 S. Ct. at 3013 n.22.

170. *Id.* at 3019 (Burger, C.J., dissenting) (quoting Rummel v. Estelle, 445 U.S. 263, 275 (1980)). The *Helm* dissent misquoted the *Rummel* opinion, which used the word *criminal* rather than *individual.*

A rigid distinction between violent and nonviolent crimes would require simple assault to be termed more severe than any of these nonviolent, but nonetheless serious, crimes. Under such a distinction, the gravity of the offense would not consistently be determined by the harm caused or by the offender's culpability.[171]

The *Helm* Court announced specific, objective criteria for determining whether a prison sentence is disproportionate to a crime. These criteria, however, are inadequately defined and were inconsistently applied in *Helm*. The Court indicated that Helm's prior offenses could be ignored because they were nonviolent, but this distinction between violent and nonviolent crimes confuses a determination of the gravity of the offense. The *Helm* Court also undermined its own requirement of proportionality in sentencing by implicitly endorsing a consideration of the availability of parole. Furthermore, the Court did not clearly indicate whether the eighth amendment requires both absolute and relative proportionality. Finally, by explicitly refusing to overrule *Rummel* and *Davis,* the *Helm* Court created further confusion concerning the bounds of legislative discretion and the validity of recidivist statutes.

CONSEQUENCES OF THE *HELM* DECISION

The *Helm* decision is likely to have a substantial and immediate effect on both the sentencing of recidivists and on appellate court review of state recidivist statutes. The *Helm* dissent predicted an increased number of sentencing appeals[172] and feared that the majority's three-part test would result in a "constitutionally imposed uniformity inimical to traditional notions of federalism. . . ."[173] Yet, the most serious repercussion of the *Helm* decision is the uncertain future it creates for most state recidivist statutes.

Although the *Helm* Court acknowledged a state's right to punish a recidivist more severely than a first offender,[174] the Court's application of its proportionality test completely disregarded this valid state interest. By distinguishing violent from nonviolent crimes, *Helm* implies that past crimes should not be considered unless they were violent.[175] *Helm* also instructs courts to "focus on the principal offense" because presumably the defendant already has been punished for the prior offenses.[176] By employing an approach in which reviewing courts ignore a recidivist's criminal record, the *Helm* Court has all but overruled most recidivist statutes.

Most state recidivist statutes do not conform to the requirements announced in *Helm*.[177] While many of these statutes permit courts to consider the prin-

171. *See supra* notes 103-05 and accompanying text.
172. 103 S. Ct. at 3022 (Burger, C.J., dissenting).
173. *Id.* at 3019 (quoting Rummel v. Estelle, 445 U.S. 263, 282 (1980)).
174. *Id.* at 3013.
175. *Id.*
176. *Id.* at 3013 n.21.
177. *See infra* Statutory Appendix.

cipal offense in determining the appropriate sentence,[178] it is normally only one of several factors in the sentencing decision.[179] Typically, the number and type of prior crimes are equally important concerns.[180] A history of violent criminal conduct will often weigh more heavily than "relatively minor" offenses, but the vast majority of states do not limit their recidivist laws to violent felons.[181] The *Helm* Court's interpretation of its proportionality test apparently requires sentencing courts to ignore all prior nonviolent crimes, even though most recidivists do not commit violent felonies[182] and many

178. *See, e.g.*, IND. CODE ANN. § 35-50-2-8 (Burns 1979 & Supp. 1982); S.D. CODIFIED LAWS ANN. § 22-7-7 (1979). The principal offense may be construed in varying ways to ascertain the length of a sentence. In some states, the principal felony calls for a basic sentence plus an additional term because of the criminal history. *See, e.g.*, IND. CODE ANN. § 35-50-2-8 (Burns 1979 & Supp. 1982); N.M. STAT. ANN. § 31-18-17 (Supp. 1983). Another common approach imposes the sentence authorized for felonies that are one or more classes higher than the principal felony. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 22-7-7 (1979). Recidivist statutes often are inapplicable when a fixed sentence is imposed regardless of the principal offense, and a greater penalty would otherwise be authorized. *See, e.g.*, NEV. REV. STAT. § 207.010 (1981); N.C. GEN. STAT. § 14-7.1, -7.2 (1981). Finally, a recidivist statute may enumerate particular offenses such as kidnapping or armed robbery. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9714 (Purdon 1982); S.C. CODE ANN. § 17-25-45 (Law. Co-op. Supp. 1982).

