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State v. Davis: a Proportionality Challenge to Maryland's Recidivist Statute

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Notes

STATE V. DAVIS: A PROPORTIONALITY CHALLENGE TO MARYLAND'S RECIDIVIST STATUTE

The Maryland Court of Appeals decision in *State v. Davis*[1] held that a sentence of life imprisonment without parole for the fourth conviction of a violent crime[2] does not violate the eighth amendment[3] proportionality requirement.[4] This holding, however, demonstrates that a court's blind deference to legislative intent can lead to a constitutionally suspect result.

This note reviews the defendant's criminal record in conjunction with the Maryland habitual offender statute[5] and the federal doctrine of proportionality.[6] In sum, this note suggests that the court's review of the proportionality of Davis's sentence was subjective. More importantly, the court's efforts to uphold the legislative intent underlying the Maryland recidivist statute yielded an unsavory and disproportionate result for this nonviolent, habitual offender.[7]

I. THE CASE

The defendant, Drexel Otto Davis, had a lengthy history of criminal activities. His prior convictions consisted of four cases of burglary in May 1966,[8] one case of burglary in October 1966,[9] one

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1. 310 Md. 611, 530 A.2d 1223 (1987), *aff'g in part & rev'g in part* 68 Md. App. 581, 514 A.2d 1229 (1986).

2. *See infra* note 17. Capital punishment is the only other punishment authorized by Maryland law that exceeds this penalty in severity. 68 Md. App. at 590, 514 A.2d at 1234.

3. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. *Cf.* MD. CONST. DECL. OF RTS. art. 25 ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law.").

4. 310 Md. at 632, 530 A.2d at 1233. Specifically, the proportionality doctrine requires that a criminal sentence be graduated and "proportionate to the crime for which the defendant has been convicted." Solem v. Helm, 463 U.S. 277, 290 (1983).

5. *See infra* notes 8-35 and accompanying text.

6. *See infra* notes 36-69 and accompanying text.

7. *See infra* notes 73-105 and accompanying text.

8. On May 31, 1966, Davis was convicted and sentenced by Judge Joseph R. Byrnes for "four cases of '[b]urglary' in Baltimore City, to which Davis pleaded guilty and for

case of daytime housebreaking in August 1975,[10] and two cases of daytime housebreaking in October 1981.[11] In January 1985 a Baltimore County jury found Davis guilty of daytime housebreaking.[12] With this conviction, Davis was sentenced to life imprisonment without parole pursuant to article 27, section 643B(b),[13] the Maryland habitual offender statute.[14] Davis appealed his conviction and sentencing to the Court of Special Appeals, which vacated his sentence for want of proportionality.[15] The Maryland Court of Appeals, how-

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which he was sentenced to five years each, with the first three sentences consecutive and the fourth concurrent with the third." 310 Md. at 616, 530 A.2d at 1225.

9. On October 18, 1966, Davis was convicted and sentenced by Judge John E. Raine, Jr., for "one case of '[b]urglary' in Baltimore County for which Davis, upon a guilty plea, was sentenced to fifteen years to be served concurrently with the sentences for the Baltimore City offenses." *Id.*

10. On August 11, 1975, Davis was convicted of "one case of daytime housebreaking in Anne Arundel County for which Davis was sentenced to five years, with service of the last three years suspended." *Id.* For a comparison of statutory burglary, common-law burglary, and daytime housebreaking under Maryland law, see Reagan v. State, 4 Md. App. 590, 594-95, 244 A.2d 623, 626 (1968).

Numerous jurisdictions impose harsh sentences for daytime housebreaking as a first offense. In Maryland, the maximum sentence for daytime housebreaking is 10 years. MD. ANN. CODE art. 27, § 30(b) (1987 & Supp. 1988). In comparison to other states, Maryland imposes a lenient sentence for a first offense of daytime housebreaking. *See, e.g.*, TEX. PENAL CODE ANN. §§ 12.32, 30.02 (Vernon 1974) (maximum sentence for daytime housebreaking as first offense is life imprisonment).

Further, numerous states impose between 15- and 25-year maximum sentence limitations for a first offense of housebreaking. *See, e.g.*, ARK. CODE ANN. §§ 5-39-201, 5-4-401(a)(3) (1987) (20 years); D.C. CODE ANN. § 22-1801(b) (1981) (15 years); GA. CODE ANN. § 16-7-1 (1988) (20 years); HAW. REV. STAT. §§ 708-810, 706-661(2) (1985) (20 years); ILL. ANN. STAT. ch. 38, paras. 19-3, 1005-8-1 (Smith-Hurd 1977 & Supp. 1988) (15 years); NEB. REV. STAT. §§ 28-507, 28-105 (1985) (20 years); OHIO REV. CODE ANN. §§ 2911.11, 2929.11(B)(1)(a) (Anderson 1987) (25 years); OR. REV. STAT. §§ 164.225, 161.605 (1983) (20 years); PA. STAT. ANN. tit. 18, §§ 3502, 1103 (Purdon 1983) (20 years); S.D. CODIFIED LAWS ANN. §§ 22-32-3, 22-6-1 (1988) (15 years); TENN. CODE ANN. § 39-3-403 (1982) (15 years); UTAH CODE ANN. §§ 76-6-202, 76-3-203 (1988) (15 years); VA. CODE ANN. § 18.2-91 (1988) (20 years); W. VA. CODE § 61-3-11 (1989) (15 years).

11. On October 28, 1981, Davis was convicted and sentenced by Judge John R. Hargrove for "two cases of daytime housebreaking in Baltimore City for each of which Davis was sentenced to three years, to be served concurrently." 310 Md. at 616, 530 A.2d at 1226.

12. *Id.*, 530 A.2d at 1225. "Davis was convicted of stealing items worth little more than $100." 68 Md. App. at 591, 514 A.2d at 1234.

13. 310 Md. at 613, 530 A.2d at 1224. For the text of MD. ANN. CODE art. 27, § 643B(b) (1987 & Supp. 1988), see *infra* note 17.

