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Consistently Inconsistent: The Supreme Court and The Confusion Surrounding Proportionality in Non-Capital Sentencing

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CONSISTENTLY INCONSISTENT: THE SUPREME COURT AND THE CONFUSION SURROUNDING PROPORTIONALITY IN NONCAPITAL SENTENCING*

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There has always been debate about how, why and to what extent society should punish individuals who violate its norms. In this country that debate has been conducted on primarily two levels. First, in legislatures and among punishment theorists the debate has revolved around what are the appropriate goals of a criminal justice system and how can a sentencing framework be developed to best accomplish those goals. Second, in the courts, particularly the Supreme Court, the debate has involved the meaning of the ban on cruel and unusual punishment contained within the Eighth Amendment of the Constitution.

This issue of CRIMINAL PRACTICE LAW REPORT examines the Supreme Court's treatment of the Eighth Amendment with respect to claims of excessiveness regarding prison sentences. Specifically, it addresses the issue of whether and to what degree the Eighth Amendment requires that a punishment not be disproportional to the crime punished. In analyzing all of the modern holdings of the Court in this area, one finds significant fault with each. The result of this series of flawed opinions from the Supreme Court is that the state of the law with respect to proportionality in sentencing is confused, and what law can be discerned rests on weak foundations.

*Adapted by permission from 84 Ky. L. J. 107 (1995).

Rummel v. Estelle

The modern approach to the application of an Eighth Amendment-based proportionality principle for prison sentences began with the Supreme Court's holding in *Rummel v. Estelle*, 445 U.S. 263 (1980). Rummel was sentenced under a Texas recidivist statute that required life imprisonment for anyone convicted of a felony. He argued that such a sentence was disproportionate to the offense of which he was convicted or even to the three aggregate felonies that were used to trigger the recidivist statute.

Rummel was convicted by a jury in 1973 of theft, for obtaining $120.75 by false pretenses. Under the relevant Texas statute, theft of more than $50 was punishable by two to ten years in prison. The state, however, chose to prosecute Rummel under the Texas felony recidivist statute. The two previous felony convictions offered by the state were a 1964 plea of guilt to fraudulently using a credit card to obtain $80 worth of services and a 1969 plea to passing a forged check of $28.36. Rummel had received prison terms of three and four years respectively for these two prior convictions. After his 1973 conviction, the trial judge imposed the life sentence mandated by the recidivist statute.

The Supreme Court concluded that setting the maximum length of prison sentences for criminal offenses is a role properly handled by legislatures and not appellate courts. The Court based this conclusion both on its perception of how the Eighth Amendment has previously been interpreted by the Court in this realm and on its view of the proper role of judges in the sentencing process. In both of these areas, the Court began a series of unpersuasive and unfortunate opinions with respect to the application of the principle of proportionality in sentencing.

The Court in *Rummel* divided its

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analysis of its previous holdings involving Eighth Amendment proportionality into death penalty cases and those involving imprisonment. As to the former, the Court concluded that since death is a unique form of punishment, previous Supreme Court decisions in capital cases that had clearly discerned a proscription against disproportional sentencing within the Eighth Amendment were "of limited assistance" in assessing whether jail sentences could be impermissibly long. Regarding noncapital cases, the Court said that successful challenges to the proportionality of such sentences were "exceedingly rare" and, in fact, analyzed only one such case, *Weems v. U.S.*, 217 U.S. 349 (1910).

Decided in 1910, *Weems* was the first opinion of the Supreme Court that clearly identified a requirement for proportional sentencing within the Eighth Amendment. Weems, a disbursing officer for the Coast Guard, stationed in the Philippines, was convicted of falsifying a cash book in the amount of 616 pesos. For this offense, Weems received a fine plus fifteen years of a punishment called "cadena temporal." During the cadena, the prisoner is chained from the ankles and wrists and forced to perform what the Court called "hard and painful labor," 217 U.S. at 364. Even after the incarceration period is over, the offender has no marital authority, neither parental nor property rights, and is subject to lifelong surveillance.

