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## Eight Amendment--Cruel and Unusual Punishment: Habitual Offender's Life Sentence without Parole is Disproportionate

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# EIGHTH AMENDMENT—CRUEL AND UNUSUAL PUNISHMENT: HABITUAL OFFENDER'S LIFE SENTENCE WITHOUT PAROLE IS DISPROPORTIONATE

**Solem v. Helm, 103 S. Ct. 3001 (1983).**

## I. INTRODUCTION

In *Solem v. Helm*,<sup>1</sup> the Supreme Court, for the first time, held a sentence of imprisonment to be cruel and unusual because it was disproportionate to the crime committed. The Court overturned a life sentence without parole imposed under a recidivist statute on a defendant who had been convicted of seven relatively minor felonies. The Court held that the sentence was disproportionate and thus violated the eighth amendment's prohibition against cruel and unusual punishment.<sup>2</sup>

Whether the eighth amendment proportionality analysis<sup>3</sup> would be applied to sentences other than death was in doubt after the Supreme Court refused, in its 1980 decision in *Rummel v. Estelle*,<sup>4</sup> to apply the analysis to a mandatory sentence of life with parole. The Court's decision in *Helm* establishes that this analysis will be applied to non-capital sentences, at least to those for life without parole. However, the decision leaves the relationship between the proportionality test used in capital cases and that used in non-capital cases unclear. Moreover, the Court's attempt to distinguish *Helm* from *Rummel* on the basis that *Helm* was sentenced to life without parole is formalistic and not consistent with the Court's recent treatment of parole and commutation. It seems that the Court's decision in *Helm* can best be explained by the Court's concerns about individualized sentencing, guided sentencing discretion, and federalism.

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<sup>1</sup> 103 S. Ct. 3001 (1983).

<sup>2</sup> The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The cruel and unusual punishment clause of the eighth amendment applies to the states under the fourteenth amendment. *Robinson v. California*, 370 U.S. 660 (1962).

<sup>3</sup> See *infra* note 18 and accompanying text.

<sup>4</sup> 445 U.S. 263 (1980).

II. FACTS OF *HELM*

Jerry Buckley Helm pled guilty in a South Dakota circuit court to a charge of uttering a \$100 "no account" check.<sup>5</sup> The maximum penalty for this charge was five years' imprisonment and a \$5,000 fine,<sup>6</sup> but the South Dakota recidivist statute provided for a maximum penalty of life imprisonment and a \$25,000 fine upon a fourth felony conviction.<sup>7</sup> Helm had previously been convicted in South Dakota of six felonies,<sup>8</sup> all of which were nonviolent and involved alcohol as a contributing factor.<sup>9</sup> Although Helm was informed that a guilty plea could result in a life sentence, he waived his rights to a preliminary hearing and a presentence investigation, insisted on pleading guilty, and demanded immediate sentencing.<sup>10</sup> The judge sentenced Helm to life imprisonment, which, in South Dakota, was without possibility of parole.<sup>11</sup>

The South Dakota Supreme Court affirmed Helm's sentence, re-

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<sup>5</sup> *Solem v. Helm*, 103 S. Ct. 3001, 3005 (1983). Helm was charged under S.D. CODIFIED LAWS ANN. § 22-41-1.2 (1979). Helm offered the following explanation of his crime to the state trial court:

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

103 S. Ct. at 3005.

<sup>6</sup> S.D. CODIFIED LAWS ANN. § 22-6-1(6) (1979) (now codified at S.D. CODIFIED LAWS ANN. § 22-6-1(7) (Supp. 1983)).

<sup>7</sup> S.D. CODIFIED LAWS ANN. §§ 22-7-8 (1979) (amended 1981), 22-6-1(2) (1979) (now codified at S.D. CODIFIED LAWS ANN. § 22-6-1(3) (Supp. 1983)).

<sup>8</sup> 103 S. Ct. at 3004. In 1964, 1966, and 1969, Helm was convicted of third-degree burglary under S.D. CODIFIED LAWS ANN. §§ 22-32-8, 22-32-9 (1967) (repealed 1976). In 1972, Helm was convicted of obtaining money under false pretenses under S.D. CODIFIED LAWS ANN. § 22-41-4 (1967) (repealed 1976). In 1973, Helm was convicted of grand larceny under S.D. CODIFIED LAWS ANN. §§ 22-37-1, 22-37-2 (1967) (repealed 1976). In 1975, Helm was convicted of third-offense driving while intoxicated under S.D. CODIFIED LAWS ANN. § 32-23-4 (1976) (amended 1982).

<sup>9</sup> 103 S. Ct. at 3005.

<sup>10</sup> *State v. Helm*, 287 N.W.2d 497, 498 (S.D. 1980).

<sup>11</sup> 103 S. Ct. at 3005; S.D. CODIFIED LAWS ANN. § 24-15-4 (1979). The sentencing judge may have been unaware that parole would not be available. When sentencing Helm, the judge made the following statements:

Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all of this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.

It will be up to you and the parole board to work out when you finally get out, but I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.

