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## CRIMINAL LAW: *United States v. Gonzales*: In Search of a Meaningful Proportionality Principle

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# UNITED STATES v. GONZALEZ:\* IN SEARCH OF A MEANINGFUL PROPORTIONALITY PRINCIPLE

## INTRODUCTION

If New York City were to enact a law imposing a sentence of life imprisonment on third-offense illegal parkers in an effort to stem a rising tide of illegal parking, there would be a public outcry.<sup>1</sup> Behind this outcry would lie the proportionality principle which dictates that punishment comport with either the degree of harm caused or the moral blameworthiness of the offending individual.<sup>2</sup> Although legislative bodies wield a great amount of

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\* 922 F.2d 1044 (2d Cir.) (before Cardamone, Miner, Circuit Judges, & Pollack, District Judge; opinion per Cardamone, J.), *cert. denied*, 112 S. Ct. 660 (1991).

<sup>1</sup> This hypothetical is based upon the "overtime parking" example utilized in proportionality case law to illustrate an extreme case in which the punishment is undoubtedly disproportionate to the offense. Given such a scenario, most jurists agree that a court would be correct in holding that the punishment would be unconstitutional. *See, e.g., Solem v. Helm*, 463 U.S. 277, 311 n.3 (1983) (Rehnquist, J., dissenting) (in extraordinary cases, where reasonable men cannot differ as to the inappropriateness of a punishment, the proportionality principle might apply, but in all other cases courts should defer to the legislature's line-drawing); *Hutto v. Davis*, 454 U.S. 370, 374 n.3 (1982) (there could be situations, such as the overtime parking hypothetical, in which the proportionality principle may be applicable); *Rummel v. Estelle*, 445 U.S. 263, 274 n.11, 283 (1980) (the Court states that the dissent's extreme example may bring the proportionality principle into play); *but see Harmelin v. Michigan*, 111 S. Ct. 2680, 2697 (1991) (plurality) (it is improbable that the "overtime parking" scenario would ever materialize and, if it did, the problem the punishment was directed at would be so grave that people would differ over the appropriateness of the punishment).

<sup>2</sup> *See* Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 26 (1985) ("Simply stated, the proportionality doctrine prohibits a punishment more severe than that deserved by the criminal for the harm caused and the moral blameworthiness exhibited.").

Although proportionate sentencing may serve broad utilitarian goals designed to instill respect for the criminal justice system, *see infra* note 65 and accompanying text, the proportionality principle is inherently a retributive concept, concerned with "just deserts." Once a defendant has been convicted of a crime, it is just to punish that defendant, but the severity of the punishment should not inflict suffering beyond what the defendant deserves. In this respect, proportionate sentencing insures that a defendant is treated as an individual and thus limits the pursuit of utilitarian goals by legislatures. This is in accord with the Eighth Amendment's concern with the dignity of the individual. *See infra* notes 66-68 and accompanying text.

Anthony Granucci has provided a detailed explanation of how the prohibition of excessiveness in punishment can be traced back to one of the laws given to Moses by

discretionary power in defining crimes and fixing sentences to address societal problems,<sup>3</sup> the proportionality principle serves as a limit on this power by protecting an individual defendant from penal policies formulated by elected majorities that consider broad societal needs to the exclusion of individual rights.<sup>4</sup>

When an appellate court questions whether a specified sentence for a term of years is disproportionate to a crime, it immediately confronts the problem of how to gauge what is proportionate and what is unconstitutionally disproportionate.<sup>5</sup> Critics

God, the *lex talionis*—an eye for an eye, a tooth for a tooth. This is considered to be a law of retribution. Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 844 (1969). The Federal Sentencing Commission, in formulating the Federal Sentencing Guidelines, took into account that "appropriate punishment should be defined primarily on the basis of the principle of 'just deserts' . . . [the punishment] scaled to the offender's culpability and the resulting harms." Federal Sentencing Guidelines Manual, Policy Statement (Nov. 1990). See also H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 230-37 (1960); Mundle, *Punishment and Desert*, in PHILOSOPHY OF PUNISHMENT 65 (H. Acton ed., 1969); Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1121 n.13 (1979)("[I]ntuitive justice permits states to punish individuals no more than they deserve in light of the gravity of their offenses, thus limiting the potentially inhumane pursuit of reformation and the protection of society.").

