1985

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EIGHTH AMENDMENT CHALLENGES TO THE LENGTH OF A CRIMINAL SENTENCE: FOLLOWING THE SUPREME COURT “FROM PRECEDENT TO PRECEDENT”* 

Thomas E. Baker**
Fletcher N. Baldwin, Jr.***

I. INTRODUCTION

Defendant A was convicted twice previously of felonies and sentenced to prison for fraudulent use of a credit card ($80.00) and for passing a forged check ($28.36). Upon his third felony conviction for obtaining money by false pretenses ($120.75), he received a mandatory life sentence under a state recidivist statute.

Defendant B was convicted six times previously of felonies, including three convictions for third-degree burglary, once obtaining money under false pretenses, one grand larceny (more than $50.00), and a third-offense driving while intoxicated. Upon his seventh felony conviction for uttering a “no account” check ($100), he received a mandatory life sentence under a state recidivist statute.

Suppose the defendant in each hypothetical above challenges the recidivist sentence as being disproportionate and unconstitutional under the incorporated eighth amendment.1 In classic law school parlance, “How do you

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* A land of Settled government,
A land of just and old renown,
Where Freedom slowly broadens down
From precedent to precedent... . .
A. Tennyson, You Asked Me, Why, in The Poetical Works of Alfred Lord Tennyson 69 (1885).

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1. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The “cruel and unusual punishments” clause
rule and why?" If you conclude that the first sentence is constitutional and the second sentence is unconstitutional, then you know the distinct holdings in Rummel v. Estelle and Solem v. Helm. If you are able to reconcile these holdings, your analytical abilities may exceed those of the Justices who voted these holdings into precedent.

Our emphases here are at once narrow and broad. First, our narrow concern is only one aspect of the "cruel and unusual punishments" clause—the doctrine of proportionality as it applies to the length of a prison sentence for a term of years. Thus, beyond the scope of this article are such related issues as non-constitutional limits on the length of a sentence, the constitutionality of the type of punishment imposed, the constitutionality of the death penalty, and the constitutionality of defining particular conduct as criminal. Simply stated, the proportionality doctrine prohibits a punishment more severe than that deserved by the criminal for the harm caused and the moral blameworthiness exhibited. The Supreme Court has held that the incorporated eighth amendment forbids grossly disproportionate sentencing, but has been cautious in applying the principle. With this, as with many other constitutional principles, the Court has had an uneven experience in developing a methodology for decision. Its recent efforts are the subject of our paper.

Decisions like Rummel and Helm belie much constitutional simplicity. Hence, our inquiry must broaden to approach understanding. A background history emphasizing the last three Supreme Court decisions on proportionality begins our inquiry. Next, reconciliation and stare decisis are examined in a search for some unifying theme. Finally, going beyond holdings, we posit a new synthesis for understanding and explaining the proportionality case law. Along the way, fundamental principles of has been applied to the states through the fourteenth amendment due process clause. Robinson v. California, 370 U.S. 660 (1962); Francis v. Resweber, 329 U.S. 459 (1947).

8. At times, proportionality doctrine is confused with what has been called the "necessity principle." The latter, which only indirectly applies to our topic, holds that "even if punishment is deserved, it is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment." Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1123-24 (1979). See infra text accompanying notes 253-54. See also Baldus, Pulaski, & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. CRIM. L. & CRIMINOLOGY 661, 665-68 (1983) (distinguishing disproportionate sentences from sentences which are "comparatively excessive" when compared to lesser sentences imposed in factually comparable cases).
II. PROPORTIONALITY CASE LAW

A. Background

We resist the scholarly temptation to trace the concept of proportionality back to the Rosetta stone. It should be noted, however, that the philosophical roots of the proportionality doctrine run deep in the principle of personhood in Western thought. The proportionality principle is but another example of the *leitmotiv* in modern constitutional law that government is obliged to respect the human dignity of its citizens. Historically, the story of the eighth amendment has been told in secondary literature and in case reports. A brief background of the proportionality requirement within the law of the eighth amendment will serve as base relief for our contemplation of the recent trilogy.

Searches for the proverbial framers’ intent have met with mixed results. The requirement that the punishment be proportionate to the crime may be traced backward to the Magna Charta in 1215 and forward through the English common law, the English Bill of Rights in 1689, and beyond. The issue of the framers’ intent is a paradigm in the interpretivism versus non-interpretivism debate in the recent constitutional literature. Traditionally, the framers were thought to have been concerned only with torturous and inhumane punishment methods. The prevailing view today, however, is


13. *See generally J. ELY, DEMOCRACY AND DISTRUST 13-14, 97, 173-76 (1980). We choose not to enter that larger fray here, except to a limited extent in identifying our ratchet theory. See infra text accompanying notes 219-72.*

that the framers intended to create a constitutional "right to be free from excessive punishments." The seeming lack of attention by the framers has been more than made up by the Supreme Court in the last few Terms, but earlier judicial treatment must be described as sporadic and tentative.

In Supreme Court precedent, the proportionality doctrine may be traced back to Justice Field's 1892 dissenting opinion in *O'Neil v. Vermont.* The defendant, a legitimate New York dealer, was convicted of 307 separate counts of mail-order sales of liquor in Vermont, a dry state. His cumulative fine plus costs were $6,638.72 and he was committed until payment; a failure to meet a payment deadline would result in a 19,914 day (about 55 years) sentence at hard labor. A majority dismissed the writ for want of jurisdiction because the error had not been preserved and because the eighth amendment did not then apply to the states. Justice Field, along with Justices Harlan and Brewer, dissented on both holdings and concluded that the eighth amendment was violated by such "punishments which by their excessive length or severity are greatly disproportioned to the offences charge."

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16. The debate in Congress was both brief and unilluminating:

Mr. Smith, of South Carolina, objected to the words, "nor cruel and unusual punishments," the import of them being too indefinite. Mr. Livermore.—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive ball? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hand a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

The question was put on the clause, and it was agreed to by a considerable majority.

I ANNALS OF THE CONG. 754 (J. Gales, ed. 1789) (complete debate).


There are several explanations for the first century of desuetude, and, perhaps, some of them explain the small number of decisions. Chief among them was the developmental stage of penology then. It was not until the middle of the 19th century that the states began even to establish and to organize the penitentiary system. *See D. Rothman,* *The Discovery of the Asylum,* 79-81 (1971). For most of our nation's early history, imprisonment was used only for holding the accused for trial and was not used as a method of punishment. *See G. Sykes,* *The Society of Captives xi* (1958). The Supreme Court has itself noted another factor, the century long omission of Congressional authorization to hear criminal appeals: "It was not until 1889 that Congress permitted criminal defendants to seek a writ of error in this Court, and then only in capital cases . . . . Only then did it become necessary for this Court to deal with issues presented by the challenge of verdicts on appeal." United States v. Scott, 437 U.S. 82, 88 (1978) (citation and footnote omitted). *See also infra* note 38.

18. 144 U.S. at 331.

19. *Id.* at 332. *See also* Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1866). The second holding would not be available today. *See supra* note 2. The cumulative punishments would be proper under modern principles of double jeopardy law, if otherwise consistent with legislative intent. *See Gore v. United States,* 357 U.S. 392 (1932). A $20 fine for each count seems beyond challenge and proportionate. Three days for each $1 might be more problematical today. *Cf. Tate v. Short,* 401 U.S. 395 (1971) (indigent convicted of offenses punishable by fine only cannot be incarcerated a sufficient time to satisfy fines). *But cf.* *O'Neil v. Vermont,* 144 U.S. at 326 (second offense punishable by one month imprisonment).

20. 144 U.S. at 339-40, 370-71, Justice Field considered punishments of other offenses in the
The first majority position embracing the proportionality principle came in 1910 in *Weems v. United States*. The defendant was convicted of falsifying a public document and was sentenced to fifteen years of *cadena temporal* ("temporary chain"), a punishment remnant of the Spanish Civil Code that included imprisonment, hard and painful labor, shackling at the ankle and wrist, and the permanent loss of basic civil rights. The Court's analysis began with a candid admission that neither legislative history nor stare decisis nor commentary shed much light on the central meaning of the amendment. The majority declared "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." Justice McKenna, writing for the majority, was not content to rest this holding only on the malleable concept of the framers' intent but invoked the accepted principle that the Constitution must be read in light of contemporary social needs as well. In majestic language of role, the Court committed to a course of broad interpretation of the eighth amendment based on objective measures going beyond general sensibilities to include comparisons with punishments of similar crimes in other jurisdictions and comparisons with punishments for more serious crimes within the same jurisdiction. No-where in the opinion did the Court qualify this bold statement of principle. Applying this comparative law analysis, the Court held that the defendant's sentence was "cruel in its excess of imprisonment and that which accompa-nies and follows imprisonment . . . [and] unusual in its character. Its pun-
ishments come under the condemnation of the Bill of Rights, both on account of their degree and kind." Thus, the decision may be viewed as a basic constitutional law holding that the power of the legislature to define crimes and punishments is prominent, but not absolute, and that the engine of judicial review creates an affirmative role for the Court. While the "function of the legislature is primary," constitutional limits exist, "and what those are the judiciary must judge." Equally important, the Court admitted an evolutionary potential for humanity in the amendment, a landmark holding in eighth amendment law. The Court thus recognized the most serious issue at stake was whether the judiciary could review the legislative exercise and declare that the statutory sentencing parameters violated the constitutional guarantee. Its answer was an unequivocal assertion of the power and, indeed, an acknowledgement of the constitutional duty to perform the review function. Equally critical was the Court’s assertion that the duty was on-going under an evolving principle. The proportionality requirement was to be flexible and dynamic and not controlled by the dead hand of past senses of decency; "a principle to be vital must be capable of a wider application than the mischief which gave it birth." While the Court owed legislative enactments great deference, the Constitution obliged a dynamic judicial review.

These two eighth amendment principles laid dormant for nearly fifty years. During that period, the proportionality principle figures in sentences in two Supreme Court decisions. In the first, the Court upheld a state recidivism statute which imposed a mandatory life sentence on a thrice-convicted felon. The cryptic one sentence in the unanimous opinion rejecting the eighth amendment claim must be attributed to the refusal, as of 1912, to incorporate that guarantee into fourteenth amendment due process. The second decision involved a federal sentence of five years concurrent and $7,000 cumulative fine for seven counts of mail fraud. Best understood, the one line rejection of the eighth amendment claim simply suggests that the Court did not find that sentence cruel and unusual.

28. Id. at 377.
29. Id. at 367, 378-79. That the Weems opinion was meant to be as broad as the eighth amendment seems obvious and a close reading of the Court's handiwork supports the conclusion. See Dressler, supra note 9, at 1090-91.
30. 217 U.S. at 379.
31. "The clause . . . may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." Id. at 378.
33. "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." 217 U.S. at 373.
In 1958, the evolutionary theme gained prominence again in *Trop v. Dulles.* The plurality held that the eighth amendment prohibited denationalization for a soldier's crime of being absent without leave one day. Marking the modern era of the proportionality principle, Chief Justice Warren captured the essence of the *Weems* reading of the eighth amendment:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. [citing *Weems*] The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Four years later, a majority applied the principle to invalidate a criminal sentence. The defendant in *Robinson v. California* was given a ninety-day sentence for being addicted to the use of narcotics. Recognizing that

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38. Some explanations may be offered for the fifty year hiatus between *Weems* and its modern progeny. See Note, supra note 12, at 117-18 n.32. See also supra note 17. First, before incorporation into the fourteenth amendment, there were fewer opportunities for applying eighth amendment principles. See supra note 1. One might observe that only state sentences have been voided under the proportionality principle, suggesting that federal judges are more reluctant to reverse their own trial judges. Note, supra note 12, at 117 n.32. Concerns for federalism, however, push the other way. A better explanation is that state sentencing statutes have been much more draconian than their federal counterparts. Second, the *Weems* decision itself was treated inhospitably by lower federal courts which seemed to confuse the constitutional issue with the non-constitutional question of appellate review of sentences. See supra note 4. *E.g.*, Edwards v. United States, 206 F.2d 855 (10th Cir. 1953); United States v. Rosenberg, 195 F.2d 583 (2d Cir.), cert. denied, 344 U.S. 838 (1952); United States v. Corcey, 151 F.2d 899 (7th Cir. 1945), cert. denied, 327 U.S. 794 (1946); Kachnic v. United States, 53 F.2d 312 (9th Cir. 1931); Gurera v. United States, 40 F.2d 338 (8th Cir. 1930); Bailey v. United States, 284 F. 126 (7th Cir. 1922). *But see Mickle v. Henrichs,* 262 F. 687 (D. Nev. 1918). Two reasons suggest themselves for this lack of enthusiasm. Justice White's powerful dissent and the careful ambiguities of the majority opinion taken together may have warned-off lower court judges. See Schwartz, supra note 10, at 385-86. See also Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative As Applied to Sentencing Determinations,* 58 CORNELL L. REV. 51, 67 (1972); Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the Weems Principle,* 3 CRIM. L. BULL. 145, 149-50 (1967). Additionally, it should be noted that there were no fewer than nineteen decisions between 1910 and 1975 which declared sentences unconstitutionally disproportionate. L. BERKSON, supra note 10, at 191-92 n.46 (citations).


42. 370 U.S. 660 (1962).
such a punishment considered in the abstract was neither cruel nor unusual, the Court appealed to "contemporary human knowledge" to declare that any imprisonment would be disproportionate to the offense of addiction, placing that status beyond the legislative criminalization power. Justice Stewart's opinion emphasized the limited role of the Supreme Court to define "the range of valid choice" without considering "the wisdom of any particular choice within the allowable spectrum." The legislature, however, had gone beyond the constitutional limit.

More recently, proportionality analysis has played a prominent role in the Court's many death-penalty cases, which are beyond the scope of our treatment here except in a most general way. The mere existence of a death penalty "is not a license to Government to devise any punishment short of death within the limits of its imagination." The twin themes of human dignity and judicial role weave throughout this line of cases. The legislature, however, had gone beyond the constitutional limit.

Within the foregoing precedent stream, the Supreme Court decided three cases which must be highlighted to achieve an appreciation for the
current proportionality principle. Beyond the case sequence we will attempt a reconciliation and propose a new synthesis.

B. Rummel v. Estelle

*Rummel v. Estelle,*53 of course, is the "Defendant A" hypothetical. William James Rummel was convicted in 1964 of fraudulent use of a credit card to obtain $80 worth of goods; he was convicted in 1969 of passing a forged check for $28.36; finally, in 1973 he was convicted of obtaining money ($120.75) by false pretenses. All three nonviolent property offenses were classified as felonies under Texas law. The state prosecutor elected to prosecute Rummel for his third or "trigger" offense under the Texas recidivist statute.54 Under the statute, which provided for a mandatory life sentence upon a conviction for a third felony following conviction and imprisonment for two prior felonies, the state trial judge imposed the obligatory life sentence. After unsuccessful state direct appeals and collateral attacks, Rummel moved through the federal procedures for collateral review and appeal, culminating in an affirmance of the denial of federal relief by a five-to-four Supreme Court division.55

Justice Rehnquist, writing for the plurality,56 began with two "givens": the Texas recidivist statute was constitutional on its face57 and each of the three underlying offenses was constitutionally punishable as a felony.58 Thus narrowed, the constitutional question was whether the state could impose a sentence of life imprisonment for these three sequential felonies.59 The plurality's opinion must be described as somewhat disingenuous. Conceding that the Court had "on occasion stated" a principle of proportionality, the plurality stressed that recent applications had been limited to the


54. TEx. PENAL CODE ANN. art. 63 (1925), recodified as tit. 3, § 12.42(d) (Vernon 1974). The Court did not expressly consider Rummel’s complete record. He had been convicted of at least twelve separate crimes between 1959 and 1973, some of which were rather serious as, for example, carrying a deadly weapon, burglary, and aggravated assault. We cannot be sure that the Court viewed his criminal career as more serious than the formal recidivist record disclosed, but we can be sure that the Court was made aware of it. Brief for Amicus Curiae, District Attorney of Bexar County, Texas, at 3, Rummel v. Estelle, 445 U.S. 263 (1980).