14. The qualification of one of Davis's prior convictions was disputed at the sentencing hearing; nevertheless, the prior convictions were found to qualify in order to invoke § 643B. 310 Md. at 616, 530 A.2d at 1226.

15. 68 Md. App. at 585, 514 A.2d at 1233. Davis bifurcated his constitutional challenges at the Court of Special Appeals level. First, Davis urged that the lack of uniform policy for invocation of the mandatory sentencing statute violated the equal protection clause. The court rejected this challenge for lack of a discriminatory purpose or an arbi-

ever, rejected the Court of Special Appeals determination and found that Davis's predicate convictions supported invocation of the habitual offender statute. Therefore, the sentence imposed upon Davis was constitutionally proportionate.[16]

In *Davis* the Maryland Court of Appeals addressed two issues: (1) whether the defendant's prior convictions necessarily met the criteria to invoke the Maryland habitual offender statute[17] and (2) whether imposing a life sentence without parole violated the princi-

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trary classification. *Id.* at 589, 514 A.2d at 1233. *See also* Middleton v. State, 67 Md. App. 159, 168-72, 506 A.2d 1191, 1195-97, *cert. denied*, 308 Md. 146, 517 A.2d 771 (1986) (similar equal protection challenges rejected). Second, Davis argued that the sentence inflicted cruel and unusual punishment. 68 Md. App. at 589, 514 A.2d at 1233. He urged that the sentence imposed did not meet the constitutional proportionality test. The court held that the habitual offender statute was unconstitutional as applied to Davis because the sentence violated the eighth amendment. *Id.* at 595, 514 A.2d at 1236.

16. 310 Md. at 632, 530 A.2d at 1233.

17. MD. ANN. CODE art. 27, § 643B (1987 & Supp. 1988), states in pertinent part:

> (a) *"Crime of violence."*—As used in this section, the term "crime of violence" means abduction; arson; burglary; daytime housebreaking under § 30(b) of this article; kidnapping; manslaughter, except involuntary manslaughter; mayhem and maiming under §§ 384, 385, and 386 of this article; murder; rape; robbery; robbery with a deadly weapon; sexual offense in the first degree; sexual offense in the second degree; use of a handgun in the commission of a felony or other crime of violence; an attempt to commit any of the aforesaid offenses; assault with intent to murder; assault with intent to rape; assault with intent to rob; assault with intent to commit a sexual offense in the first degree; and assault with intent to commit a sexual offense in the second degree.
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> The term "correctional institution" includes Patuxent Institution and a local or regional jail or detention center.
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> (b) *Mandatory life sentence.*—Any person who has served three separate terms of confinement in a correctional institution as a result of three separate convictions of any crime of violence shall be sentenced, on being convicted a fourth time of a crime of violence, to life imprisonment without the possibility of parole. Regardless of any other law to the contrary, the provisions of this section are mandatory.
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> (c) *Third conviction of crime of violence.*—Any person who (1) has been convicted on two separate occasions of a crime of violence where the convictions do not arise from a single incident, and (2) has served at least one term of confinement in a correctional institution as a result of a conviction of a crime of violence, shall be sentenced, on being convicted a third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years.

Id. at (a), (b), (c). For a review of cases challenging § 643B(c), see Minor v. State, 313 Md. 573, 583-84, 546 A.2d 1028, 1033 (1988) (finding defendant's sentence under subsection (c) within constitutional limits); Stanley v. State, 313 Md. 50, 91, 542 A.2d 1267, 1287 (1988) (finding *Davis* dispositive of an eighth amendment challenge to subsection (c)); Creighton v. State, 70 Md. App. 124, 135-36, 520 A.2d 382, 387-88 (1987) (analyzing the statutory language of § 643B(b) and (c)); Teeter v. State, 65 Md. App. 105, 117-18, 499 A.2d 503, 509 (1985), *cert. denied*, 305 Md. 245, 503 A.2d 253 (1986) (rejecting defendant's argument that § 643B(c) is unconstitutional under eighth amendment).

ple of proportionality embodied in the eighth amendment.[18] First, the court analyzed and interpreted the burglary and housebreaking crimes in Maryland[19] in conjunction with Davis's prior history of recidivism.[20] The court reviewed the transcripts of the prior convictions in order to adjudge whether the defendant met the requisite qualifications needed to invoke section 643B(b).[21] After much discussion, the court found that these fundamentals were met.[22]

After analyzing the factual record of Davis's prior convictions, the court turned to an assessment of the relevant eighth amendment jurisprudence.[23] The court examined the history of the eighth amendment along with pertinent Supreme Court precedent.[24] As a result, the court held that the sentence imposed upon Davis met the proportionality requirements mandated by constitutional law.[25]

II. LEGAL FRAMEWORK

A. Habitual Offender Statutes

In an effort to target and deter violent recidivist criminals, the General Assembly of Maryland enacted rigid sentencing laws to remove career criminals from society.[26] Maryland's habitual criminal statute subjects a violent career offender to a mandatory sentence of life imprisonment without parole.[27] In *Montone v. State*[28] the Mary-

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18. 310 Md. at 616, 530 A.2d at 1227.

19. *See* Reagan v. State, 4 Md. App. 590, 594-95, 244 A.2d 623, 626 (1968) (comparing common-law burglary, statutory burglary, and daytime housebreaking).

20. *See supra* notes 8-14.

21. 310 Md. at 617-23, 530 A.2d at 1226-29.

22. *Id.*

23. *Id.* at 623, 530 A.2d at 1229. Davis did not challenge the facial constitutionality of article 27, § 643B(b), but rather argued that § 643B(b) was unconstitutional as applied to him. 68 Md. App. at 591, 514 A.2d at 1234.

24. *See infra* notes 36-69 and accompanying text.

25. 310 Md. at 632, 530 A.2d at 1233.