<sup>3</sup> [T]here is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly . . . We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency.

*Weems v. United States*, 217 U.S. 349, 379 (1910). See *infra* notes 25-30 & 71-73 and accompanying text.

<sup>4</sup> See Gilchrist, *supra* note 2, at 1122 ("The guarantee acts as an independent constitutional limitation on the extent to which a state may impose severe sanctions on individual offenders to further broad societal goals.").

<sup>5</sup> There is a distinction between mere disproportionality and unconstitutional disproportionality. The proportionality principle does not mandate strict proportionality between crime and sentence but instead guards against punishments that are either "grossly disproportionate" to the crime, *Solem v. Helm*, 463 U.S. 277, 288 (1983), or "greatly disproportioned," *Weems*, 217 U.S. at 371. Requiring strict proportionality would presume that precise correlations between criminal offenses and deserved punishments were discernable and acknowledged by policymakers throughout the nation. Such a presumption is unrealistic given that local jurisdictions may disagree as to the severity of particular offenses. The amount of leeway allowed for jurisdictional variations, however, must not be so great as to undermine the guarantee of proportionate sentencing. To determine whether variations fall within constitutional parameters, reviewing courts usually question whether an extreme sentence is nothing "more than a different exercise of legislative judgment." *Id.* at 381.

Courts have recognized that there may be a range of constitutionally permissible

of proportionality review contend that there are no objective criteria to guide courts in making a decision on whether a legislatively mandated sentence is disproportionate to its crime.<sup>6</sup> Thus, it is argued that courts will be left to impose their subjective views of whether a punishment is proportional to its crime—leading to the accusation that courts are overstepping their bounds by substituting their judgment for that of the legislature. To meet these concerns, proponents of the proportional-

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sentences for a given offense. In *Terrebonne v. Butler*, 848 F.2d 500 (5th Cir. 1988), the court held that although a sentence of life imprisonment without parole for a 21-year-old heroin dealer was not well-proportioned to the crime, that did not mean it rose to a level of unconstitutional disproportionality. *Id.* at 507. Justice Kennedy has underscored this view by stating that one of the guiding principles in proportionality review is that the Eighth Amendment does not require strict proportionality between crime and sentence. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2705 (1991). Strict proportionality would not allow for different theories of punishment or differing responses to local conditions and would inhibit innovative legislative responses to societal problems. *Id.* See also Gilchrist, *supra* note 2, at 1121 n.13 (explaining that strict proportionality is impracticable because of the difficulty in determining the relative gravity of different offenses, the amount of punishment deserved for each and the unacceptability of requiring persons to suffer the punishment deserved in every case without regard to competing principles of social utility).

<sup>6</sup> See, e.g., Hon. William H. Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 *FORDHAM L. REV.* 639, 646 (1979)(requiring courts to make judgments as to the seriousness of crimes for sentencing purposes invites the substitution of the judiciary's subjective views for determinations of the legislature); Charles W. Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 *J. CRIM. L. & CRIMINOLOGY* 378, 417 (1980)(the inability of the judiciary to make objective distinctions between different degrees of severity calls for a rejection of activist proportionality intervention by the courts).

The supposed lack of objective standards to guide courts has provided the basis for the Supreme Court's refusal to endorse a broad guarantee of proportionate sentencing. For instance, in *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court rejected the notion that crimes involving violence could conclusively be regarded as more serious and thus meriting harsher punishments than nonviolent crimes. Justice Rehnquist stated that:

Caesar's death at the hands of Brutus and his fellow conspirators was undoubtedly violent; the death of Hamlet's father at the hands of his brother, Claudius, by poison, was not. Yet there are few, if any, States which do not punish murder by poison (or attempted murder by poison) as they do murder or attempted murder by stabbing.