55. The Texas Court of Criminal Appeals affirmed Rummel’s conviction. Rummell v. State, 509 S.W.2d 630 (Tex. Crim. App. 1974). He then filed an unsuccessful petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Texas claiming, inter alia, that his sentence was unconstitutionally disproportionate. A divided panel of the United States Court of Appeals for the Fifth Circuit reversed the district court’s denial of relief. Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978). On rehearing, the en banc court rejected the panel’s ruling and affirmed the district court’s denial of the petition. 587 F.2d 651 (5th Cir. 1978) (en banc), aff’d, 445 U.S. 263 (1980).

56. Justice Rehnquist’s opinion was joined by Chief Justice Burger and Justices White and Blackmun. Justice Stewart concurred separately. See infra note 57.

57. The Court had held as much in *Spencer v. Texas*, 385 U.S. 554 (1967). This alone seemed to justify Justice Stewart's enigmatic concurrence in *Rummel*, 445 U.S. at 285 (Stewart, J., concurring). Curiously, in this regard, *Rummel* may be considered a 4:1:4 decision on the issue on certiorari and an 8:1 decision on the issue that *Spencer* controlled—only Justice Stewart thought so.


59. The majority was careful to note that a large number of states authorized significant terms of imprisonment for each of Rummel’s three individual crimes. 445 U.S. at 269-71 nn.9-10.
death penalty. Because the death penalty is unique in its finality and abso-
luteness, the plurality sought to distinguish those recent proportionality
precedents as different in kind. The very rarity of successful proportionality
challenges was suggested as somehow lessening the principle which thereby
was conceded some viability. Still, the plurality had to contend with
Weems v. United States. Weems was limited to "its peculiar facts," includ-
ing the minor nature of the offense, the lengthy minimum term, and the
extraordinary accessory punishments of the cadena temporal. Thus, under-
stating precedent, the plurality overstated its revisionist position:
[O]ne could argue without fear of contradiction by any decision of this
Court that for crimes concededly classified and classifiable as felonies,
that is, as punishable by significant terms of imprisonment in a state
penitentiary, the length of the sentence actually imposed is purely a
matter of legislative prerogative.

Eschewing a subjective judicial role, the plurality's procrustean use of prece-
dent drew a "bright line" between the ultimate sanction and all lesser terms
of imprisonment. Importantly, the plurality conceded a limited judicial role
based on sufficiently objective factors. It rejected as lacking true objectivity,
however, such criteria as the absence of violence or the relatively small sums
of money at stake. Instead, the Court emphasized the state's heightened
interest in dealing with recidivists, those offenders who have demonstrated
an unwillingness to conform to societal norms. The plurality found the de-
tailed and complex comparisons of the various states' recidivism schemes
unconvincing and too sophisticated a calculus, given such vagaries as parole
policies and prosecutorial discretion. Further, the Court was not per-
suaded by a comparative analysis to other punishments for crimes in
Texas.

Justice Powell's dissent merits attention for how it answered the plural-
ity and for the lasting significance of its proffered analysis. The dissent's
starting premise, based on legislative history, framers' intent, and decisional
law, was that the disproportionality analysis is an inherent aspect of the

60. See Gardner, supra note 45, at 1124 n.155, 1125.
61. 217 U.S. 349 (1910), discussed at Rummel, 445 U.S. at 272-77. See also supra text accom-
panying notes 21-33.
62. 445 U.S. at 274. The majority added a crucial note: "This is not to say that a proportional-
ity principle would not come into play in the extreme example mentioned by the dissent, . . . if a
legislature made overtime parking a felony punishable by life imprisonment." Id. at n.11.
63. 445 U.S. at 277-84.
64. Id. at 282-83 n.27. Texas does have something of a vengeful sentencing attitude. See, e.g.,
Rodriguez v. State, 509 S.W.2d 625 (Tex. Crim. App. 1974) (1,500 years for robbery); Albro v. State,
502 S.W.2d 715 (Tex. Crim. 1973) (100 years for possession of marijuana); Angle v. State, 501
App. 1971) (1,000 years for robbery). An approach that approves any sentence within the statutory
maximum permits such terms. See Comment, Constitutional Law— Eighth Amendment: Sentences
Within Legislatively Determined Limits are not Cruel and Unusual Punishments, 46 Mo. L. Rev.
v. State, 478 S.W.2d 456 (Tex. Crim. 1972) (50 years for robbery by assault affirmed) with Grayson
v. State, 468 S.W.2d 420 (Tex. Crim. 1971) (8 years for robbery by assault affirmed).
(Powell, J., dissenting). Justice Powell was critical of recidivist provisions in an earlier dissent in
which he emphasized the nature of the trigger offense and supposed some necessary relation with the
cruel and unusual punishments clause. Relying on Weems and other non-capital cases as well as on the death penalty decisions, the dissent felt a constitutional obligation to measure "the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender."66 The eighth amendment polestar must be "evolving standards of decency."67 Justice Powell was sensitive to concerns for judicial subjectivity. Again operating within mainstream eighth amendment doctrine, he fashioned three objective criteria: the nature of the offense; comparison with sentences imposed in other jurisdictions for commission of the same crime; and comparison with sentences imposed in the same jurisdiction for commission of other crimes.68 Applying these criteria in the case at hand could yield but one conclusion: Rummel's sentence violated the Constitution. First, the nature of the three offenses began the analysis moving in Rummel's favor. Involving slightly less than $230, the three offenses were without violence or even the threat of injury.69 Second, the Texas scheme was dramatically more harsh than other jurisdictions, even the minority that had chosen to deal with recidivists more severely than other offenders. The federal and the overwhelming majority of state legislative judgments rejecting a mandatory life sentence for the commission of three nonviolent felonies were further objective indications of the intolerable gap between the Texas scheme and contemporary value.70 Third, within the Texas statutory scheme, first and second offenders who commit more serious crimes, such as murder, kidnapping, and rape, could receive much less severe sentences. While a life sentence is not inherently barbarous, the dissenters were convinced that Rummel's life sentence for the three felonies he committed went beyond what the Constitution allows.71

Two themes made this result inevitable to the dissenters. Objective indicia of evolving standards of decency justified the Court's exercise of its historic role, first recognized in Weems, as final arbiter of the cruel and unusual punishments clause.72 This theme of historic role distinguished the dissent from the plurality. While the plurality sought to draw a bright line between capital and all other punishments, the dissent recognized that the proportionality principle obliged the Court to fashion some principled basis for measuring the proportionality of sentences short of the ultimate penalty. Having admitted that some life sentences were disproportionate and unconstitutional, the plurality had in fact committed the Court to make such dis-

66. Id. at 288. See also id. at 288-93.
67. Id. at 292 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
68. 445 U.S. at 295.
69. Id.
70. Id. at 296-300.
71. Id. at 300-03.
72. Courts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess, in a case before them, whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body.
445 U.S. at 303 (Powell, J., dissenting) (quoting Furman v. Georgia, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting)).
tinctions without explaining how cases beyond *Rummel* would be decided.\(^73\)

It was the plurality and not the dissent that sent the Court down the slippery slope. The proportionality principle became a value in search of some analytical rigor. The plurality seemed to admit there was a constitutional threshold but said little more than Rummel's sentence was not beyond it. In the name of a "bright line" analysis, no line was drawn and no line-drawing method was provided.\(^74\) Justice Powell's dissent would have extended the proportionality principle to supply the necessary analysis.\(^75\) It would be the dissent's analysis that would stop the slide and return the Court to principled decisionmaking, although not without some further slippage.\(^76\)

C. Hutto v. Davis

The second precedent in the triology came one year later. In *Hutto v. Davis*,\(^77\) the Court seemed to make a special effort to reaffirm its holding in *Rummel*.\(^78\) Roger Trenton Davis was convicted of possession of marijuana

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73. The Court was unanimous that some hypothetical limit existed beyond which the legislature could not go, as, for example, a mandatory life sentence for overtime parking. Compare 445 U.S. at 274 n.11 (plurality) with id. at 288, 307 n.25 (dissent). But cf. *supra* note 57 (Justice Stewart's separate concurring opinion did not reach the issue).


76. As for Rummel's fate, his fortune was better under the sixth amendment. Before the Fifth Circuit panel, he had argued that his court-appointed trial counsel was ineffective. 590 F.2d at 105. On remand, the district court agreed and ordered his retrial or release. Rummel v. Estelle, 498 F. Supp. 783, 798 (W.D. Tex. 1980). In a plea bargain, Rummel agreed to plead guilty to the third offense of fraudulently obtaining $120.75 and waive all malpractice claims against his original attorney; the District Attorney agreed to (1) drop the state's appeal of the grant of his federal petition, (2) recommend a sentence less than the time Rummel had served, and (3) not proceed under the habitual offender statute. On November 14, 1980 Rummel was freed. Comment, *supra* note 64, at 653 n.6 (citing State v. Rummel, No. 73-CR-214 (Dist. Ct. Tex. Nov. 14, 1980) (order freeing Rummel)). See also Comment, Mandatory Life Sentence Under Recidivist Statute is not Cruel and Unusual Punishment, 59 Wash. U.L.Q. 546, 559 n.111 (1981) (citing L.A. Times, Jan. 16, 1980, at 1, col. 3; Houston City Magazine, Jan. 1981, at 8).

77. 454 U.S. 370 (1982).

with intent to distribute and distribution of that marijuana; the amount of marijuana involved was approximately nine ounces, having a street value of about $200. A jury imposed a sentence of $10,000 and a twenty-year prison term on each conviction, the terms to run consecutively. The sentences were well within the Virginia statutory maxima of a $25,000 fine and forty years.\footnote{79}

The starting point of the per curiam opinion was \textit{Rummel}.\footnote{80} The majority defended the bright line drawn there between the death penalty, which differs in kind, and terms of imprisonment, which differ only in duration. The major premise was that eighth amendment judgments should not be subjective; the minor premise was that any determination of excessiveness between two terms of years would be subjective; the conclusion was that challenges against sentences for terms of years were beyond the constitutional ken of the federal courts. While straightforward, the per curiam's logic was not self-contained. The Court, once again, admitted the irresistable counterexample:\footnote{81} "\textit{Rummel} stands for the proposition that federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment,' . . . and that 'successful challenges to the proportionality of particular sentences 'should be' 'exceedingly rare.'"\footnote{82} The per curiam opinion thus conceded some role, albeit limited, for the federal courts to review the lines drawn by the state legislatures.\footnote{83} The \textit{Davis} majority simply concluded, virtually, \textit{sans} analysis, that there was no objective basis for the district court's holding.\footnote{84}

Justice Powell in a solo opinion concurred "reluctantly" with the judgment.\footnote{85} In retrospect, his concurrence in \textit{Davis} was the fulcrum in the shift of emphasis occurring in the three decisions.\footnote{86} Once again, Justice Powell

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As something of a postscript, the Supreme Court majority reprimanded the lower court's action after the first remand: "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." \textit{Hutto v. Davis}, 454 U.S. 370, 375 (1982).

\footnote{79} \textit{Davis v. Davis}, 585 F.2d 1226, 1229 (4th Cir. 1978).

\footnote{80} "Because the Court of Appeals failed to heed our decision in \textit{Rummel}, we now reverse." \textit{Hutto v. Davis}, 454 U.S. at 372. The per curiam opinion was joined by Chief Justice Burger, and Justices White, Blackmun, Rehnquist, and O'Connor.

\footnote{81} Every theory is faced with irresistible counterexamples, those situations in which a consistent application would yield an untoward result. See \textit{Van Alstyne, A Graphic Review of the Free Speech Clause, 70 CALIF. L. REV.} 107, 113-14 (1982).


\footnote{83} The Court repeated its footnote promise to protect overtime parkers from mandatory life sentences. \textit{Id.} at 374 n.3. See supra notes 62 and 70.

\footnote{84} In a "footnoteworthy" digression, the per curiam opinion rejected each of the district court's claims to objectivity: (1) the absence of violence cannot control society's interest in criminalizing the behavior; (2) evaluating the "smallness" of the amount of marijuana involved (nine ounces) was inherently subjective; (3) that Davis's sentences for possession with intent to distribute and for distribution exceeded the maximum sentence in all but four and eight states respectively did not amount to a constitutional violation; (4) a comparison to sentences in other Virginia crimes was no more convincingly objective. 454 U.S. at 373 n.2. Perhaps, the Court failed to distinguish between the first two factors being improper considerations and the last two factors being unpersuasive on the facts.

\footnote{85} 454 U.S. at 375 (Powell, J., concurring).

\footnote{86} The precedent-turning concurrence, which at the time of decision reads more like a dissent but which eventually becomes a majority position, is something of a phenomenon in Supreme Court
was quick to point out that neither the majority in Rummel nor the majority in Davis had held that there was no proportionality principle. He admitted two arguable distinctions between Rummel and the case for decision: a letter from the prosecutor labelling Davis’s sentence as “grossly unjust,” because by comparison there was such a “grave disparity in sentencing” between the sentence and other Virginia sentences in comparable drug offenses and, more importantly, the Virginia legislature later had reduced the maximum sentence for the same offenses to less than one-half of the sentence Davis received. Nevertheless, Justice Powell concluded that the Rummel precedent required reversal by reference to another objective measure: comparing Davis’s sentence with the sentence upheld in Rummel. Davis’s crimes were more serious and his sentences less severe than Rummel’s. Stare decisis thus served as yet another restraint on the subjectivity of the judicial assessment of proportionality.

Three justices dissented and joined an opinion authored by Justice Brennan. The dissent accused the majority of “a serious and improper expansion of Rummel” which the three Justices read as limited to cases involving the overwhelming state interest to punish recidivists with severe sentences which otherwise would be disproportionate. Critical that the per curiam opinion was empty of analysis, the dissent argued that this was one of those concededly rare cases in which the sentence violated the Constitution. Intrajurisdictional disparity was the dominant factor, as indicated by the trial court’s comparison of Virginia sentences among drug offenders, the prosecutor’s admission, and the subsequent state legislative reduction. The Davis decision left the law in an unsatisfying state. Rummel, apparently, was reconfirmed and expanded to apply to nonrecidivists. At the same time, the questions Rummel had left unanswered still remained after Davis. Indeed, the theoretical ambivalence worsened. A proportionality principle of amorphous dimension survived both decisions. Yet, by demanding objective criteria while at the same time rejecting all proffered criteria as being too subjective, the two controlling opinions accomplished a profound confusion regarding the applicability and the scope of proportionality review. The lower courts required better guidance.