287 N.W.2d at 500 (Henderson, J., dissenting).

jecting his claim that it constituted cruel and unusual punishment.<sup>12</sup> The governor of South Dakota denied Helm's request to commute his sentence to a fixed term of years.<sup>13</sup> Helm then sought habeas corpus relief.<sup>14</sup> The district court denied relief but the Court of Appeals for the Eighth Circuit reversed, holding that the life sentence without parole was unconstitutionally disproportionate to the offense and directing the district court to issue a writ of habeas corpus unless the state resentenced Helm within sixty days.<sup>15</sup> The Supreme Court granted certiorari to consider the eighth amendment question.<sup>16</sup>

### III. SUPREME COURT OPINIONS IN *HELM*

In a five to four decision, the Supreme Court affirmed the decision of the court of appeals and held that Helm's sentence violated the eighth amendment.<sup>17</sup> Writing for the majority, Justice Powell concluded that the eighth amendment forbids sentences of imprisonment that are disproportionate to the offense.<sup>18</sup> The Court found that "[t]he principle that a punishment should be proportionate to the crime"<sup>19</sup> had been explicitly recognized by the Court in *Weems v. United States*,<sup>20</sup> *Robinson v. California*,<sup>21</sup> and *Enmund v. Florida*,<sup>22</sup> and was part of English law and the American Bill of Rights.<sup>23</sup> Acknowledging its previous statement that

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<sup>12</sup> *State v. Helm*, 287 N.W.2d 497 (S.D. 1980).

<sup>13</sup> 103 S. Ct. at 3006.

<sup>14</sup> Helm sought habeas corpus relief pursuant to 28 U.S.C. § 2241(c)(3) (1976).

<sup>15</sup> *Helm v. Solem*, 684 F.2d 582, 587 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3001 (1983). The court of appeals recommended that a presentence investigation be conducted before Helm was resentenced. *Id.* at 587 n.17.

<sup>16</sup> 103 S. Ct. 339 (1982).

<sup>17</sup> 103 S. Ct. 3001, 3016 (1983).

<sup>18</sup> *Id.* at 3009. The eighth amendment imposes several limitations on the government's power to punish. The eighth amendment prohibits modes of punishment that are inherently cruel. *See, e.g.*, *Weems v. United States*, 217 U.S. 349 (1910); *cf. In re Kemmler*, 136 U.S. 436 (1890) (electrocution not impermissibly cruel method of execution); *Wilkerson v. Utah*, 99 U.S. 130 (1878) (death by firing squad not impermissibly cruel method of execution). It prohibits punishing someone for a noncriminal status. *Robinson v. California*, 370 U.S. 660 (1962) (imprisonment for being a heroin addict unconstitutional). *But see Powell v. Texas*, 392 U.S. 514 (1968) (alcoholic can be punished for being drunk in public). In addition the eighth amendment prohibits excessive punishment. *Enmund v. Florida*, 102 S. Ct. 3368 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). Punishment is excessive when it either "(1) makes no measurable contribution to acceptable goals of punishment . . . or (2) is grossly out of proportion to the severity of the crime." *Coker*, 433 U.S. at 592; *see Gregg*, 428 U.S. at 173. Helm challenged his sentence on the ground that it was disproportionate to his crime, and thus excessive punishment.

<sup>19</sup> 103 S. Ct. at 3006.

<sup>20</sup> 217 U.S. 349 (1910).

<sup>21</sup> 370 U.S. 660 (1962).

<sup>22</sup> 102 S. Ct. 3368 (1982).

<sup>23</sup> 103 S. Ct. at 3007. The tenth clause of the 1689 English Bill of Rights states: "That

“[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,”<sup>24</sup> the Court nevertheless held that non-capital sentences must be proportionate to the crimes.<sup>25</sup>

In determining whether Helm’s sentence was proportionate, the Court considered the following “objective”<sup>26</sup> factors: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”<sup>27</sup> The Court first determined that Helm’s current offense was not serious,<sup>28</sup> that the previous offenses, for which he was being punished as a recidivist, were all “relatively minor,”<sup>29</sup> and that life without parole was the harshest punishment that could have been imposed for any crime in South Dakota.<sup>30</sup>

The Court then examined the sentences that South Dakota imposed for other felonies.<sup>31</sup> The Court listed the crimes for which the pun-

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excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.” See Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839, 853 (1969) (footnote omitted). The eighth amendment contains similar language. See *supra* note 2 and accompanying text. Commentators have argued that the amendment was intended to prohibit disproportionate punishment. According to these commentators, since the English provision prohibited excessive penalties and the Framers either knew or should have known this, the prohibition was carried into the eighth amendment. Granucci, *supra*; Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975). *Contra*, R. BERGER, DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE 29-43 (1982); Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 FORDHAM L. REV. 639 (1979); Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 378-82 (1980).

<sup>24</sup> 103 S. Ct. at 3009 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)). The proportionality analysis has been applied principally in capital cases. See *Enmund*, 102 S. Ct. at 3368; *Coker*, 433 U.S. at 584; *Gregg*, 428 U.S. at 153.

<sup>25</sup> 103 S. Ct. at 3009.

<sup>26</sup> The Supreme Court referred to all of these factors as “objective” ones. *Id.* at 3011. *But see infra* notes 87-105 and accompanying text.

