Supplementary Material

Chapter 10: The Reagan Era—Criminal Justice/Punishments

Solem v. Helm, 463 U.S. 277 (1983)

Jerry Helm was convicted of six nonviolent felonies between 1964 and 1975. Three convictions were for third-degree burglary, one was for obtaining money under false pretenses, another was for grand larceny, and the last was for driving while intoxicated. In 1979, Helm was found guilty of passing a $100 no-account check, a felony under South Dakota law. The trial judge sentenced Helm to a life sentence without parole, under a state law that permitted that penalty to be imposed on any felon who had previously been convicted of at least three felonies. Helm filed a lawsuit against Herman Solem, his prison warden, asking for a writ of habeas corpus on the ground that a life sentence without parole for passing a bum check was cruel and unusual punishment under the Eighth and Fourteenth Amendments. The local federal district court denied the writ, but that decision was reversed by the Court of Appeals for the Eighth Circuit. Solem and South Dakota appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote agreed that the life without parole sentence violated the Constitution. Justice Powell's majority opinion held that the Constitution prohibited disproportionate as well as torturous criminal penalties. On what basis did Justice Powell reach that conclusion? Why did Chief Justice Burger disagree? Who had the better of the argument? All sides in Helm *discussed* Rummel v. Estelle *(1983). In that case, a 5–4 judicial majority held that a life sentence for three non-violent felonies was not cruel and unusual punishment. How did Justice Powell distinguish* Rummel*? Four of the five justices in the* Helm *majority dissented in* Rummel*. Only Justice Blackmun appears to have switched votes. In light of this information, do you believe Powell was sincere in his effort to distinguish* Rummel *and* Solem*?*

JUSTICE POWELL delivered the opinion of the Court.

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements" may not be excessive. . . . The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land."

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality. Indeed, one of the consistent themes of the era was that Americans had all the rights of English subjects. . . . Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the

English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century. In the leading case of *Weems v. United States* (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense" and held that the sentence violated the Eighth Amendment. . . .

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There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment. . . . There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis.

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In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is *per se* constitutional. . . .

When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized. First, we look to the gravity of the offense and the harshness of the penalty. . . . Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. . . . Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. . . .

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. . . . For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence.

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Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. . . . Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. A court, of course, is entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract.

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Helm's crime was "one of the most passive felonies a person could commit." It involved neither violence nor threat of violence to any person. The $100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft. It is easy to see why such a crime is viewed by society as among the less serious offenses. . . . [Helm's] prior offenses, although classified as felonies, were all relatively minor. All were nonviolent and none was a crime against a person. . . .

Helm's present sentence is life imprisonment without possibility of parole. Barring executive clemency, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle* (1980). Rummel was likely to have been eligible for parole within 12 years of his initial confinement, a fact on which the Court relied heavily.

. . . Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. . . . [T]here were a handful of crimes that were necessarily punished [in South Dakota] by life imprisonment: murder, and, on a second or third offense, treason, first degree manslaughter, first degree arson, and kidnapping. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, first degree arson, and kidnapping; attempted murder, placing an explosive device on an aircraft, and first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Moreover, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. . . .

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada.". . . . We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada. It appears that Helm was treated more severely than he would have been in any other State.

The State argues that the present case is essentially the same as *Rummel v. Estelle,* for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel.*

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. . . . Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.

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The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

. . . The Court's starting premise is that the Eighth Amendment's Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." What the Court means is that a sentence is unconstitutional if it is more severe than five justices think appropriate. In short, all sentences of imprisonment are subject to appellate scrutiny to ensure that they are "proportional" to the crime committed.

. . . The facts in *Rummel v. Estelle* (1980) bear repeating. Rummel was convicted in 1964 of fraudulent use of a credit card; in 1969, he was convicted of passing a forged check; finally, in 1973 Rummel was charged with obtaining money by false pretenses, which is also a felony under Texas law. These three offenses were indeed nonviolent. Under Texas' recidivist statute, which provides for a

mandatory life sentence upon conviction for a third felony, the trial judge imposed a life sentence as he was obliged to do after the jury returned a verdict of guilty of felony theft.

Rummel, in this Court, advanced precisely the same arguments that respondent advances here; we rejected those arguments notwithstanding that his case was stronger than respondent's. The test in *Rummel* which we rejected would have required us to determine on an abstract moral scale whether Rummel had received his "just disserts" for his crimes. We declined that invitation; today the Court accepts it. Will the Court now recall Rummel's case so five justices will not be parties to "disproportionate" criminal justice?