26. *See supra* note 17 and accompanying text. *See also* Montone v. State, 308 Md. 599, 606, 521 A.2d 720, 723 (1987) (discussing the purpose and operation of the habitual offender statute in Maryland). *Accord* Middleton v. State, 67 Md. App. 159, 166-72, 506 A.2d 1191, 1194-97, *cert. denied*, 308 Md. 146, 517 A.2d 771 (1986) (unsuccessful constitutional challenge to the mandatory sentencing procedure of Maryland's habitual offender statute); Bryan v. State, 63 Md. App. 210, 213, 492 A.2d 644, 645, *cert. denied*, 304 Md. 296, 498 A.2d 1183 (1985) ("[f]inding no constitutional infirmity" in the habitual offender statute).

27. For the text of the statute, see *supra* note 17. Habitual offender statutes in other jurisdictions illustrate the disparate penalties imposed. *See, e.g.*, KY. REV. STAT. ANN. § 532.080 (Baldwin 1985) (maximum sentence of life imprisonment with parole eligibility after 10 years); N.M. STAT. ANN. § 31-18-17 (1978) (enhancement of sentence from 1 to 8 years depending upon the current conviction—no suspension or deferral allowed); N.C. GEN. STAT. § 14-7.6 (1986) (sentence for at least 14 years with credit for good

land Court of Appeals enunciated the purpose of the recidivist statute—"to identify and target a unique class of people so that they may be permanently exiled from our free society."[29] Criminals sentenced pursuant to the recidivist statute have been incarcerated for three distinct periods of time with a resultant refusal to "conform their conduct to societal standards."[30] In sum, these criminals have not evinced the benefits of rehabilitation and in effect are presumed incapable of rehabilitation.

Maryland's habitual offender statute has three distinct requirements: (1) conviction for a crime of violence, (2) a sentence of imprisonment, and (3) three separate and distinct periods of actual incarceration before a fourth conviction of a crime of violence.[31] As a predicate requirement, an intervening term of incarceration must separate two other terms of incarceration.[32] This formality does not include consecutive or concurrent sentences.[33] Further, the statute is directed narrowly toward habitual offenders of *violent* crimes.[34] Overall, the Maryland recidivist statute is unique in statutory form; the legislature's goal to remove "incorrigible" *violent* repeat offend-

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behavior); OHIO REV. CODE ANN. §§ 2929.01, 2929.11 (Anderson 1987) (maximum term of 25 years); TENN. CODE ANN. § 39-1806 (1982) (life sentence without parole); TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974 & Supp. 1986) (upgrade of offense between 25 and 99 years).

28. 308 Md. 599, 521 A.2d 720 (1987).

29. *Id.* at 606, 521 A.2d at 723. The court further explained:

> Section 643B(b) is unlike any other habitual offender statute in the country. The Maryland statute requires more than merely "previous" convictions; it requires separate convictions. Moreover, the statute's scope is narrowed by the fact that it requires not only that an individual shall have received separate convictions, but that he shall have been sentenced to, and shall have *actually served*, three separate terms of confinement under the jurisdiction of the correctional system . . . .

Id. (footnote omitted) (emphasis in original). Only four other states—Alabama, Delaware, Louisiana, and Mississippi—have statutes similar to Maryland. *See* ALA. CODE § 13A-5-9 (1982); DEL. CODE ANN. tit. 11, § 4214 (1979); LA. REV. STAT. ANN. § 15:529.1 (West 1981); MISS. CODE ANN. § 99-19-83 (1972 & Supp. 1985).

30. *Montone*, 308 Md. at 606, 521 A.2d at 723. *See also Survey of Developments in Maryland Law, 1986-87—Criminal Law*, 47 MD. L. REV. 793, 830 (1988) (discussion of *Montone* decision). The court articulated two reasons for this qualification: (1) to avoid undermining the purpose of the recidivist statute—to weed out individuals incapable of reform, and (2) to ensure that two convictions are separated by an intervening term of incarceration in order to evidence a criminal's incapability for rehabilitation. *Montone*, 308 Md. at 613, 521 A.2d at 737.

31. 310 Md. at 615, 530 A.2d at 1225. For the text of the statute, see *supra* note 17.

32. Montone v. State, 308 Md. 599, 614, 521 A.2d 720, 727 (1987).

33. *Id.*

34. *Id.* For the definition of a "crime of violence," see *supra* note 17.

ers from society is praiseworthy.[35]

B. Eighth Amendment Proportionality Jurisprudence

The eighth amendment,[36] as applied to the states through the incorporation doctrine,[37] proscribes cruel and unusual punishments. The prohibitions of this amendment include (1) barbaric methods of punishment and (2) punishments that are exceedingly disproportionate to the crime committed.[38] The concept of disproportionality has evolved from English constitutional law.[39]

In particular, in common-law England, three chapters of the Magna Carta embodied the proportionality principle for criminal fines.[40] Further, when incarceration rather than execution became the norm, the common law prescribed that the punishment should be proportionate to the crime, a principle later embraced in the English Bill of Rights.[41] The framers of the United States Bill of Rights adopted verbatim the language of the English Bill of Rights along with the proportionality principle.[42]

The proportionality principle explicitly has been endorsed in our courts for nearly a century.[43] Notably, the most common appli-

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35. *Montone*, 308 Md. at 614, 521 A.2d at 727. For a cursory overview of the Governor's role in the parole process, see 310 Md. at 627 n.5, 530 A.2d at 1231 n.5.

36. *See supra* note 3.

37. *See* Robinson v. California, 370 U.S. 660, 667, *reh'g denied*, 371 U.S. 905 (1962) (application of the eighth amendment to the states through the fourteenth amendment). *Accord* Duncan v. Louisiana, 391 U.S. 145, 148, *reh'g denied*, 392 U.S. 947 (1968) (most recent standard of incorporation of the Bill of Rights to the states through the fourteenth amendment).