<sup>27</sup> *Id.* at 3011. The Court cautioned that “no single criterion can identify when a sentence is . . . grossly disproportionate,” but stated that “a combination of objective factors can make such analysis possible.” *Id.* at 3010 n.17. The Court rejected the argument that application of these criteria involved legislative line-drawing that could not be done by courts. The Court stated that courts could judge the severity of a crime and cited examples of widely agreed-upon criteria for distinguishing crimes by severity. These were: violence; the type and amount of harm caused; and the offender’s moral culpability. *Id.* at 3011.

<sup>28</sup> The Court characterized the crime as “passive,” nonviolent, and not involving a large amount of money. *Id.* at 3012-13.

<sup>29</sup> *Id.* at 3013. The Court also noted that the sentence would not advance the goals of the criminal justice system and would remove any incentive to provide treatment for Helm’s alcohol problem. *Id.* at 3013 n.22.

<sup>30</sup> *Id.* at 3013. South Dakota did not permit capital punishment at that time. *Id.*

<sup>31</sup> *Id.* at 3014. The Court took repeat offender statutes into account.

ishment was a mandatory life sentence,<sup>32</sup> crimes for which a judge could, in his discretion, impose a life sentence,<sup>33</sup> and those for which the maximum sentence was a term of years.<sup>34</sup> The Court noted that no habitual offender other than Helm had ever received life imprisonment for offenses as minor as those committed by Helm.<sup>35</sup> The Court determined that Helm had been treated more severely than others who had committed far more serious crimes in South Dakota.<sup>36</sup> Finally, the Court found that Helm could have received such a sentence only in one other state, Nevada, and noted that no evidence had been presented that criminals convicted of crimes similar to Helm's had ever received a life sentence without parole in Nevada.<sup>37</sup> The Court therefore concluded that "Helm was treated more severely than he would have been in any other State."<sup>38</sup>

The Court distinguished its recent holding in *Rummel v. Estelle*,<sup>39</sup> that a sentence of life imprisonment with parole for three minor felonies did not violate the eighth amendment, by pointing to the difference between parole and commutation. Parole is a "regular part of the rehabilitative process" and is "the normal expectation in the vast majority of cases,"<sup>40</sup> while commutation is an "*ad hoc* exercise of executive clemency" which may occur "at any time for any reason without reference to any standards."<sup>41</sup> While the Court admitted that *Rummel* rejected a proportionality challenge to a particular sentence, it emphasized that *Rummel* "should not be read to foreclose proportionality review of sentences of imprisonment."<sup>42</sup> The Court noted that in *Rummel* it had "carefully 'distinguish[ed] Rummel from a person sentenced under a recidivist statute . . . which provides for a sentence of life without parole.'" <sup>43</sup>

Because Helm had "received the penultimate sentence for relatively minor criminal conduct"<sup>44</sup> and was treated more harshly than criminals convicted of similar crimes, the Court concluded that Helm's

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<sup>32</sup> Such crimes include murder (where it is the offender's first conviction), treason, and first degree manslaughter (where the offender has one or two prior felony convictions). *Id.*

<sup>33</sup> Such crimes include first degree manslaughter (where it is the offender's first conviction), attempted murder, and first degree rape (where the offender has only one or two prior felony convictions). *Id.*

<sup>34</sup> Such crimes include attempted murder (where it is the offender's first conviction), first degree rape, and heroin dealing. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 3015.

<sup>39</sup> 445 U.S. 263 (1980).

<sup>40</sup> 103 S. Ct. at 3015.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 3016 n.32.

<sup>43</sup> *Id.* at 3015 n.28 (quoting *Rummel*, 445 U.S. at 281).

<sup>44</sup> *Id.* at 3016.

sentence was unconstitutionally disproportionate to his crime.<sup>45</sup>

In dissent, Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, argued that *Rummel* was correctly decided and should determine the result in this case. The dissent wrote that *Rummel* rejected eighth amendment proportionality review of sentences of imprisonment.<sup>46</sup> According to the dissent, the proportionality analysis should not be applied to sentences of imprisonment for two reasons. First, the length of imprisonment is solely a matter of legislative prerogative. Second, there is no bright line separating one sentence of imprisonment from another, or indicating the appropriate length of imprisonment for a particular crime.<sup>47</sup> The dissent noted that each of the three factors considered by the majority in declaring Helm's sentence disproportionate<sup>48</sup> had been categorically rejected by the *Rummel* Court because they were subjective and violated principles of federalism.<sup>49</sup> The dissent denied that Helm's ineligibility for parole distinguished his case from *Rummel*'s.<sup>50</sup> Finally, the dissent argued that because the majority failed to stipulate the prison sentences to which the proportionality analysis would be applied, the majority's decision would result in appellate review of all sentences of imprisonment.<sup>51</sup>

#### IV. ANALYSIS

In *Solem v. Helm*, the Court held for the first time that, under the eighth amendment, prison sentences, at least those for life without parole, must be proportionate to the crime.<sup>52</sup> Three years before, however,

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 3017-18 (Burger, C.J., dissenting).

<sup>47</sup> *Id.* at 3019 (Burger, C.J., dissenting).

<sup>48</sup> See *supra* note 27 and accompanying text.

<sup>49</sup> 103 S. Ct. at 3019-20. The dissent also noted that the Court had reaffirmed this position two years later in *Hutto v. Davis*, 454 U.S. 370 (1982).