Weems claimed that his punishment was cruel and unusual because of its harshness and oppressiveness, and because the length of the sentence was disproportionate to the offense he committed. In its decision that his sentence was violative of the Eighth Amendment, the Supreme Court seemed to accept both of Weems' rationales.

The Court in *Rummel*, while acknowledging that the earlier holding had found Weems' sentence to be disproportional to his offense, attributed this finding primarily to the "unique" nature of the cadena punishment and not its length. The *Weems* opinion was characterized by the Court in *Rummel* as "consistently referring *jointly* to the length of imprisonment and its 'accessories' of 'accompaniments'," 445 U.S. at 272, 273.

The analysis of *Weems* undertaken by the Court in *Rummel* is deficient in that it omits those aspects of the earlier holding that support the position that Weems' sentence was violative of the Eighth Amendment for two separate reasons, its length and its harshness. Furthermore, the Court placed no weight on those parts of the decision in *Weems* that declared proportionality to be an essential component of the Eighth Amendment without alluding to the nature or uniqueness of the cadena sentence. Thus, while *Weems* may not be a definitive holding that length of imprisonment alone can make a sentence unconstitutionally disproportionate to an offense, it offers far stronger support for this position than is suggested by the Court in *Rummel*.

The Court in *Rummel* was similarly dismissive of the relevance of those cases involving capital punishment that had clearly identified a proportionality principle in the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. at 153 (1976), which held that the death penalty was constitutional at least in certain circumstances, and *Coker v. Georgia*, 433 U.S. at 584 (1977), holding that capital punishment is disproportionate to the crime of raping an adult woman, had both been decided only a few years before *Rummel*. Each of these decisions held that punishments excessive in relation to the crimes committed were violative of the proportionality requirement of the Eighth Amendment. Furthermore, each decision made clear that excessiveness alone, without regard to the barbaric nature of the punishment, was sufficient to invalidate a sentence. The Court in *Rummel* found these pronouncements on excessiveness, because they appeared in capital cases, to be "of limited assistance" in deciding the constitutionality of terms of imprisonment.

Assuming arguendo both that the death penalty is a unique form of punishment and the questionable notion that the Court's pronouncements in capital cases have no bearing on other sentences, the Court in *Rummel* was still remiss in ignoring the manner in which those capital cases interpreted earlier proportionality holdings of the Court. Such an omission is particularly glaring when those earlier proportionality cases did *not* themselves involve capital sentences.

The *Rummel* Court was also understandably concerned with the possibility that appellate judges might use a proportional sentencing requirement to substitute their views as to what constitutes an appropriate sentence in a given case for that of the trial judge or the legislature. Rummel attempted to demonstrate that his sentence should be deemed unconstitutionally excessive through the application of reasonably objective criteria, arguing that both the fact that his crimes were nonviolent and that individually or even collectively the crimes involved relatively small amounts of money were objective evidence of the nonserious nature of his crimes. The Court, however, considered the seriousness of any crime to be an inherently subjective question and regarded it as a matter for each state to determine, according to its particular needs and interests. In this instance, said the Court, Texas was responding primarily to the problem of recidivism and not merely the specific crimes for which Rummel was convicted. Once recidivist statutes are deemed to be rational responses to the problem of repeat offenders (and Rummel did not challenge this), how the statute is structured is a matter of line-drawing, according to the Court. Regarding such line-drawing to be a legislative function, the Court rejected Rummel's attempt to fashion a judi-

cial approach to assess the excessiveness of a legislatively sanctioned sentence.

The judicial struggle over the application of the Eighth Amendment to proportional sentencing was thus to be fought primarily on two fronts: interpretation of earlier Supreme Court cases (and later, other historical sources) and the existence of criteria that meaningfully objectify an appellate court's determination as to whether a particular sentence is grossly disproportionate to the crime committed.

Hutto v. Davis

The first time after *Rummel* that the Supreme Court had the opportunity to confront an Eighth Amendment proportionality challenge to a noncapital sentence was the case of Roger Trenton Davis, *Hutto v. Davis*, 454 U.S. 370 (1982). Davis had been sentenced by a jury in Virginia to a total of forty years imprisonment and a fine of $20,000, based on his convictions for distribution and possession with intent to distribute a total of nine ounces of marijuana.

