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# Casenotes: Constitutional Criminal Law — Sentencing — Mandatory Sentencing Statute Requiring Life Imprisonment without Parole for Habitual Offenders of Violent Crimes Satisfies the Eighth Amendment's Proportionality Principle When Applied to a Fourth Conviction of Daytime Housebreaking. State v. Davis, 310 Md. 611, 530 A.2d 1223 (1987)

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CONSTITUTIONAL CRIMINAL LAW—SENTENCING—MANDATORY SENTENCING STATUTE REQUIRING LIFE IMPRISONMENT WITHOUT PAROLE FOR HABITUAL OFFENDERS OF VIOLENT CRIMES SATISFIES THE EIGHTH AMENDMENT'S PROPORTIONALITY PRINCIPLE WHEN APPLIED TO A FOURTH CONVICTION OF DAYTIME HOUSEBREAKING. *State v. Davis*, 310 Md. 611, 530 A.2d 1223 (1987).

A man was convicted of daytime housebreaking in the Circuit Court of Baltimore County.[1] The trial court found that at least three of the man's eight prior convictions[2] qualified as recidivist convictions and sentenced the defendant to life imprisonment without parole pursuant to article 27, section 643B of the Maryland Annotated Code (the "recidivist statute").[3] The defendant contended that the severity of the sentence

1. The defendant was convicted pursuant to article 27, section 30(b) of the Maryland Annotated Code, which provides: "Any person . . . who shall be convicted of the crime of breaking a dwelling house in the daytime . . . with intent to steal . . . the personal goods of another of any value therefrom, shall be guilty of a felony. . . ." MD. ANN. CODE art. 27, § 30(b) (1982). A jury found Davis guilty of this offense in January, 1985 based upon evidence of his fingerprints found on the victim's window, his presence in the vicinity of the victim's home on the day of the crime, and his possession of the victim's stolen property. *See* Davis v. State, 68 Md. App. 581, 585, 514 A.2d 1229, 1231 (1986), *rev'd*, 310 Md. 611, 530 A.2d 1223 (1987).
2. The state cited eight prior convictions of Davis for daytime housebreaking or burglary dating back to 1966. Following a detailed pre-sentencing investigation, the trial court decided that four of the convictions served as predicates for application of the enhanced sentence. This decision was subsequently affirmed by the court of special appeals and the court of appeals. *See Davis*, 68 Md. App. at 586-87, 514 A.2d at 1231-32; State v. Davis, 310 Md. 611, 615-23, 530 A.2d 1223, 1225-29 (1987).
3. Section 643B of article 27 of the Maryland Annotated Code provides:

> § 643B. Mandatory sentences for crimes of violence.
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> (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

was disproportionate to the gravity of his offense because none of the offenses precipitating these convictions had involved an element of violence or a threat of violence.[4] Consequently, the court of special appeals held that the gravity of the defendant's offenses did not justify such a severe sentence, and found the recidivist statute unconstitutionally disproportionate as applied.[5] The court of appeals, however, reversed the lower court and held that the sentence of life imprisonment without parole for a fourth conviction of daytime housebreaking did not offend the proportionality doctrine of the eighth amendment.[6]

Proportionality, a philosophy which maintains that the severity of punishment be in proportion with the gravity of the offense, is presently a fundamental element of the American criminal justice system at both the federal and state level.[7] This philosophy is derived from the English Bill of Rights[8] and is embodied in the eighth amendment to the United States

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third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years. Neither the sentence nor any part of it may be suspended, and the person shall not be eligible for parole except in accordance with the provisions of Article 31B, § 11. A separate occasion shall be considered one in which the second or succeeding offense is committed after there has been a charging document filed for the preceding occasion.

(d) Compliance with Maryland Rules.—If the State intends to proceed against a person as a subsequent offender under this section, it shall comply with the procedures set forth in the Maryland Rules for the indictment and trial of a subsequent offender.

MD. ANN. CODE art. 27, § 643B (Supp. 1988). This statute defines daytime housebreaking as a violent crime. *Id.* § 643B(a). Consequently, a fourth separate conviction of daytime housebreaking may be punished by a sentence of life imprisonment without parole. *Id.* § 643B(b).

4. Brief for Appellee at 5-6, State v. Davis, 310 Md. 611, 530 A.2d 1223 (1987) (No. 87-142); *see Davis*, 68 Md. App. at 591, 514 A.2d at 1233. Davis was convicted of stealing items worth only $100. Of the four predicate convictions, the two most recent were for stealing items of even lesser value. This includes a conviction for the theft of ten chocolate-chip cookies and a pound of salami lunch meat. *Id.* at 591-92, 514 A.2d at 1234. No evidence was presented to show that Davis used a weapon or encountered anyone during the commission of his prior crimes. *Id.* at 591, 514 A.2d at 1234.
5. *Davis*, 68 Md. App. at 595, 514 A.2d at 1236. The court of special appeals, however, rejected Davis' equal protection attack on the recidivist statute. Davis claimed that the recidivist statute had not been enforced uniformly and therefore did not provide him with equal protection of the law as guaranteed by the fourteenth amendment. *Id.* at 589, 514 A.2d at 1233. The court rejected this argument because Davis failed to show either that the enforcement of the recidivist statute was motivated by a discriminatory purpose, or that the invocation of the statute was based on an arbitrary classification. *Id.*; *see also* Middleton v. State, 67 Md. App. 159, 168-72, 506 A.2d 1191, 1194-97, *cert. denied*, 308 Md. 146, 517 A.2d 771 (1986).
6. *Davis*, 310 Md. at 631-32, 530 A.2d at 1233.
7. *See generally* W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 162-64 (1972).
8. The English Bill of Rights of 1689 codified the long-standing English policy against disproportionate penalties and prohibited penalties that were unauthorized by statute and beyond a court's jurisdiction. 1 W. & M., sess. 2, ch. 2 (1689); *see* L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 3 (1975); *see also*