38. *See* Rummel v. Estelle, 445 U.S. 263, 288 (1980) (plurality opinion) (Texas recidivist statute invoked following a third felony conviction did not violate eighth amendment). *See also* Hutto v. Finney, 437 U.S. 678, 680-83 (1978) (reviewing remedial measures of formerly unconstitutional conditions of confinement); Ingraham v. Wright, 430 U.S. 651, 653 (1977) (students challenging disciplinary corporeal punishment in schools). *See generally* Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 SW. L.J. 1063 (1981); Note, *Recidivist Offenses: Can the Whole be Greater Than the Sum of its Parts?*, 26 LOY. L. REV. 698 (1980); Note, *Mandatory Life Sentence Under Recidivist Statute Not Cruel and Unusual Punishment*, 59 WASH. U.L.Q. 546 (1981).

39. *Rummel*, 445 U.S. at 288 (Powell, J., dissenting). Stemming from the Magna Carta, the principle found its way into the English Bill of Rights, which was the model for the United States Bill of Rights. *Id.* at 289. "Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender." *Id.* at 288.

40. *See* Solem v. Helm, 463 U.S. 277, 284 (1983).

41. *Id.* at 285.

42. *Id.* at 285-86.

43. *Id.* at 286. *See, e.g.*, O'Neil v. Vermont, 144 U.S. 323, 337 (1892) (Field, J., dissenting). The seminal Supreme Court case proscribing grossly disproportionate

cation is in the capital punishment arena.[44] Yet, in the last decade, the proportionality theory has gained popularity for challengers of felony prison sentences, most commonly life sentences without parole. The United States Supreme Court interpreted this issue in both *Rummel v. Estelle*[45] and *Solem v. Helm*.[46]

In *Rummel* the defendant was sentenced to life imprisonment for his third felony conviction under the Texas recidivist statute.[47] The State charged Rummel with felony theft for obtaining $120.75 by false pretenses but, because Rummel had a prior criminal history, the prosecution proceeded against him under the recidivist statute.[48] Rummel challenged the sentence imposed as disproportionate to the crimes committed.[49] The Court, however, refused to apply a proportionality analysis because the case did not involve a capital offense.[50] In so doing, the Court upheld the sentence and declared that the Texas recidivist statute did not violate the eighth

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sentences is Weems v. United States, 217 U.S. 349, 381-82 (1910) (successful challenge to the imposition of the punishment known as "*cadena temporal*" for the falsification of public documents); *accord* Robinson v. California, 370 U.S. 660, 667, *reh'g denied*, 371 U.S. 905 (1962) (finding that 90-day sentence for crime of being addicted to narcotics was excessive); Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion) (meaning of proportionality concept drawn from "evolving standards of decency that mark the progress of a maturing society"); *see generally* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

44. *See* Enmund v. Florida, 458 U.S. 782, 801 (1982) (death penalty excessive for nonculpable murder); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (death penalty excessive for crime of rape); Gregg v. Georgia, 428 U.S. 153, 207, *reh'g denied*, 429 U.S. 875 (1976) (death penalty for armed robbery and murder held constitutional); Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam) (death penalty constitutes cruel and unusual punishment).

45. 445 U.S. 263 (1980) (plurality opinion).

46. 463 U.S. 277 (1983). *See generally* Note, *Life Sentence Without Parole Imposed on Recidivist Guilty of Seven Non-Violent Crimes Constitutes Cruel and Unusual Punishment Under the Eighth Amendment Proportionality Test*, 14 U. BALT. L. REV. 177 (1984).

47. *Rummel*, 445 U.S. at 264. Prior to the revision of the Texas Penal Code, the recidivist statute stated: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." TEX. PENAL CODE ANN. art. 63 (recodified at TEX. PENAL CODE ANN. § 12.42 (Vernon 1974 & Supp. 1988)).

48. *Rummel*, 445 U.S. at 266. Rummel's previous convictions were for the fraudulent use of a credit card to obtain $80 worth of goods and the passing of a forged check for $28.36. *Id.* at 265.

49. Rummel v. Estelle, 445 U.S. 263, 267 (1980) (plurality opinion).

50. "Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel." *Id.* at 272. For opinions dealing with the proportionality of a death penalty sentence, see, *e.g.*, Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 173, *reh'g denied*, 429 U.S. 875 (1976); Furman v. Georgia, 408 U.S. 238, 458 (1972) (Powell, J., dissenting).

amendment's ban on cruel and unusual punishment.[51] Indeed, the statute was found to promote the legitimate societal purpose "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law."[52] Simply put, the severity of the sentence imposed pursuant to the recidivist statute was virtually immune from constitutional scrutiny; that is, the majority did not find it necessary to embark upon a proportionality analysis. Two partial justifications for this lack of scrutiny were (1) the possibility that Rummel was eligible, if warranted, for parole after twelve years[53] and (2) a reluctance to review legislatively mandated terms of incarceration.[54] Three years later the Court in *Helm* virtually ignored this plurality opinion.[55]

In *Helm* Justice Powell[56] analyzed whether a life sentence without parole violated the eighth amendment in a noncapital case despite the traditional viewpoint that a proportionality review was only applied in capital cases.[57] The State of South Dakota invoked its

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51. *Rummel*, 445 U.S. at 285.

52. *Id.* at 276. Further, the severity of a sentence is largely within the discretion of the punishing jurisdiction. *Id.* at 285.

53. Rummel v. Estelle, 445 U.S. 263, 280-81 (1980) (plurality opinion).

54. *Id.* at 274.

55. The majority in *Helm* broadly asserted that its "decision is entirely consistent with . . . Rummel v. Estelle" and that the proportionality principle can be applied to cases of imprisonment. Solem v. Helm, 463 U.S. 277, 288 n.13, 289 (1983). The dissent, however, urged that "the Court blithely discard[ed] any concept of *stare decisis* . . . and distort[ed] the concept of proportionality of punishment by tearing it from its moorings in capital cases." *Id.* at 304 (Burger, C.J., dissenting) ("Although today's holding cannot rationally be reconciled with *Rummel*, the Court does not purport to overrule *Rummel*").