In reversing the holding of the Fourth Circuit that Davis' sentence violated the Eighth Amendment, the Supreme Court wrote a terse per curiam opinion that appeared to foreclose virtually any proportionality challenge in a noncapital case. The Court observed that the decision in *Rummel* had made clear that any assessment of the excessiveness of a prison term was inherently subjective and therefore "purely a matter of legislative prerogative," 454 U.S. at 373. The per curiam opinion reiterated that because of the unique nature of the death penalty, the Court's pronouncements regarding proportionality requirements in capital cases had little relevance outside that realm. Furthermore, the Court noted that in *Rummel* it had rejected each of the purported objectifying criteria that had been relied upon by the district court in granting the writ. The Court in *Davis*, again reiterating what it held in *Rummel*, warned that successful challenges to the proportionality of sentences should be "exceedingly rare" and offered life imprisonment for overtime parking as an example of such an extraordinary situation.

Justice Brennan, writing for three dissenters, argued that while the language in *Rummel* may be expansive, its holding is limited to the premise that Texas had validly chosen to punish habitual offenders severely in order to have a strong deterrent impact on prospective recidivists. In citing approvingly prior decisions such as *Weems*, the Court in *Rummel*, according to Brennan, did not advocate abandonment of all disproportionality analysis. To Brennan, a sentence of forty years imprisonment, roughly thirteen times greater than the average for others in Virginia convicted of the same crimes, is grossly disproportionate to the crimes of distributing and possessing nine ounces of marijuana. Justice Powell, who authored a dissent in *Rummel*, also believed that Davis' sentence was disproportional to his crimes but felt constrained by the holding in *Rummel* to concur in this case.

Thus, something of a three way division among the justices developed in *Davis* with respect to how to approach proportionality challenges. It is difficult to discern clearly whether this division was one of degree or one of kind. The majority apparently believed that such challenges should rarely, if ever, be successful, using again the never-in-a lifetime example of life imprisonment for overtime parking. To Justice Powell, discerning whether such a "rare" situation exists apparently depends on whether the offense and sentence in the challenged case are more disproportionate than those involved in Rummel's case (and presumably hereafter in Davis' case as well). The dissenters seem to regard *Rummel* as limited to recidivist statutes and would apparently advocate that appellate courts in other cases should engage in proportionality analysis in keeping with the Eighth Amendment's "evolving standards of decency that mark the progress of a maturing society," quoting from *Trop v. Dulles*, 350 U.S. at 101 (1958).

Davis was particularly noteworthy because the Supreme Court had held that a sentence of forty years incarceration for possession and distribution of nine ounces of marijuana was not violative of the Eighth Amendment. As Davis was not sentenced under a recidivist statute, the focus of any analysis had to be the particular crime committed. If such a lengthy sentence for the sale of a moderate amount of a relatively nondangerous drug was

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not deemed disproportional, it is hard to imagine a sentence that would be so viewed by the Court. At least it was until one year later when the Court decided *Solem v. Helm*, 463 U.S. at 277 (1983).

Solem v. Helm

Jerry Helm was convicted of uttering a no account check in 1979, a felony under South Dakota law. The maximum sentence for that crime ordinarily was five years incarceration and a $5000 fine. Helm, however, was sentenced under South Dakota's recidivist statute, which imposed life imprisonment upon conviction of a fourth felony. A companion statute prohibited parole for those sentenced to life imprisonment. Unlike the opinion of the Court in *Rummel*, Justice Powell, speaking for the Court in *Helm*, saw no ambiguity in *Weems* with respect to its endorsement of an Eighth Amendment-based proportionality requirement. Powell identified further support for a proportionality requirement in other, later cases decided by the Court. *Robinson v. California*, 337 U.S. 660 (1962); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982).