Constitution.[9]

The proper scope and application of the proportionality doctrine, however, has been the subject of much debate.[10] Traditionally, legal

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Granucci, *"Nor Cruel or Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 840, 860 (1969); Note, *Solem v. Helm: The Courts' Continued Struggle to Define Cruel and Unusual Punishment*, 21 CAL. W.L. REV. 590, 592-93 (1985) [hereinafter Note, *Struggle to Define*]; Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1911) [hereinafter Note, *What is Cruel and Unusual*]. The English enacted this legislation to address illegal or excessive penalties rather than penalties that allowed brutal methods of punishment or execution. L. BERKSON, *supra*, at 3-4; *see* Granucci, *supra*, at 848, 859. Some historians claim that the English Bill of Rights of 1689 was a reaction to the treason trials (appropriately named "The Bloody Assize") occurring in England during that period. Sentences for treason involved the drawing of a convicted man on a cart to the gallows where he was hung by the neck, then cut down while still alive, only to be disembowelled and have his bowels burned before him—after which he was beheaded and quartered. *See* 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 92 (cited in Granucci, *supra*, at 854).

Such practices, however, continued long after the enactment of the English Bill of Rights of 1689. This, combined with the fact that the "Bloody Assize" was not referred to in the House of Commons debate on the Bill of Rights as either "cruel" or "illegal," leads to the conclusion that no prohibition on the *methods* of punishment was intended. Rather, the term "cruel and unusual" can be interpreted as referring only to punishment unauthorized by statute and beyond the jurisdiction of the court. *See* L. BERKSON, *supra*, at 3-4; Granucci, *supra*, at 855-56. Thus, methods of punishment considered abhorrent by today's standards were generally unchallenged unless they were disproportionate to other criminal penalties or not sanctioned by law.

9. The eighth amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII. Article 25 of the Maryland Declaration of Rights contains the following similar language:

> That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted, by the Courts of Law.

MD. CONST. DECL. OF RIGHTS art. 25; *see* Walker v. State, 53 Md. App. 171, 452 A.2d 1234 (1982) (stating that article 25 is derived from the same source as the eighth amendment to the United States Constitution, and is therefore *pari materia* with the eighth amendment); *see also* MD. CONST. DECL. OF RIGHTS art. 16 ("[N]o Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereafter.").

In 1776, delegate George Mason adopted the language of the English Bill of Rights verbatim in his drafting of a provision in the Virginia Declaration of Rights which served as the foundation for the eighth amendment in 1791. *See* C. COLLIER & J. COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787 332-35 (1986); Granucci, *supra* note 8, at 840. Thus, the drafters of the eighth amendment implicitly adopted the English principle of proportionality. *See* Solem v. Helm, 463 U.S. 277, 285-86 (1983) (the Bill of Rights was drafted to ensure that American citizens were entitled to the same rights as the citizens of England). *But see* Furman v. Georgia, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting) ("From every indication, the Framers of the Eighth Amendment [sic] intended to give the phrase a meaning far different from that of its English precursor.").

10. *See* Note, *Solem v. Helm: Proportionality Review of Recidivist Sentencing Is Required By The Eighth Amendment*, 33 DEPAUL L. REV. 149, 150 n.6 (1983) [hereinafter Note, *Proportionality Review*]; Note, *What is Cruel and Unusual*, *supra* note 8, at 55. *See generally* Baker & Baldwin, *Eighth Amendment Challenges to the Length*

practitioners thought the doctrine applied only to the prevention of torturous punishment or execution.[11] This ideology can be attributed, in part, to an American misinterpretation of the cruel and unusual punishment clause of the English Bill of Rights.[12] The modern view, however, recognizes the constitutional right to freedom from all forms of excessive punishments.[13] Supreme Court decisions addressing the proportionality issue throughout the past century illustrate this evolution.[14]

*O'Neil v. Vermont*[15] was the first Supreme Court decision to contain an opinion that recognized the proportionality doctrine within the eighth amendment.[16] In *O'Neil*, the defendant was faced with a potential sentence of more than 54 years in prison for violations of Vermont's liquor sales laws.[17] Although the Court did not address whether the sentence violated the eighth amendment,[18] the dissent argued that "punishments which by their excessive length or severity are greatly disproportioned to the offences [sic] charged" violate the eighth amendment.[19] The dissent reached this conclusion by reasoning that the legislative history of the eighth amendment demonstrated an intent to prohibit all punishments deemed excessive.[20]

The Court formally adopted the proportionality doctrine almost two decades later in *Weems v. United States*.[21] In *Weems*, the defendant was sentenced to 15 years of imprisonment, including hard labor in chains and permanent civil forfeitures, as a result of his conviction for falsifying a public document.[22] Finding that the defendant's sentence was excessively cruel and unusual, the Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense."[23]

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*of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25 (1985) (a comprehensive examination of the development of Supreme Court cases addressing the proportionality issue).