87. Therefore, he had no institutional criticism for the trial and appellate courts’ willingness to consider the constitutional challenge. 454 U.S. at 377 (Powell, J., dissenting). But see supra note 78.
88. 454 U.S. at 377-79.
89. Id. at 379-81.
90. Justices Brennan, Marshall and Stevens dissented. Id. at 381 (Brennan, J., dissenting).
91. Id. at 382-83, 386 n.5. The dissent’s principal focus was the argued impropriety of summary disposition in Davis. Id. at 381, 387. Additionally, the dissent disowned the per curiam’s criticism of the court of appeals and district court. Id. at 388 n.7. See supra notes 75 & 84.
92. See generally Note, supra note 41, at 454-62.
93. See Note, supra note 75, at 501; Note, supra note 74, at 690-91.
94. The lower federal courts spent a lot of time sorting out the Supreme Court’s inconsistencies without much success. See, e.g., Helm v. Solem, 684 F.2d 582 (8th Cir. 1982); Terrebone v. Blackburn, 646 F.2d 997 (5th Cir. 1981) (en banc); Davis v. Davis, 646 F.2d 123 (4th Cir. 1981) (en banc).
D. Solem v. Helm

The guidance came the next Term, only three years after Rummel. Solem v. Helm,95 of course, is the "Defendant B" hypothetical. At the time of sentencing, Jerry Buckley Helm was a thirty-six year old alcoholic and bad-check artist who had spent much of the previous fifteen years in the penitentiary. His six previous state felonies included: three third-degree burglaries (1964, 1965, 1969); obtaining money under false pretenses (1972); grand larceny (1973); and a third-offense of driving while intoxicated (1975). In 1979, Helm pled guilty to uttering a "no account" check for $100; the ordinary maximum punishment would have been a $5,000 fine and five years imprisonment. Under the South Dakota statutory scheme, Helm's record made him eligible for life imprisonment without the possibility of parole, which is what he received.96 After being refused relief in the state appellate system97 and in his § 2254 proceeding in the district court, Helm succeeded in the Eighth Circuit.98 His success was affirmed in the Supreme Court in a somewhat dramatic fashion.99 Justice Powell, the author of the Rummel dissent100 and the Davis concurrence,101 wrote for the Court.102

Justice Powell's analysis began with principles of constitutional text and history. He traced the constitutional value of proportionality back to the original framers' intent and the received common law. Justice Powell relied on a century of Supreme Court precedents, pausing to note "the leading case" of Weems and also Robinson and the capital punishment line of cases.103 Emphasizing the need for deference first, to the paramount authority of the legislature in determining general limits and second, to the informed discretion of trial courts in sentencing particular offenders, the majority still held "as a matter of principle that a criminal sentence must be

95. 103 S. Ct. 3001 (1983).
97. State v. Helm, 287 N.W.2d 497 (S.D. 1980). Two justices would have reversed and remanded for resentencing and two justices affirmed the sentence; the justice who cast the deciding vote concurred with the affirmance based on the state clemency statutes. Id. at 499.
98. Helm v. Solem, 684 F.2d 582 (8th Cir. 1982). The panel distinguished Rummel and Davis, presaging the Supreme Court's treatment of Helm as an important new development in proportionality analysis. Id. at 584-85.
100. See supra text accompanying notes 65-76.
101. See supra text accompanying notes 85-89.
102. Justice Powell's opinion was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Like that of his Brother Blackmun, see infra text accompanying notes 124-32, Justice Powell's eighth amendment orientation has evolved over the years. In the first death penalty series, Justice Powell assumed a very deferential posture toward the legislature. See Furman v. Georgia, 408 U.S. 238, 422 n.4, 451 (1972) (Powell, J., dissenting). In the second series, he aligned with those approving guided discretion statutes and striking down mandatory statutes. See Proffitt v. Florida, 428 U.S. 242 (1976). Later, Justice Powell voted to void the death penalty for rape, but carefully sought to narrow the plurality's opinion. Coker v. Georgia, 433 U.S. 433, 602 (1977) (Powell, J., concurring in part and dissenting in part). Most notably, he abandoned the deferential posture and accepted the eighth amendment responsibility to apply the Court's own judgment. Id. at 603 n.2. See id. at 607 n.2 (Burger, C.J., dissenting) (noting Justice Powell's "dissueting shift"). See generally Radin, supra note 45.
103. 103 S. Ct. at 3007-09. See supra Part II.A.
Such deference necessarily means that successful proportionality challenges will be rare, but objective factors inform when the usual deference is constitutionally inapposite: (1) a comparison of the gravity of the offense and the harshness of the penalty; (2) a comparison with sentences imposed for other crimes in the same jurisdiction; and (3) a comparison with sentences imposed for the same crime in other jurisdictions. The conceded relativity of these three criteria does not reduce them to purely subjective and completely idiosyncratic measures. Courts are assumed competent to make such broad comparisons of crime, criminal and sentence; evaluating harm, determining culpability, and linestrawing are standard techniques of the judicial art.

The Court's application to the case at hand is instructive. The trigger crime of uttering a $100 no-account check was passive, non-violent, and involved a relatively small amount. The conviction of recidivism, however, made relevant all of Helm's priors, which the Court characterized as nonviolent, relatively minor, and property offenses. As for sentence, life imprisonment without the possibility of parole was the most severe punishment available in South Dakota. Thus, the first criteria suggested an imbalance between crime and punishment. Second, the Court reviewed the entire legislative scheme of authorized punishments in the state, considering the context of the recidivist sentence. Only a few of the most serious crimes were mandatorily punished by life imprisonment; for a larger group, such a sentence was authorized; and such a sentence was not authorized for a large group of very serious offenses. The record indicated that in the state no one other than Helm was given a life sentence for comparable crimes. Thus, the Court concluded that Helm's life sentence was equivalent or more severe than South Dakota imposed for much more serious crimes. Third, the Court considered the sentence in the national context and concluded that Helm would have received a less severe punishment in every other state. Finally, consistent with its case-by-case approach, the majority distinguished the Texas parole system in Rummel from the executive commutation system in South Dakota, thus, distinguishing the former precedent. Rummel had not presented the Court with a sufficiently stabilized sentence on which to base an objective disproportionality analysis. Helm did. Mandatory life imprisonment without parole is second only to the death penalty in its complete and permanent deprivation of fundamental existence. Before such a punishment can be imposed, the Constitution's threshold prohibiting apparent

104. 103 S. Ct. at 3009.
105. Id. at 3011.
106. The majority rewarded close readers with some illustrations of the analysis. Widely shared views consider violent crime more serious. A lesser included offense should not be punished more severely than the greater inclusive offense. Traditional concepts of mental state and motive differentiate among offenders. On a case-by-case basis, one sentence of imprisonment may be distinguished from another. Id. at 3011-12.
107. Id. at 3013.
108. Id. at 3014.
109. Only in Nevada would a life sentence without parole even have been possible and the actual experience with that sentence there involved far more serious series of offenses. Id. at 3014-15.
110. Id. at 3015-17, 3017 n.32.
grossly disproportionate sentences must be overcome; the threshold was not
overcome in *Helm*.

Four Justices dissented in a very intense opinion authored by Chief Justic
Burger, beginning, “[T]oday the Court blithely discards any concept of
*stare decisis*, trespasses gravely on the authority of the States, and distorts
the concept of proportionality. . . .”¹¹¹ The dissent’s principal point was
that *Rummel* controlled and had “categorically rejected the very analysis
adopted by the Court. . . .”¹¹² That rejection had been repeated, according
to the dissent, in *Davis*.¹¹³ Still the dissenters recognized a limited, though
subjective, role for eighth amendment proportionality analysis.¹¹⁴ Reading
the intellectual development of the amendment more narrowly, the dissent
accused the majority of distorting history, commentary, and case law.¹¹⁵
Despairing at what they viewed as a “bald substitution of individual subjec
tive moral values,” the dissenters recast the Court’s holding: “What the
Court means is that a sentence is unconstitutional if it is more severe than
five justices think appropriate.”¹¹⁶ They rejected the proffered analysis as
standardless, a characteristic which they feared would flood the appellate
courts.¹¹⁷ All these criticisms had as backdrop an announced concern for
the constitutional values of federalism and separation of powers.

The *Helm* dissent is correct in one important regard: the permutations
of questions this trilogy raises are virtually endless.¹¹⁸ Our purpose here is
to ask the relevant questions and begin to answer them within some princi
ded framework.

III. RECONCILIATION

Our respect for the Constitution and the article III role of the Supreme
Court demands that “not only what the Supreme Court does but most of
what it says in support of what it does” must be taken seriously.¹¹⁹ There
fore, we are left with the task of reconciliation of these three proportionality
precedents. It is possible to draw three figures around the proportionality
constellation of *Rummel, Davis, and Helm*. Charting the Court, from prece
dent to precedent to precedent, provides its own reward in a richer apprecia
tion for the values in conflict.

A. Changes Among the Justices

One figure around the three precedents may be drawn by counting
votes. We may begin by comparing the votes in *Rummel* and *Helm*.¹²⁰

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¹¹¹ *Id.* at 3017 (Burger, C.J., dissenting). Justices White, Rehnquist and O’Connor joined the
Chief Justice’s dissent.

¹¹² *Id.* at 3019 (Burger, C.J., dissenting). See also *id.* at 3017–20, 3022–23.

¹¹³ *Id.* at 3020 (Burger, C.J., dissenting).

¹¹⁴ “I agree that the Cruel and Unusual Punishments Clause might apply to those rare cases
where reasonable men cannot differ as to the inappropriateness of a punishment.” *Id.* at 3020 n.3.

¹¹⁵ *Id.* at 3021.

¹¹⁶ *Id.* at 3022, 3017.

¹¹⁷ *Id.* at 3022.

¹¹⁸ *Id.*


¹²⁰ See supra notes 56, 65, 102 and 111.
First, Justice O'Connor replaced Justice Stewart. Since Justice O'Connor voted with the plurality in *Rummel* and Justice Stewart voted with the dissent in *Helm*, that personnel change cannot explain the development of the proportionality doctrine.\textsuperscript{121} The most significant change came, not in personnel, but in the vote of one Justice. Justice Blackmun voted against the proportionality claim in *Rummel* but voted in favor of the proportionality claim in *Helm*. All the remaining Justices stayed on the same side of the issue.\textsuperscript{122} The decisions were that close and that difficult.\textsuperscript{123}

We are left without an opinion by Justice Blackmun, however, in any of the three decisions. Justice Blackmun's earlier constitutional philosophy has been summarized as emphasizing "judicial restraint, an appreciation for the limits of judicial authority and deference to state and legislative prerogatives."\textsuperscript{124} That philosophy is consistent with his *Rummel* vote in favor of the Texas sentence. Yet, he has been described as capable of "astonishing judicial leaps,"\textsuperscript{125} which, perhaps, may be illustrated by his vote in *Helm* to strike the South Dakota sentence. But noting a capability does not explain its exercise. One attractive explanation is that his two votes, three years apart, are part of an overall change in Justice Blackmun's social vision concerning the Court's institutional role and his personal role within the institution.\textsuperscript{126} His death-penalty votes suggest a similar shift in position.\textsuperscript{127} The

\textsuperscript{121} Preliminary evaluations by court-watchers of Justice O'Connor suggest that her replacement of Justice Stewart would not make the Court more sympathetic to a proportionality claim. See Riggs, *Justice O'Connor: A First Term Appraisal*, 1983 B.Y.U. L. REV. 1, 11-12, 16, 20; Schenker, "Reading" Justice Sandra Day O'Connor, 31 CATH. U.L. REV. 487, 503 (1982). Indeed, Justice O'Connor voted with the *Rummel* plurality in *Davis* without the ambiguity Justice Stewart had shown in the earlier case. See supra notes 57 and 80. In available statistics, at least, Justice O'Connor seems more often aligned with the conservative justices than was Justice Stewart. See *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 305 (1983) (five-year-average voting alignments).

\textsuperscript{122} The *Rummel* division was Chief Justice Burger and Justices Stewart, White, Blackmun and Rehnquist versus Justices Brennan, Marshall, Powell and Stevens. See supra notes 57 and 66. The *Helm* division was Justices Brennan, Marshall, Blackmun, Powell and Stevens versus Chief Justice Burger and Justices White, Rehnquist, and O'Connor. After *Rummel* and before *Helm*, one commentator suggested a strategy that proved right for the wrong reason: "A lawyer could try to prove to the Court that *Rummel* was based on such a false premise [a utilitarian justification for recidivist provisions] and thereby persuade one of the Justices in the slim majority of five to change his vote." Dressler, supra note 9, at 1119.


\textsuperscript{125} Id.


\textsuperscript{127} Justice Blackmun did not write an opinion but voted to uphold the death penalty in the second set of companion cases. See Gregg v. Georgia, 428 U.S. 153 (1976). That vote was consistent, however, with his deferential dissent from the earlier decision to declare the death penalty unconstitutional:

To reverse the judgments in these cases, of course, is the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the
problem is that we do not know. It is not too much to ask for an explanation of the deciding vote in two cases so close in time, facts, and majority. If the eighth amendment is to be reduced to Justice Blackmun's thumb-up or thumb-down vote based on his intuitive judgment of justice in the particular case, that, at least, should be made clear. When Justice Blackmun has concluded that we are, to use his words, "moving down the road toward human decency," at least, he should tell us. We do not accept, however, the "I know it when I see it" theory of constitutional law. Nor, we believe, does Justice Blackmun. The cases must be distinguishable or the Court has failed to adhere to its own principle of stare decisis. Perhaps, stare decisis cannot reconcile two cases which all but one Justice saw as irreconcilable, but again, the search deepens understanding. We must "grapple with the complexities and tensions in the 'close cases'," always emphasizing both the human dignity at stake and the Court's critical role in realizing the constitutional potential.

B. The Announced Stare Decisis

The second figure around the precedents is the one drawn by the Court:

thoughts—perhaps the rationalizations—that this is the compassionate decision for a maturing society; that this is the moral and the "right" thing to do . . . . This, for me, is good argument, and it makes some sense. But it is good argument and it makes sense only in a legislative and executive way and not as a judicial expedient. Furman v. Georgia, 408 U.S. 238, 410 (1972) (Blackmun, J., dissenting). Consistent with his unexplained shift in the proportionality cases, Justice Blackmun later joined but did not write in the principal opinion invalidating the death penalty for rape. Coker v. Georgia, 433 U.S. 584 (1977).

28. The truest insights may be had in a Justice's solo opinion. See Easterbrook, Ways of Criticizing the Court, 95 HARv. L. REV. 802, 832 (1982). Veteran court-watchers may recall Justice Douglas and development of the current per se rule favoring searches with warrants. That shift was just as significant, dramatic, and unexplained. Justice Blackmun's change of position relative to the heretofore majority in Harris v. United States, 331 U.S. 145 (1947), which adopted a reasonableness orientation to warrantless searches. The majority relied upon Justice Douglas' earlier opinion for the Court in Davis v. United States, 328 U.S. 582 (1946). One year later without explanation, Justice Douglas voted with the Harris dissenters to adopt a per se rule declaring warrantless searches unconstitutional except in limited circumstances. Johnson v. United States, 333 U.S. 10 (1948). Perhaps, Justice Douglas explained his shift and Justice Blackmun's in the front piece to his autobiography by quoting Persian poet Jalal-Ud-Din Rumi: "All your anxiety is because of your desire for harmony. Seek disharmony; then you will gain peace." W. DOUGLAS, Go EAST YOUNG MAN: THE EARLY YEARS viii (1974).

29. See Note, supra note 126, at 725, 736.

No one openly would prefer such a substitution of will for reasoning as to say "I have 5 votes, that is how I distinguish the contrary decisions," so the contrary precedents do not control. Monaghan, supra note 119, at 19. See supra text accompanying note 116.

31. Justice Blackmun's judicial approach emerges not as a series of doctrinal corollaries formally derivable from ideological postulates, but rather as a continuing effort to grapple with the complexities and tensions in the "close" cases before the Court. Though not always tidy or predictable, such a search has impelled Justice Blackmun to emphasize the human dimension in the cases confronting him.

Note, supra note 126, at 736.