While conceding that in both *Rummel* and *Davis* the Court had indicated that proportionality challenges to the length of jail sentences would rarely be successful, Justice Powell interpreted both decisions as leaving the door somewhat open to such challenges. In confronting the language in *Rummel* that seemed to foreclose proportionality challenges to the length of sentences, Justice Powell offered an interpretation that is at best unpersuasive and perhaps somewhat disingenuous. The Court in *Rummel* wrote that, "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 sentence actually imposed is purely a matter of legislative prerogative," 445 U.S. at 274. Speaking for the Court in *Helm*, Justice Powell imposed on the words "one could argue" an interpretation that is literal to the extreme. To Powell, the Court in *Rummel* with these words "did not adopt the standard proposed but merely recognized that the argument was possible," 463 U.S. at 288 n. 14. In addition, Justice Powell apparently ignored the words that followed, "without fear of contradiction." Taken together, these words hardly support Justice Powell's interpretation that the Court in *Rummel* was apparently posing a hypothetical argument. However, apparently unwilling to hold that the Court was wrong in *Rummel* when it declared that appellate courts have no role in ensuring that sentences are proportional, Justice Powell and the majority in *Helm* were forced into this interpretation.

Some method then must be devised, according to Justice Powell, to assess the proportionality of a sentence to the offense committed. Principally, this method must to some extent objectify the proportionality determination so that it does not become merely a reflection of the personal predilections of each appellate judge. With this in mind, Justice Powell offered objectifying criteria that the Court had used in other cases for assessing the constitutionality of a sentence.

First, Powell advocated looking to the nature of the crime and its seriousness. Second, the Court regarded as "helpful" a comparison between the sentence at issue and sentences for similar or more serious crimes in the subject jurisdiction. Third, the Court viewed as "useful" a comparison between the sentence at hand and that which offenders receive for the same crime in other jurisdictions. In discussing the above objectifying criteria, Justice Powell unfortunately and perhaps necessarily omitted the analysis of those factors that was performed by the Court in *Rummel*. In that case, as well as in *Davis*, the Court's analysis led to a specific rejection of the three factors adopted by the Court in *Helm*.

However, the Court in *Helm* did take issue with the assertion in these earlier decisions that an assessment of the seriousness of a crime was too subjective a determination to inform a decision as to the proportionality of a sentence. The Court pointed out that based on clearly established principles, it is well accepted that certain crimes are considered more serious than others. Without enunciating all such principles, the Court said that seriousness can be determined by looking to, among other things, the harm caused by the crime, the use or threat to use violence, the intent of the criminal, whether a crime is a lesser included offense, and whether the criminal is a principal or merely an accessory after the fact.

In addressing the criticism of the use of the factor that compares sentences among other jurisdictions, the Court in *Helm* acknowledged that under our federalist system, some states would invariably impose harsher sentences for certain crimes. However, this does not justify dismissing this factor, according to the Court, but argues for the use of a combination of factors with no one alone determining disproportionality. Having defended its adoption of the three objectifying criteria, what remained for the Court was to apply the factors to Helm's crime and punishment.

In applying the first objectifying factor, the gravity of the crime, the Court noted that Helm's crime of uttering a no account check for $100 was "'one of the most passive felonies a person could commit'," 463 U.S. at 296. The crime was completely nonviolent and involved a relatively small amount of money. Although acknowledging that it was proper to sentence Helm for his past crimes as well, the Court regarded these prior crimes also as "relatively minor." Notably absent from the Court's assessment of the gravity of Helm's crimes was any comparison between the seriousness of Helm's criminal record and that of Rummel. This omission is particularly glaring as the Court's assessment of the harshness of Helm's sentence relied significantly on a comparison to

Rummel's sentence. Perhaps this omission occurred because, in the words of the dissent, "by comparison Rummel was a relatively 'model citizen'," 463 U.S. at 304 (Burger, C.J., diss'g).

In comparing South Dakota's treatment of other comparable and more serious crimes, the next objectifying factor, the Court noted that only crimes far more serious than Helm's, such as murder or kidnapping, could result in life imprisonment. Acknowledging that Helm's sentence as a recidivist compelled it to consider his prior crimes as well, the Court maintained that even for second or third time felons to receive life imprisonment, the crimes at issue had to be far graver than those committed by Helm. While this may be true, it could be argued that the state has related but somewhat separate goals in incarcerating for life someone who, by being convicted of seven felonies in eleven years, has demonstrated complete disregard for society's laws. Such a goal can take the form of general deterrence, by communicating to other potential recidivists that there is a limit to their felonious criminal activity. It can take the form of retribution or just desserts by making the societal statement that those who continuously ignore our laws against committing nonpetty crimes deserve to be incarcerated for life. While neither of these goals necessarily justify the specific sentence in Helm's case, the Court should have considered these traditional sentencing goals.