179. Indeed, a recidivist statute, by definition, requires a court to consider the past crimes as well as the principal offense. *See supra* notes 4 & 158.

180. Some states employ what might be called a stepped approach: as the number of convictions increases, the additional authorized punishment multiplies. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 22-7-7 to -8 (1979 & Supp. 1982). An alternative approach is to consider the type and number of prior offenses as a whole: a few violent crimes would weigh as heavily as several less serious crimes. *See, e.g.*, CAL. PENAL CODE §§ 667-667.7 (West 1970 & Supp. 1983); MO. ANN. STAT. §§ 558.016-.018 (Vernon 1979 & Supp. 1983).

181. Only Pennsylvania limits its recidivist law to violent criminals. *See* 42 PA. CONS. STAT. ANN. § 9714 (Purdon 1982).

182. The most exhaustive study of recidivists and their characteristics is found in D. WEST, THE HABITUAL PRISONER (1963). West conducted interviews with two groups of recidivists: 50 "preventive detainees" (similar to Helm) and 50 "intermittent recidivists" (men who had substantial lapses of honesty). Very few of the men in either group were convicted of violent crimes. "Contrary to the popular stereotype of a persistent criminal, few of these prisoners were prone to violence and hardly any were efficiently organized, professional criminals. The majority were shiftless, work-shy characters for whom petty stealing represented the line of least resistance." *Id.* at 100. West found that only eight of the fifty preventive detainees had been convicted for violent crimes, and only one of this group had ever inflicted serious injury. *Id.* at 13. Charges for sexual offenses, in both groups, accounted for only three percent of the convictions, and none of these sexual offenses was accompanied by serious physical violence. *Id.* at 14. "Contrary to what one might expect, both groups of prisoners, but especially the preventive detainees, included a substantial number of habitually petty thieves and very few enterprising swindlers on a grand scale. Most of their crimes seemed to have been undertaken for the sake of rather trivial loot, and carried out without previous organisation or planning and without the aid of accomplices." *Id.* at 15. Indeed, West preferred the term "habitual prisoner" to the more common "habitual criminal" because "the determined professional criminal, however persistent his antisocial activities, rarely sinks to the status of a habitual prisoner." *Id.* at ix.

Since long prison sentences typically are imposed for crimes involving serious physical violence, the majority of recidivists would logically be petty thieves, and not dangerous and violent criminals. Murderers and rapists, for example, normally receive the harshest sentences. Obviously, death or life imprisonment limits an offender's opportunities to commit further crimes.

serious crimes involve no violence.[183] It seems unlikely that these facts could validate recidivist statutes that otherwise fail to survive the *Helm* proportionality test, because the legislative purpose in enacting a particular recidivist statute is not considered under that approach.[184]

Another consequence of the *Helm* decision, recognized by the dissent,[185] will be a marked increase in the number of prison sentence appeals. Under *Rummel* and *Davis,* judicial review of a sentencing statute was appropriate only if the appellant claimed that the law was unconstitutional on its face.[186] Thus, a sentencing statute was invalid only if, under any conceivable set of circumstances, reasonable people could not disagree as to the inappropriateness of the mandated penalty.[187] In contrast, proportionality challenges under the *Helm* standard will be heard on a case-by-case basis. The particular sentence imposed for the particular crime will be examined, and a facially valid statute may be found invalid as applied in an individual case.[188] Of course, as the *Helm* Court observed, successful appeals from noncapital punishments on grounds of disproportionality will be "exceedingly rare."[189] Nevertheless, the most extreme cases will now be seriously considered, and virtually all cases may be heard, even if the statute is not unconstitutional on its face.

Because courts now must consider each case on its individual facts, it is likely that offenders will be encouraged to appeal their sentences. Case-by-case analysis of proportionality is desirable despite the concomitant increase in the number of appeals; under such an approach, an individual offender's constitutional rights are better ensured. Unfortunately, an unnecessarily large increase in the number of appeals will result from the ambiguities and inconsistencies that complicate the *Helm* decision.[190] As district courts strug-

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Aside from serving shorter prison sentences, petty thieves can actually profit from their crimes. The astute criminal is more likely to commit crimes that produce income, particularly if the danger of failure is superficial (few prosecutions, short sentences, or both). West's findings tend to support this theory. *See generally* D. WEST, *supra.*

183. *See supra* notes 170-71 and accompanying text.