11. *See* L. BERKSON, *supra* note 8, at 10; Baker & Baldwin, *supra* note 10, at 27; Note, *Struggle to Define*, *supra* note 8, at 593.
12. *See* L. BERKSON, *supra* note 8, at 65; Granucci, *supra* note 8, at 860-65; *see also supra* notes 8-9.
13. *See, e.g., Helm*, 463 U.S. at 284 ("The . . . [cruel and unusual] clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."); Coker v. Georgia, 433 U.S. 584, 586 (1977) ("the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed"); *see also* Baker & Baldwin, *supra* note 10, at 27-28.
14. *See generally* Baker & Baldwin, *supra* note 10.
15. 144 U.S. 323 (1892).
16. *See* Baker & Baldwin, *supra* note 10, at 28.
17. *O'Neil*, 144 U.S. at 327-30.
18. The majority dismissed the case for lack of jurisdiction and because the eighth amendment did not yet apply to the states. *Id.* at 331-32.
19. *Id.* at 339-40 (Field, J., dissenting).
20. *Id.* at 360-64 (Field, J., dissenting); *id.* at 370-71 (Harlan & Brewer, JJ., dissenting).
21. 217 U.S. 349 (1910).
22. *Id.* at 364-65.
23. *Id.* at 367.

In addition to recognizing the proportionality doctrine as a constitutional standard, *Weems* is significant in two other respects. First, by relying on the fact that the defendant had been punished more severely than persons who had committed more serious crimes in the same jurisdiction as well as persons in other jurisdictions who had committed the same crimes,[24] *Weems* was the first Supreme Court decision to render a broad interpretation of the eighth amendment based upon objective sentencing comparisons.[25] Second, because the *Weems* Court found the legislatively created punishment to be unconstitutional, the decision has been interpreted as an early indication that legislative power to determine crimes and punishments, although substantial, is not absolute.[26]

The *Weems* decision went virtually unchallenged for 70 years until the critical plurality opinion in *Rummel v. Estelle*.[27] In assessing whether a sentence of life imprisonment under a Texas recidivist statute was unconstitutionally disproportionate,[28] the *Rummel* Court employed a strict policy of legislative deference in an effort to comply with the principles of federalism.[29] Citing societal interests as the reason for dealing more harshly with repeat offenders, the Court yielded to the state legislature for the determination of felony sentences.[30] The Court further suggested that judicial review of state recidivist statutes was generally appropriate only in regard to capital punishment because of the finality and absoluteness of death.[31]

*Rummel*'s "bright-line" approach to reviewing the proportionality doctrine of the eighth amendment, however, failed to require an examination of the factual details of each case, such as the absence of violence. Consequently, the Court implicitly rejected the comparative analysis test

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24. *Id.* at 381-82.
25. *See* Baker & Baldwin, *supra* note 10, at 29; Note, *Struggle to Define*, *supra* note 8, at 594-95; *see also* Note, *Interpretation Of The Eighth Amendment—Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 DUKE L.J. 798-803 (1984) [hereinafter Note, *The Eighth Amendment*]. This objective sentencing comparison became the basis of the porportionality test adopted by the Court in Solem v. Helm, 463 U.S. 277 (1983). *See infra* notes 35-40 and accompanying text.
26. *See supra* note 25. Such an interpretation is supported by the separation of powers doctrine. *See infra* notes 74-77 and accompanying text.
27. 445 U.S. 263 (1980).
28. Prior to a conviction in 1973 for obtaining $120.75 by false pretenses, Rummel had been convicted for fraudulent use of a credit card and passing a forged check. *Id.* at 265-66. Because Rummel's 1973 conviction constituted his third felony conviction, he was sentenced to life imprisonment pursuant to Texas' recidivist statutes. *See* TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974).
29. *Rummel*, 445 U.S. at 274-75.
30. *Id.* at 275-76. The Court indicated that all states have an interest "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." *Id.* at 276.
31. *Id.* at 271-72. The Court also distinguished *Weems* on the basis of the peculiar punishments imposed in that case. *Id.* at 272-74; *see also* text accompanying note 22.

suggested in *Weems*.[32] The plurality reasoned that reference to factual details lacked true objectivity and that complex comparisons of various states' recidivist arrangements were unpersuasive in light of such variables as parole policies and prosecutorial discretion.[33] In dissent, however, Justice Powell espoused an objective three-part test for proportionality review in response to the plurality opinion.[34]

Although the Supreme Court reaffirmed *Rummel* one year later,[35] Justice Powell's test for proportionality ultimately prevailed in *Solem v. Helm*.[36] In *Helm*, the defendant was sentenced to life imprisonment without the possibility of parole under South Dakota's recidivist statute because of his six prior felony convictions.[37] To assist in determining whether the defendant's sentence was unconstitutionally disproportionate to his crime, the Court outlined the following test: (1) A comparison of the gravity of the offense with the harshness of the penalty; (2) a comparison of sentences imposed for other crimes in the same jurisdiction; and (3) a comparison of sentences imposed for the same crime in other jurisdictions.[38]

The Court, however, indicated two qualifications on the scope and applicability of this proportionality test. First, the Court noted that none of these factors alone are controlling. Rather, each factor must be considered within the totality of circumstances.[39] Second, the Court prefaced its discussion of the test by emphasizing that appropriate deference to both legislative authority and trial court discretion were considerations in judicial review of proportionality issues.[40] In conclusion, however, the Court found that it was necessary to establish an objective means for determining when such legislative deference was inappropriate

32. Baker & Baldwin, *supra* note 10, at 36; *see also* Dressler, *Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines*, 34 Sw. L.J. 1063, 1089-95 (1981) (a comprehensive analysis and critique of the *Rummel* decision).