*Id.* at 282 n.27. Similarly, Rehnquist argued that rational people could disagree on whether embezzlement by a banking executive or robbery of a bank at gunpoint would merit harsher punishment. *Id.*

Justice Scalia has also been a vocal critic of the notion that judges can objectively discern standards of proportionality. Believing that the gravity of an offense depends upon how socially threatening one believes an offense to be, Scalia states that the "real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not." *Harmelin*, 111 S. Ct. at 2697.

ity guarantee offer standards that purport to make proportionality review a more objective undertaking. The most frequently used standard constitutes a tripartite test that: (1) assesses the gravity of the offense and the harshness of the punishment; (2) compares the challenged sentence to sentences imposed on other criminals in the same jurisdiction; and (3) compares the challenged sentence to sentences imposed for the commission of the same crime in other jurisdictions.<sup>7</sup> Proportionality critics, however, are not persuaded that the first two prongs of the test sufficiently minimize judicial subjectivity to make proportionality review viable and they attack the third prong as violative of federalism principles owing to its interjurisdictional comparison of sentences.<sup>8</sup>

The United States Supreme Court has had great difficulty in elaborating a proportionality doctrine that adequately addresses all concerns. The Court has vacillated between adherence to a very narrow proportionality principle and adoption of a broad standard of review. On the one hand, fears of judicial subjectivity have compelled the Court to constrict the scope of proportionality review to those rare instances where there would be little disagreement as to the disproportionality of a particular sentence.<sup>9</sup> On the other hand, the Court's faith in workable objective standards has allowed a greater scope of review.<sup>10</sup> Consequently, the Court has never clearly enunciated a proportionality doctrine and, within the past decade, has been sending contradictory signals to lower courts on the scope and proper method of interpreting the doctrine.<sup>11</sup>

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<sup>7</sup> The earliest courts engaging in proportionality review recognized the usefulness of these standards either individually or in conjunction with one another and the standards gradually became more systemized. Justice Powell embraced this tripartite analysis in *Solem v. Helm*, 463 U.S. 277 (1983). See *infra* notes 38-43 and accompanying text.

<sup>8</sup> By employing an analysis that uses the sentencing schemes of other jurisdictions as a standard for comparison, critics charge that a state or locality is prohibited from addressing peculiarly local problems with novel approaches. The use of the inter-jurisdictional test is deemed inimical to the diversity cultivated in the federal system. The federalism argument rests on the notion that states retain a large degree of sovereignty to shape their penal laws. When a court engages in an inter-jurisdictional comparison, it impinges upon a state's sovereignty. See *infra* note 121 and accompanying text.

<sup>9</sup> See *Hutto v. Davis*, 454 U.S. 370 (1982); *Rummel*, 445 U.S. at 263.

<sup>10</sup> See *Solem*, 463 U.S. at 277.

<sup>11</sup> Regardless of any claims of consistency, see *Solem*, 463 U.S. at 288 n.13, the Court's contradictory signals are apparent when comparing *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), *Solem*, 463 U.S. at 277, *Hutto*, 454 U.S. at 370, and *Rummel*, 445 U.S. at

Within this unsettled framework Hector Gonzalez asked the United States Court of Appeals for the Second Circuit to review the proportionality of his sentence.<sup>12</sup> After he was convicted of tampering with a Drug Enforcement Agency informant and premeditated first degree murder, Gonzalez was sentenced to life imprisonment without parole. With respect to the proportionality issue presented, *United States v. Gonzalez*<sup>13</sup> is not an unusual or terribly difficult case. Regardless of how the Supreme Court may define its proportionality review, the *Gonzalez* decision was clearly correct: life imprisonment without possibility of parole is not a disproportionate sentence for the crime of first degree murder. While the result itself may be unremarkable, the analysis employed by the *Gonzalez* court was significant. Disregarding the objective factors set forth by the Supreme Court in *Solem v. Helm*,<sup>14</sup> the Second Circuit stated that only where the offense committed causes less revulsion than the punishment imposed would a proportionality challenge be successful. Not only does *Gonzalez* highlight the difficulty lower federal courts have had in following admittedly inconsistent Supreme Court doctrine,<sup>15</sup> but it also signifies the federal judiciary's abandonment of any meaningful proportionality guarantee.