One explanation for Justice Blackmun's silence is that he has changed his mind simply on the strength of the Helm opinion he joined. In a similar situation, Justice Stewart once took refuge in an aphorism by Justice Frankfurter: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." Boys Markets v. Retail Clerks Union, 398 U.S. 235, 255 (1970) (Stewart, J., concurring).
the announced stare decisis. While basic, the concept of stare decisis has been surprisingly mercurial within the common law system generally, and constitutional law, particularly. The mechanism of precedent has three stages: (1) identification of a prior decision similar to the case to be decided; (2) discernment of the rule of law inherent in the prior decision; and (3) application of the rule of law to the case to be decided. Most important to this theory is that the deciding court, or at least a majority, controls stare decisis by its own view of the prior precedent. The reach of the facts, rule, and rationale of a prior decision is not controlled by the prior court, but by the deciding court’s majority in identification, discernment, and application. Thus, the Court’s own efforts at reconciliation of the three-decision sequence must be considered.

How the Rummel precedent was used successively in Davis and Helm is of immediate concern here. In the two later decisions, Davis and Helm, all the Justices agreed in the “identification” of Rummel as the operative precedent. Disagreement centered on the “discernment” and “application” stages.

The Davis majority opinion simply read Rummel as placing the length of sentences for terms of years beyond the judicial domain in all but “exceedingly rare” situations; the sentence before the Court was not an “exceedingly rare” situation. The line between the death penalty and all other sentences was defended. Justice Powell’s concurring opinion discerned the same “rarity” principle and applied it by comparing the crimes and sentences involved in the two cases to conclude that the disproportionality in Rummel had been greater. The Davis dissent, first and more significant, would have limited Rummel to recidivist sentences, and second, would have labelled the Davis sentence disproportionate.

The Helm majority opinion then had both Rummel and Davis to reconcile. Davis was deemed little more than a reaffirmation of Rummel. Discernment of the Rummel principle, however, sharply divided the

133. See Monaghan, supra note 119, at 5-6. See also generally Mykkelvedt, Ratio Decidendi or Obiter Dicta?: The Supreme Court and Modes of Precedent Transformation, 15 GA. L. REV. 311 (1981).
134. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 2-3 (1949). We acknowledge, of course, that Professor Levi’s approach is but one of many competing frameworks. See Baker, Precedent Times Three: Stare Decisis in the Divided Fifth Circuit, 35 SW. L.J. 687, 712-17 (1981). While Professor Levi’s theory claims virtually no role for stare decisis in constitutional law, E. Levi, supra, at 8, we believe his framework aids understanding of the principal three cases. It seems to be the prevailing formal approach in constitutional law today. See Monaghan, supra note 119, at 8-9.
135. For a non-constitutional, hypothetical example, see Baker, supra note 134, at 713-17.
136. The succeeding majorities appeared unwilling to overrule precedent but very willing to re-cast and distinguish prior holdings. Indeed, this seems to be very characteristic of proportionality stare decisis. See Note, supra note 75, at 504; Note, supra note 74, at 694. How the Rummel plurality dealt with prior precedent will be important in later discussion. See infra text accompanying notes 156-72.
137. See supra notes 72-94.
138. Hutto v. Davis, 454 U.S. at 373-74. One could consider the Court’s prior remand as having established as much; the majority, at least, seemed to be of that view. Id. See supra note 78.
139. See supra text accompanying notes 85-89.
140. See supra text accompanying notes 90-94.
141. See supra text accompanying notes 95-110.
142. Solem v. Helm, 103 S. Ct. at 3010 n.17, 3016-17 n.32.
Court.\textsuperscript{143} For the \textit{Helm} majority, \textit{Rummel} and \textit{Davis} in tandem established little principle for decision, only that successful proportionality challenges must be rare.\textsuperscript{144} Because the prior two precedents admitted the possibility but offered no guidance for determining the proportionality issue, the \textit{Helm} majority deemed itself free to develop its own analytical framework within the factual constraints of the two prior cases.\textsuperscript{145} The Court devised the three-factor objective framework summarized above\textsuperscript{146} and distinguished both earlier precedents. Implicitly, the life without parole term before the Court was an order of magnitude more severe than Davis's forty years.\textsuperscript{147} \textit{Rummel} was left to be distinguished. Indeed, South Dakota urged that \textit{Rummel} was essentially the same case. The majority answered that there was a constitutional difference, however, based on the distinction between the possibility of parole there and the possibility of executive clemency in \textit{Helm}.\textsuperscript{148} While parole is a normal expectation and governed by specific legal standards, executive commutation is an ad hoc exercise without articulable standards. Besides its rarity—no life sentence had been commuted in the state in eight years—executive clemency only would render Helm eligible for parole consideration. According to the \textit{Helm} deciding Court, the Texas parole system had been critical to the factual holding in \textit{Rummel} and distinguished that case.\textsuperscript{149} With \textit{Davis} and \textit{Rummel} limited to their facts and distinguished, the \textit{Helm} majority deemed itself free to apply the objective three-part analysis and to hold Helm's sentence unconstitutional.\textsuperscript{150}

\textsuperscript{143} See supra text accompanying notes 111-117.

\textsuperscript{144} While the Court had never invalidated a prison sentence solely on the basis of excessive length, the \textit{Helm} majority was careful to emphasize that that possibility had always been admitted. Solem v. Helm, 103 S. Ct. at 3009.

\textsuperscript{145} Solem v. Helm, 103 S. Ct. at 3016-17 n.32. Not so for the dissenters, who believed that the \textit{Rummel} Court was not simply summarizing an argument but was affirmatively stating a rule of constitutional law. \textit{Id.} at 3018-20 (Burger, C.J., dissenting).

\textsuperscript{146} See supra text accompanying notes 95-110.

\textsuperscript{147} Solem v. Helm, 103 S. Ct. at 3016 n.31 (mathematical comparison with \textit{Rummel} hypothesizing a commutation to a term of forty years). Perhaps because of the summary disposition in \textit{Davis}, see supra note 91, or the anonymity of the per curiam opinion, the \textit{Davis} decision played a minor role in \textit{Helm}. Recall that Justice Powell concurred separately because he deemed Rummel's sentence to have been more severe. Hutto v. Davis, 454 U.S. 370, 376 (1982) (Powell, J., concurring). As the author of \textit{Helm}, it must have been even more obvious to him that a life sentence without parole was greater than a forty-year sentence. See supra text accompanying notes 85-89.

The \textit{Helm} dissent, on the contrary, discerned more from \textit{Davis}. The dissent's reading of \textit{Davis} was that only when "reasonable men could not differ about the appropriateness of [the] punishment" could a court hold that a sentence within legislative limits is disproportionate and unconstitutional. \textit{Id.} at 3020 n.3.

\textsuperscript{148} \textit{Id.} at 3015. One related argument might distinguish the two decisions. Rummel's life sentence was mandatory under the Texas statutes; the South Dakota statutes in \textit{Helm} merely authorized a maximum life sentence with no minimum required. Thus, a concern for deference toward a legislative judgment was less direct in \textit{Helm}. Cf. Solem v. Helm, 103 S. Ct. at 3014 n.26. See generally Comment, Eighth Amendment—Cruel and Unusual Punishment: Habitual Offender's Life Sentence Without Parole Is Disproportionate, 74 J. CRIM. L. & CRIMINOLOGY 1372, 1381-82 (1983).

\textsuperscript{149} 103 S. Ct. at 3015 n.28 and 3016. The deciding court's dissent in \textit{Helm} disagreed with this characterization of the \textit{Rummel} parole discussion and considered the alleged difference as marginal, particularly since \textit{Helm} demonstrated a greater personal propensity for more serious crimes. \textit{Id.} at 3023 (Burger, C.J., dissenting). The \textit{Helm} dissent seemed to have the better view of precedent, in this regard. See Rummel v. Estelle, 445 U.S. at 293-95 (Powell, J., dissenting). Parole is not a matter of right and executive clemency may not be arbitrary. The distinction is expedient but somewhat unconvincing. Comment, supra note 148, at 1380-81.

\textsuperscript{150} \textit{Id.} at 3012-15. See also Note, supra note 12, at 130.
The dissent twice disagreed. First, the dissent discerned an additional rule from the *Rummel* precedent: besides the rule of strict rarity, the nondeciding court in *Rummel* had specifically rejected and preempted the *Helm* majority’s objective analysis. According to the dissent, there was no gap to fill. Second, the *Helm* dissent disagreed with the majority’s application of its objective analysis and would have concluded that Helm’s sentence was constitutional.

Thus, within this case sequence, *Helm* has explained *Rummel* and *Davis*. The Court’s reconciliation has harmonized the decisions, however, only by an admittedly strained reading of the precedents. Successful proportionality challenges against sentences of imprisonment—either for life or for a term of years—are rare, but possible. Objective comparative factors that inform judicial review of sentences are: (1) a comparison of the gravity of the offense and the harshness of the penalty; (2) a comparison of sentences imposed for the same crime in the same jurisdictions; and (3) a comparison with sentences imposed for the same crime in other jurisdictions. For now, stare decisis at least reaches a life sentence without possibility of parole imposed for the crimes Helm committed. Beyond that, future deciding courts are left with questions about how to discern and apply the rule in *Helm*.

C. The Real Stare Decisis

The Court’s announced reconciliation seems strained and artificial. Paying closer attention to what the Court did, as opposed to how it described what it was doing, suggests a third, and perhaps the truer, shape for the constellation drawn around these three decisions. *Rummel* and *Helm* followed two distinct analyses for evaluating proportionality claims. The *Rummel* methodology was generalized. The plurality emphasized the rarity of successful claims, rejected specific comparisons of the sentences, and found controlling the states’ interest in punishing recidivists as a category of offenders deserving harsh sentences. In contrast, the *Helm* methodology was particularized. The majority strove for objectivity in comparatively evaluating the crime, the offender, and the sentence. These two methodologies are directly opposed.

On close reading, *Davis* may provide some explanation. The dissent in *Davis* objected to the improper expansion of *Rummel* beyond recidivist

151. 104 S. Ct. at 3017-20 (Burger, C.J., dissenting). In this regard, the dissent also relied on *Davis* as having definitively rejected the majority’s analysis. *Id.* at 3020 (Burger, C.J., dissenting) (citing Hutto v. Davis, 454 U.S. 370 (1982) (per curiam)).
152. *Id.* at 3022-23 (Burger, C.J., dissenting).
153. We are not as comfortable with this technique as the Court seems to be. Compare *Paul v. Davis*, 424 U.S. 693 (1976) with *Wisconsin v. Constintineau*, 400 U.S. 433 (1971). It is, however, one step removed from simply ignoring precedents which strongly suggest a contrary result. Compare *Roe v. Wade*, 410 U.S. 113 (1973) with *Buck v. Bell*, 274 U.S. 200 (1927).
154. Thus, the significance of *Helm* may be limited because only South Dakota and Nevada have recidivism sentences of life without parole. See *Solem v. Helm*, 103 S. Ct. at 3014-15.
155. We will speculate about some answers to those questions later in this essay. See infra Part IV.
156. See generally Note, supra note 96, at 679-83.
157. See generally Note, supra note 74, at 694-98.
sentences. It may be that the *Helm* majority was responding to the cumulative effect of *Rummel* and *Davis*, which arguably placed authorized terms of imprisonment for years beyond the reach of the Constitution. By limiting *Rummel* to its own facts, the *Helm* decision broadly reaffirmed the text and history of the eighth amendment and prior holdings that "no penalty is per se constitutional."\(^{158}\) This is curious because *Rummel* just as carefully had narrowed the proportionality principle. To pretend that all three holdings have survived creates quite a labyrinth. First, the deciding court must consider whether the case on decision falls within the shadows of *Rummel* and *Davis*. This threshold determination seems virtually standardless and, within the doctrine of stare decisis, necessarily involves a large degree of subjectivity in deciding that a particular sentence is more or less proportionate than the sentences upheld in *Rummel* and *Davis*. If *Helm* does, in fact, achieve a constitutionally satisfactory level of judicial objectivity, this preliminary *Rummel-Davis* factual evaluation should be dismissed as surplusage.\(^{159}\) This, then, is the rub between *Rummel* and *Davis*, on the one hand, and *Helm* on the other. The first two decisions, *Rummel* and *Davis*, seem to assign a lesser weight while the most recent decision, *Helm*, assigns a greater weight to the same constitutional value of proportionality. How can we conclude anything else but that one approach is wrong?\(^{160}\)

To be sure, stare decisis in constitutional matters is a fragile concept.\(^{161}\) There are as many ways to "follow" a precedent as there are to dispatch one.\(^{162}\) Under a last-decided-best-decided theory of stare decisis, any proportionality analysis would begin and end with *Helm*. The dissent in *Helm* clearly stated that the majority had, in effect, overruled *Rummel* and *Davis*.\(^{163}\) After all, the *Helm* majority reads like the *Rummel* dissent. The author of the *Helm* majority and the *Rummel* dissent was the same Justice and all but one Justice viewed the two cases as the same.\(^{164}\) The same text, history, and precedents *Rummel* had narrowed were broadened in *Helm*. The expansion and refinement of eighth amendment jurisprudence asked for and refused in *Rummel* was offered again and accepted in *Helm*. The *Helm* analysis seems drafted to refute the *Rummel* rationale. Most importantly, *Helm* is more consistent with the policies implied in the text, history of the eighth amendment, and precedents. Argued distinctions, when realistically viewed, seem ephemeral. Indeed, one very likely discernment and applica-

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159. *See generally* Note, *supra* note 12, at 130-36. Alternatively, we might suggest that *Rummel* has gone the way of other endangered species of precedent which have been preserved only to be confined as curiosities with little importance beyond themselves. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969); Escobedo v. Illinois, 378 U.S. 478 (1964).
164. *See supra* Part III.A.
tion of *Helm* by some future deciding court may be that *Rummel* and *Davis* have been overruled. It is not uncommon for the Court to struggle and strain to avoid overruling a prior decision, only to admit at the next occasion of precedent that it was unsuccessful in its efforts at preservation. 165 *Helm* may be the latest example of this technique. 166 The *Helm* majority leaves the impression that if the *Rummel* facts had been presented after the decision in *Helm*, *Rummel* would have been decided differently. Comparing Justice Powell's two opinions, his *Rummel* dissent and his *Helm* majority opinion, bolsters this impression. 167 This was pointed out by the *Helm* dissenters. 168 *Helm* is really a rejection of *Rummel*. Past precedents, at least arguably, supported both approaches. While it is possible to view the decisions as parallel and in coexistent tension preserving two tracks of reasoning, the *Helm* Court has done all within its power to uproot the *Rummel* approach. This effort will not escape the notice and respect of some future deciding court. If nothing else, the *Helm* decision appears to have established some consistency in an otherwise incongruous case law. 169

165. A paradigm example of this technique may be found in the recent shopping center cases. First, in *Amalgated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), the Court held that the incorporated first amendment protected a labor union's peaceful picketing of a nonunion retail store in a shopping center. Four years later, in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court struggled and strained to distinguish *Logan Valley* on its facts and narrowed it so as not to apply to picketing unrelated to the shopping center's operations. The dissent in the second decision found "no valid distinction" between the two cases. *Id.* at 584 (Marshall, J., dissenting). So it was to be. A third case, factually indistinguishable from the first, forced the issue. In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the majority admitted that the reasoning and holding in the two previous decisions could not be reconciled and that the second had in fact overruled the first decision. Thus, a future deciding court may hold that *Helm* overruled *Rummel*. *See also Israel, supra* note 159, at 223-26.

166. Cynically, *Rummel* may be viewed as surviving merely as a convenient citation for summarily handling most challenges against sentences. Note, *Supra* note 12, at 133. The Court used this technique in obscenity cases during the 1960s. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 82-83 (1973) (Brennan, J., dissenting).