33. *Rummel*, 445 U.S. at 279-82.

34. *Id.* at 295 (Powell, J., dissenting). This test was later adopted by the Court in Solem v. Helm, 463 U.S. 277 (1983). *See infra* notes 35-40 and accompanying text.

35. *See* Hutto v. Davis, 454 U.S. 370 (1982) (per curiam). In *Hutto*, the defendant received a sentence of twenty years imprisonment and a $10,000 fine for the possession and distribution of marijuana. The amount of marijuana found on the defendant was approximately nine ounces with a street value of about $200. The Court refused to consider the details of the defendant's case claiming such an examination would permit too much subjectivity. Without extensive reasoning or explanation, the Court defended its position in *Rummel* and concluded that the lower court's decision lacked any objective basis. *Id.* at 374-75.

36. 463 U.S. 277 (1983).

37. Prior to his 1979 conviction for uttering a "no account" check for $100, Helm had been convicted three times for third-degree burglary, three times for driving while intoxicated, once for obtaining money under false pretenses and once for grand larceny. *Id.* at 279-83.

38. *Id.* at 294.

39. *See id.* at 295; *see also* Baker & Baldwin, *supra* note 10, at 68-69.

40. *Helm*, 463 U.S. at 290.

because no penalty was *per se* constitutional.[41]

Because the Court in *Helm* did not expressly overrule *Rummel*,[42] the adoption of Justice Powell's test appears to conflict with the analysis in *Rummel*.[43] This incongruity has led some recent commentators to conclude that, from a historical perspective of the proportionality doctrine, *Rummel* should be viewed as an aberration.[44] Consequently, courts in federal and state jurisdictions have generally applied the *Helm* reasoning to decide proportionality issues.[45] The Maryland Court of Appeals, however, has declined to accept the rationale of *Helm* as controlling on all proportionality issues.[46] Instead, the court appears to have adopted a more conservative approach, similar to the *Rummel* decision, when deciding proportionality issues.[47]

In *State v. Davis*,[48] the Maryland Court of Appeals held that it was constitutionally permissible for the Maryland Legislature to mandate a sentence of life imprisonment without parole for a fourth conviction of daytime housebreaking, notwithstanding the fact that the defendant's crimes lacked any element of actual violence.[49] To arrive at this conclusion, the court found it necessary to determine the appropriate level of review to be given to the defendant's proportionality challenge.[50] Ac-

41. *Id.*
42. The majority in *Helm* did not overrule *Rummel* because they found the facts in *Rummel* to be distinguishable. Whereas Rummel was eligible for a reasonably early parole under the Texas recidivist statute, Helm was sentenced to life imprisonment without the possibility of parole. *See id.* at 304 n.32. A forceful dissent, however, argued that the *Rummel* Court had categorically rejected the very same proportionality analysis that was adopted by the *Helm* majority. *Id.* at 306 (Burger, C.J., dissenting). Further, the dissent opined that *Rummel* was an affirmative rule of law that applied to all sentences of imprisonment, other than the death penalty or bizarre physically cruel punishments. *Id.* at 307 (Burger, C.J., dissenting); *see also supra* text accompanying note 22.
43. Baker & Baldwin, *supra* note 10, at 46-47; Note, *Struggle to Define*, *supra* note 8, at 608; Note, *The Eighth Amendment*, *supra* note 25, at 792-94, 798.
44. *See* Baker & Baldwin, *supra* note 10, at 49; *see also* Dressler, *supra* note 32, at 1088-1117.
45. *See, e.g.*, Seritt v. Alabama, 731 F.2d 728 (11th Cir. 1984); Rhoden v. Israel, 574 F. Supp. 61, 65 (E.D. Wis. 1983); Commonwealth v. Middleton, 320 Pa. Super. 633, 467 A.2d 841 (1983). *But see* United States v. Rhodes, 779 F.2d 1019, 1028 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986) (*Helm* "requires an extensive proportionality analysis only in those cases involving life sentences without parole"); Mosely v. State, 500 So.2d 108 (Ala. Crim. App. 1986) (sentence of life imprisonment without parole upheld without a *Helm* proportionality review).
46. State v. Davis, 310 Md. 611, 629, 530 A.2d 1223, 1232 (1987). Several years prior to the *Helm* decision, the United States Court of Appeals for the Fourth Circuit identified and applied an objective proportionality test in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). The Fourth Circuit, therefore, can be credited with structuring the analytical framework relied upon by the Supreme Court in *Helm*. As such, it is unusual that the Maryland Court of Appeals would not adopt principles fostered within its own federal circuit.
47. *See Davis*, 310 Md. at 629-31, 530 A.2d at 1232-33.
48. 310 Md. 611, 530 A.2d 1223 (1987).
49. *Id.* at 629-32, 530 A.2d at 1232-33.
50. *Id.* at 623-28, 530 A.2d at 1229-32.