In applying the final objectifying factor, the Court in *Helm* adopted the finding of the Court of Appeals that in only one other state could Helm, as a recidivist, have received life imprisonment for the crime he committed.

After concluding that each of the three objectifying criteria pointed to the disproportionality of Helm's sentence, the Court turned to the severity of the sentence itself. Specifically, the Court rejected the state's attempt to compare Helm's sentence with the sentence received by Rummel. The Court noted that under Texas law Rummel was eligible for parole, and that parole could be granted as early as ten years into his sentence and could be reasonably expected in twelve years. Under South Dakota law, Helm had no possibility of parole and could be released only through executive clemency. The Court in Helm regarded the distinction between the possibility of parole and commutation through clemency to be "fundamental." It viewed the former as a "regular part of the rehabilitative project," 463 U.S. at 300, usually embodying specific procedures and standards. While one may legitimately have an expectation of parole at some time, the granting of executive clemency, according to the Court, was purely ad hoc. The Court further noted that South Dakota in fact had rarely commuted life sentences and even if commutation occurred, that would only make Helm eligible for parole.

> *. . . seriousness [for purposes of proportionality review] can be determined by looking to, among other things, the harm caused by the crime, the use or threat to use violence, the intent of the criminal, whether a crime is a lesser included offense, and whether the criminal is a principal or merely an accessory after the fact.*

The distinction drawn by the Court in *Helm* between parole and commutation through executive clemency, based on their respective likelihoods, is a reasonable one. It would skew an attempt to apportion crime to punishment were the Court to ignore the difference between a sentence that will likely result in the defendant's release and one for which the possibility of release is just one step beyond the theoretical. What is debatable is the Court's assertion in *Helm* that the opinion in *Rummel* "relied heavily" on Rummel's possible parole.

The Court in *Rummel* specifically rejected the state's attempt to treat Rummel's sentence as something less than life imprisonment because of the possibility of parole. It did, however, note that an assessment of Rummel's sentence "could hardly ignore" the possibility of release and this possibility distinguished Texas' statute from one that contains no parole possibility.

The result of the holdings in *Rummel*, *Davis* and *Helm* was to send a mixed and confusing message with respect to the Supreme Court's approach to the requirement of proportional sentencing. Reconciling the three holdings, all still deemed by the Court to be good law, was no easy task for lower courts attempting to assess proportionality challenges. Is there a clear proscription against grossly disproportionate sentences; to what types of cases does this proscription apply; and how do we assess such challenges were all questions that seemed to produce different answers when looking at *Rummel/Davis* as opposed to *Helm*. It is therefore hardly surprising that eight years after *Helm* was decided the Court again waded into the proportionality morass.

Harmelin v. Michigan

In *Harmelin v. Michigan,* 501 U.S. 957 (1991), Harmelin was convicted of possession of 672 grams of cocaine under a Michigan law that mandated life imprisonment without parole for possessing a large amount of drugs.

In the Supreme Court, five justices joined in Justice Scalia's opinion holding that while severe mandatory punishments could be considered cruel, they were not historically unusual. These justices agreed that the obligation that exists in capital cases for the sentencer to consider all mitigating facts related to the crime and the offender does not apply to noncapital sentences. Contrary to the defendant's assertion that as with capital punishment, life imprisonment without parole is a unique sentence, the Court held that such a sentence is actually more similar to other sentences of life imprisonment. Therefore, according to a majority of the Court, no special protection such as the requirement to consider mitigating factors applied to sentences such as that received by Harmelin. Unfortunately for courts that would have to wrestle with proportionality challenges in the future, the members of the Court agreed on little else.