This Comment will first provide an overview of the legal origins and judicial development of the proportionality doctrine in Anglo-American jurisprudence. Next it will examine the Second Circuit's reasoning in *Gonzalez*. By substituting a subjective "shock the conscience" standard of review for a more objective approach, the Second Circuit severs proportionality review from the few stable anchorings it once had. Additionally, the Supreme Court's most recent visiting of the issue, in *Harmelin v. Michigan*,<sup>16</sup> has not offered an acceptable alternative to the tripartite analysis. This Comment submits that *Gonzalez* followed too restrictive an approach to the proportionality analysis and urges

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263.

<sup>12</sup> *United States v. Gonzalez*, 922 F.2d 1044 (2d Cir.), cert. denied, 112 S. Ct. 660 (1991).

<sup>13</sup> 922 F.2d 1044 (2d Cir.), cert. denied, 112 S. Ct. 660 (1991).

<sup>14</sup> 463 U.S. 277 (1983).

<sup>15</sup> *Gonzalez* is only one of scores of cases that have struggled to interpret the Supreme Court's proportionality doctrine in light of *Rummel* and *Solem*. A survey of the case law reveals how confusing proportionality review has become. See *infra* note 105 and accompanying text.

<sup>16</sup> 111 S. Ct. 2680 (1991).

that the Second Circuit broaden its proportionality review accordingly. The *Solem* tripartite test has led neither to an infusion of subjective judicial views in proportionality review nor to the overturning of legislative schemes. Ultimately, this Comment advocates adherence to the *Solem* test.

## I. EVOLUTION OF THE PROPORTIONALITY PRINCIPLE IN THE SUPREME COURT

Those who have challenged their sentences as unconstitutionally disproportionate relied on the Eighth Amendment's Cruel and Unusual Punishments Clause<sup>17</sup> for a guarantee of proportionate sentencing. Although on its face this clause does not guarantee that sentences be proportioned to the offenses committed, English history provides some support for finding such a guarantee. Accordingly, the Supreme Court has recognized, at various times and to various degrees, an Eighth Amendment right to proportionate sentencing.<sup>18</sup>

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<sup>17</sup> U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

<sup>18</sup> There is a lively and inconclusive debate over the origins and meaning of the Cruel and Unusual Punishments Clause. Tracing the text of the clause back to the English Declaration of Rights of 1689, historians have been unable to conclude whether the English intended to prohibit only cruel and unusual methods of punishment or whether the clause was aimed at disproportionate punishments as well. See Granucci, *supra* note 2, at 839 (arguing that in viewing the English Bill of Rights as prohibiting only barbarous modes of punishment, the Framers misinterpreted the intention of the English drafters); Schwartz, *supra* note 6, at 382 (arguing that the "traditional view" of the Eighth Amendment as prohibiting only cruel methods of punishment is valid); JUSTICE STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 750-51 (Da Capo Press 1970) (1833) (The Eighth Amendment was "adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts. . . . Enormous fines and ameracements were . . . sometimes imposed, and cruel and vindictive punishments inflicted."). Not even the Eighth Amendment ratification debates have yielded much insight into the problem since there was little debate on the amendment. See I Annals of the Cong. 754 (J. Gales, ed. 1789)(complete debate). Nonetheless, the Justices have expressed their views on the matter and bring them to bear in their opinions. See, e.g., *Weems v. United States*, 217 U.S. 349, 393 (1910)(White, J. dissenting)(the English bill of rights contained no theory of proportional punishment); *Solem*, 463 U.S. at 286 (1983) (Justice Powell asserts that the Framers of the Eighth Amendment adopted the principle of proportionality that was implicit in the English bill of rights.). Most recently, Justice Scalia, in *Harmelin v. Michigan*, 111 S. Ct. 2680, 2687 (1991), argued that the English cruel and unusual punishments clause had nothing to do with proportionate sentencing, but was meant to prohibit the illegal exercise of royal power. Contrary to Justice Scalia's somewhat isolated view, this Comment presumes that the Eighth Amendment's Cruel and Unusual Punishments Clause does provide a guaran-