<sup>50</sup> 103 S. Ct. at 3021 n.4, 3023 (Burger, C.J., dissenting).

<sup>51</sup> *Id.* at 3022 (Burger, C.J., dissenting).

<sup>52</sup> *Weems v. United States*, 217 U.S. 349 (1910), was cited by the *Helm* Court and has been cited by commentators as applying a proportionality analysis to a prison sentence. 103 S. Ct. at 3008; Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 990 n.7 (1978); see e.g., *Furman v. Georgia*, 408 U.S. 238, 324-25 (1972) (Marshall, J., concurring). It is not at all clear, however, that such was the case. In *Weems*, the defendant, a Philippine official, was convicted of falsifying a public document and sentenced to fifteen years in *cadena temporal*. (*Cadena temporal* was imprisonment at hard and painful labor followed by perpetual surveillance and loss of civil rights.) The Court declared the punishment cruel and unusual in both mode and extent, stating: "[The punishment] is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind." 217 U.S. at 377. The decision thus seems to have been based on the Court's holding that the *mode* of punishment was cruel and unusual. Support for a proportionality holding in *Weems* has been taken from the Court's isolated statement that "[s]uch penalties for such offenses amaze those

in *Rummel v. Estelle*,<sup>53</sup> the Court declined to hold that a life sentence with parole was disproportionate. The Court in *Helm* distinguished *Rummel* on the basis that *Helm* had no possibility of parole. This Note will show that this distinction is inconsistent with the Court's prior treatment of parole and commutation, and that the exercise of judicial sentencing discretion in *Helm* and its absence in *Rummel* better explains the different results reached in these two cases. This Note will also show that the proportionality analysis used by the *Helm* majority is different from the proportionality test used by the Court in capital cases. The *Helm* decision thus leaves the relationships between the proportionality test used in capital cases and that used in non-capital cases unclear.

#### A. THE COURT'S DISTINCTION BETWEEN *RUMMEL* AND *HELM*

The Court recently rejected a proportionality challenge to a non-capital sentence in *Rummel v. Estelle*.<sup>54</sup> *Rummel* was convicted of three felonies involving the fraudulent obtainment of money; the total amount obtained was \$230.<sup>55</sup> The prosecutor charged *Rummel* under Texas's recidivist statute,<sup>56</sup> which imposed a mandatory life sentence upon conviction of a third felony. The Court, in a five-four decision,<sup>57</sup> rejected *Rummel's* habeas corpus claim that his life sentence was disproportionate punishment and thus cruel and unusual.<sup>58</sup>

In *Rummel*, the Court did not clearly reject proportionality analysis for non-capital cases but indicated that it would rarely, if ever, find a sentence of imprisonment disproportionate. Reviewing its past cases, the Court stated:

Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.<sup>59</sup>

*Weems* and the capital punishment cases were declared of little relevance because of the unique nature of the punishments involved:

"Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." Since *Coker* involved

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who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 366-67.

<sup>53</sup> 445 U.S. 263 (1980).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 265-66.

<sup>56</sup> TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974).

<sup>57</sup> Justices Powell, Brennan, Marshall, and Stevens dissented. 445 U.S. at 285.

<sup>58</sup> *Id.* at 265.

<sup>59</sup> *Id.* at 274. The Court left open the possibility that proportionality would apply in the hypothetical example of life imprisonment for overtime parking. *Id.* at n.11.

the imposition of capital punishment . . . this Court could draw a "bright line" between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction . . . . [T]his line was considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years.<sup>60</sup>

The Court in *Rummel* examined factors suggested by the defendant for judging the proportionality of the sentence but found that, because of considerations of federalism and the complications of parole and recidivist punishment, these factors did not justify a finding of disproportionality. These factors, later adopted by the majority in *Helm*,<sup>61</sup> were: the severity of the crime and of the punishment; sentences for other crimes in the same jurisdiction (intra-jurisdictional comparison); and sentences for the same crime in other jurisdictions (inter-jurisdictional comparison). The Court found violence and the value of property to be unsatisfactory criteria for judging the severity of a crime.<sup>62</sup> The Court accepted segregation of recidivists from society as a goal of punishment and stated that "the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction."<sup>63</sup> The intra-jurisdictional comparison, complicated by *Rummel*'s recidivism, was "inherently speculative,"<sup>64</sup> and the inter-jurisdictional comparison showed subtle, not gross, disparities<sup>65</sup> and did not reflect different states' parole practices.<sup>66</sup>

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<sup>60</sup> *Id.* at 274-75 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)).

<sup>61</sup> *See supra* note 27 and accompanying text.

<sup>62</sup> 445 U.S. at 282 & n.27.

<sup>63</sup> *Id.* at 285.

<sup>64</sup> *Id.* at 282 n.27.

<sup>65</sup> *Id.* at 279.