169. *But see Maltz, supra* note 161, at 467 ("if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent—new or old—has been safe"). Justice Powell, the author of the *Rummel* dissenting and the *Helm* majority opinions, once explained his own view of precedents under the Constitution:

To be sure, *stare decisis* promotes the important considerations of consistency and predictability in judicial decisions and represents a wise and appropriate policy in most instances. But that doctrine has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation. Where the Court errs in its construction of a statute, correction may always be accomplished by legislative action. Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter, for it requires the cumbersome route of constitutional amendment. It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand. As Mr. Chief Justice Taney commented more than a century ago, a constitutional decision of this Court should be "always open to discussion when it is supposed to have been founded
Still another phenomenon of constitutional stare decisis would achieve the same effect and might appeal to some future deciding court. Retrospectively, the Court occasionally has come to realize that a particular decision within a line of precedents is inconsistent with underlying themes and values and therefore must be culled.\textsuperscript{170} Within the history of the proportionality doctrine, \textit{Rummel} may be viewed as the aberration.\textsuperscript{171} The \textit{Rummel} majority opinion strained to distinguish and limit prior precedents; some future court well may conclude that the \textit{Rummel} majority acted too procrustean. \textit{Helm} may signal a return to the proper solicitude for the proportionality principle. While \textit{Rummel} sought to narrow the principle by applying it only to punishments “different in kind,” \textit{Helm} suggested that the principle applied to all punishments.\textsuperscript{172} Some future deciding court may conclude that \textit{Rummel} must be culled from proportionality precedent.

OVERRULING \textit{Rummel} by either approach will give consistency to the proportionality area. \textit{Rummel} and \textit{Helm} were made possible through the coexistence of conflicting holdings and precedents. That we have strained so much and failed so completely in our effort at reconciliation makes it clear that the decisions are inconsistent. Logic may overtake this part of the law yet.

IV. \textsc{Beyond Holdings}

Having described the proportionality principle and having explored a few permutations of the recent triology, it is necessary to go beyond the holdings to complete the analysis. To understand the present and likely future state of the art, the recent trilogy must be considered on two more levels. First, we suggest a new synthesis which is justified against concerns for important values in federalism, separated powers and judicial restraint. Next, we will evaluate our synthesis against shared understandings by considering how lawyers and judges have approached the proportionality issues in decisions since the trilogy.

A. “Facial” and “As Applied” Challenges

A few basic points serve as helpful background. Three principles may be distilled from the eighth amendment, only one of which is of concern. First, there is a limit on the power of the legislature to impose inhumane or barbarous modes of punishment.\textsuperscript{173} “[B]urning at the stake, crucifixion, in error, [so] that [our] judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported. Mitchell v. W.T. Grant Co., 416 U.S. 600, 627-28 (1974) (Powell, J., concurring) (footnote omitted).


171. Most commentators have so viewed \textit{Rummel}. See, e.g., Dressler, \textit{supra} note 9, at 1090-94; Gardner, \textit{supra} note 45, at 1129; \textit{The Supreme Court, 1979 Term}, 94 Harv. L. Rev. 75, 95 (1980); Note, \textit{supra} note 12, at 135 n.135; Note, \textit{supra} note 96, at 674; \textit{But see} Schwartz, \textit{supra} note 10, at 420.


173. \textit{See} \textit{In re Kemmler}, 136 U.S. 436, 446 (1890); Granucci, \textit{supra} note 10, at 847. \textit{See also} \textit{supra} note 5.
breaking on the wheel, or the like" are out of constitutional fashion.\textsuperscript{174} Second, the constitutional provision limits the power of the legislature to define certain conduct as criminal.\textsuperscript{175} The flu cannot be made felonious.\textsuperscript{176} Third, the Constitution obliges the legislature to proportion punishment to the crime. This Article, of course, is concerned with the third concept. The proportionality concept must, however, be refined by employing a standard constitutional law technique—the "facial" and "as applied" distinction.

Some penalties are disproportionate on their face. This is to say that the state is forbidden to impose the challenged penalty on any person guilty of the particular crime.\textsuperscript{177} "Facial" challenges are none too successful; rationality is enough and even legislatures can usually achieve it.\textsuperscript{178} This is precisely not what we are concerned with here. "Facial" challenges, of course, are related to "as applied" challenges, but the two analyses are distinct.\textsuperscript{179} The decisions we have discussed here have involved "as applied" challenges in which the only constitutional issue is the proportionality of the specific sentence imposed on the individual defendant.

The disproportionate-as-applied challenge is a refinement of the traditional argument that an otherwise neutral enactment has been "applied and administered by public authority with an evil eye and an unequal hand."\textsuperscript{180} The statutorily authorized sentence is not at all challenged in the abstract; context is an added refinement. Context may include disparity among sentences for the same offense, total cumulative sentences, the breadth of conduct included in the offense, and punishment enhancements.\textsuperscript{181} The defendant's argument is that whatever the constitutionality of the sentence in the abstract, his unique sentence defies the eighth amendment. The combination of the legislative authorization of penalty with the judicial implementation of sentence has resulted in a fundamental error. A constitutional process—legislative enactment and judicial application—has reached an unconstitutional result. The distinction is basic but crucial. In \textit{Rummel}, for example, the argument was not that the Texas recidivist statute or its

\begin{footnotes}
\footnote{174. Kemmler, 136 U.S. at 446.}
\footnote{175. See Robinson v. California, 370 U.S. 660 (1962). See also supra notes 42-45.}
\footnote{176. "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Robinson v. California, 370 U.S. at 667.}
\footnote{177. Solem v. Helm, 103 S. Ct. at 3006, 3009.}
\footnote{178. Solem v. Helm, 103 S. Ct. at 3006, 3009. See also Note, \textit{An Excessively Long Sentence Constitutes Cruel and Unusual Punishment}: Davis v. Davis, 16 WAKE FOREST L. REV. 821, 824-28 (1980); Note, supra note 41, at 447-49; Annot., 33 A.L.R.3d 335 (1970) (collecting cases).}
\footnote{179. The relatedness to "as applied" analysis is obvious. The facial question is "whether a statutorily authorized sentence comports with the eighth amendment's core concept of the dignity of man: proportionality in relation to the penalties prescribed for other offenses and compatibility with the contemporary standards of just punishment embodied in the penal codes of sister states." Note, supra note 8, at 1136. Facial challenges are beyond the scope of our essay. See generally id. at 1136-53.}
\footnote{181. See generally Note, supra note 8, at 1153-67.}
\end{footnotes}
mandatory life sentence was unconstitutional. Controlling precedent established the facial validity of the Texas statute\textsuperscript{182} and the states' greater interest in dealing more harshly with habitual offenders withstands most constitutional challenges.\textsuperscript{183} Instead, Rummel unsuccessfully argued that his sentence did not satisfy the "as applied" proportionality principle.\textsuperscript{184} The issue becomes uniquely factbound by sentence and offender.\textsuperscript{185} Furthermore, the issue becomes virtually incomprehensible upon close examination of such institutionalized disparities as jury sentencing and sentencing judges' penological philosophies. Perhaps, too close a scrutiny will blur the analysis as much as an unfocused inquiry.

B. Challenges Against Terms of Years

Stated simply, an "as applied" challenge may be launched against any disproportionate sentence for a term of years. To so conclude, we must establish the application of the proportionality principle beyond life imprisonments under recidivist provisions and without regard to whether parole is prohibited.

Although \textit{Rummel} and \textit{Helm} involved life sentences and habitual offender statutes, there is no reason to limit their combined effect to such statutes.\textsuperscript{186} First, \textit{Davis} should be considered as precedent for applying proportionality analysis to ordinary sentences for terms of years.\textsuperscript{187} Although the \textit{Davis} Court reaffirmed \textit{Rummel} and upheld the forty-year sentence under the cruel and unusual punishments clause, the Court carefully saved the possibility that some hypothetical sentence would violate the Constitution.\textsuperscript{188} Furthermore, the majority seemed to concede \textit{sub silentio}, that its proportionality holdings applied to sentences of terms of years. Jus-


\textsuperscript{184} Rummel v. Estelle, 445 U.S. at 268-69.


\textsuperscript{186} \textit{See Gardner, supra note 45, at 1129. Constitutional challenges to enhanced sentences under recidivist statutes still are subject to proportionality review on a case-by-case basis. \textit{See generally} Annot., 27 A.L.R. Fed. 110 (1976) (citations).

\textsuperscript{187} \textit{See supra} text accompanying notes 77-94.

\textsuperscript{188} Hutto v. Davis, 454 U.S. at 374 n.3; \textit{id.} at 376-77 (Powell, J., concurring).
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Brennan's vigorous dissent helped to force that point.\textsuperscript{189} Second, even if it survives, the narrowest of the three holdings, \textit{Rummel}, expressly assured some role for proportionality analysis in nonrecidivist situations.\textsuperscript{190} Third, the heightened state interest in punishing habitual offenders is not present by definition so there is less reason for deference towards ordinary sentences for terms of years. Fourth, interjurisdictional and intrajurisdictional comparisons are simplified and clarified by eliminating the recidivism factor. Fifth, and most likely controlling, the \textit{Helm} holding and opinion supports the extension we urge. The general effort of the \textit{Helm} majority opinion was to establish an all-encompassing analysis.\textsuperscript{191} The framers' logic of extending proportionality analysis from fines, at one extreme, to capital punishment, at the other extreme, necessarily includes both life imprisonment and terms of years in between.\textsuperscript{192} The Court's own discussion eschewed line-drawing beyond the threshold of imprisonment.\textsuperscript{193} The Court expressly committed us to a case-by-case approach to proportionality challenges.\textsuperscript{194} Indeed, although the results in \textit{Rummel} and \textit{Helm} were inapposite, the analysis was similar in this regard. The real difference was that a majority was convinced of a constitutional violation only in \textit{Helm}. Finally, the text, history, and preceding case law also may be marshalled to dispel any notion that the life sentence or recidivist factors alone should control.\textsuperscript{195}

\begin{enumerate}
\item[189.] 454 U.S. at 381, 381-83 (Brennan, J., dissenting). \textit{See also id.} at 377 (Powell, J., concurring).
\item[190.] 445 U.S. at 274 n.11.
\item[191.] Note, \textit{supra} note 74, at 694-95.
\item[192.] Beyond \textit{Weems}, the Court has recognized that the eighth amendment imposes "parallel limitations" on bail, fines, and other punishments. Ingraham v. Wright, 430 U.S. 651, 664 (1977). The trend in eighth amendment bail analysis is toward collapsing the capital—noncapital distinction. S. SALTBURG, \textit{AMERICAN CRIMINAL PROCEDURE} 691 (2d ed. 1984). In a case challenging prison conditions, the Court observed "the length of confinement cannot be ignored in deciding whether confinement meets constitutional standards." Hutto v. Finney, 437 U.S. 678, 681 (1978). Most recently, in a death penalty decision the Court summarized the prohibition "against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." Enmund v. Florida, 458 U.S. 782, 788 (1983).
\item[193.] "There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty." 103 S. Ct. at 3012 n.18. \textit{But cf.} Government of the Virgin Is. v. Grant, No. 83/87, slip op. (D.V.I. May 31, 1984) (emphasizing rarity of a successful challenge on a term of years).
\item[194.] The \textit{Rummel} majority, in passing, had suggested a line at those offenses arguably classifiable as felonies. 445 U.S. at 274. \textit{But see} Dressler, \textit{supra} note 9, at 1122-26 (narrowing and criticizing). The \textit{Helm} majority seems clearly to have rejected that approach. \textit{See supra} text accompanying notes 103-110. Recall the later majority's discussion of other constitutional redoubts in cases concerning the right to a speedy trial and the right to a jury trial. 103 S. Ct. at 3012. The Court's commitment to a case-by-case approach answers the question.
\item[196.] 103 S. Ct. at 3012.
\item[197.] Dressler, \textit{supra} note 9, at 1124-25. \textit{See also} Note, \textit{Is Eighth Amendment Proportionality Analysis Applicable to Mere Length of Sentence}, 4 W. N. ENG. L. REV. 335 (1981).
\item[198.] Textually, the prohibition on excessive bails, fines and punishments is absolute in application, qualified only by the evil of disproportionality. \textit{See supra} note 192. \textit{See also} Solem v. Helm, 103 S. Ct. at 3006-3007; Gardner, \textit{supra} note 45, at 1129.
Additionally, consideration of the trilogy completes the scope of proportionality review both temporally and functionally. While the parole/non-parole distinction has some appeal on first impression, it cannot control. Strictly limited to its facts, Helm, the only Supreme Court decision declaring a criminal sentence disproportionate in length, involved a life sentence without parole. Indeed, that factor played some role in the Court's reasoning.  

Nevertheless, drawing a line between capital punishment and life imprisonment without parole, on the one hand, and all the remaining sentences with parole, on the other hand, would do violence to the eighth amendment. The reasons given above for erasing the line between life sentences and terms of years apply again. How could the same Court that decided Helm defend a refusal to apply proportionality analysis to a life sentence with the possibility of parole? Rummel's reservation of some proportionality role would prevent such an outrageous result. Davis, in which the same reservation was repeated, involved a term of years with the possibility of parole. It must be beyond even the Supreme Court's ability to distinguish such precedents and to decide somehow that a greater sentence of a term of years without the possibility of parole is beyond constitutional inquiry.

The threshold must be loss of liberty. The term of years/life sentence distinction, the recidivist/non-recidivist distinction, the parole/non-parole distinction are all important considerations in the analysis, none of which alone are controlling. That a sentence is within such legislative limits, however, cannot determine ipso facto that the sentence is constitutional. The objective analysis set out in Helm will determine that issue. The reviewing court must begin and end the inquiry with the three factors: (1) a comparison of the gravity of the offense and the harshness of the penalty; (2) a comparison of sentences imposed for other crimes in the same jurisdiction; and (3) a comparison with sentences imposed for the same crime in other jurisdictions. The inexorable logic of case-by-case adjudication obliges proportionality review of all sentences, although "extended" or in-depth analysis is to be reserved for the rare evaluation in favor of the defendant.

This approach raises some concerns, some real and others fanciful. Separation of powers, federalism, and judicial restraint have become a standard litany for our article III courts. These concepts provide us with the means
to demarcate the proper place for the proportionality principle and the deciding court.

C. Separation of Powers

In criminal law, we must begin with legislative power and executive discretion under the doctrine of separation of powers. Of course, the legislature has the power to define conduct as crime and to provide punishments. And, of course, the prosecutor has discretion to decide when and what charges should be brought. Were there no eighth and fourteenth amendments, the analysis would end there. However, a constitutional precept of our justice holds that punishment must be proportionate to the severity of the crime. Justice Brennan used the cruel and unusual punishments clause to trump the absolute separation of powers ploy: "Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights."202 The Constitution does not rely solely upon the executive and legislative departments.203 Instead, the judiciary, the third branch, as arbiter of the Constitution, has the duty to provide a remedy for executive and legislative excesses.204 The opposite approach would be fundamentally wrong. Individual liberty is not purely an executive and legislative prerogative.205 Furthermore, when a federal appellate court reviews a federal conviction and sentence or when a state appellate court performs that function within the state system, the judicial hierarchy is merely supervising the lower courts in the exercise of their discretion and separation of powers is not indicated at all. The allegation is that a legitimate judicial process, "as applied," has yielded an invalid result. The appellate court has an affirmative duty to right the wrong and the other branches of government should not be burdened with a judicial responsibility to impose a proportionate sentence.206 Indeed, when the legislature, state or federal, delegates to the judiciary, state or fed-

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204. The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights "may not be submitted to vote; [it] depend[s] on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Furman v. Georgia, 408 U.S. at 268 (Brennan, J., concurring) (citations omitted).
205. See Rummel v. Estelle, 445 U.S. at 274.
eral, the authority to choose from a wide range of sentences, the legislature should be entitled to expect the choice will be reasonable and the sentence proportionate to the crime.\textsuperscript{207} By contrast, when a federal court reviews a state conviction and sentence, the constitutional concern for separated powers shifts to concern for principles of federalism.\textsuperscript{208}

D. Federalism

Federalism may “mean all things to all people.”\textsuperscript{209} What we mean by it here is the proper respect by the federal courts for the sovereign states’ primary role in enforcing the law of crimes. If the eighth and fourteenth amendments prohibit state governments from inflicting cruel and unusual punishments, then the event of incorporation alone should afford enough respect.\textsuperscript{210} Even after a state court has reviewed the matter, a positive concept of federalism is served by the second look by the article III court.\textsuperscript{211} Proportionality review need not eliminate state experimentation with punishment schemes.\textsuperscript{212} The objective indicia from Helm allay the concern that the federal judiciary will become a roving parole board. Comparison with determine the propriety of such a sentence at this juncture; another branch of government should not be burdened with rectifying this injustice.”)