184. *See supra* notes 98 & 117-18 and accompanying text. The *Helm* Court did not apply the rational basis test, or any similar test, to the South Dakota statute. Without considering the legislative purpose, the Court came to an independent conclusion as to the appropriateness of Helm's sentence.

185. 103 S. Ct. at 3022 (Burger, C.J., dissenting).

186. *See* Hutto v. Davis, 454 U.S. 370, 377 (1982); Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980).

187. *See* 103 S. Ct. at 3020 n.3 (Burger, C.J., dissenting).

188. The South Dakota statute would probably have been valid if the defendant had a history of violent crimes. The statute was not facially unconstitutional, but it was worded too broadly and authorized the application of an unfair sentence in Helm's case. The Supreme Court could have concluded that the statute was overly broad, or that the trial court abused its discretion in imposing Helm's penalty. Although life imprisonment was not required by the statute, the trial court chose a life sentence as Helm's punishment. The Court did not specify which of these two conclusions it had drawn.

189. 103 S. Ct. at 3009 (quoting Rummel v. Estelle, 445 U.S. 263, 279 (1980)).

190. For example, the *Helm* Court's definition of "gravity of the offense" is inconsistent with its application of the test's first step. *See supra* notes 103-04, 170-71 and accompanying

gle to apply the *Helm* proportionality test to particular sets of facts, inconsistent decisions will result. Even if statutes are invalidated intermittently, the *Helm* dissent's fear that "this holding will flood the appellate courts with cases in which . . . arbitrary lines must be drawn"[191] is not unfounded. Eventually, the Supreme Court will need to resolve varying interpretations of *Helm*'s proportionality test.

The *Helm* dissent was apparently less troubled by the decision's potentially adverse impact on appellate court dockets, than it was by the supposed demise of federalism and states' rights. The dissent maintained that comparisons between jurisdictions, as required by the third prong of the *Helm* test, were impracticable because sentencing statutes and parole systems vary widely among the states.[192] Furthermore, the dissent continued, interstate comparisons would "trample on fundamental concepts of federalism."[193] Consequently, the dissent asserted that the majority's interpretation of the eighth amendment was incompatible with the federalist system established by the Constitution to encourage diversity and experimentation.[194]

The *Helm* dissent supported its contention by observing that the same conduct may produce substantially different consequences in two states, because of differences in local conditions.[195] A proper application of the *Helm* test, however, provides the solution to the very problem the dissent purports to raise. For purposes of comparison, identical conduct cannot fairly be categorized as the same crime because the gravity of the particular offense may differ between jurisdictions.[196] A greater punishment in one state would be

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text. The Court also vacillated on the question of how prior convictions should be considered in sentencing recidivists. *See supra* notes 108-14, 152-63 and accompanying text.

191. 103 S. Ct. at 3022 (Burger, C.J. dissenting).

192. *Id.* at 3019 (Burger, C.J., dissenting).

193. *Id.* (Burger, C.J., dissenting).

194. This view of federalism has previously been rejected by the Court as a rationale for limiting the scope of judicial review. The eighth amendment limits state action, and states are not free to infringe individual liberties in the name of experimentation with social goals. *See, e.g.*, Coker v. Georgia, 433 U.S. at 592 (1977) (punishment may be unconstitutional even if it serves legitimate goals); Robinson v. California, 370 U.S. 660, 663-64 (1962) (eighth amendment constrains state's valid authority to combat drug traffic).

195. The *Helm* dissent posed the following hypothetical: "Different states surely may view particular crimes as more or less severe than other states. Stealing a horse in Texas may have different consequences and warrant different punishment than stealing a horse in Rhode Island or Washington, D.C. . . ." 103 S. Ct. at 3019 (Burger, C.J., dissenting). In the dissent's view, the difference in punishment would be justified and constitutionally permissible because, "[a]bsent a constitutionally imposed uniformity . . . some State will always bear the distinction of treating particular offenders more severely than any other State." *Id.* In addition, different areas may have significantly different crime rates. An area with a particularly high rate of drug trafficking may have a greater interest in deterring that activity or may have more trouble prosecuting offenders. Arguably, that jurisdiction would be justified in imposing more stringent penalties for drug-related crimes.