<sup>66</sup> *Id.* at 280-81. The Court rejected another proportionality challenge in 1982. In *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam), the Court found that a 40-year sentence for possessing and intending to distribute nine ounces of marijuana did not violate the eighth amendment. *Id.* at 375. The maximum sentence for the offenses was 80 years. *See id.* at 371. The court of appeals had found the sentence disproportionate using the four-factor proportionality test suggested by the Fourth Circuit in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974). The factors considered under this test were: the nature and gravity of the offense; the legislative purpose of the punishment; punishment of the crime in other jurisdictions; and punishment of other crimes in the same jurisdiction. *Id.* at 140-43. In *Hutto*, the Supreme Court reaffirmed *Rummel*, rejected each of the four factors, and indicated that *Rummel* had implicitly rejected the factors considered in *Hart*. 454 U.S. at 373-74 & n.2. The Supreme Court chided the court of appeals for failing to follow *Rummel*:

*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" . . . . By affirming the District Court decision after our decision in *Rummel*, the Court of Appeals sanctioned an intrusion into the basic line-drawing process that is "properly within the province of legislatures, not courts."

*Id.* at 374 (quoting *Rummel*, 454 U.S. at 272, 274, 275-76).

Justices Brennan, Marshall, and Stevens dissented, viewing the opinion as an improper

The *Helm* Court distinguished *Rummel* on the basis that parole was available to Rummel and not to Helm.<sup>67</sup> It appears that the main reason the Court thought this distinction to be important was its belief that a life sentence without parole, unlike a sentence of life with parole, is similar to capital punishment.<sup>68</sup> In *Rummel*, the Court found the death penalty cases, in which the proportionality analysis had been applied, to be of limited relevance because there was no bright line between one sentence of imprisonment and another as there was between death and other punishments.<sup>69</sup> The *Helm* Court felt that life imprisonment without parole was, like capital punishment, qualitatively different from a sentence for a term of years because the only hope of release is commutation.<sup>70</sup> The *Helm* Court seemed to suggest that a prisoner sentenced to life with parole legitimately has a greater expectation of release than does a prisoner sentenced to death or to life without parole. In other words, the Court suggested that the possibility of receiving parole is much greater than is the possibility of commutation, which, according to the Court, is granted “*ad hoc*” and “without reference to any standards.”<sup>71</sup>

The Court’s distinction between life with parole and life without parole is formalistic and inconsistent with the Court’s recent treatment of parole and commutation. While the Court has recently emphasized the difference between parole and commutation,<sup>72</sup> the Court has also held that, in the absence of a statutorily granted expectation, there is no constitutionally protected right to parole.<sup>73</sup> Moreover, the Court has not always characterized clemency as standardless. Members of the Court have assumed that clemency will be exercised in a principled

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expansion of *Rummel* and as an abdication of the Court’s responsibility to enforce the eighth amendment. The dissent read *Rummel* as approving the application of a proportionality analysis to non-capital sentences: “*Rummel* rests on the understanding that, as a consequence of the overwhelming state interests in deterring habitual offenders, the Eighth Amendment does not preclude a State from imposing *what might otherwise constitute a disproportionate prison sentence* on an individual determined under state law to be a habitual offender. *Id.* at 383 (Brennan, J., dissenting) (emphasis in original).

<sup>67</sup> See *supra* notes 39-41 and accompanying text.

<sup>68</sup> See *supra* note 43 and accompanying text.

<sup>69</sup> See *supra* note 60 and accompanying text.

<sup>70</sup> See *supra* notes 39-41 and accompanying text. Because clemency is also available in capital cases, the possibility of clemency in *Helm* did not differentiate Helm’s life sentence from a death sentence.

<sup>71</sup> 103 S.Ct. at 3015.

<sup>72</sup> *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 461 (1981) (prisoner denied commutation has no right to explanation from Pardons Board even though 75% of commutation requests granted).

<sup>73</sup> *Greenholtz v. Inmates*, 442 U.S. 1 (1979); see *Dumschat*, 452 U.S. at 465.

manner and will not be standardless or arbitrary.<sup>74</sup> The Court has held that capital sentencing juries may consider the fact that life sentences can be commuted, rejecting arguments that such consideration injected a speculative element into the sentencing process.<sup>75</sup>

The Court's belief that life without parole is similar to capital punishment is not consistent with the Court's rationale for treating capital punishment differently from other punishments. The Court has reasoned that there is greater need for reliability in capital sentencing because the punishment is final and irrevocable. If the defendant is wrongfully convicted, there is no possibility of relief after execution.<sup>76</sup> Life sentences with parole and without parole are both unlike death sentences in this respect,<sup>77</sup> and thus the absence of parole does not justify the application of a capital punishment analysis to a life sentence. Therefore, the distinction between *Helm* and *Rummel* based on the possibility of parole, while expedient, seems unprincipled.

The different results in *Rummel* and *Helm* are more likely to have been caused by the role judicial sentencing discretion played in *Helm*. *Rummel* was sentenced pursuant to a statute providing that a habitual offender receive a mandatory life sentence.<sup>78</sup> *Helm* was sentenced pursuant to a statute authorizing a maximum enhanced sentence of life imprisonment but providing for no minimum sentence.<sup>79</sup> Presumably, the trial judge could have given *Helm* any sentence up to life imprisonment.