207. Note, supra note 8, at 1165.

208. Separated powers is a concept of respect between coordinate political branches. Baker v. Carr, 369 U.S. 186 (1962). Professor Thayer noted the same adjustment discussed in this Article:

But when the question is whether State action be or not be conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. Fundamentally, it involves the allotment of power between the two governments,—where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate and the limit is at a different point. The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.


209. Baker, The History and Tradition of the Amount in Controversy Requirement: A Proposal to “Up the Ante” in Diversity Jurisdiction, 102 F.R.D. 299, 317 (1984). Outside the legal community, editorials appeared in the Washington Star (“When punishment is as out of proportion as it was here, the danger . . . is that law, not to mention federalism, will be made contemptible.”), the New York Times (“Would any sentence be so out of line as to violate the Court’s sense of decency?”), and The Nation (“One would have thought that preventing such cruel aberrations is just what the Supreme Court and the Eighth Amendment were created to do.”), which were critical of the Rummel decision. Comment, 19 Duq. L. Rev. 167, 178-79 n.86 (1980) (quotations). This is some indication of what federalism means to some people.

210. See supra note 1.

The argument that there somehow is a tenth amendment state power to violate the eighth and fourteenth amendment cannot be taken seriously. See Rummel v. Estelle, 587 F.2d 651, 661-62 (5th Cir. 1978) (en banc).

211. Justice Brennan has observed:

Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.


sentences imposed for other crimes in the same jurisdiction obviously defers to the particular state's legislative scheme and the state judiciary's primary role in implementation. Comparison with sentences for the same crime in other jurisdictions achieves a federalizing influence. Both intrajudicial and extrajudicial comparisons circumscribe federal judicial subjectivity by relying on objective data from the state legislatures. These two factors place a premium on deference to the state legislature. The third factor, a comparison between the gravity of the offense and the harshness of the penalty, is not so much subjective as it is relative and judicial. Certainly, the initial sentencing of a convicted defendant is not so subjective as to be beyond the judicial ken. Nor should be the proportionality review. The Helm court was mindful of federalism: "The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment." \(^\text{213}\) This accommodation affords sufficient respect for state sovereignty; proportionality review requires sufficient respect for human dignity. \(^\text{214}\) Many state courts and some federal courts had employed the objective criteria before the Supreme Court gave its imprimatur with no untoward effect on federalism. In the vast majority of cases, the proportionality review will be cursory and the sentence will be affirmed as constitutional. Rarely will the court engage in extended analysis\(^\text{217}\) and rarer still will be the successful claim. \(^\text{218}\) Finally, the degree of interference is lessened. A successful proportionality challenge does not free the defendant or make retrial impossible, but only obliges the state to re-sentence within broad constitutional proportions. In matters of federalism, "[i]t is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse." \(^\text{219}\)

\(^{213}\) Solem v. Helm, 103 S. Ct. at 3010 n.17. See also Dressler, supra note 9, at 1114-16.

\(^{214}\) For most crimes, experience is commonplace and legislative response has been relatively uniform. After all, 38 states have adopted the same model criminal code. In some complex areas of criminal law policy, however, diversity is more likely. For example, a particular jurisdiction may single out drug or sex crimes for particularly harsh sanctions. Justifications for variation do exist and, most assuredly, the objective criteria will admit such legitimate disparity. See generally Note, supra note 8, at 1141-50. E.g., United States v. Greer, 739 F.2d 262 (7th Cir. 1984) (upholding state statute imposing extended sentence for "exceptionally brutal or heinous behaviour indicative of wanton cruelty.")

\(^{215}\) That state courts previously have utilized the technique goes far to answer the federalism concern. See Schwartz, supra note 10, at 396-401 (California, Kentucky, Michigan, South Carolina). See generally Comment, 1976 Wis. L. Rev. 584, 664-67; Annot., 33 A.L.R.3d 335 (1976) (citations).


\(^{217}\) "In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." Solem v. Helm, 103 S. Ct. at 3009 n.16.

\(^{218}\) Id. at 3009 ("exceedingly rare"); (quoting Rummel v. Estelle, 445 U.S. at 272).

E. Judicial Restraint

Judicial restraint provides one last vantage on the *Rummel-Davis-Helm* trilogy.\textsuperscript{220} The Court's approach may be explained by considering the path taken and the philosophy of text and institution. This twin sense of role provides a new perspective on the proportionality principle which we call the "ratchett theory." Where our theory leads, however, is an issue on which we coauthors disagree. Our eighth amendment disagreement is encompassed within the recent debate over the larger issue of judicial review. This Article, however, is confined to the philosophy of proportionality.

1. Coauthor Consensus

The Court certainly was prophetic in 1878 when it observed, "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted."\textsuperscript{221} The particular dilemma facing the Court in the proportionality analysis is whether the principle is merely a euphemism or whether the principle bestows on the Court a responsibility to create a rational, coherent structure of sentencing and an obligation to reconcile each sentence with the created system.\textsuperscript{222} As it has done when faced with most dilemmas, the Court has attempted to steer a middle course. Far from being a simple compromise, the Court's resolution is a classic statement of role and follows the superior philosophy of the eighth amendment text.\textsuperscript{223}

The proportionality principle has long been a component of the eighth amendment protection. The difficulty greater than creation has been divining content. One reason for the principle's periods of desuetude has been the lack of a coherent framework for analyzing proportionality issues. The Court in *Rummel* and *Davis* did not supply that framework. The *Helm* Court took the necessary next step. *Rummel* and *Davis* represent one choice of analysis and one philosophy of the principle. *Helm* represents the other. For the *Rummel* and *Davis* controlling positions, the proportionality principle was an ill-defined attitude that engaged, if at all, only the most extreme sentence imaginable—"if a legislature made overtime parking a felony punishable by life imprisonment."\textsuperscript{224} Such a proportionality principle smacks of the old, discredited "shocks the conscience" approach to constitutional law.\textsuperscript{225} The flaws are obvious. Far from being less subjective, the due pro-

\textsuperscript{220} To the reader who asks what sentences we would uphold in the three cases we discuss, our answer may be unsatisfactory but is a truthful "We do not know." The federal interest is satisfied by striking the disproportionate sentence and remanding to the state for reconsideration. Commentators should be able to get away with what the Court does. See generally Posner, *The Meaning of Judicial Restraint*, 59 Ind. L.J. 1 (1983).

\textsuperscript{221} Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878).

\textsuperscript{222} Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1071 (1964).

\textsuperscript{223} See Gardner, supra note 45, at 1103, 1105; Note, supra note 203, at 825. See generally M. Franke; *Criminal Sentences* 7-8, 23-24, 105-111 (1973).

\textsuperscript{224} *Rummel* v. Estelle, 445 U.S. at 274 n.11.

\textsuperscript{225} *See Rogers v. United States*, 304 F.2d 520, 521 (5th Cir. 1962) ("completely arbitrary and shocking to the sense of justice"); *Mitchell v. State*, 563 S.W.2d 19, 26 (Mo. 1978) ("so disproport-
cess test allows the Justices to make purely personal decisions appealing to their own personal jurisprudence. The *Rummel-Davis* orientation was quite clear. *Davis* may be seen as embracing a philosophy that equated "rare" with "never" as in "‘successful challenges to the proportionality of particular sentences’ should be ‘exceedingly rare.’" This approach turns the concept of constitutional rights on its head; constitutional rights cannot depend on majority sentiment to be meaningful. Most importantly, the *Rummel-Davis* philosophy defers to the legislature completely on the question of sentencing, and is therefore at odds with the text, history and precedent of the cruel and unusual punishments clause. In effect, the now discarded approach could have collapsed the "facial"/"as applied" distinction and predictably would have upheld all sentences within legislative maxima as ipso facto valid. The Court thus would have abdicated its constitutional responsibility.

Instead, the *Helm* majority took a tack between that extreme position and an equally unsatisfactory opposite. Still rejecting a role that would fabricate a constitutionally required sentencing scheme and measure each sentence against the hypothetical ideal, the *Helm* Court pulled back from the *Rummel-Davis* abdication. The objective test rebuffed in *Rummel-Davis* and embraced in *Helm* represents an important refinement of the proportionality doctrine. The doctrinal adjustment in *Helm* may be seen best by distinguishing two recent death penalty decisions.

Contrast the *Coker-Enmund* approach and results with *Helm*. The same data was considered. Intrajurisdictional comparisons with sentences...
for other crimes and interjurisdictional comparisons with sentences for the same crime, the second and third Helm factors, were derived from the death penalty analysis.\(^{235}\) The first factor in Helm, a comparison of the gravity of the offense and the harshness of the penalty, was also taken from the death cases but with two significant refinements. By the legerdemain of constitutional stare decisis, the Rummel-Davis requirement for objectivity was satisfied by labeling the comparison "objective."\(^{236}\) Additionally, the factor was demoted from being controlling in the death cases to simply one of three factors in the imprisonment cases.\(^{237}\)

Philosophy becomes central in this discussion. There is a meaningful distinction between interjurisdictional and intrajurisdictional external-objective comparisons, on the one hand, and the introspective crime-punishment comparison, on the other. Comparing the sentence imposed with other crime sentences in the same jurisdiction and with same crime sentences in other jurisdictions is a positivistic approach to the issue. The concern for equal treatment is pursued by deferring to other institutional decisionmakers, legislatures, trial courts, and juries. Without more, however, the approach is sterile at best and circular at worst.\(^{238}\) Human dignity goes beyond statistical study and the Justices must be more than statisticians. Furthermore, the approach meets itself in every case in which the sentence is within legislative limits. In contrast, the first factor, the introspective comparison of crime and punishment, is ultimately normative. "Ultimately, proportionality comes down to a comparison of the personal and social interests invaded by the criminal with the personal and social interests invaded by the punishment."\(^{239}\) This factor plumbs the depths of evolving standards of human decency and of the institutional role of the Court.

Concerns for human dignity are on both sides of the comparison, the crime suffered by the victim and the punishment imposed on the perpetrator. This weighing and balancing necessarily involves the Court in measuring evolving standards of human decency. In effect, the Court is obliged to interpret text with social morality in a contextual application of "social text."\(^{240}\)

On this level, the failure of the Rummel-Davis approach and the inevitability of Helm is better understood. The Rummel-Davis demand for complete objectivity cannot be satisfied, at least not to the satisfaction of the Rummel and Davis pluralities. So be it. The eighth amendment is designed to preserve human dignity, not objective science. The philosophy is human-

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\(^{235}\) Solem v. Helm, 103 S. Ct. at 3008 (citing Enmund and Coker).  
\(^{236}\) Id. at 3010-11.  
Realistically viewed, proportioning the crime and punishment certainly is no less objective than eighth amendment decisions involving the mode of punishment in executions by injection, gaseous asphyxiation, shooting, and hanging. See generally L. Berkson, supra note 10, at 21-31.  
\(^{237}\) Solem v. Helm, 103 S. Ct. at 3010 n.17.  
Whether Helm signals a deemphasis of this factor in death cases or whether the wholistic approach is limited to imprisonment cases or even, most narrowly, life imprisonment without parole cases is unclear. See Comment, supra note 146, at 1384. See also Note, supra note 8, at 1122.  
\(^{238}\) Radin, supra note 45, at 1057-60.  
\(^{239}\) Id. at 1060.  
\(^{240}\) Brest, Interpretation and Interest, 34 Stan. L. Rev. 765, 767, 769 (1982).
istic not formalistic. The prevailing philosophy, indeed the framers' philosophy and the only consistent philosophy, has emphasized the evolutionary nature of the amendment. The "evolving concept of human decency" is the benchmark, the dignity of man the goal. The concept may be likened to a ratchet. As civilization makes progress in respecting the personhood of individuals, the scope of the eighth amendment protection increases. The social text expands the eighth amendment text in fits and surges but in one certain direction. Once the ratchet has turned, it cannot be allowed to click back. Once the text has been developed, it cannot be allowed to slip back to a lesser level of protection for the Constitution defines a social minimum. Once the community's morality has condemned a punishment and that condemnation has been incorporated into the constitutional morality, there is no going back. Is it even arguable that a Gallup poll could permit a return to drawing and quartering? The intent and history of the eighth amendment obliges a one-directional evolution; only reamendment may change this feature. This holds for methods of discernment as well as for units of progress. Hence, Rummel and Davis were wrongly decided. They are aberrations in the constitutional evolution. Prior, accepted decisions had recognized and applied the proportionality principle. The principle had been read into the eighth amendment text. The ratchet could not be turned back, at least not constitutionally without amendment. Social text cannot be overruled by the Court. Helm correctly applied the eighth amendment ratchet.

241. Dressier, supra note 9, at 1082; Packer, supra note 221, at 1076.
242. See generally Note, supra note 9.
244. Analogies come to mind. In the general matter of individual rights, the state supreme courts may not go below the constitutional minima set by the United States Supreme Court, but can go farther in extending protection under a state constitution. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 20-21 (2d ed. 1982). Congress, under section five of the fourteenth amendment, seems empowered to expand the law of equal protection but not to contract it. See Cox, The Role of Congress in Constitutional Determination, 40 U. CIN. L. REV. 199, 253 (1971).
247. Professor Hart's famous dialogue contains our thesis:
Q. But that is what the Court has held. And so I guess that's that.
A. No, it isn't.
The deepest assumptions of the legal order require that the decisions of the highest court in the land be accepted as settling the rights and wrongs of the particular matter immediately in controversy. But the judges who sit for the time being on the court have no authority to remake by fiat alone the fabric of principle by which future cases are to be decided. They are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice.
And so when justices of the Supreme Court sit down and write opinions in behalf of the Court which ignore the painful forward steps of a whole half century of adjudication, making no effort to relate what then is being done to what the Court has done before, they write without authority for the future. The appeal to principle is still open and, so long as courts of the United States sit with general jurisdiction in habeas corpus, that means an appeal to them and their successors.

The ratchet theory exposes an important issue involving the underlying role of the eighth amendment. Giving normative content to the proportionality analysis creates an ambiguity. The ambiguity is deep enough to divide the coauthors. "Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfactory to ourselves, when arrived at in our own way." Our division, in turn, highlights an underlying tension in eighth amendment theory.