The same five justices agreed that Harmelin's sentence was not grossly disproportionate to his crime but disagreed among themselves on such critical issues as why the sentence was constitutional, whether the Eighth Amendment contains any meaningful limitation on noncapital sentences and how appellate courts should handle future challenges to the excessiveness of prison sentences due to their length. Only Chief Justice Rehnquist joined in Justice Scalia's opinion, which construed both Anglo-American history and judicial precedent as evidence of the fact that the Eighth Amendment contains no prohibition on grossly disproportionate prison sentences.

Justice Scalia took issue with the historical analysis in *Helm*. Specifically, he rejected the notion that the prohibition against cruel and unusual punishment contained in the English Declaration of Rights had anything to do with disproportionate punishments. Regarding the debate surrounding the proper interpretation of *Weems*, Scalia concluded that the holding in that case is ambiguous and provides no clear-cut basis for the existence of a proportionality principle within the Eighth Amendment. As the Court did in *Rummel*, Justice Scalia regarded previous decisions that required proportionality assessments in capital cases to be limited to just such cases.

The only Supreme Court case that Justice Scalia believed clearly identified a principle of proportionality was *Solem v. Helm*. As to *Helm's* elaboration of a proportionality principle, Justice Scalia concluded that the Court was "simply wrong." According to Justice Scalia, it was wrong regarding its explanation of the genesis of the Eighth Amendment, wrong in its interpretation of *Weems* and wrong because it misread the holdings in *Rummel* and *Davis*.

In addition, Justice Scalia addressed the wisdom of employing such a principle in noncapital cases by examining the three objectifying factors for assessing proportionality that were used by the Court in *Helm*. Assessing the first factor, Justice Scalia acknowledges that crimes of violence will always be deemed to be serious in nature. The problem he sees is with determining what other crimes are serious and assessing how serious they are compared to some violent crimes. This determination, according to Justice Scalia, is inherently subjective and not susceptible to objective analysis.

The inability to assess objectively the seriousness of a crime, Scalia reasoned, results as well in the failure of the second of *Helm's* objectifying factors. As one crime cannot be deemed to be objectively more serious than another, according to Justice Scalia, it is fruitless to look for other crimes to use as vehicles for comparison. To Justice Scalia, differential treatment by a state of two arguably serious crimes merely means that the legislature, for any of a number of appropriate reasons, perceives greater danger in one type of serious crime than it does in another. It is not the function of the courts in such situations, according to Justice Scalia, to substitute their judgment for that of the duly elected representatives of the people regarding which crime is more serious.

As for *Helm's* third objectifying factor, Justice Scalia concedes that comparing how other states punish the crime at issue can be done with "clarity and ease." He contends, however, that such a comparison has no bearing on an Eighth Amendment challenge. Justice Scalia's view, mirroring that expressed by the Court in *Rummel*, is that our principles of federalism permit, if not encourage, such differential treatment of crimes based on the different interests of the states involved.

Justice Scalia is correct in his observation that defining seriousness involves a significant amount of subjectivity and in his recognition of the fact that a federalist system will inevitably result in disparate treatment of crimes in different jurisdictions. Open to question, however, is his conclusion that these observations negate the effectiveness of the objectifying factors. While each of Scalia's points illustrates that no precise calculus of what constitutes a constitutional prison length can be drawn from the objectifying factors, neither of them negates the ability of the factors to point to sentences that are *grossly disproportional* to the crimes committed.

Justice Scalia was able to garner the support of only one other member of the Court for his approach to proportionality challenges under the Eighth Amendment. Justice Kennedy, writing for himself and two other justices, joined Scalia only in the judgment upholding Harmelin's sentence and in that portion of Scalia's opinion rejecting the defendant's claim that his sentence was invalid because it was not individualized.

The opinion of Justice Kennedy is significant for a variety of reasons. First it makes clear that a majority of the justices accept the existence of at least some form of proportionality principle contained within the Eighth

Amendment for both capital and noncapital sentences. While acknowledging that *Helm* takes a different approach to application of proportionality principles than either *Rummel* or *Davis*, Justice Kennedy sees certain common threads running through each of these cases.