The judicial discretion involved in *Helm* undermines the *Rummel* Court's primary reason for rejecting *Rummel*'s proportionality challenge. In *Rummel*, the Court emphasized that deciding the appropriate punishment for a crime was a matter of legislative prerogative and that courts could not perform this function.<sup>80</sup> The Court refused to substitute its own judgment for that of the Texas legislature. The legislature had the authority to judge the state's interest in confining repeat offenders, and the recidivist statute was "nothing more than a societal decision that when such a person as the defendant commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life . . . ."<sup>81</sup> Because the South Dakota legislature made the more

<sup>74</sup> *California v. Ramos*, 103 S. Ct. 3446, 3465 (1983) (Marshall, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 349-50 (1976) (White, J., dissenting).

<sup>75</sup> *California v. Ramos*, 103 S. Ct. 3446 (1983).

<sup>76</sup> *E.g.*, *Ramos*, 103 S. Ct. at 3451; *Zant v. Stephens*, 103 S. Ct. 2733, 2747 (1983); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

<sup>77</sup> Radin, *supra* note 52, at 1022-23.

<sup>78</sup> See *supra* note 56 and accompanying text.

<sup>79</sup> See *supra* note 7 and accompanying text.

<sup>80</sup> See *supra* note 59 and accompanying text.

<sup>81</sup> 445 U.S. at 278.

limited judgment that persons convicted of four felonies could be deserving of terms of up to life imprisonment, legislative judgment was not being reviewed by the *Helm* Court.<sup>82</sup> The *Helm* Court could invalidate an individual sentence without invalidating a statutory scheme of punishment.<sup>83</sup>

Viewing the *Helm* decision in this way suggests that the Court may begin to review the sentencing discretion exercised in non-capital cases. Generally, a sentence within statutory limits is not subject to judicial review.<sup>84</sup> The Court has reviewed judicial sentencing discretion only in death penalty cases.<sup>85</sup> The Court's invalidation of the discretionary sentence imposed in *Helm* may indicate that in the future the Court will review the exercise of discretion in non-capital cases. If such is the case, the Court will not only be following the course it has adopted in death penalty cases; it will also be following the current trend favoring a curtailment of judicial sentencing discretion.<sup>86</sup>

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<sup>82</sup> 103 S. Ct. at 3014 n.26. One commentator has noted that when the legislature delegates to the judiciary the authority to choose from a wide range of sentences, it is reasonable to believe that the legislature has assumed that the judiciary will impose sentences proportionate to the crimes. Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1160, 1165 (1979).

<sup>83</sup> The *Helm* Court recognized this distinction. 103 S. Ct. at 3014 n.26.

<sup>84</sup> *E.g.*, *United States v. Tucker*, 404 U.S. 443, 446-47 (1972); *Gore v. United States*, 357 U.S. 386, 393 (1958); see Note, *Constitutional Law—Eighth Amendment—Appellate Sentence Review*, 1976 WIS. L. REV. 655, 660 nn.34-35. One possible exception to this general rule is where the sentence imposed may be due to judicial vindictiveness. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court held that imposition of a more severe sentence upon retrial by the same judge could raise a presumption of judicial vindictiveness and that, to rebut this presumption, the reasons for imposition of a more severe sentence after retrial had to appear in the record and had to be based on the defendant's conduct following the original sentence.

<sup>85</sup> Only in capital cases has sentence individualization (that is, tailoring the sentence to the circumstances of the offense and the characteristics of the offender) been held to be constitutionally required. *Zant v. Stephens*, 103 S. Ct. 2733, 2743-44 (1983); *Lockett v. Ohio*, 438 U.S. 586, 602, 605 (1978) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). The Supreme Court has also required that capital sentencing discretion be limited and channeled, so that a death sentence is not imposed in an arbitrary manner. *E.g.*, *Zant v. Stephens*, 103 S. Ct. 2733 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Dix*, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Note, *Eighth Amendment—The Death Penalty*, 71 J. CRIM. L. & CRIMINOLOGY 538 (1980).

<sup>86</sup> In recent years numerous proposals have been made to reduce sentencing discretion and sentencing disparity for non-capital crimes. M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978); Forst & Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment*, 33 RUTGERS L. REV. 799 (1981). Recent interest in curtailing sentencing discretion appears to be due, at least in part, to the resurgence of the "just deserts" or retribution theory of punishment and the decline of rehabilitation as a justification for punishments. See R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* (1979); Forst &

## B. PROPORTIONALITY TESTS IN CAPITAL AND NON-CAPITAL CASES

The proportionality test used in *Helm* was different from the proportionality test the Court has applied in death penalty cases such as *Coker v. Georgia*<sup>87</sup> and *Enmund v. Florida*.<sup>88</sup>

In *Coker*, a plurality of the Court held that death was a disproportionate and thus excessive penalty for the rape of an adult woman.<sup>89</sup> The plurality's proportionality analysis consisted of two steps. First, the Court examined objective evidence to determine whether imposing the death penalty for the crime of rape was acceptable to contemporary society. The objective evidence examined included: whether other states imposed the death penalty for rape;<sup>90</sup> whether juries had given the death sentence to rapists;<sup>91</sup> and whether more serious crimes had less severe maximum penalties.<sup>92</sup> Second, the plurality applied its own judgment to determine whether the crime was serious enough to warrant the harshest penalty society imposes.<sup>93</sup> The Court indicated that its subjective judgment, not the objective evidence, was the decisive factor in determining proportionality.<sup>94</sup>

The Court next decided, in *Enmund*, that death was an unconstitutionally disproportionate penalty for an aider and abettor in a murder who did not take or attempt or intend to take life.<sup>95</sup> The Court used the analysis developed in *Coker*,<sup>96</sup> again emphasizing that whether the penalty was proportionate to the crime depended on the Court's own

Wellford, *supra*, at 821; von Hirsch, *Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Criminal Sentencing*, 33 RUTGERS L. REV. 772, 772 (1981).