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The *Rummel* Court also rejected the claim that *Weems v. United States* (1910) required it to determine whether Rummel's punishment was "disproportionate" to his crime. In *Weems,* the Court had struck down as cruel and unusual punishment a sentence of *cadena temporal* imposed by a Philippine Court. This bizarre penalty, which was unknown to Anglo-Saxon law, entailed a minimum of 12 years' imprisonment chained day and night at the wrists and ankles, hard and painful labor while so chained, and a number of "accessories" including lifetime civil disabilities. . . .

The lesson the *Rummel* Court drew from *Weems* and from the capital punishment cases was that the Eighth Amendment did not authorize courts to review sentences of *imprisonment* to determine whether they were "proportional" to the crime. . . .

. . . [T]he *Rummel* Court emphasized that drawing lines between different sentences of imprisonment would thrust the Court inevitably "into the basic line-drawing process that is pre-eminently the province of the legislature" and produce judgments that were no more than the visceral reactions of individual Justices.

The *Rummel* Court categorically rejected the very analysis adopted by the Court today. Rummel had argued that various objective criteria existed by which the Court could determine whether his life sentence was proportional to his crimes. . . . First, it rejected the distinctions Rummel tried to draw between violent and nonviolent offenses, noting that "the absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular individual." Second, the Court squarely rejected Rummel's attempt to compare his sentence with the sentence he would have received in other States—an argument that the Court today accepts. . . . [T]he recidivist laws of the various states vary widely. . . . Different states surely may view particular crimes as more or less severe than other states. Stealing a horse in Texas may have different consequences and warrant different punishment than stealing a horse in Rhode Island or Washington, D.C. . . . Finally, we flatly rejected Rummel's suggestion that we measure his sentence against the sentences imposed by Texas for other crimes: "Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative. . . ." . . .

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Although historians and scholars have disagreed about the Framers' original intentions, the more common view seems to be that the Framers viewed the Cruel and Unusual Punishments Clause as prohibiting the kind of torture meted out during the reign of the Stuarts. . . . The prevailing view up to now has been that the Eighth Amendment reaches only the *mode* of punishment and not the length of a sentence of imprisonment. In light of this history, it is disingenuous for the Court blandly to assert that "[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century

This Court has applied a proportionality test only in extraordinary cases, . . . The Court's reading of the Eighth Amendment as restricting legislatures' authority to choose which crimes to punish by death rests on the finality of the death sentence. Such scrutiny is not required where a sentence of imprisonment is imposed after the State has identified a criminal offender whose record shows he will not conform to societal standards.

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By asserting the power to review sentences of imprisonment for excessiveness the Court launches into uncharted and unchartable waters. Today it holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly "nonviolent" felony. How about the

eighth "nonviolent" felony? The ninth? The twelfth? Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price-fixing? The permutations are endless and the Court's opinion is bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective" factors and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes. Must all these factors be present in order to hold a sentence excessive under the Eighth Amendment? How are they to be weighed against each other? Suppose several States punish severely a crime that the Court views as trivial or petty? I can see no limiting principle in the Court's holding.

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The differences between this case and *Rummel* are insubstantial. First, Rummel committed three truly nonviolent felonies, while respondent, as noted at the outset, committed seven felonies, four of which cannot fairly be characterized as "nonviolent." At the very least, respondent's burglaries and his third-offense drunk driving posed real risk of serious harm to others. . . .

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Parole was relevant to an evaluation of Rummel's life sentence because in the "real world," he was unlikely to spend his entire life behind bars. Only a fraction of "lifers" are not released within a relatively few years. In Texas, the historical evidence showed that a prisoner serving a life sentence could become eligible for parole in as little as 12 years. In South Dakota, the historical evidence shows that since 1964, 22 life sentences have been commuted to terms of years, while requests for commutation of 25 life sentences were denied. And, of course, those requests for commutation may be renewed.

In short, there is a significant probability that respondent will experience what so many "lifers" experience. Even assuming that at the time of sentencing, respondent was likely to spend more time in prison than Rummel, that marginal difference is surely supported by respondent's greater demonstrated propensity for crime—and for more serious crime at that.

It is indeed a curious business for this Court to so far intrude into the administration of criminal justice to say that a state legislature is barred by the Constitution from identifying its habitual criminals and removing them from the streets. Surely seven felony convictions warrant the conclusion that respondent is incorrigible. . . .