196. *See, e.g.*, Walker v. State, 53 Md. App. 171, 193, 452 A.2d 1234, 1245 (1982) (the proportionality of a sentence is measured not by comparing the sentence with the label given the crime, but by comparing the sentence with the criminal's behavior and the consequences of his act).

justified by more serious consequences suffered in that locale. Even though the third prong of the test, which requires interjurisdictional comparisons, may reveal a substantial disparity in punishments, an evaluation of the gravity of the offense, as required by the first prong of the test, will provide a justification for the disparity.

Uniform sentencing standards will not result from application of the *Helm* test. As in any adversarial proceeding, a state will always be permitted to respond to an offender's challenge to the constitutionality of his sentence. If the disparity between states can be justified as a response to local needs, or as a legitimate difference of legislative opinion, a court is likely to reject the offender's eighth amendment claim.[197]

The Supreme Court must further clarify its position on recidivism and the eighth amendment. The constitutionality of most recidivist statutes is questionable after *Helm*. Other problems with the *Helm* decision are likely to produce confusion and inconsistency in the lower courts, which may lead to a marked increase in the number of prison sentences appealed. Until further clarified by the Supreme Court, the utility of the *Helm* test will be limited.

CONCLUSION

In *Solem v. Helm,* the Court explicitly adopted an objective test for determining whether a prison sentence is disproportionate to the crime for which it is imposed. In the past, lower courts had employed a similar test, and prior Supreme Court decisions had implicitly approved the three-part analysis. The *Helm* Court's articulation and application of its criteria, however, are not entirely consistent, particularly on the question of sentencing under recidivist statutes. Further, though *Rummel* and *Davis* seem to be completely incompatible with *Helm,* the Court refused to overrule either of these recent decisions. As a result, both the validity of recidivist statutes and the scope of legislative discretion under the cruel and unusual punishments clause are unclear. *Helm* is likely to produce substantial litigation, but, due to its ambiguities and inconsistencies, the decision actually provides little guidance for the lower courts.

Mary K. Bentley

197. *See* Note, *Disproportionality, supra* note 2, at 1135-36. The *Helm* majority indicated that substantial deference should be granted legislative findings. 103 S. Ct. at 3009.

STATUTORY APPENDIX

KEY: *Prior offenses*
A—Statute applies only to violent felonies
B—Statutes applies only to serious felonies, which include some nonviolent felonies
C—Statute applies to all felonies

Principal offense
D—Principal offense affects sentence length
E—Principal offense does not affect sentence length

Discretion as to sentence length
F—Length of sentence is mandatory
G—Length of sentence is discretionary

STATE	CHARACTERISTICS	STATUTORY PROVISIONS
Alabama	C,D,F/G*	ALA. CODE §§ 13A-5-6 to -10 (1982).

* Mandatory life without parole if a fourth felony conviction is a Class A felony; mandatory life if fourth conviction is a Class B felony; sentence discretionary for all others.

Alaska	C,D,G	ALASKA STAT. §§ 12.55.125, .155 (1980).
Arizona	C*,D,G	ARIZ. REV. STAT. ANN. § 13-604 (1956).

* Applies to some misdemeanors as well.

Arkansas	C,D,G	ARK. STAT. ANN. §§ 41-1001 to -1004 (1947).
California	B,D*,F**	CAL. PENAL CODE §§ 667-667.7 (West 1970 & Supp. 1983).

* Violent offenses punished more harshly than nonviolent.

** Mandatory life for violent recidivists; mandatory enhancement of normal sentences for other recidivists.

Colorado	B/C*,D,F/G**	COLO. REV. STAT. § 16-13-101 (1978 & Supp. 1982).

* Applies to felonies punishable by 5 or more years on a third conviction; all felonies on fourth conviction.

** 25-50 years on third conviction; natural life on fourth conviction unless death otherwise authorized.

STATE	CHARACTERISTICS	STATUTORY PROVISIONS
Connecticut	C*,D,G,	CONN. GEN. STAT. ANN. § 53a-40 (West 1972 & Supp. 1983).

* Connecticut defines four different types of "persistent offenders" dependent upon types of offenses committed.

Delaware	C,D/E,F/G*	DEL. CODE ANN. tit. 11, §§ 4214, 4215 (1974).

* On a third conviction for one of several enumerated violent felonies, court must impose life without parole; otherwise, life is merely authorized on a fourth felony conviction.

District of Columbia	C,E,G*	D.C. CODE ANN. § 22-104A (1981).

* Any greater sentence may be imposed up to and including natural life.