2. Coauthor Baldwin Concurring

For two hundred years, this nation has glorified one text as central. Indeed, the Constitution is more theological than legal. It is heretical for the present Court to be unaware, or unwilling to admit that its judgments have moral force, to pretend that it is only "a court" and not an institution steeped in political, moral, and ethical values. Despite some of the current members' protestations to the contrary, the Supreme Court is not an ordinary court, it is unique. With this powerful role comes responsibility. The Court must understand its own nature to deal with the folly of both coordinate branches and state sovereigns. Self-discipline requires that the Court strip away verbiage to discover the first principles which have nurtured the almost mystical respect for the Court and the Constitution. The Court must exhibit the courage to uphold its role as a counter-institutional check upon the majority and even the political process itself. Much is at stake. During the present period of transition, the balance between government and the individual shows signs of being weighted in favor of the government. Under the Constitution, however, the Court is obliged to place its thumb on the scale. Fealty to that document will not allow de-emphasis of the principles of personhood. The Rummel-Davis-Helm trilogy, while ultimately resisting the threatening devaluation, does so somewhat ineptly. Visceral subjectivity of the sitting Justices is no better than the persons involved. More must be expected. I expect more. The Helm asymptotes of objectivity are inevitably value-laden. Yet, that admission is their virtue and not, as the dissent there would have it, their vice. The three criteria are not a pretense of absolute objectivity, but rather represent an effort to gauge tangible reflection of the common mind, the Jungian sense of justice. They are the present culmination of historically rich principles and valid constitutional concerns. The three-year struggle with Rummel to fix absolutes was the aberration, the lapse in institutional courage; Helm was the needed return. Nor should the three Helm criteria be viewed as hubris. The comparative law approach and the Court's role in the proportionality principle are venerable propositions of constitutional law.

Majority opinion alone cannot be determinative. While public opinion may be relevant, it cannot be conclusive in assessing whether a particular sentence is consonant with contemporary standards. What society actually
does is a more compelling indicator. The *Helm* factors recognize this by taking into account intrajurisdictional other-crime sentences and extrajurisdictional same-crime sentences. Yet there is more to the judicial role. Reflection of contemporary morality is not moral leadership. An eighth amendment commitment to moral evolution calls for such leadership from the Court. The *Helm* Court may be faulted for not going further, for not turning the ratchet. Whether a sentence is grossly out of proportion to the severity of the crime is but one dimension of the constitutional value. Ultimately and logically the proportionality analysis must extend the portion of the death penalty analysis least recognized and most controversial. The Court eventually must admit and exercise the power to declare a punishment excessive and unconstitutional if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." That issue was briefed and avoided in *Rummel* and ignored in *Helm*. I recognize that this second prong of eighth amendment analysis had not yet been the basis of a Supreme Court holding. If evolving standards of decency are foreseeable and articulable, then the Supreme Court has a moral duty to articulate them and incorporate them into the body politic. This then, is the challenge facing the Court, to fulfill its sacred trust with ourselves and our posterity.

3. Coauthor Baker Concurring

Coauthor Baldwin's approach goes too far. Accepting the two *Weems* corollaries of first, subordination of the judiciary to the legislature and, second, interpretive constitutional supremacy in the Supreme Court, I believe that the institutional role of the Court must remain in the present. Of course, the Court's role goes beyond fitting theory and rules. The Court is obliged to exercise the normative philosophy of society—but not its own. The distinction is crucial. The Court is the only institution capable of developing a theory of the Constitution by referring to political philosophy and institutional detail. These external referents control the Court's own predilections and predictions. Any theory of the Constitution must be true to society's concept of human dignity. I remain convinced that the Court must measure human dignity as it is objectively reflected at present. Two reasons explain why. First, prediction is fraught with problems; the future is uncertain and may be misread. Second, tomorrow's decency is just as out of touch with today's society as was yesterday's decency. "[A] 'liberal accelerator' is neither less nor more consistent with democratic theory than a 'con-

252. The Supreme Judicial Court of Massachusetts recently followed this logic to conclude the death penalty violated the state constitutional protection against crime and unusual punishments. District Attorney v. Watson, 381 Mass. 648, 411 N.E.2d 1274 (1980).
259. Id. at 134.
servative brake.'

Human decency, if it is to have any philosophic roots, must be rooted in prevailing democratic philosophy respecting the personhood of the individual. The Court serves as guardian of the Constitution not as a convention.

Of course, the first step in the analysis, comparing the gravity of the offense with the severity of the punishment, will call for application of the Court's own judgment. That application, however, must be informed by careful study and the second and third factors, the interjurisdictional other crime comparison and the extrajurisdictional same crime comparison, must be complementary. While no one factor controls, the factors taken together must yield an obvious conclusion to be legitimate. While it is difficult to know how far the Court should go, at least one approach can be identified that does not go far enough. Justice Rehnquist, author of Rummel and dissenter in Helm, once explained his viewpoint in a death penalty decision:

> [A]n error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual’s constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

This could not be more wrong in its incompleteness. The potential harm from judicial abdication is most serious under our Constitution:

> The risks from court abdication are great. An error by the judiciary in favor of a defendant and against legislature action adds to the right of individuals while denying legislature flexibility. This error seems preferable to the [Justice Rehnquist] alternative: leaving the enforcement of the principle of personhood to the good faith and abilities of legislature bodies. The violation of individual rights that would result from a legislative error in the application of that precept of justice is more serious than any loss of legislative flexibility that would be sacrificed by allowing judicial oversight.

Judicial review inevitably involves a conflict between judicial and legislative interpretation; the eighth amendment is no different. Nevertheless, there should be some judicial restraint. More can be made out of the text than my

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261. See infra note 330.
263. Dressler, supra note 9, at 1102-03.
264. Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not.

Furman v. Georgia, 408 U.S. at 313-14 (White, J., concurring). Cf. also id. at 466 (Rehnquist, J., dissenting).
coauthor allows. For example, the judicial review power is narrowed only to those punishments that are either too serious ("cruel") or too capricious ("unusual"). The judiciary must apply these limits, but must be aware of them in that application. The principle of proportionality is constitutionally mandated, but not boundless. A corollary principle within the objective Helm analysis is the strong presumption of validity since "the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards." Coauthor Baldwin pays this only lip service. While a successful proportionality challenge will be something of a rara avis, that reality does not lessen the necessity of the particular category of judicial review. The sentence "must not only be rational, but decent." The Court cannot shirk its responsibility, as it tried to in Rummel. The Helm analysis reasserted the proper judicial role. The inherent difficulty in line drawing does not excuse the Court from its responsibility.

Still, a harsh punishment should be declared unconstitutional only if the Court is confident that the great majority of society would find it unacceptable for the crime committed and not because of some accounting comparison. It is not necessary to go the next step, as coauthor Baldwin does, and gaze into the crystal ball. The text, history, and precedents of the eighth amendment do not go so far. My coauthor leaves them and me far behind—in the present. Nor does constitutional common sense call for his radical approach. First, it betrays reality to believe that any sentence authorized by a legislature and imposed by a judge would "mak[e] no measurable contribution to acceptable goals of punishment." Modern punishment theory is a melange of retribution, deterrence, denunciation, incapacitation, and rehabilitation. Every sentence is prima facie beyond challenge from the Kantian notion that "one man ought never to be dealt with merely as a means subservient to the purposes of another." As an absolute, then, this precept is devoid of content. Besides, I believe that constitutional law does best

266. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures.
268. Dressier, supra note 9, at 1113 n.387. "It is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U.S. 349, 367 (1910).
to avoid substantive absolutes. The concern must be marginal, that is, the benefit to penological goals is too small to justify the severity of the particular sentence. But that is the proportionality principle—the principle of personhood that prohibits a punishment more severe than that deserved.

Coauthor Baldwin’s approach simply goes too far; during the journey he crosses accepted boundaries of judicial review, separation of powers, federalism, and even democratic theory. It is one thing to base a disproportionality holding on objective measures of marginal utility using contemporary indicators. It is quite another to arrogate to a non-democratic elite the power to shape the future course of human dignity. It is true that the social text informs the written text, but the latter codifies a minimum, not a maximum, content of personhood. My coauthor’s approach also violates principles of personhood and individual autonomy. Individual morality is for the individual. Societal morality is for the society to determine. The Court has gone as far as I would have it go in the Helm objective analysis. Coauthor Baldwin’s excess simply proves too much. The Supreme Court does serve as conscience of the Constitution, but the Constitution should value and honor the freedom of conscience of the individual and society, both now and in the future. There is one important point for agreement: the ratchet theory of the eighth amendment finally and conclusively demonstrates the fundamental error of the Court in Rummel and Davis. Eighth amendment analysis must not allow retrogression. Furthermore, the issue remaining should force the Court to plumb the depths of the doctrine of judicial review. The Helm analysis will vacillate until the Court recognizes and decides the central divisive issue of role. To complete the task, however, esoteric concerns must be put aside and analysis of precedent and application be continued.

F. Judicial Reaction to the Trilogy

With each shift in proportionality philosophy, the Supreme Court writes an epistle on social text for the entire judicial system. Reaction is prompt and instructive. Lower federal court and state court response to Helm confirm a few preliminary observations and suggest some techniques for advocates and adjudicators alike. The stream of cases is not yet very deep; elaboration and refinement have been tentative.

274. Professor Ely does enough to shake my confidence in going as far as I do: the notion that the genuine values of the people can most reliably be discerned by a nondemocratic elite is sometimes referred to in the literature as “the Fuhrer principle,” and indeed it was Adolph Hitler who said that “[m]y pride is that I know no statesman in the world who with greater right than I can say he is the representative of his people.” We know, however, that this is not an attitude limited to rightwing elites. “The Soviet definition of democracy, as H.B. Mayo has written, also involved the ancient error of assuming that ‘the wishes of the people can be ascertained more accurately by some mysterious methods of intuition open to an elite rather than by allowing people to discuss and vote and decide freely.”


275. For summaries of federal and state court reactions to Rummel, then seen as definitive, see generally Dressier, supra note 9, at 1118 n.406; Note, supra note 75, at 497-501; Note, supra note 12, at 129-30; Note, supra note 41, at 452-61; Note, supra note 206, at 828-32.

276. Certainly the “flood of cases” warned against by some has not materialized. Doomsayers
Only a few federal court of appeals' decisions merit mention. Not surprisingly, there are two distinct approaches toward reconciling Rummel and Helm. In Moreno v. Estelle, the Fifth Circuit took a literalist approach to the precedents. Jerry Carlo Moreno was convicted of aggravated assault and sentenced to life imprisonment under the Texas recidivist statute. The court of appeals affirmed the denial of federal relief in the nature of habeas corpus, holding, among other things, that his sentence satisfied the proportionality principle. Evidencing some ambiguity, the court of appeals applied Rummel which "still provides the rule in cases with fact situations not clearly distinguishable." Moreno had been sentenced under the same Texas recidivist statute applied in Rummel and was eligible for parole. The only distinction, that under the Texas statutes Moreno would be eligible for parole eight years later than Rummel, was negated by a simple comparison of Moreno's more serious third felony (aggravated assault with a deadly weapon) with Rummel's third felony (obtaining $120.75 by false pretenses). Thinking itself bound by Rummel and unable to distinguish it, the court of appeals refused to remand Moreno to the district court for a Helm analysis even though the latter case was decided after the district court's consideration.


It remains to be seen whether the federal judiciary will experience an overwhelming surge of proportionality claims, although that seems unlikely. If the cases do come in waves, the federal courts might try to follow the California lead and hold that attacks to indeterminate sentences are premature until a release date is set. See People v. Wingo, 15 Cal. 3d 167, 534 F.2d 1001 (1975). The Court's trilogy analysis, however, seems to deny this approach. The federal courts also might try to screen proportionality appeals by extending Stone v. Powell, 428 U.S. 465 (1976), to bar habeas corpus review as "a far cry" from parole. The First Circuit affirmed a twelve year and $2500 fine sentence for possession with intent to distribute a controlled substance with only the assertion that it was not cruel and unusual punishment. United States v. Francisco, 725 F.2d 817, 823 (1st Cir. 1984). Most uses of the Helm precedent have been even less significant. See, e.g., Smith v. Snow, 722 F.2d 630, 632 (11th Cir. 1983); McClaskey v. United States Dept. of Energy, 720 F.2d 583, 591 (9th Cir. 1983) (Reinhardt, J., dissenting); Haygood v. Younger, 718 F.2d 1472, 1482 (9th Cir. 1983); Prejean v. Blackburn, 570 F. Supp. 985, 998 (W.D. La. 1983).

277. For example, on direct review in United States v. Rosandich, 729 F.2d 1512, 1512-13 (8th Cir. 1984), the court summarily upheld a guilty plea and two-year sentence for conspiracy to commit mail fraud. A one-year incarceration sentence with six one-year sentences consecutive and suspended for home improvement trade practice violations under state law was approved on federal habeas corpus review as "a far cry" from Helm. Stepniewski v. Gagnon, 732 F.2d 567, 571-72 n.3 (7th Cir. 1984).

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279. See supra notes 133-55 and accompanying text.

280. 717 F.2d at 179-81.

281. Id. at 180. The district court had denied relief based exclusively on Rummel. The court of appeals observed, "[w]e are unable to reject the [proportionality] claim without consideration of the principles modifying Rummel as enunciated by the Supreme Court decision in Solem v. Helm." Id. at 179 (citation omitted). Later, the court mysteriously noted, "Of course, a determination of whether a sentence is 'within constitutional-limits' will often require at least a perfunctory Solem analysis." Id. at 180 n.10. Cf. also Whitmore v. Maggio, 742 F.2d 230, 233-34 (5th Cir. 1984).

282. See supra note 54.

283. 717 F.2d at 181. Seemingly, much the same approach was taken by the Seventh Circuit in United States v. Zylstra, 713 F.2d 1332, 1341 n.2 (7th Cir.), cert. denied, 104 U.S. 403 (1983).
By contrast, the Eleventh Circuit seems to have adopted the realistic view of the precedents suggested earlier. In *Seritt v. Alabama*, the district court denied federal habeas corpus relief to Harlin Phillip Seritt, mandatorily sentenced to life imprisonment without parole under the Alabama habitual felony offender statute. Seritt had been convicted of four separate offenses in 1975 and one in 1973 under the state controlled substances act. Armed robbery was the triggering offense for the habitual sentence. Citing *Rummel*, the court of appeals upheld the facial constitutionality of the nonparolable recidivist statute. The court of appeals then concluded that *Helm* alone was completely dispositive of the "as applied" proportionality issue. Evaluation of the gravity of the offense and the harshness of the penalty satisfied the first objective criteria. Alabama had created a complex grading of the recidivist sanction for persons like Seritt who had been convicted at least three times previously of very serious offenses and who then committed a serious and violent crime which threatened life. Considering the first objective factor, both blameworthiness and punishment were of the most severe type. The second objective factor, comparison of intrajurisdictional sentences, also moved the court towards affirmance. Focusing on the intricacies of the Alabama legislature's framework, the court recognized a complex three-tiered recidivist hierarchy in which the least serious offenses triggered a discretionary life sentence with the possibility of parole, more serious offenses triggered a mandatory life sentence with the possibility of parole, and the most serious offenses of a life threatening variety triggered a mandatory life sentence without the possibility of parole. The Constitution was satisfied by Alabama's careful discrimination among categories of recidivists. The third objective factor left the court unsure. Assuming that Seritt had the burden of showing interjurisdictional disproportionality, the court tried to apply the sentencing provisions in Georgia, Mississippi, Florida, and Tennessee to his criminal record. Although neither Georgia nor Mississippi have habitual-offender statutes, both states authorize life imprisonment for Seritt's trigger offense of armed robbery. Florida has the same authorized sentence plus an habitual-offender statute which has a particular requirement for the timing of prior offenses, as did Tennessee, which was not clearly indicated in the record before the court. The court of appeals was not convinced that Seritt would not have received an enhanced sentence in those two states. Because it was "not clear" that the Alabama sentence was more harsh than the sentences which would have been imposed in the other states, the court was "not left with a firm conviction that Seritt's sentence...

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284. See infra notes 156-72 and accompanying text.

285. 731 F.2d 728 (11th Cir. 1984).