<sup>87</sup> 433 U.S. 584 (1977).

<sup>88</sup> 102 S. Ct. 3368 (1982).

<sup>89</sup> 433 U.S. at 584. Justices White, Stewart, Blackmun, and Stevens held that death was disproportionate for rape. Justices Brennan and Marshall concurred, concluding that death was cruel and unusual under all circumstances. Justice Powell concurred that death was excessive in this case but dissented from the holding that it would be in all cases of rape. Chief Justice Burger and Justice Rehnquist dissented.

<sup>90</sup> 433 U.S. at 593-96.

<sup>91</sup> *Id.* at 596-97.

<sup>92</sup> *Id.* at 600.

<sup>93</sup> *Id.* at 597-98.

<sup>94</sup> The Court stated:

[T]he attitude[s] of state legislatures and sentencing juries do not wholly determine [t]he controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment. Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman.

*Id.* at 597. In his concurring opinion, Justice Powell agreed that the ultimate decision was one for the Court's judgment. *Id.* at 603 n.2 (Powell, J., concurring). The dissent argued that the subjective views of members of the Court should not enter into the Court's decision. *Id.* at 619-22 (Burger, C.J., dissenting).

<sup>95</sup> 102 S. Ct. at 3379.

<sup>96</sup> *See supra* notes 89-94 and accompanying text.

judgment.<sup>97</sup>

In *Helm*, the Court did not apply the same test, although it drew support from *Coker* and *Enmund* in formulating the test. The *Helm* Court examined the same factors as those considered in *Coker* and *Enmund*. Public opinion was determined through interjurisdictional and intrajurisdictional comparisons. In considering the gravity of the offense, the harm caused and the moral culpability of the offender were discussed,<sup>98</sup> as they were in *Coker* and *Enmund*.<sup>99</sup> In *Helm*, however, the Court emphasized that all the factors were objective and that no one factor was determinative,<sup>100</sup> while in *Coker* and *Enmund* the Court stated that its subjective determination of the severity of the offense and the harshness of the punishment was decisive.<sup>101</sup> The Court in *Helm* cited *Coker* and *Enmund* as the source of the factors<sup>102</sup> but did not assert that it was applying the same proportionality test it had applied in those death penalty cases.

It is likely that the Court in *Helm* referred to the "severity of the crime versus the harshness of the penalty" factor as an "objective" one in order to be consistent with *Rummel*, where even the "objective" factors involved in determining public opinion were dismissed as inherently speculative or violative of federalism concerns.<sup>103</sup> Whether the "severity-harshness" factor is called subjective or objective may be immaterial; determination of the severity of a crime is inherently the most subjective of the factors considered.<sup>104</sup> It seems clear that, at least in non-capital cases, no one factor is determinative. Whether the same is now true for capital cases as well is not clear. Since *Rummel* emphasized the distinction between capital and non-capital proportionality review, and the Court in *Helm* was careful not to overrule *Rummel*, it seems unlikely that the Court intended to change the proportionality test used in capital cases. However, the *Helm* Court's distinction between *Helm* and *Rummel* on the basis of parole allows *Helm* to be interpreted as applying a proportionality test only because a life sentence without parole is analogous

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<sup>97</sup> The Court stated:

Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place . . . . We have concluded, along with most legislatures and juries, that it does not.

102 S. Ct. at 3376-77.

<sup>98</sup> *Helm*, 103 S. Ct. at 3011.

<sup>99</sup> 433 U.S. at 597-600; 102 S. Ct. at 3376-78.

<sup>100</sup> 103 S. Ct. at 3010 n.17.

<sup>101</sup> See *supra* notes 94, 97 and accompanying text.

<sup>102</sup> 103 S. Ct. at 3010.

<sup>103</sup> See *supra* notes 61-66 and accompanying text.

<sup>104</sup> See *Coffee, supra* note 86, at 1007-08; Note, *supra* note 84, at 664.

to death.<sup>105</sup> If *Helm* is read in this way, the Court may apply the *Helm* formulation of the proportionality test in future capital cases.

## V. IMPLICATIONS

The *Helm* decision makes it clear that life sentences without parole imposed in a judge's discretion may be found disproportionate. Mandatory sentences are unlikely to be found disproportionate because of the unacceptable impact such a result would have on legislative discretion to decide the appropriate punishment for a crime. Because the Court is reluctant to compare the severity of imprisonment for different numbers of years,<sup>106</sup> sentences for terms of years are unlikely to be found disproportionate unless the sentencing process changes to include structures, such as guidelines, sentencing councils, and required articulation of reasons for sentences, for narrowing sentencing discretion.