In 1982 the Supreme Court ruled on the proportionality of a 40-year sentence under Virginia law for "the crime of possessing less than nine ounces of marihuana . . . ." Hutto v. Davis, 454 U.S. 370, 371 (per curiam), *reh'g denied*, 455 U.S. 1038 (1982). Relying on *Rummel*, the Court indicated its reluctance to review the terms of imprisonment and that a successful eighth amendment challenge should be " 'exceedingly rare.' " *Id.* at 374 (quoting *Rummel*, 445 U.S. at 272, 274). Justice Powell, concurring in judgment only, remained steadfast with the principles he espoused in his dissent in *Rummel*: "[O]ur system of justice always has recognized that appellate courts *do* have a responsibility—expressed in the proportionality principle—not to shut their eyes to grossly disproportionate sentences that are manifestly unjust." *Id.* at 377 (Powell, J., concurring in judgment only) (emphasis in original). Indeed, Justice Brennan further articulated that blind deference "cannot justify the complete abdication" of enforcing the eighth amendment. *Id.* at 383 (Brennan, J., dissenting).

56. Justice Powell previously explained his viewpoint on the proportionality review of noncapital cases in his dissenting opinion in *Rummel*, 445 U.S. at 285 (Powell, J., dissenting). In fact, the dissenters in *Rummel* became the majority in *Helm*.

57. *Helm*, 463 U.S. at 279. *See generally* Note, *Proportionality Review of Recidivist Sentencing is Required by the Eighth Amendment*, 33 DE PAUL L. REV. 149 (1983).

recidivist statute[58] and sentenced Helm to life imprisonment without parole for the felonious uttering of a "no account" check.[59] The Court concluded that Helm's sentence was significantly disproportionate to his crime and thus violated the eighth amendment's proscription of cruel and unusual punishment of criminals.[60]

Unique to the *Helm* opinion was the objective tripartite standard of review that a court may use when extensively analyzing a sentencing claim on eighth amendment grounds.[61] First, a court looks to the "gravity of the offense and the harshness of the penalty."[62] Second, "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction."[63] Third, "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."[64]

The *Helm* majority purportedly distinguished *Rummel* because Rummel was eligible for a relatively early parole.[65] Also, the majority vaguely pronounced, in dicta, the standard for judicial review when a sentence is challenged for disproportionality:

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58. The recidivist statute states:

> If a defendant has been convicted of three or more felonies in addition to the principal felony and one or more of the prior felony convictions was for a crime of violence as defined in subdivision (9) of § 22-1-2, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.

S.D. CODIFIED LAWS ANN. § 22-7-8 (1988). The sentence for a Class 1 felony is "life imprisonment in the state penitentiary." *Id.* § 22-6-1(3).

59. *Helm*, 463 U.S. at 279-80. Helm's criminal history consisted of three convictions of third degree burglary, one conviction of grand larceny, one conviction of obtaining money under false pretenses, and three offenses of driving while intoxicated. The crimes were neither violent nor against a person. *Id.*

60. *Id.* at 303.

61. *Id.* at 290-92.

62. *Id.* at 290-91. Other relevant variables that a court can take into consideration are nonviolent crimes versus violent crimes, the actual harm caused to a victim or society, the absolute magnitude of the crime, and the culpability of the defendant. These factors further illustrate that the analysis should be on a broad scale. *Id.* at 292-94. *See generally* Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974). *See also* Enmund v. Florida, 458 U.S. 782, 797-801 (1982) (Court thoroughly examined circumstances of defendant's crime).

63. *Helm*, 463 U.S. at 291. "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." *Id. See, e.g.*, Weems v. United States, 217 U.S. 349, 380-81 (1910) (identifying an exhausting list of more serious crimes subject to less serious penalties).

64. *Helm*, 463 U.S. at 291-92. This criterion is self-explanatory. *Cf. Enmund*, 458 U.S. at 801 (death penalty held to be excessive for felony murder under the circumstances). The use of the word "may" in prongs two and three connotes that they are not mandatory criteria. *Helm*, 463 U.S. at 291.

65. *See Helm*, 463 U.S. at 297. The majority reasoned that Helm would spend the rest of his life in prison while Rummel was eligible for parole within 12 years. *Id.*

> [W]e do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court *rarely* will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.[66]

Not surprisingly, this footnote has sparked substantial debate over the propriety of engaging in an extended proportionality analysis.[67] For example, under what circumstances will a sentence warrant review? This threshold issue remains open to query.

Justice Powell also brought to the surface two underlying assumptions regarding a proportionality review: that judges are competent to assess the gravity of an offense and that the courts are able to contrast and compare different sentences.[68] Yet these assumptions may prove to be too idealistic. Nevertheless, with *Helm*'s uniform analytical framework intact, a review of sentences for proportionality supposedly will guarantee a criminal defendant constitutional protection against cruel and unusual punishment.[69]

III. ANALYSIS

The Maryland Court of Appeals' refusal to invoke the eighth amendment to invalidate a life sentence without parole resulted in a constitutionally infirm sentence for Davis.[70] In so doing, the court mirrored the legislative intent to remove habitual offenders from free society.[71] The court and legislature justified their position by assuming that the recidivist is unresponsive to rehabilitation and therefore in need of segregation from the community.[72] Despite

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66. *Id.* at 290 n.16 (emphasis added).

67. *See infra* notes 73-75 and accompanying text.

68. Solem v. Helm, 463 U.S. 277, 292-94, 303 (1983).

69. *Id.*

70. State v. Davis, 310 Md. 611, 613, 530 A.2d 1223, 1224 (1987), *aff'g in part & rev'g in part* 68 Md. App. 581, 514 A.2d 1229 (1986).

71. *Id.* at 614-15, 530 A.2d at 1225.

72. *Id. Accord* Montone v. State, 308 Md. 599, 614, 521 A.2d 720, 727 (1987) ("criminals who qualify for punishment under § 643B(b) are incorrigible and beyond rehabilitation"); *cf.* Justice Rehnquist's discussion in Rummel v. Estelle, 445 U.S. 263 (1980) (plurality opinion):

this deference accorded to state legislatures, a court should not ignore the circumscribed protections embodied in the Bill of Rights. Even so, the court glossed over the mandates of *Rummel* and *Helm* without an in-depth analysis and applied a proportionality review without reconciling the two precedents.