286. Id. at 730-31 (citing Rummel v. Estelle, 445 U.S. 263 (1980)).

287. 731 F.2d at 731-32 (citing Solem v. Helm, 103 S. Ct. 3001 (1983)). In what appears to have been a lapse into wooden factual comparisons, the court of appeals distinguished *Helm* by arbitrarily narrowing that holding to a one sentence proposition: "The Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony." 731 F.2d at 732 (quoting Solem v. Helm, 103 S. Ct. at 3004 (emphasis by court of appeals)). Since Seritt's trigger felony was violent, his was factually distinguishable. Id. Fortunately, the court of appeals did not stop there.

288. The court of appeals did not explain why these states were chosen or why other states' statutes were not considered.
The eighth and fourteenth amendments were satisfied, at least in the Eleventh Circuit. The federal courts have favored the Eleventh Circuit's approach over that of the Fifth Circuit.

Post-\textit{Helm} state court developments may be summarized similarly. While courts in many states have considered the proportionality principle, they have divided along the same line as the literalist view of the Fifth Circuit and more realistic view of the Eleventh Circuit. One group of decisions takes the literalist approach to the proportionality precedential trilogy; \textit{Rummel, Davis}, and \textit{Helm} are deemed coequal holdings. A second group of decisions, which seems to predominate, follows the more realistic approach and uses the \textit{Helm} objective criteria exclusively. The state experience demonstrates the rarity of a successful proportionality challenge.

Thus, it appears that a court may approach a proportionality issue principle from either the \textit{Rummel} or the \textit{Helm} perspective. This subtle conflict underscores the importance of the advocate's sophistication and facility with the precedents and the courts' sophistication in the analysis.

G. \textit{Application of the Extended Analysis}

To get beyond conclusory invocations of disproportionality, an attorney or a court must carefully reflect on the three \textit{Helm} factors. As with most

\begin{notes}
289. \textit{Id.} at 736.

290. For examples of decisions that have used the Eleventh Circuit's approach, see United States v. Fishback & Moore, Inc., Slip op. No. 84-3242 (3d Cir. Dec. 10, 1984); United States v. Ortiz, Slip op. No. 84-1040 (2d Cir. Aug. 17, 1984); United States v. Darby, 744 F.2d 1508 (11th Cir. 1984); Rhoden v. Israel, 574 F. Supp. 61, 65 (E.D. Wis. 1983) (upheld a 17-year sentence for armed robbery on a first offender); Schwartzmiller v. Gardner, 567 F. Supp. 1371, 1381-82 (D. Idaho 1983) (upheld a minimum sentence of 11 years 8 months for larceny and larceny conduct with a minor).

291. Earlier state court cases, decided before \textit{Helm}, are discussed in Note, \textit{supra} note 42, at 458-61. Holdings under related provisions in state constitutions are beyond the scope of our discussion. See, e.g., People v. Dillon, 34 Cal. 3rd 441, 194 Cal. Rptr. 390, 668 P.2d 697 (Cal. 1983); State v. Weigel, 228 Kan. 195, 612 P.2d 636 (1980); State v. Fain, 94 Wash. 2d 387, 617 P.2d 720 (1980); Wanstreet v. Bordenkircher, 276 S.E.2d 204 (Va. 1981). Some state court decisions are at least noteworthy because they have ignored the Supreme Court's recent efforts. State v. Watson, 686 P.2d 879 (Mont. 1984) (three consecutive 100-year terms without possibility of parole).


\end{notes}
balancing analyses, the totality-of-the-circumstances approach makes relevant almost everything imaginable. The difficulty remains in identifying important variables, assigning them a weight, and deciding their cumulative effect. The three-step sequence of objective criteria in *Helm* is helpful in determining a framework. Creativity and diligence must be the advocate's watchwords.

Of course, neither counsel nor court should overlook applicable statutory requirements of sentencing regularity. The constitutional analysis proceeds along familiar lines. Within the statutory maxima, sentencing is committed to the trial court's discretion. Proportionality analysis is similar to the analysis the sentencing court must make. As an "as applied" constitutional issue, the analysis is to be conducted on a case-by-case basis. The reviewing court may reach the issue *sua sponte.* The reviewing court must be able to apply and articulate the objective factors to save the sentence from subjectivity. The burden of persuasion, of course, is on the defendant to establish the lack of proportionality in the challenged sentence. Finally, concerns for waiver and estoppel are sometimes relevant when, for example, the sentence is the product of detailed plea negotiations and the record discloses a knowing, voluntary, and intelligent guilty plea.

First, and foremost, the deciding court must compare the gravity of the offense and the harshness of the penalty. Ascertaining the gravity of the offense is very problematical. The proper focus is on the blameworthiness of the defendant rather than on the benefit to society of increased punishment. Courts should "distinguish between harm to persons and harm to property, between intentional and negligent conduct, and between harm actually caused and harm only threatened or risked." Of course, the Constitution does not require a "perfect symmetry" and some differences simply are "not of constitutional dimension." Nevertheless, rough approximations are quantifiable; "stealing a million dollars is more serious than stealing a hundred dollars." The most serious punishments must be reserved for the most serious crimes, crimes against persons involving the taking of life, the use of force and violence, and the use of weapons.

 nombreux citations et références sont fournies dans le texte, incluant des notes de bas de page et des références bibliographiques.
crimes, such as sex and drug offenses, do not fit neatly into Year Book pigeonholes of harm to persons and property.\textsuperscript{309} Far from insignificant, however, such crimes may signify a profound blameworthiness. To urge the once-trendy appellation of "victimless crimes" will not do for proportionality principles.\textsuperscript{310} The social interests in such crimes belie that notion. The qualitative measure of blameworthiness must center on the defendant, but the blameworthiness of the defendant will be determined, in part, by the character of the victims,\textsuperscript{311} and the degree of harm caused to those victims.\textsuperscript{312} Relevant data may be gleaned from presentence hearing and psychiatric evaluation.\textsuperscript{313} Relevant facts include such commonsensical items as the age,\textsuperscript{314} drug addiction,\textsuperscript{315} and criminal record\textsuperscript{316} of the defendant—everything relevant to the sentencing decision. Indeed, the first factor of eighth amendment proportionality analysis bears a striking resemblance to the trial court's sentencing decision in an indeterminate system.\textsuperscript{317}

The severity of the punishment must be considered along a continuum. The proportionality trilogy described a hierarchy of death penalty, life imprisonment and imprisonment for a term of years.\textsuperscript{318} Of course, the actual sentence imposed is on review, not the maximum merely authorized in the statute.\textsuperscript{319} Theories of punishments such as retribution, general and special deterrence and rehabilitation are appropriate considerations in proportionality review of severity.\textsuperscript{320} The punishment must be appropriate to further such goals. Whether the punishment is discretionary or mandatory is also relevant.\textsuperscript{321} Punishment is two dimensional; besides severity a second dimension is likelihood. Probability analysis makes relevant the jurisdiction's laws on parole and clemency; postconviction adjustments may mitigate the severity of a sentence by reducing the effective term. The difficulty in quantifying

\begin{footnotesize}
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\item[309.] Note, \textit{supra} note 8, at 1128.
\item[310.] In response to such an argument, the Supreme Court of South Dakota remarked, "This argument is so patently inane that it deserves mention for that reason alone." \textit{State v. Weiker}, 342 N.W.2d 7, 11 (S.D. 1983), \textit{cert. denied}, 104 S. Ct. 1422 (1984).
\item[311.] See \textit{United States v. Greer}, 739 F.2d 262 (7th Cir. 1984); \textit{United States v. Ely}, 719 F.2d 902 (7th Cir. 1983); \textit{State v. Weiker}, 342 N.W.2d 7 (S.D. 1983).
\item[314.] See \textit{United States v. Won Chon}, 730 F.2d 1260 (9th Cir. 1984).
\item[317.] \textit{Gardner}, \textit{supra} note 45, at 1105. \textit{See} \textit{United States v. Serhant}, 740 F.2d 548 (7th Cir. 1984).
\item[318.] \textit{See} \textit{supra} Part IV.B.
\item[321.] \textit{See generally} \textit{Note, Criminal Law: Constitutionality of the Mandatory Minimum Sentence, 18 Washburn L.J. 166 (1978).}
\end{enumerate}
\end{footnotesize}
the probability that the sentence will be fully served is obvious. In an "as applied" analysis, it is impossible to decide the proportionality claim without knowing when offenders are released under the jurisdiction's parole system. Such uncertainty makes the successful claim all that more difficult. Post-conviction behavior basically is irrelevant to the proportionality doctrine yet is often controlling on the release issue. Even when early release is obtained, substantial limits on liberty remain as does the statistical likelihood of reincarceration for reasons having nothing to do with the underlying crime.

It is clear, however, that a sentence imposed without the possibility of premature release is more severe than one with that possibility. It is equally clear that the likelihood of release is a relevant factor in proportionality analysis of the severity of the punishment. The *Rummel* opinion emphasized the high probability of parole in Texas; the *Helm* opinion emphasized the low probability of commutation in South Dakota. While courts may be reluctant to "undertake a penological survey" on their own, counsel should obtain the relevant statistics and expert commentary and present them to the court. Federal guidelines, as nation-wide norms, may be highly relevant in this comparative analysis. Sociological arguments may be used to establish offense and punishment severity scales which quantify community perceptions. It is important to emphasize currency. Sentences imposed and upheld in years past are dim reflections of current societal attitudes. Likewise, it would seem that a sentence is always subject to challenge if it is arguably based on an erroneous perception of present attitudes.

The second objective factor, comparison with other crimes sentences in the same jurisdiction, is a relative measure. Considering the fairness and equality of the defendant's sentence requires context. The legislative context comes first. The court should consider sentences statutorily authorized within the jurisdiction and place the defendant's sentence within the jurisdic-

322. See generally Note, supra note 8, 1129-31. There is a conceptual difficulty, as well. Parole, reduction of sentence, and clemency are acts of executive grace and the defendant has no substantive constitutional interest in obtaining such relief. See Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979). Therefore, to consider such measures in proportionality analysis pivots a constitutional value on a purely discretionary and unreviewable practice. See *Rummel* v. Estelle, 445 U.S. at 293-95 (Powell, J., dissenting).


324. See *United States* v. Stead, 740 F.2d 657 (8th Cir. 1984); State v. Lathers, 444 So. 2d 96, 101 (La. 1983).


331. See generally Note, supra note 8, at 1131-32.
tional continuum of severity. Gradings and groupings of offenses are significant, as are traditional substantive criminal law concerns such as mandatory or discretionary sentences, the felony/misdemeanor distinction, and habitual offender treatment. Additionally, counsel should not overlook records of other actual sentencing decisions. Comparisons can be made through statistics, case reports, and the actual sentencing dispositions of co-conspirators and co-defendants.

The third objective factor, comparison with the same crime sentences in other jurisdictions, necessarily assumes the penal codes are the most objective evidence of absolute proportionality. While there is little risk of subjectivity, counsel and court must be sensitive to principles of federalism. Not all diversity among states is unconstitutional; some differences are entitled sovereign choices of a state’s legislature. The Constitution, as interpreted through the engine of judicial review, must be above state sovereignty; that much has been settled for a long time. Yet, it would be a mistake to believe that there was a specific model penal code in our national Jungian self-conscious. Regional and local differences exist. Our philosophy of punishment is eclectic; retribution, deterrence, and rehabilitation coexist in conflict. Moreover, idiosyncratic policies often explain the sentencing structure in a state. Counsel and court must be sensitive to particular legislative intents. “Stealing a horse in Texas may have different consequences and warrant different punishment than stealing a horse [in Florida].” Beyond such peculiarities, comparative statistics must be presented to the court. Regional influences and common perspectives may make some states’ statutes naturally more significant in the comparison. Careful and complete comparative research ought to be reduced to charts and tables to buttress conclusions. Nationwide compilation and analysis may be necessary.

V. CONCLUSION

Admittedly, the Supreme Court and lower federal courts must give due

334. See generally Note, supra note 8, at 1132-36.
336. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816). Justice Holmes once observed: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." O.W. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).
337. See supra text accompanying note 270.
338. See Note, supra note 75, at 513.
deference to the states' evaluations in sentencing and cannot be merely subjective in the analysis of cruel and unusual punishment challenges. Yet, "neither can [the courts] sanction as being merely unwise, that which the constitution forbids."\textsuperscript{342} Under commonly accepted and modern concepts of penology, the punishment is expected to fit the offender and the crime.\textsuperscript{343} The Court's analysis must be conducted accordingly, for the Constitution contemplates that ultimately the Court's judgment will be brought to bear on the questioned acceptability of a penalty under the eighth amendment. Punishments inevitably exist that should be barred by the eighth amendment and it matters not that they are approved by their authorizers or imposers.

The states are empowered to make sentencing decisions and the Supreme Court should not ordinarily invade that province. The interests of the nation are ordinarily best served when the constraints of federalism and comity are observed. It is therefore without dispute that, absent constitutional implications, the Court must be sensitive to valid state interests, deferring to the judgment of state legislators and state courts.

It is equally uncontroverted, however, that those same states are bound to obey the mandates of the federal Constitution. Therefore, the Supreme Court must be able and willing to evaluate their performances. Neither the enactment by the state legislature nor the ruling of the state sentencing court alone can determine eighth amendments rights, particularly when state opportunities to correct constitutional errors have been exhausted. Even in a recidivism context, where deference to state severity in sentencing may be heightened, the sentence is only "largely", and not exclusively, within the discretion of the state. To refute a check on that discretion would render it absolute and beyond the Constitution.

The caution with which the Court has historically intervened to find a punishment cruel and unusual reflects an almost too careful balance between deference to the principles of comity on the one hand and federalism rights on the other. When, however, a state act cannot keep company with the basic concepts of human dignity or other clear constitutional commands, the Court's duty, and not its discretion, is invoked.

Since its earliest confrontation with severity of sentencing and proportionality of punishment, the Supreme Court has, as in most criminal due process contexts, struggled with the concept of federalism. The present Court will be noted for its great deference to the states and for often preferring traditional institutional forces over constitutional guarantees. In \textit{Rummel}, the majority sought to develop elaborate barriers behind which to retreat. A sophisticated state violation of human dignity was immunized in the process. In \textit{Rummel} and in \textit{Davis}, the majority had great difficulty in implementing its few broad policy decisions. The abdication soon proved too much. In \textit{Helm}, a new majority of those present at the decision of \textit{Rummel} recognized the inability or unwillingness of some state criminal justice systems to foster constitutional guarantees. In reaffirming principles of proportionality in sentencing, the \textit{Helm} majority was in reality reasserting its

\textsuperscript{342} Trop v. Dulles, 356 U.S. at 103.
role as a part-time Republican conscience—"part-time" because there can be no absolutism in developing a role for the Supreme Court in the Republic. Above all else, there must be the threat of constitutional scrutiny.

In the past, the Court's infrequent reliance on the proportionality principle resulted from an uncertainty sounding of constitutional dimension. It may be that hard cases make bad law. In proportionality review, at least, some bad cases have made cruel and unusual law. The trilogy of decisions, *Rummel*, *Davis*, and *Helm*, are not without their remaining uncertainties. Still, these decisions have gone far to clarify the law. It is unlikely that there will be a deluge of proportionality reversals. On the contrary, the principle must be applied selectively to have continued legitimacy. Most sentences are invulnerable. Only in the close cases will the reviewing court need to agonize through the three-part analysis. The courts will play their proper role and the Constitution will be served. In time, the punishment will fit the crime.345

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345. *W. Gilbert & A. Sullivan, Mikado*, in *The Complete Plays of Gilbert and Sullivan* 331 (W. Norton ed. 1976) (quoted in *Mulligan*, supra note 10, at 639 n.3.) ("My object all sublime / I shall achieve in time / To let the punishment fit the crime—/ The Punishment fit the crime.")