Florida	C*,D,G**	FLA. STAT. ANN. § 775.084 (West 1976 & Supp. 1983).

* Applies to misdemeanors under some circumstances.
** Maximum sentences provided.

Georgia	C,D,F*	GA. CODE ANN. § 27-2511 (1978 & Supp. 1982).

* Upon second felony conviction, maximum sentence authorized for principal offense is mandatory; upon fourth felony conviction, maximum without parole is mandatory.

Hawaii	B*,D,G**	HAWAII REV. STAT. § 706-606.5 (1976 & Supp. 1982).

* Offenses enumerated.
** Mandatory minimum sentences without parole.

Idaho	C,E,G*	IDAHO CODE § 19-2514 (1979).

* Minimum five years.

Illinois	B,D,F/G*	ILL. REV. STAT. ch. 38, §§ 33B-1, 1005-5-3 (1981).

* Natural life mandatory for third conviction of Class X felony; mandatory minimums for other recidivists.

Indiana	C,E*,G*	IND. CODE ANN. § 35-50-2-8 (Burns 1979 & Supp. 1983).

* Additional term, not dependent upon principal offense, added to normal sentence. Mandatory 30 years unless more than ten years have elapsed since last conviction, otherwise 5-30 years.

STATE	CHARACTERISTICS	STATUTORY PROVISIONS
Iowa	B*,E,G**	IOWA CODE ANN. §§ 321.555, 902.8 (West. 1979 & Supp. 1983).

* Applies to Class C and D felonies (including some serious violent and nonviolent felonies) and to certain motor vehicle offenses. Excludes most serious felonies involving danger to human life.

** Mandatory minimum sentence.

Kansas	C,D,G	KAN. STAT. ANN. § 21-4504 (1981 & Supp. 1982).
Kentucky	C,D,G	KY. REV. STAT. ANN. § 532.080 (Bobbs-Merrill 1975 & Supp. 1982).
Louisiana	C,D,G	LA. REV. STAT. ANN. § 15.529.1 (West 1981 & Supp. 1983).
Maine		ME. REV. STAT. ANN. tit. 29, §§ 2291-2299 (Supp. 1982).

Applies only to motor vehicle offenses.

Maryland		MD. ANN. CODE art. 27, §§ 366, 474, 522 (1957).

No comprehensive recidivist statute; enhanced punishment authorized for second or subsequent convictions of certain crimes.

Massachusetts	C*,D,F**	MASS. ANN. LAWS ch. 279, § 25 (Michie/Law. Co-op. 1980).
Michigan	C,D,G	MICH. COMP. LAWS ANN. §§ 769.10, .11, .12, .14 (West 1968 & Supp. 1982).
Minnesota		MINN. STAT. ANN. § 609.155 (West 1964)

Repealed effective 1980.

Mississippi	C,D,F*	MISS. CODE ANN. §§ 99-19-81, -83 (Supp. 1983).

* Mandatory maximum authorized for principal offense; mandatory life if any violent offense; no parole.

Missouri	C,D,G*	MO. ANN. STAT. §§ 558.016, .018 (Vernon 1979 & Supp. 1983).

* Missouri divides recidivists according to number and type of offenses committed. Those previously convicted of certain sexual offenses or presently convicted of violent felonies receive longer sentences.

STATE	CHARACTERISTICS	STATUTORY PROVISIONS
Montana	C,E,G	MONT. CODE ANN. §§ 46-18-501, -502 (1981).
Nebraska	C,E*,G	NEB. REV. STAT. § 29-2221 (1979). Fixed term regardless of principal felony.
Nevada	C*,E**,F/G***	NEV. REV. STAT. § 207.010 (1981).
New Hampshire	C*,D,G	N.H. REV. STAT. ANN. § 651.6 (Supp. 1983).
New Jersey	C*,D,G	N.J. STAT. ANN. §§ 2C 43-7, 44-3 (West 1982).
New Mexico	C,D*,F*	N.M. STAT. ANN. § 31-18-17 (Supp. 1983).
New York	C*,D*,G	N.Y. PENAL LAW §§ 70.04, .06, .08, .10 (McKinney 1975 & Supp. 1982).
North Carolina	C,E*,G**	N.C. GEN. STAT. §§ 14-7.1, -7.2 (1981).
North Dakota	B*,D,G	N.D. CENT. CODE § 12.1-.32-09 (1976 & Supp. 1981).

* Except that if a greater punishment is otherwise authorized for the principal offense, the recidivist provision is expressly inapplicable.