cording "substantial deference" to the General Assembly's classification of daytime housebreaking as a crime of violence and emphasizing the stringent requirements of Maryland's recidivist statute, the court determined that a *Helm* proportionality review was not required.[51] Instead the court employed a less extensive proportionality analysis of the defendant's sentence. Under this review, the court considered sentences found to be constitutional in other jurisdictions[52] as well as the severity of the criminal conduct and the requirements of the recidivist statute.[53] Nevertheless, the court did apply the three-prong proportionality test of *Helm* to further substantiate its holding that the application of a mandatory life sentence pursuant to Maryland's recidivist statute was not unconstitutionally disproportionate.[54]

In applying the first criterion of *Helm*, comparing the seriousness of the crime with the harshness of the penalty, the court acquiesced to the General Assembly's classification of daytime housebreaking as a violent crime.[55] Citing its earlier analysis,[56] the court added that "the risk of personal harm and the right to be free from intrusion" were concerns sufficient to justify the inclusion of daytime housebreaking within this classification.[57] Therefore, the court concluded that the seriousness of the crime is compatible with a sentence of life imprisonment without parole under the recidivist statute.[58]

In considering the second criterion, comparing the severity of the sentence under consideration with the sentences for more serious crimes in Maryland, the court adhered to a policy of legislative deference.[59] The court noted that a narrow construction of the recidivist statute permits the sentence of life imprisonment without parole only upon the fourth separate conviction of daytime housebreaking, or any other offense in-

51. *Id.* at 628-29, 530 A.2d at 1232. The court of appeals appears to have assigned greater weight to the statement in *Helm* regarding legislative deference than to the pronouncement in *Helm* of the objective three-part test. *Id.*

52. *See, e.g.*, Griffin v. Warden, 517 F.2d 756 (4th Cir.), *cert. denied*, 423 U.S. 990 (1975) (sentence of life imprisonment upheld without a *Helm* proportionality review where prior offenses all involved the potentiality of violence); Mosely v. State, 500 So.2d 108 (Ala. Crim. App. 1986) (sentence of life imprisonment without parole upheld without a *Helm* proportionality review where prior offenses consisted of rape, theft, burglary and breaking into an automobile); State v. Vance, 262 S.E.2d 423 (W.V. 1980) (court declined to apply a *Helm* proportionality review where third felony offense carried the potentiality of violence).

53. *Davis*, 310 Md. at 628-32, 530 A.2d at 1232-33.

54. *Id.* at 632-39, 530 A.2d at 1233-37.

55. *Id.* at 633-35, 530 A.2d at 1234-35.

56. The court employed the same analysis for the first criteria of the *Helm* review as it did for determining that a *Helm* review was not required. *See id.* at 633, 530 A.2d at 1234; *see also supra* note 51 and accompanying text.

57. *Davis*, 310 Md. at 635, 530 A.2d at 1235. The court also noted that the maximum sentence imposed for housebreaking was greater in many other jurisdictions than it was in Maryland. *Id.* at 633-35, 530 A.2d at 1234-35.

58. *Id.* at 631, 530 A.2d at 1233.

59. *Id.* at 635-36, 530 A.2d at 1235-36.

cluded within the statutory classification of violent crimes.[60] The court defended the legislature's exclusion of certain inherently violent crimes from section 643B(a), such as burglary with explosives,[61] child abuse,[62] third degree sex offenses,[63] and poisoning water,[64] as rational within the proportionality context because, hypothetically, each offense could be charged as one of the section 643B violent crimes.[65]

For the third criterion of *Helm*, the court examined the sentencing treatment of habitual housebreakers in other states as compared to Maryland.[66] The court found that the defendant could have been sentenced to life imprisonment for three or less housebreaking convictions under several state statutes.[67] Therefore, the court reasoned that the constitutional proportionality of the Maryland recidivist statute, which provides life imprisonment without the possibility of parole for a fourth conviction of housebreaking, was preserved.[68]

The *Davis* court's holding that a *Helm* extended proportionality analysis was not required in this case is improper for several reasons. First, the court of appeals placed emphasis on a paragraph in the *Helm* opinion promoting legislative deference,[69] but elected to ignore the next