For the first hundred years of its existence, the Eighth Amendment received scant attention from the Court, and the prevailing view was that it prohibited only cruel and unusual methods of punishment.<sup>19</sup> The amendment's protection did not extend to a guarantee of proportionate sentencing.<sup>20</sup> In 1892, in *O'Neil v. Vermont*,<sup>21</sup> the proportionality element of the Cruel and Unusual Punishments Clause was noticed in a dissenting opinion.<sup>22</sup> While the majority would not entertain O'Neil's claim that his sentence was disproportionate,<sup>23</sup> Justice Field stated

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tee against disproportionate punishment. Moving from that point, the issue becomes how broad a guarantee the Constitution encompasses and how that guarantee is most effectively implemented by courts.

<sup>19</sup> During this period, the Eighth Amendment was largely viewed as a prohibition against torture and inhumane forms of punishment. *See supra* note 18. It was thought to be a safeguard against such heinous acts as the English practice of "drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disembowelled and his bowels burnt before him, and then beheaded and quartered" and burning female felons at the stake. *See Granucci, supra* note 2, at 854; *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892). The brief presented by the government in *Weems* reflected this view, arguing that the Eighth Amendment was concerned only with "mutilations and degradations." 217 U.S. at 356. The Eighth Amendment was invoked at various times to challenge methods of capital punishment. *See Wilkerson v. Utah*, 99 U.S. 130 (1878) (capital punishment by firing squad not cruel and unusual given that this was a common mode of execution); *In re Kemmler*, 136 U.S. 436 (1890) (although not a historical punishment, the New York State legislature concluded that death by electrocution was more humane than death by hanging).

In addition, the era was marked by the federal judiciary's reluctance to intrude upon what was believed to be the exclusive realm of state courts. Not until the extension of other federal guarantees to the criminally accused and convicted by the Supreme Court under Chief Justice Earl Warren was the Eighth Amendment expressly held applicable to states in *Robinson v. California*, 370 U.S. 660 (1962) (invalidating a 90-day prison sentence for the crime of being addicted to narcotics).

<sup>20</sup> Although it was not yet considered to be within the purview of the Eighth Amendment, the possibility of a proportionality guarantee was referred to on occasion. For example, in *Pervear v. Commonwealth*, 72 U.S. (5 Wall.) 475, 480 (1866), the Court stated in dicta that if the Eighth Amendment had applied to state legislation, a \$50 fine and a term of three months at hard labor would "not be regarded as excessive, cruel, or unusual" for the crime of maintaining a tenement for the sale of liquors without a license. 72 U.S. at 480. The Supreme Judicial Court of Massachusetts, when reviewing a 25-year sentence imposed under a recidivist statute on a defendant convicted of perjury, obtaining property by false pretenses and forgery, stated it was possible "that imprisonment . . . for a long term of years might be so disproportionate to the offense as to constitute cruel and unusual punishment." *McDonald v. Commonwealth*, 173 Mass. 322, 328-29 (1899), *aff'd*, 180 U.S. 311 (1901).

<sup>21</sup> 144 U.S. 323 (1892).

<sup>22</sup> *Id.* at 339-40.