A. Extended Review

After *Rummel* and *Helm*, a court reviewing a sentencing appeal will find it difficult to reconcile the principles espoused in either case. That is, if *Rummel* is controlling, an appellate court need not engage in the proportionality analysis set forth in *Helm*. Yet, if *Helm* is controlling, an extended tripartite analysis is preferred.[73] Indeed, whether *Helm* effectively overruled *Rummel* remains controversial.[74]

> The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

Id. at 284.

73. Several commentators have suggested that *Helm* repudiated *Rummel*. *See, e.g.*, Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 211 (1986-87) ("*Solem* is important not only because the Court effectively wrote *Rummel* out of the body of eighth amendment case law . . . ."); Note, Solem v. Helm: *The Courts' Continued Struggle to Define Cruel and Unusual Punishment*, 21 CAL. W.L. REV. 590, 608 (1985) ("*Solem* does not technically overrule *Rummel*. However, in theory it must overrule *Rummel* . . . ."). *See also* Williams v. State, 539 A.2d 164, 172 (Del. Super. Ct. 1988) ("Although *Solem* did not go so far as to overrule *Rummel*, it did repudiate much of the reasoning upon which *Rummel* relied." (footnote omitted)).

74. *See* Minor v. State, 313 Md. 573, 546 A.2d 1028 (1988). In *Minor* the Maryland Court of Appeals concluded that an extended proportionality analysis was not mandatory for a 25-year sentence without parole for daytime housebreaking imposed pursuant to MD. ANN. CODE art. 27, § 643B(c) (1987 & Supp. 1988). *Id.* at 583, 546 A.2d at 1034. In a concurring opinion, Judge Eldridge argued that *Helm* is controlling. *Id.* at 587, 546 A.2d at 1034-35 (Eldridge, J., concurring). Judge Adkins has yet another interpretation—"I read *Helm* as effectively overriding *Rummel* and *Hutto* . . . ." *Id.* at 590, 546 A.2d at 1036 (Adkins, J., dissenting). *Accord* Whitmore v. Maggio, 742 F.2d 230, 233-34 (5th Cir. 1984) (remanding a federal habeas corpus appeal for at least a perfunctory *Helm* analysis); *but see* United States v. Rhodes, 779 F.2d 1019, 1027-28 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986) (refusing to engage in extended proportionality analysis for lengthy sentences imposed under 21 U.S.C. § 848 (1982)); Mosley v. State, 500 So. 2d 108, 110 (Ala. Crim. App. 1986) (life sentence without parole upheld without extended proportionality review for rape); Caulder v. State, 500 So. 2d 1362, 1366 (Fla. Dist. Ct. App. 1986) (life sentence without parole for 25 years imposed for first offense of statutory sexual battery upheld without extended proportionality review); State v. Vance, 164 W. Va. 216, 233, 262 S.E.2d 423, 432 (1980) (nonapplicability of proportionality doctrine in reviewing state habitual offender statute).

In *Davis*, for example, the Maryland Court of Appeals refused to reconcile *Rummel* and *Helm*. Rather, in the alternative, the Court of Appeals engaged in a judicial review of Davis's sentence under Justice Powell's objective criteria after pronouncing that the review was unnecessary.[75] This reasoning evidences the confusion left in the wake of *Rummel* and *Helm*.

Unfortunately, the extended review of Davis's sentence against the *Helm* criteria disclosed weaknesses in the *Helm* criteria.[76] Further, the court overlooked many similarities between *Helm* and the instant case.[77] Although extreme deference is to be given to a state legislature's efforts to impose criminal sanctions against lawbreakers, legislative mandates are not always correct.[78]

B. The Gravity of the Offense and the Harshness of the Penalty

The first criterion of the *Helm* analysis is a review of the seriousness of the crime and the strictness of the penalty.[79] Davis had a total of four prior convictions for both daytime housebreaking and burglary; in Maryland, daytime housebreaking and burglary are characterized as "crimes of violence."[80] The defendant in *Helm*, however, similarly had three prior third degree burglary convictions along with convictions for grand larceny, larceny by false pretenses,

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75. 310 Md. at 633-39, 530 A.2d at 1234-37.

76. *Id.* In *Minor* Judge Eldridge profoundly suggested that a proportionality review need not be limited to Justice Powell's three criteria:

> Moreover, proportionality review need not always consider, and always be limited to, the three factors discussed in . . . Justice Powell's *Solem* opinion. It is noteworthy that the second and third factors were set forth as mere suggestions or possibilities. In some cases, an examination into the sentences imposed in other jurisdictions may be unnecessary and not very fruitful; in other cases, it may be quite helpful. Considerations apart from the three factors mentioned in . . . the *Solem* opinion are also pertinent, including deference to the legislative judgment, the *particular facts concerning the commission of the crime*, information in a pre-sentence investigation report, etc. I think that it would be unfortunate if Eighth Amendment proportionality review of sentences were frozen in the form of a "three criteria" review.

Minor, 313 Md. at 587-88, 546 A.2d at 1035 (footnote omitted) (emphasis added).

77. Davis averred that *Helm* was dispositive because the crimes were similar and characterized as minor by the Supreme Court. The court, however, agreed with the State and held that "*Helm* is not factually dispositive of the instant case." 310 Md. at 628, 530 A.2d at 1232. *See infra* notes 81-82 and accompanying text.

78. Solem v. Helm, 463 U.S. 277, 290 (1983). "In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." *Id.* at 290 n.16.

79. *Id.* at 292. See *supra* note 62.

80. *See supra* note 17. For a chronological history of Davis's prior criminal activity, see *supra* notes 8-12 and accompanying text. The court emphasized the increased risks

uttering, and driving while intoxicated.[81] The *Helm* Court characterized these offenses as minor and nonviolent and concluded that a sentence of life imprisonment without parole was too severe.[82] Nonetheless, Davis's virtually similar situation was labeled a "crime of violence" by the state legislature, thus triggering invocation of the recidivist statute.