60. *Id.* at 635, 530 A.2d at 1235.
61. MD. ANN. CODE art. 27, § 34 (1987).
62. *Id.* § 35A.
63. *Id.* § 464B (prohibiting the intentional touching of a nonconsensual victim's anal or genital area by: employing or displaying a dangerous or deadly weapon; inflicting suffocation, strangulation, disfigurement, or serious physical injury; threatening or otherwise placing the victim in fear; being aided and abetted by one or more individuals; or by committing the offense against an incapacitated victim).
64. *Id.* § 451.
65. The court interpreted article 27, section 451 broadly in its explanation of why the offense of poisoning water is not classified by the General Assembly as a "violent crime." The court stated that "[it] is *probably* a crime against property, *e.g.*, farm animals. If the conduct were directed at a human being, it would seemingly be attempted murder, a § 643B crime of violence." State v. Davis, 310 Md. 611, 636, 530 A.2d 1223, 1236 (1987) (emphasis supplied). In regard to child abuse, the court of appeals concluded that as a practical matter, four separate convictions would be precluded by the mere nature of the offense. *Id.* at 636, 530 A.2d at 1235-36. Finally, the court rationalized that under the correct circumstances, some of the excluded dangerous crimes, such as burglary with explosives, could be treated simply as burglary for purposes of the recidivist statute — this, the court implied, is merely a prosecutorial perogative. *Id.* at 635-36, 530 A.2d at 1235.
66. *Id.* at 636-39, 530 A.2d at 1236-37.
67. *Id.* at 638, 530 A.2d at 1236-37; *see* D.C. CODE ANN. §§ 22-1801(b), 22-104(a) (1981); IDAHO CODE §§ 18-1401, 18-1402, 19-2514 (1987); N.Y. PENAL LAW §§ 140.20 (McKinney 1975), 70.10 (McKinney Supp. 1987); S.C. CODE ANN. §§ 16-11-312 (Law Co-op Supp. 1987), 17-25-45 (Law Co-op 1985 & Supp. 1987); UTAH CODE ANN. §§ 76-6-202, 76-8-1001 (1978); W. VA. CODE §§ 61-3-11, 61-11-18 (1984). The court also noted that the defendant could have been sentenced to life imprisonment without parole after his fourth conviction for housebreaking in at least two other states. *Davis*, 310 Md. at 638, 530 A.2d at 1237; *see* NEV. REV. STAT. ANN. §§ 205.060, 207.010.2 (Michie 1986); S.D. CODIFIED LAWS ANN. §§ 22-7-8, 22-6-1(3) (Michie 1988).
68. *Davis*, 310 Md. at 638, 530 A.2d at 1237.
69. Solem v. Helm, 463 U.S. 277, 290 (1980); *see supra* text accompanying note 40.

sentence of the paragraph which states that "no penalty is per se constitutional."[70] When viewed in its entirety, this statement in *Helm* implies that the eighth amendment requires courts to scrutinize criminal statutes to ensure that the punishment corresponds with the circumstances of the crime, rather than merely acquiescing to the language of the legislature. Therefore, by giving undue deference to the legislature,[71] the *Davis* decision fails to embrace the fundamental principles of proportionality evidenced in the legislative history of the eighth amendment[72] and Supreme Court cases such as *Solem v. Helm*.[73]

A second criticism of the *Davis* holding concerns the court's role in acting as a part of the judiciary branch of government. The separation of powers doctrine requires that the judiciary bear the responsibility of determining the constitutionality of legislation.[74] Simply yielding to legislative discretion is tantamount to a breach of this judicial duty.[75] Accordingly, judicial review has been recognized as necessary to resolve issues concerning the proportionality of sentencing legislation.[76] As one member of the Supreme Court stated: "[J]udicial enforcement of the [cruel and unusual punishments] clause . . . cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes."[77] Therefore, the court of appeals, by affording undue deference to the legislative classification of crimes that justify life imprisonment without parole, failed to adequately consider the separation of powers issue in its treatment of *Davis*.

A third criticism of the holding is the court's adherence to principles that are not controlling under the circumstances. The court relied upon principles of legislative deference enunciated by a Supreme Court that was motivated by an interest in protecting federalism.[78] Supreme Court

70. *Helm*, 463 U.S. at 290; *see supra* text accompanying note 41.
71. *See Davis*, 310 Md. at 629, 530 A.2d at 1232.
72. *See supra* notes 8-13 and accompanying text.
73. 463 U.S. 277 (1983); *see supra* notes 36-41 and accompanying text.
74. *See* MD. CONST. DECL. OF RIGHTS art. 8; *see also* Attorney General v. Waldron, 289 Md. 683, 426 A.2d 929 (1981); Maryland Comm. for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656, *rev'd on other grounds*, 377 U.S. 656 (1962); Barnes v. Meleski, 211 Md. 182, 126 A.2d 599 (1956); H. CHASE & C. DUCAT, CONSTITUTIONAL INTERPRETATION 8-10 (2d ed. 1979).
75. *See* Barnes v. Meleski, 211 Md. 182, 126 A.2d 599 (1956); *see also supra* note 74.
76. *See* State v. Helm, 287 N.W.2d 497, 500 (S.D. 1980) (Henderson, J., dissenting) ("It is incumbent upon this court to determine the propriety of such a sentence at this juncture; another branch of government should not be burdened with rectifying this injustice."); Baker & Baldwin, *supra* note 10, at 30 (interpreting the Court's decision in Weems v. United States, 217 U.S. 349 (1910), the authors state that the Court's holding "was an unequivocal assertion of the power and, indeed, an acknowledgment of the constitutional duty to perform the [sentencing] review function.").
77. Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring).
78. *See* Rummel v. Estelle, 445 U.S. 263, 303 (1980) (Powell, J., dissenting); U.S. CONST. amend. X; *see also* Mackey, *Rationality Versus Proportionality: Reconsidering the Constitutional Limits on Criminal Sanctions*, 51 TENN. L. REV. 623, 630-31 (1984) (a critical review of the Supreme Court's treatment of federalism in regard to proportionality review).

cases have frequently cited legislative deference as a means to preserve the states' sovereign right to enforce criminal laws and set penalties.[79] In *Davis*, however, the discretion of the Maryland General Assembly was not reviewed by the federal judiciary, but by a state court, and therefore, federalism was not an issue because Maryland's sovereignty was not threatened.