<sup>23</sup> *O'Neil*, a wholesale and retail dealer of wines and liquors in Whitehall, New York, was in the practice of filling orders received from the citizens of Rutland, Vermont. *Id.* at



that the Eighth Amendment was directed not only against barbarous modes of punishment, such as the rack, the thumbscrews and the iron boot, "but against all punishments which by their excessive length or severity [we]re greatly disproportioned to the offences charged."<sup>24</sup>

#### A. *Weems v. United States*

In 1910 the Supreme Court decided what is often regarded as the seminal proportionality doctrine case. In *Weems v. United States*<sup>25</sup> the Court enlarged the scope of the Eighth Amendment to incorporate Justice Field's view that the Constitution guaranteed proportionate sentencing. Under this approach, the Court held that a fifteen-year prison term of "cadena temporal" was unconstitutionally disproportionate for the offense of falsifying a public document.<sup>26</sup> While recognizing

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327. The thirsty Vermonters would often send their empty jugs to O'Neil via the National Express Company with a note attached requesting that the containers be filled. *Id.* O'Neil would honor these requests and send the filled jugs back to Rutland to be delivered C.O.D. Subsequently, a Rutland jury convicted O'Neil of 307 violations "of selling intoxicating liquor without authority and contrary to the laws of Vermont." *Id.* See Revised Laws of Vermont, ch. 169, §§ 3800, 3802 (1880). He was fined \$6638.72, \$20 for each offense plus prosecution costs. If he did not pay before a specified date, he was to be confined to hard labor for 19,914 days (over 54 years). See Revised Laws of Vermont, § 4366 (1880) (prescribing the time of imprisonment for default of fines payment).

The majority found that the claim of cruel and unusual punishment was not assigned as error in the brief to the Court and, furthermore, that the Eighth Amendment did not apply to the states. *Id.* at 331-32. Justice Field, however, was not content with the majority's resolution of the case. He stated that "[i]f there is no remedy . . . there is a defect in our laws . . . I think there is a remedy, and that it should be afforded by this court." *Id.* at 341.

<sup>24</sup> *Id.* at 339-40. Even before the proportionality principle was officially recognized, Justice Field was engaging in a comparative analysis to other crimes and sentences. He noted that if O'Neil had been convicted of burglary, highway robbery, manslaughter, forgery or perjury he would have received a lesser punishment. *Id.* at 339. This demonstrates the tendency to resort to a comparative analysis to make an informed objective decision on the proportionality of a sentence.

<sup>25</sup> 217 U.S. 349 (1910).

<sup>26</sup> Owing to the historical fact of the Spanish cession of the Philippine Islands to the United States after the Spanish-American War, the *Weems* Court found itself interpreting a provision of the Philippine Bill of Rights that was nearly identical to the Eighth Amendment. The interpretation of the Philippine clause was therefore deemed to be a pronouncement of the meaning of its American counterpart.

*Weems*, a government disbursing officer who falsified an entry in a cashbook, was sentenced to 15 years of "cadena temporal," a punishment borrowed from the penal code of Spain. The Court described *Weems'* punishment as "confinement in a penal institution [with] a chain at the ankle and wrist . . . hard and painful labor, no assistance from

the "wide range of power that the legislature possesses"<sup>27</sup> in defining crimes and fixing punishments, the Court asserted that it was "a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."<sup>28</sup> To illustrate the disproportionate relationship between Weems's punishment and offense, the Court compared his crime to more serious crimes that had more lenient penalties and also to the comparable federal offense of falsifying public documents, which would have merited, at most, two years imprisonment.<sup>29</sup> Essentially *Weems* carved out a broad proportionality guarantee from the Cruel and Unusual Punishments Clause by tempering its respect for the legislative prerogative in defining punishments. The Court did so through a comparative analysis that assessed whether the legislature had exceeded its constitutional authority.<sup>30</sup>

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friend or relative, no marital authority or parental rights or rights of property . . ." *Id.* at 366. In addition to these conditions of confinement, Weems would endure "accessories" to his punishment after his release. These consisted of civil interdiction, perpetual absolute disqualification and subjection to surveillance for the remainder of his life. *Id.* at 364. Holding this sentence to be unconstitutional, the Court stated that such punishment for such a crime "excit[ed] wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime." *Id.* at 365.