The Maryland court did not afford this criterion enough weight in the proportionality review. According to the facts presented in the trial court, Davis's acts were nonviolent; no evidence suggested the possession of a dangerous weapon.[83] In fact, Davis stole items with a value of just over $100[84] and his two prior criminal acts involved items of even less value.[85] In effect, both the innocuous nature of the defendant's acts and the gravity of the prior offenses were moderate in relation to the harshness of the penalty imposed. Nevertheless, the court refused to assess the particular facts of Davis's crimes. Indeed, this reluctance suggests that the facts of the predicate crimes involved are immaterial and not subject to review. Yet the *Helm* Court did not espouse that viewpoint; in fact, the Court delved into a review of the crimes Helm actually committed.[86] Accordingly, the first prong of the proportionality test as applied is flawed because the court failed to analyze this prong as *Helm* prescribed.[87]

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associated with entering a dwelling house as opposed to entering a building. 310 Md. at 628, 530 A.2d at 1232. The similarities of the crimes, however, are axiomatic.

Other concerns underlie the stringent penalties imposed upon housebreakers—"risk of personal harm and the right to be free of intrusion." *Id.* at 635, 530 A.2d at 1235. Indeed, there are instances where daytime housebreaking transpired into murder. *See* Johnson v. State, 303 Md. 487, 500, 495 A.2d 1, 7 (1985), *cert. denied*, 474 U.S. 1093 (1986) (victim killed during daytime housebreaking); Colvin v. State, 299 Md. 88, 95, 472 A.2d 953, 956 (1984) (same). These concerns served to justify the Maryland legislature's inclusion of daytime housebreaking and burglary in the category of "crimes of violence." 310 Md. at 629, 530 A.2d at 1232.

81. *Helm*, 463 U.S. at 279-81.

82. Solem v. Helm, 463 U.S. 277, 279, 303 (1983).

83. 68 Md. App. at 591, 514 A.2d at 1234. *Cf.* Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974) (nonviolence of offense is factor for consideration). *But see* Teeter v. State, 65 Md. App. 105, 110-11, 499 A.2d 503, 505-06 (1985), *cert. denied*, 305 Md. 245, 503 A.2d 253 (1986) (malicious destruction of property).

84. 68 Md. App. at 591, 514 A.2d at 1234. *Cf.* Seritt v. Alabama, 731 F.2d 728, 732 (11th Cir. 1984) (finding *Helm* inapposite because of violent nature of defendant's felony).

85. The list of items stolen during Davis's most recent crimes included $80 in cash, ten chocolate chip cookies, and a quarter pound of salami luncheon meat totaling $1.50 in value. In 1966 and 1975, however, Davis's stolen goods totaled over $2000. 68 Md. App. at 591-92, 514 A.2d at 1234.

86. Solem v. Helm, 463 U.S. 277, 280 (1983).

87. The Court of Special Appeals held that the gravity of the offenses was dispropor-

To further illustrate, daytime housebreaking, burglary, and arson are the only listed "crimes of violence" that are not crimes against a person.[88] Interestingly enough, however, neither assault nor battery is listed as a crime of violence in section 643B(a).[89] Therefore, the mere legislative labeling of daytime housebreaking and burglary as crimes of violence, which in turn triggers the mandatory habitual offender statute, has evoked a harsh result for nonviolent offenders. That is, no matter how innocuous and passive Davis's crimes were, Davis would be subject to the same penalties as a felony murderer.[90] Surely Justice Powell did not envisage such deference to a law-making regime without thoroughly examining the pettiness of the offense. In sum, it appears that the first criterion of the objective *Helm* test clearly was exposed to an analysis that gave extreme, almost blind, deference to the General Assembly.

C. Sentences Imposed on Other Crimes in the Same Jurisdiction

The Court of Appeals also incorrectly assessed the second prong of the *Helm* analysis.[91] At this stage, the court reviewed various sentences imposed in Maryland for crimes of a more serious nature.[92] The Maryland Court of Special Appeals in its decision revealed five crimes that are not categorized as "crimes of violence."[93]

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tionate to the seriousness of the Maryland penalty. *Id.* at 592, 514 A.2d at 1234. In addition, the court explained that the value of the property was only a consideration when the crimes were nonviolent. *Id.* n.2. The Supreme Court, however, has recognized the relevance of assessing the "absolute magnitude of the crime. Stealing a million dollars is viewed as more serious than stealing a hundred dollars." *Helm*, 463 U.S. at 293. The Court of Appeals in *Davis*, however, did not find the pettiness of the offense persuasive. 310 Md. at 635, 530 A.2d at 1235.

88. *See supra* note 17.

89. *Id.* "In assessing the nature and gravity of an offense, courts have repeatedly emphasized the element of violence and danger to the person." Hart v. Coiner, 483 F.2d 136, 140 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

90. *See supra* note 17.

91. Solem v. Helm, 463 U.S. 277, 291 (1983). *See supra* note 63 and accompanying text.

92. 310 Md. at 635, 530 A.2d at 1235.

93. The court noted:

> For example, the following obviously violent crimes, even if repeated four times, would not result in the automatic imposition of a life sentence without possibility of parole because they are not included under § 643B(a): burglary with explosives (§ 34), child abuse (§ 35A), and third degree sexual offense (§ 464B). Poisoning water, drink, or food (§ 451) is another crime not covered by the repeat offender provision. Also, Davis would not suffer such a harsh penalty had he been a habitual cocaine distributor, rather than a housebreaker. A person with previous drug convictions would still enjoy a possibility of parole. *See* § 286(b).

68 Md. App. at 592-93, 514 A.2d at 1235.

The Court of Appeals disregarded these crimes and concluded that they were of "almost no significance" to the second prong of the *Helm* evaluation.[94] This reasoning is weak and inappropriate. Indeed, consideration of the penalties imposed for other grave violent crimes in Maryland evidences the irrationally disparate treatment given Davis.[95] Examination of the other serious crimes in the same jurisdiction is the bedrock of this criterion; it is not an immaterial task that can be ignored.