Finally, the court failed to distinguish the defendant's challenge of the recidivist statute as applied to him individually from a "facial" challenge attacking the statute's general purpose and construction.[80] The court merely addressed the legitimate legislative purpose of the statute (the protection of the public) and the construction of the statute (the statute's requirement of four convictions).[81] These issues, however, were not raised by the appellant. Had the court of appeals addressed the defendant's challenge of the statute as applied to him individually, an examination of the factual details of Davis' convictions would have been necessary.[82]

Despite holding that extended proportionality review was not required, the *Davis* court went on to address the application of the *Helm* objective test to the facts of the case from a hypothetical perspective.[83]

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79. *See, e.g., Rummel*, 445 U.S. 263; Hutto v. Davis, 454 U.S. 370 (1982).

80. The defendant challenged the statute as it applied to him individually. *See supra* note 4 and accompanying text. The facial validity of the recidivist statute has been repeatedly sustained by precedents which justify the purpose and operation of section 643B(b). *See* Montone v. State, 308 Md. 599, 521 A.2d 720 (1987); Middleton v. State, 67 Md. App. 159, 506 A.2d 1191, *cert. denied*, 308 Md. 146, 517 A.2d 771 (1986); Bryan v. State, 63 Md. App. 210, 492 A.2d 644, *cert. denied*, 304 Md. 296, 498 A.2d 1183 (1985). Like most habitual offender statutes, it serves a legitimate and rational state interest in protecting the safety and security of its citizens, and in providing enhanced punishment for repeat offenders displaying an inability to reform. In *Montone*, the court stated:

> Thus, the picture that emerges is one of a [recidivist] statute specifically designed to identify and target a unique class of people so that they may be permanently exiled from our free society. These are the violent criminals who have been exposed to the correctional system three distinct times, who have refused to conform their conduct to societal standards, and who, instead, have demonstrated violent criminal behavior after each encounter with the correctional system, thus evidencing the futility of any hope for their rehabilitation.

*Montone*, 308 Md. at 606, 521 A.2d at 723. In this regard, the statute accommodates the principal objectives common to all criminal laws. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 7, § 5 (discussing the purposes of criminal punishment including rehabilitation, retribution, deterrence and restraint).

81. State v. Davis, 310 Md. 611, 629, 530 A.2d 1223, 1232 (1987).

82. The examination of factual details places an unquestionable strain on the court system and jeopardizes judicial economy. *See* Note, *Proportionality Review*, *supra* note 10, at 172-75. This could be considered a compelling state interest justifying a constitutional rejection of the *Helm* test under certain circumstances. However, the court failed to articulate this position in its decision. Further, a counter-argument can be maintained that judicial efficiency and economy are not sufficiently compelling interests to avoid a factual review where a defendant is subject to the possibility of life imprisonment without parole.

83. *Davis*, 310 Md. at 632-39, 530 A.2d at 1233-37.

The court apparently applied the criteria in an effort to further substantiate its holding that the sentence was constitutional.[84] The court's motive, however, may have tainted its objectivity; its application of each criterion can be characterized as an effort to perpetuate a conservative application of the proportionality doctrine—a result-oriented approach. Furthermore, in applying the *Helm* test, the court also failed to consider the totality of the circumstances as required by the test and treated single factors as controlling.[85]

The fallaciousness of the *Davis* court's application of the *Helm* test is demonstrated by the court's treatment of the first and second criteria. The court concluded that the first criterion of the *Helm* test[86] was satisfied because the serious nature of repeated daytime housebreaking justified the harsh penalty of life imprisonment without parole.[87] Again, the court's rationale was a resort to a policy of legislative deference, yielding to the discretion of the Maryland General Assembly and other state legislatures for the classification of daytime housebreaking as a violent crime.[88] This rationale can be challenged, however, because it indicates a fundamental misunderstanding of the teachings of *Helm*;[89] it ignores the court's role under the separation of powers doctrine;[90] and it fails to maintain a distinction between an "as applied" challenge and a "facial" challenge.[91]

In regard to the application of the second *Helm* criterion, which compares the severity of the sentence under consideration with the sentences for more severe crimes in the same jurisdiction, the court's rationalizations that other inherently violent crimes were appropriately excluded from the recidivist statute are unpersuasive.[92] The offenses that are excluded from the recidivist statute all contain an element of assault

84. The court of appeals determined that the sentence was constitutionally proportional without the application of the *Helm* test. *Id.* at 629, 530 A.2d at 1232; *see also supra* notes 48-54 and accompanying text.
85. *See supra* note 39 and accompanying text.
86. *Davis*, 310 Md. at 633-35, 530 A.2d at 1234-35; *see also supra* notes 38-41 and accompanying text.
87. *Davis*, 310 Md. at 628-30, 633-35, 530 A.2d at 1232, 1234-35.
88. *Id.* at 633-35, 530 A.2d at 1234-35; *see also supra* notes 51, 56 and accompanying text.
89. Although the *Helm* Court stated that a state has a justified interest in punishing a recidivist more severely than a first-time offender, it also noted that the offender's status could not be examined in the abstract. *Helm*, 463 U.S. at 296. Consequently, the *Helm* Court considered the factual circumstances of the defendant's prior crimes in applying the first criteria of the test. *See id.* at 296-97.
90. *See supra* notes 74-77 and accompanying text.
91. The court noted that daytime housebreaking carried a potential for violence, yet it ignored the fact that none of Davis' prior crimes contained any element of violence. *Compare* Davis v. State, 68 Md. App. 581, 591, 514 A.2d 1229, 1234 (1986) (considering the absence of violence in applying the first criterion of *Helm*) *with Davis*, 310 Md. at 628-29, 633-35, 530 A.2d at 1232, 1234-35 (noting the hypothetical potential for violence in daytime housebreaking). *See also supra* notes 4, 48-58, 80-82 and accompanying text.
92. *See Davis*, 310 Md. at 635-36, 530 A.2d at 1235-36.