According to Justice Kennedy, the first principle to be discerned from previous cases is the need for courts to defer to legislative judgments concerning what constitutes an appropriate sentence for a particular crime. How and whether a state wishes to punish an offense involve political determinations about the needs and interests of the state involved as well as critical judgments as to what goals of punishment are to be used and in what combination. Such matters to Kennedy are fundamentally legislative in nature.

The second principle Kennedy sees emerging from previous cases is that legislatures are free to use any of a number of punishment theories in structuring a sentencing system.

Next, Kennedy determined that the Court, through its previous holdings, had recognized that disparate treatment of the same crime by different states was an inevitable byproduct of federalism. Differences regarding punishment of a particular offense are due to the variety of philosophies and concerns that underlie each state's sentencing system. To Justice Kennedy, this makes any interstate sentencing comparison an "imperfect enterprise," 501 U.S. at 1000.

. . . while severe mandatory punishments could be considered cruel, they were not historically unusual.

The final principle Justice Kennedy sees emerging from the earlier cases is the importance of relying on objective factors, where feasible, to assess proportionality. To Kennedy, the most important objective factor is the type of punishment imposed. As the penalty of death has long been viewed by the Court as unique, a clear line can be drawn between it and a sentence involving jail time. Justice Kennedy, however, does not discern such a clear line as existing between sentences involving shorter and longer periods of incarceration; courts should be exceedingly reluctant to entertain proportionality challenges to noncapital sentences.

Few would argue with Justice Kennedy's view of legislative primacy in sentencing, the ability of each legislature to use various sentencing theories in different combinations or the inevitable result that some jurisdictions will treat certain crimes more harshly than other jurisdictions. Merely recognizing these principles, however, without acknowledging the important limits that attach to each, risks devaluing any proportionality requirement and making its application less effective.

The Eighth Amendment was designed specifically to check legislative excesses. While legislatures establish punishment schemes, when a particular sentence is unconscionable, it is "not our discretion but our duty" to interfere, as the Court said in *Weems*, 217 U.S. at 378. While a standard of "gross disproportionality" will appropriately require less frequent judicial intervention, when required, such intervention is crucial, in part, because of its infrequency.

Although Justice Kennedy's attempt to harmonize the opinions of the Supreme Court in previous proportionality cases may be somewhat more persuasive than was Justice Powell's attempt to do so in *Helm*, it raises many questions as well. Kennedy's conclusion that prior cases are universal in their acceptance of a sentencing proportionality principle, albeit a narrow one, is at least defensible. His assertion, however, that the use of two of the three proportionality criteria adopted by the Court in *Helm* is discretionary is far less convincing. In *Helm*, the Court said "it *may* be helpful to compare sentences imposed on other criminals in the same jurisdiction" and "the courts *may* find it useful" to engage in interjurisdictional comparison, 463 U.S. at 291. To Justice Kennedy this means that courts may also decide there is no need to engage in such comparisons where there is no clear gross disproportionality after assessing the seriousness of the offense and harshness of the punishment. This turned out to be a conclusion of some significance, as many courts faced with challenges to the proportionality of a sentence after the decision in *Harmelin* have adopted Justice Kennedy's approach.

Justice Kennedy's conditional approach to use of the comparative analyses criteria can be criticized as to its efficacy as well. As Kennedy notes, one clear principle that emerges from the Court's previous holdings regarding proportionality is that judicial determinations of the excessiveness of a sentence should not be nor appear to be merely the individual predilections of the judges involved. The exclusive use of the harshness of the crime criteria (even if this one-criteria approach is used only when there appears to be no gross disproportionality between crime and sentence) runs counter to this principle. As Justice White points out in his dissenting opinion in *Harmelin*, it is far more subjective to base proportionality determinations on merely the view of the deciding judges regarding the seriousness of the crime than it is to have their judgment informed by the way in which the state treats other criminals and how other states deal with the crime at issue.

The problem in using only the seriousness of the crime criterion is evidenced by a look at how Kennedy applies his proportionality approach to Harmelin's crime and comparing it with Justice White's application of all three

criteria in his dissent. Justices Kennedy and White have a reasonable difference of opinion regarding the seriousness of possessing over 650 grams of cocaine. Although Kennedy regards the sentence of life without parole as harsh, he argues that Michigan has the right to determine that the goal of deterring possession of large amounts of cocaine warrants such a sentence. He rejects Harmelin's claim that drug possession should be regarded as a victimless crime, and describes how the effects of drugs harm not only the user but society as well.