<sup>27</sup> *Id.* at 379.

<sup>28</sup> *Id.* at 367.

<sup>29</sup> *Id.* at 380-81. The terse comparison that was done in the *O'Neil* dissent took on greater analytical proportion in *Weems*. Closely paralleling the tripartite test, which would be enunciated years later, the Court: (1) evaluated the nature of Weems's offense and punishment, finding that he had falsified a single item of a public record, had injured no one and had no intent to defraud, but was nonetheless subjected to a severe punishment imposed with "draconian uniformity"; (2) listed several crimes, including various degrees of homicide, inciting rebellion, robbery and larceny, all of which the Court believed to be more serious than Weems's offense, yet they merited more lenient punishment; and (3) compared Weems's offense and sentence to the identical crime in the United States and found that an offender in the United States could not be imprisoned for more than two years.

<sup>30</sup> This expansive interpretation of *Weems* is not the only possible reading of the case. In the Court's most recent opinion interpreting the contours of the proportionality principle, Justice Scalia forthrightly asserts that *Weems* is susceptible of divergent readings. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2699 (1991). Since the *Weems* Court condemned the punishments "both on account of their *degree and kind*," 217 U.S. at 377 (emphasis added), a question arises whether the opinion can be read as an endorsement of a broad proportionality guarantee alone or whether the holding was inextricably tied to the peculiar accessories also imposed as part of the punishment. Justice Scalia supports his view that *Weems* did not announce a general proportionality principle by noting the long period of dormancy after *Weems* during which no proportionality guarantee was invoked. *Harmelin*, 111 S. Ct. at 2700.

This Comment argues, however, that the most crucial portion of the *Weems* decision, which Justice Scalia overlooks, directs that the Cruel and Unusual Punishments

## B. *The Rummel v. Estelle and Solem v. Helm Decisions*

Seventy years after *Weems* the Supreme Court had the opportunity to apply the proportionality principle to another sentence for a term of years.<sup>31</sup> Unlike *Weems*, the decision in *Rummel v. Estelle*<sup>32</sup> adopted a restrictive approach to proportionality review. The Court held that a mandatory life term with a possibility of parole was not a disproportionate punishment for a third-felony offender convicted under a Texas recidivist statute.<sup>33</sup> *Rummel's* life sentence for three nonviolent, property-related offenses<sup>34</sup> underlined how narrow the proportionality principle had suddenly become. In addition to construing *Weems* as based more upon the peculiarity of the sentence than its excessive length, the Court reasoned that since courts were incapable of making objective determinations regarding the severity of

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Clause be interpreted liberally. The *Weems* Court devoted several pages to an exposition of the necessity of reading the Constitution broadly, instructing that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems*, 217 U.S. at 373. The Court suggested that the Framers of the Eighth Amendment had sufficient insight to foresee that cruel and unusual punishment could be inflicted in ways "other than those which inflicted bodily pain or mutilation," and that they therefore intended the clause to apply to other abusive practices as they arose in the future. *Id.* at 372. Following the express language set forth by the Court, it is unmistakable that the clause is to be interpreted to encompass "new conditions and purposes," such as the guarantee of proportionate sentencing. *Id.* at 373. The earliest commentary on *Weems* stated that "the progressive construction of [the Cruel and Unusual Punishments Clause] laid down by this case [*Weems*] seems desirable." Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1911) [hereinafter *What is Cruel*]. This reading of the clause is also supported by the Court's continued recognition of the Eighth Amendment's dynamic nature. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.>").

<sup>31</sup> Although this Comment is concerned only with the proportionality principle as it applies to sentences for terms of years, proportionality challenges do arise in other contexts. For instance, the Court's death penalty jurisprudence often involves questions of proportionate sentencing. See *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that capital punishment is a disproportionate punishment for the crime of rape); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty is unconstitutional when imposed for felony murder where defendant was but a mere participant in the felony).