and battery or, as in daytime housebreaking, present a potential for violence.[93] Multiple convictions for these crimes, however, are not subject to the enhanced sentencing provisions of the recidivist statute. Therefore, Davis' enhanced sentence for daytime housebreaking is disproportionate to the punishments imposed for these equal, if not more serious, offenses. Additionally, the court's argument that each excluded offense could be charged as one of the section 643B(a) violent crimes is inconsistent.[94] For example, the crime of daytime housebreaking, aggravated by an element of violence,[95] could be charged as robbery in many circumstances provided larcenous intent can be shown.[96]

Conversely, the *Davis* court's analysis of the third criterion was not inconsistent with the analysis performed in *Helm*.[97] The court applied the principles of federalism appropriately in concluding that a state's right to sovereignty allows it to penalize criminal violations without being influenced by other states.[98] Furthermore, although *Helm* requires a comparison of the sentencing possibilities in other states with the treatment in question,[99] the Supreme Court failed to provide guidelines to determine what percentage of states must have comparable punishment in order to satisfy this requirement. To satisfy the third criteria, therefore, the court's reliance on a small minority of jurisdictions with similar sentencing guidelines cannot be faulted.

The *Davis* decision may stifle future constitutional challenges to sentencing in Maryland. The burden of persuasion is already on a defendant to demonstrate the disproportionality of a challenged criminal sentence,[100] and the holding in *Davis* makes this burden even heavier. Furthermore, the result in *Davis* places undue influence on a recidivist defendant to negotiate a plea bargain because the application of article 27, section 643B remains largely within the discretion of the State's Attorney.[101] Finally, the *Davis* court's application of the *Helm* test, despite

93. *See supra* notes 61-65 and accompanying text.
94. *See Davis*, 310 Md. at 635, 530 A.2d at 1235.
95. As used in this context, an "element of violence" may include the carrying of a handgun or the display of any other form of weapon or degree of force. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 7, at 696-700.
96. *See* MD. ANN. CODE art. 27, § 486 (1982). Robbery is a common law crime in Maryland, defined as "the felonious taking and carrying away of the personal property of another . . . by violence, or by putting him in fear." Darby v. State, 3 Md. App. 407, 239 A.2d 584 (1968), *cert. denied*, 393 U.S. 940 (1970).
97. *Compare* Solem v. Helm, 463 U.S. 277, 291-92, 299-300 (1983) *with Davis*, 310 Md. at 636-39, 530 A.2d at 1236-37.
98. *Davis*, 310 Md. at 636-38, 530 A.2d at 1236-37; *see also* Spaziano v. Florida, 468 U.S. 447, 464 (1984) ("The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.").
99. *See supra* notes 38, 66-68 and accompanying text.
100. *See* W. LAFAVE & A. SCOTT, JR., *supra* note 7, at 51.
101. *See* MD. ANN. CODE art. 27, § 643B(d) (Supp. 1988); *see also* Sinclair v. State, 278 Md. 243, 363 A.2d 468 (1976); Murphy v. Yates, 276 Md. 475, 348 A.2d 837 (1975); Brack v. Wells, 184 Md. 86, 40 A.2d 319 (1944).

finding such an analysis unnecessary,[102] leaves the Maryland practitioner uncertain as to the standard to be applied in future proportionality challenges.[103] Not only must the practitioner consider the more conservative approach of *Rummel* when assessing the probability of a successful proportionality challenge, he must also remain cognizant of the *Helm* criteria.

In *State v. Davis*, the Court of Appeals of Maryland adopted a conservative application of the eighth amendment proportionality doctrine that jeopardizes the fundamental principles of proportionality. The court afforded too much weight to legislative deference and failed to recognize the distinction of a challenge regarding the application of the statute as opposed to the intent or structure of the statute. This reasoning has led to an anomaly within Maryland law. Although daytime housebreaking has been classified as a "violent crime"—legitimately punishable by life imprisonment without parole for a fourth conviction—other crimes, inherently more threatening, have been excluded from this classification. By failing to clearly indicate the standard that will be applied to future proportionality challenges, the *Davis* decision has ratified the legislature's inconsistent classifications, and has placed an undue burden upon criminal defense attorneys challenging the proportionality of a sentence.

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102. *See supra* notes 48-54 and accompanying text.

103. Although the *Davis* court can be criticized for failing to enunciate a decisive standard for proportionality challenges, much of the confusion stems from the *Helm* Court's failure to clearly indicate when a court should engage in an extended proportionality analysis. *See* Note, *Proportionality Review*, *supra* note 10, at 166-172. Because of this omission, an extended proportionality analysis will often be within the discretion of the court. *Compare* Mosely v. State, 500 So.2d 108 (Ala. Crim. App. 1986) (sentence of life imprisonment upheld without a *Helm* proportionality review) *with* Commonwealth v. Middleton, 320 Pa. Super. 633, 467 A.2d 841 (1983) (sentence of life imprisonment upheld only after a *Helm* proportionality review); *see also supra* note 45.