Justice White, in his dissent, concedes that the use of drugs is serious, but not so serious as sale or possession with intent to sell, neither of which Harmelin was convicted of. White compares the collateral consequences of drugs, a factor upon which Justice Kennedy appears to rely heavily, to those of alcohol. Such consequences, White asserts, could lead to certain penalties but not to oppressively harsh ones. Furthermore, in a state such as Michigan, where there is no capital punishment, life imprisonment is the harshest punishment possible. To apply such a harsh punishment mandatorily, without regard to the fact that Harmelin is a first offender and without any suggestion that Harmelin's particular offense was especially egregious is even more problematic.

In sum, Justice Kennedy and the two justices who join in his opinion view Harmelin's crime as more serious than do Justice White and the three other justices who join with him. Further, the views of both groups of justices seem to be reasonable. Under Justice Kennedy's approach, once the determination is made that no gross disproportionality exists based on an assessment of the seriousness of the crime, analysis stops. In such a situation the subjective views of the judges would appear to be not just a factor in the decision but the likely determining factor. It would be wiser to turn, as Justice White then does, to the two comparative analyses to inform any determination of gross disproportionality.

In so doing Justice White observes that Michigan's harshest penalty is reserved for only two other crimes, both of which are surely more serious than drug possession. Furthermore, arguably more serious crimes against the person such as murder in the second degree, rape and armed robbery do not carry mandatory life sentences. It is also significant, according to Justice White, that Michigan is the only state in which a defendant could receive life without parole for possessing the amount of drugs Harmelin had. While this is certainly permissible under our federalist system, that Michigan treats Harmelin differently than would any other state informs an assessment of proportionality and even more obviously objectifies the assessment measurably.

In the wake of *Harmelin*, following on the decisions in *Rummel*, *Davis* and *Helm*, a great deal of confusion exists respecting the application of a proportionality principle to noncapital sentences. Much of that confusion stems from the inability of the justices to agree upon and articulate clearly an Eighth Amendment proportionality principle, and from the mixed signals they have given with respect to how to apply such a principle. These problems derive from the Court's failure to develop a convincing philosophical basis on which to premise a meaningful ban on grossly disproportional punishments.

Conclusion

The time has come for the Supreme Court to make clear that it accepts the existence of a proportionality principle within the Eighth Amendment that applies to excessive prison sentences. While appellate courts should be reluctant to overturn legislatively sanctioned sentences and do so only when the sentences are grossly disproportionate to the crime committed, cruel and unusual punishments cannot be allowed to stand.

The three-criteria approach advanced by the Court in *Helm* serves as a good foundation for assessing the disproportionality of a sentence. This approach offers judges the opportunity to evaluate the seriousness of an offense by examining such things as the consequences of the act and the moral wrongfulness of the actor. Additionally, it looks to the harshness of the sentence, considering all possible justifications for the sentence imposed. Finally, it requires comparisons of the crime and sentence to others within the subject state and in other states in order to objectify somewhat the conclusion as to disproportionality. This approach would allow trial judges to continue to be the principal sentencers, give them clearer guidance as to what is permissible under the Eighth Amendment and reduce the number of grossly excessive prison sentences that are inflicted.

RECENT DECISION

Wisconsin "Sexually Violent Person" Statute Upheld

The Wisconsin Supreme Court has recently held constitutional as against due process and ex post facto challenges a state statute that provides for the involuntary commitment of individuals found to be "sexually violent persons." *State v. Carpenter*, 541 N.W.2d 105 (1995).

A "sexually violent person" was defined as a person previously convicted of a violent sex offense "who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." The Wisconsin Supreme Court found no double jeopardy problem existed because this statute's primary purpose was not punishment, retribution or deterrence, but instead protection of the public and treatment of high risk sex offenders. Similarly, it was held not to violate ex post facto prohibitions because it serves "a legitimate, regulatory, nonpunitive function."