More specifically, in Maryland there are several violent crimes that, if perpetrated four times, would not yield a life sentence without parole.[96] Notably, the crime of child abuse, burglary with explosives, drug distribution, and third degree sexual offenses are *not* within the ambit of a "crime of violence."[97] Yet Davis's sentence was harsher than repeat offenders who commit these life-threatening crimes. This impressive list of more serious crimes indicates that the punishment Davis received as a nonviolent housebreaker was excessive. Nevertheless, the Court of Appeals summarily disposed of this issue with little analysis.[98] The mere fact that the legislature included only certain offenses as "crimes of violence" does not mean a court should be deterred from engaging in a *Helm* analysis, especially when it is considering the proportionality of a life sentence without parole. Indeed, this is exactly what the Court of Appeals did. Not surprisingly, this is *not* the type of analysis that *Helm* directed. From a proportionality standpoint, the second criterion of the *Helm* analysis weighed in Davis's favor.

D. Comparison of the Sentences Imposed for Commission of the Same Crime in Other Jurisdictions

Progressing to the third prong of the *Helm* analysis, the *Davis* court seemingly narrowed its approach.[99] This prong includes a review of other jurisdictions' sentences for the same caliber of crimes.[100] After conceding that only three other states authorize a

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94. The court quickly disposed of this argument, concluding that the lack of inclusion "rests on a rational basis." 310 Md. at 636, 530 A.2d at 1236.

95. *Cf.* Hart v. Coiner, 483 F.2d 136, 142 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974) (analogous comparison of penalties under West Virginia law).

96. *See supra* note 93.

97. The court broadly deferred to the legislative judgment in this area. 310 Md. at 636, 530 A.2d at 1236. Broad deference, however, should not lead to constitutional deprivations.

98. *Id.* at 635-36, 530 A.2d at 1236.

99. *Id.* at 636-37, 530 A.2d at 1236.

100. *Id.*

life sentence without parole for career criminals,[101] the Court of Appeals justified its reasoning by complimenting the Maryland legislature's aggressiveness in dealing with habitual offenders.[102] This interjurisdictional comparative review revealed that Davis would not have received a life sentence without parole in forty-seven other states.[103] Objectively, the severe penalty authorized by the Maryland recidivist statute was harsher than the normative range of sentences in a majority of jurisdictions.[104] Admittedly, the mere fact that the first two criteria were constitutionally suspect would not automatically weigh the third criterion in favor of Davis. It can be argued, however, that a sentence is not constitutionally proportionate just because a few other states have punishments equally as harsh. Because the application of the first two criteria were constitutionally questionable and the third criterion demonstrated the sentence was at the harshest end of the spectrum, it is a logical extension that Davis's sentence was constitutionally disproportionate.

E. Risks of an Extended Review

The court's blind deference to the categorical "crime of violence" label defined by the State legislature, evinced the court's desire to allow the legislature to mandate penological objectives. Although the *Helm* majority recommended that the judiciary grant broad deference to state legislatures, a court must avoid subjectivity when reviewing a sentence for proportionality. Justice Powell framed two assumptions inherent in the proportionality review: the ability of the courts to judge the gravity of an offense and the ability of a court to compare different sentences.[105] As demonstrated, these factors can prove to be illusory. That is, the *Davis* court failed

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101. *Id.* Maryland's draconian habitual offender statute is congruent to the habitual offender statute in Delaware, Nevada, and South Dakota. *See* DEL. CODE ANN. tit. 11, §§ 4214, 825 (1987); NEV. REV. STAT. § 207.010 (1986); S.D. CODIFIED LAWS ANN. § 22-7-8 (1988).

102. The court took pride in the fact that Maryland maintains a leading position. Moreover, the court concluded that Delaware had the harshest penalty for habitual offenders, thereby satisfying the third prong automatically. The court quoted Rummel v. Estelle, 445 U.S. 263 (1980) (plurality opinion): "[A]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Id.* at 282.

103. 310 Md. at 637, 530 A.2d at 1236.

104. The majority of states—33 other jurisdictions—provide for either "an enhanced term of years for habitual offenders, leave the sentencing to the discretion of the trial court, or provide for the possibility of parole if a habitual offender is sentenced to life imprisonment." 68 Md. App. at 594, 514 A.2d at 1235.

105. Solem v. Helm, 463 U.S. 277, 292 (1983).

to judge the gravity of the offense. For example, the fact that the court did not recognize the magnitude of the crime—stealing relatively small amounts of property in a nonviolent manner—illustrates the court's inability to judge the gravity of the offense. Arguably *Davis*'s proportionality review was based on the bench's personal beliefs about the relationship of a crime to its punishment. In sum, the reasoning of *Davis* clearly illustrates that these assumptions are viable risks for an extended proportionality review.

Justifiably, Davis's sentence should have failed the *Helm* analysis. A close examination of each criterion of the *Helm* test revealed weaknesses in judging the gravity of the offense in Maryland, comparing sentences imposed for other serious crimes in Maryland, and comparing Davis's sentence with that imposed in other jurisdictions. Davis received one of the harshest sentences in the State for relatively moderate nonviolent criminal conduct. The Court of Appeals' aggressive application of the Maryland recidivist statute is its testament to the legislature's commitment to punish and deter recidivists.

IV. CONCLUSION

The *Davis* opinion reflects the Maryland Court of Appeals' genuine concern for the prevention of habitual criminal activities. There are, however, a few basic precautions that the judiciary should take when analyzing a sentence for proportionality. Although deference should be given to a state legislature, blind deference can result in an unfair, disproportionate sentence which is of questionable constitutionality. Moreover, personal, subjective beliefs should not participate in the decisionmaking process. Davis's sentence was significantly disproportionate to his crime; the Court of Appeals should have affirmed the lower court and vacated the sentence for want of proportionality.

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