One issue that will be pressed in future proportionality challenges is the likelihood of parole and commutation under different state systems.<sup>107</sup> The *Helm* Court emphasized South Dakota's low rate of commutation, while the *Rummel* Court emphasized the high probability of parole in Texas.<sup>108</sup>

The new flood of cases challenging sentences on the basis of proportionality predicted by the *Helm* dissent<sup>109</sup> is unlikely to appear.<sup>110</sup> In the years before *Rummel*, state and lower federal courts rejected many proportionality challenges and found only a few sentences disproportionate.<sup>111</sup> Challenges did not cease after *Rummel*<sup>112</sup> and are unlikely to

<sup>105</sup> See *supra* notes 69-70 and accompanying text.

<sup>106</sup> *Hutto*, 454 U.S. at 373; *Rummel*, 445 U.S. at 275.

<sup>107</sup> See Note, *Helm v. Solem: A Favorable Decision for Recidivists Facing Life Sentences Without Parole*, 27 ST. LOUIS U.L.J. 663, 682 (1983).

<sup>108</sup> 103 S. Ct. at 3015-16.

<sup>109</sup> See *supra* note 51 and accompanying text.

<sup>110</sup> See Note, *supra* note 82, at 1154 n.170; Note, *Rummel v. Estelle: Sentencing Without a Rational Basis*, 32 SYRACUSE L. REV. 803, 809 n.47 (1981). But see Schwartz, *supra* note 23, at 418-19.

<sup>111</sup> State and lower federal courts rejected 192 eighth amendment challenges to sentences of imprisonment between 1976 and 1979, according to a count of relevant cases indexed in 15 NINTH DECENNIAL DIGEST, *Criminal Law* 1213 (Cruel and Unusual Punishment) (West 1982). Three challenges were successful: *Roberts v. Collins*, 544 F.2d 168 (4th Cir. 1976), *cert. denied*, 430 U.S. 973 (1977); *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978); *In re Grant*, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976).

In previous years, several sentences of imprisonment were held disproportionate under state constitutions or the federal constitution. *Downey v. Perini*, 518 F.2d 1288 (6th Cir. 1975), *rev'd on other grounds*, 423 U.S. 993 (1976); *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974); *United States v. McKinney*, 427 F.2d 449 (6th Cir. 1970), *cert. denied*, 402 U.S. 982 (1971); *Faulkner v. State*, 445 P.2d 815 (Alaska 1968); *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975); *In re Foss*, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974); *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972); *People v. Keogh*, 46 Cal. App. 3d 919, 120 Cal. Rptr. 817 (1975); *People v. Thomas*,

become unmanageable after *Helm*. In any case, states are free to adopt interpretations of the cruel and unusual punishment clauses of their own state constitutions that are more favorable to defendants,<sup>113</sup> and some state constitutions include explicit proportionality clauses.<sup>114</sup>

## VI. CONCLUSION

In *Solem v. Helm*, the Court clearly held for the first time that a sentence of imprisonment could be cruel and unusual because it is disproportionate to the crime committed. *Helm* clarified the confusion left after *Rummel v. Estelle* over whether a non-capital sentence could be held disproportionate. Because of the Court's careful and formalistic distinguishing of *Rummel*, however, the decision could be read in the future to allow proportionality analysis for life sentences without parole solely because of their similarity to death sentences. Such an interpretation would limit the application of proportionality analysis to life sentences without parole and could lead to confusion concerning the use of the proportionality test in capital cases. The better and more principled interpretation of *Helm* is that it is based on a review of judicial sentencing discretion. Under this reading, *Helm* modified the proportionality test used in capital cases for use in non-capital cases. The modified test pays more deference to legislative determinations and places less emphasis on the Court's own judgment.

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41 Cal. App. 3d 861, 116 Cal. Rptr. 393 (1974); *Dembowski v. State*, 251 Ind. 250, 240 N.E.2d 815 (1968); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968); *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972) (per curiam); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); *State v. Blackmon*, 260 N.C. 352, 132 S.E.2d 880 (1963); *Cannon v. Gladden*, 203 Or. 629, 281 P.2d 233 (1955); *State v. Kimbrough*, 212 S.C. 348, 46 S.E.2d 273 (1948).

<sup>112</sup> Between 1980 and 1983, 227 eighth amendment challenges to sentences of imprisonment were rejected by state and lower federal courts, according to a count of relevant cases indexed in NINTH DECENNIAL DIGEST, *Criminal Law* 1213 (Cruel and Unusual Punishment) (West 1982) and 1-18 WEST'S GENERAL DIGEST, SIXTH SERIES (1981-1983). Three challenges were successful: *People v. Lewis*, 113 Misc. 2d 1091, 450 N.Y.S.2d 977 (N.Y. Co. Ct. 1982); *State v. Fain*, 94 Wash. 2d 387, 617 P.2d 720 (1980); *Wanstreet v. Bordenkircher*, 276 S.E.2d 205 (W. Va. 1981).

<sup>113</sup> See Note, *supra* note 110, at 828.

<sup>114</sup> See, e.g., *Dembowski v. State*, 251 Ind. 250, 251, 240 N.E.2d 815, 816 (1968); *Cannon v. Gladden*, 203 Or. 629, 631, 281 P.2d 233, 234 (1955); *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 207 (W. Va. 1981).