* Also applies to nonfelonies of which fraud or intent to defraud is an element, and to petit larceny.

** Section not applicable if it would decrease the punishment otherwise authorized for the principal offense.

*** Length of sentence discretionary upon third conviction; mandatory life upon fourth conviction, but parole discretionary.

* Extended terms may be imposed if defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or if defendant has been imprisoned twice previously for more than a year.

* Statute refers to previous "crimes," not limited to felonies.

* Mandatory additional imprisonment, added to basic sentence for principal felony.

* Separate provisions for violent and nonviolent recidivists.

* Must be sentenced as Class C felon unless life sentence or death penalty otherwise authorized.

** Mandatory minimum sentence.

* Considers both number and type of prior offenses; if crimes more serious, fewer prior convictions required.

STATE	CHARACTERISTICS	STATUTORY PROVISIONS
Ohio		OHIO REV. CODE ANN. § 2929.12 (Page 1982 & Supp. 1982).

Statute establishes factors to be considered in setting sentence length. If defendant is a "repeat or dangerous offender" (not defined within statute), court shall consider imposing a longer term of imprisonment.

Oklahoma	C*,D,G	OKLA. STAT. ANN. tit. 21, §§ 51-54 (West 1983).

* Applies to crimes punishable by imprisonment in the penitentiary, to attempts to commit such crimes, and to petit larceny.

Oregon	C*,D*,G	OR. REV. STAT. § 161.725 (1981).

* Previous convictions relevant when principal felony seriously endangered another's life or safety, other factors.

Pennsylvania	A,D*,F/G**	42 PA. CONS. STAT. ANN. § 9714 (Purdon 1982).

* Statute limited to certain crimes as principal felony.

** Mandatory minimum sentence; mandatory life on second homicide.

Rhode Island	C,D*,G	R.I. GEN. LAWS § 12-19-21 (1956 & Supp. 1983).

* A term of up to 25 years is imposed in addition to sentence for principal felony.

South Carolina	B*,D*,G**	S.C. CODE ANN. § 17-25-45 (Law. Co-op. Supp. 1983).

* Three or more convictions from among an enumerated set of serious crimes.

** Mandatory life.

South Dakota	C,D*F/G*	S.D. CODIFIED LAWS ANN. §§ 22-7-7, -8 (1979 & Supp. 1983).

* Where only one or two prior felony convictions, sentence as next higher class felony. Where three or more prior felony convictions, sentence as Class 1 (life).

Tennessee	C*,E,G**	TENN. CODE ANN. §§ 39-1-801, -802 (1982).

* Three or more prior convictions; at least two must have been from among an enumerated set of felonies, petit larceny specifically excluded.

** Mandatory life without parole.

STATE	CHARACTERISTICS	STATUTORY PROVISIONS
Texas	C*,D,G	TEX. PENAL CODE ANN. § 12.42 (Vernon 1974).

* Separate provision (§ 12.43) covers habitual misdemeanor offenders.

Utah	C*,E**,G	UTAH CODE ANN. § 76-8-1001 (1978).

* At least one prior conviction for a felony second degree or greater.
** Principal felony must be second degree or greater, murder excluded.

Vermont	C*,E**,G	VT. STAT. ANN. tit. 13, § 11 (1974).

* Felonies or attempts to commit felonies.
** Murder excluded.

Virginia		VA. CODE §§ 19.2-297, 46.1-387.1 to -387.8 (1950 & Supp. 1983).

Applies only to petit larceny and motor vehicle offenses.

Washington	C*,E,G**	WASH. REV. CODE ANN. §§ 9.92.090 to .100, 9.95.040 (1977).

* Any crime of which fraud or intent to defraud is an element, petit larceny, or any felony.
** Sterilization is authorized as an additional penalty.

West Virginia	C*,D,F**	W. VA. CODE §§ 61-11-18, -20, -21 (1977).

* Also petit larceny.
** One year term for subsequent conviction of petit larceny; five year additional penalty for felony.

Wisconsin	C*,D,G	WIS. STAT. ANN. § 939.62 (West 1982).

* One felony or three misdemeanor convictions within five years preceding commission of principal offense.

Wyoming	C,D*,F/G**	WYO. STAT. §§ 6-10-201, -202 (1983).

* Principal offense must be a violent felony.
** Ten to fifty years if two prior convictions; life if three prior convictions.