<sup>32</sup> 445 U.S. 263 (1980).

<sup>33</sup> *Id.* at 285.

<sup>34</sup> In 1964 William Rummel pleaded guilty to a charge of fraudulent use of a credit card to obtain \$80 worth of goods and services. In 1969 Rummel pleaded guilty to passing a forged check in the amount of \$28.36. In 1973 Rummel was convicted of obtaining \$120.75 by false pretenses. It was upon this third conviction that the state sought to prosecute Rummel under Texas's recidivist statute which mandated a life sentence. *Id.* at 265-66.

crimes and corresponding punishments, only in very rare and extreme cases could a sentence be overturned as unconstitutionally disproportionate.<sup>35</sup>

The dissent, in challenging the majority's narrow view of the proportionality principle, reasoned that *Weems* had spelled out a broad proportionality guarantee. The dissent offered three objective factors that judges could rely upon to review the proportionality of sentences.<sup>36</sup> Reviewing courts were: (1) to ex-

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<sup>35</sup> The majority emphasized that Rummel, demonstrating himself to be incorrigible, was punished not solely for his specific offenses, but for his status as a habitual offender. He was therefore deserving of a harsh punishment. *Id.* at 276. In contrast the dissent focused on the petty nature of the underlying offenses.

Recidivist statutes raise troublesome proportionality questions when the punishment seems too severe in relation to the underlying offensive conduct. *See, e.g.,* Graham v. West Virginia, 224 U.S. 616 (1912) (mandatory life sentence for three horse stealing convictions constitutional). Unlike the Texas recidivist statute at issue in *Rummel*, the current Federal Sentencing Guidelines Career Offender provision, *see* Federal Sentencing Guidelines Manual § 4B1.1 (Nov. 1990), metes out harsher penalties only when the instant offense and the two prior convictions are either crimes of violence or controlled substance offenses. This formulation insures that a repeat offender with comparatively minor underlying convictions will receive different consideration than more serious offenders. Repeat offenders of federal drug laws who are sentenced under this provision, however, frequently challenge the proportionality of their sentences, contending that their drug offenses are not grave crimes. *See, e.g.,* United States v. McLean, 951 F.2d 1300 (D.C. Cir. 1991) (seventeen and one-half year sentence for a "career offender" not disproportionate); United States v. Gordon, 953 F.2d 1106 (8th Cir. 1992) (defendant had at least two previous convictions for controlled substance felonies and sentence of 262 months was therefore not disproportionate); United States v. Willis, 956 F.2d 248 (11th Cir. 1992) (life sentence for third and fourth drug offense convictions permissible).

It is important to recognize that the *Rummel* Court did not hold that there was no proportionality principle in constitutional review. Rather, in what proved to be the most critical part of the decision, Justice Rehnquist acknowledged in a footnote the dissent's hypothetical of overtime parking punishable by life imprisonment, noting that "[t]his [was] not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent." *Rummel*, 445 U.S. at 274 n.11; *see also supra* note 1. This slight opening allowed the *Solem* Court to broaden the guarantee just three years later.

<sup>36</sup> *Rummel*, 445 U.S. at 295 (Powell, J., dissenting). These criteria dated back to *Weems* and were being used by lower federal courts long before they were mentioned in this dissenting opinion. Justice Powell, who wrote for the dissent, indicated that these criteria were a way to "minimize the risk of constitutionalizing the personal predilections of federal judges." *Id.*

Critical of proportionality review, the majority was quick to reject the idea that an objective analysis could be performed. It believed that any ordering of crimes on a continuum was purely subjective and that it was impossible for a court to conclude, for instance, that a first time violent offender necessarily warranted harsher punishment than a three-time nonviolent offender. The Court stated that "rational people could disagree as to which criminal merits harsher punishment." *Id.* at 282 n.27. *See also supra* note 6 and accompanying text. This argument was aimed at undercutting the first two

amine the nature of the offense and the accompanying sentence; (2) to perform an intra-jurisdictional comparison of the defendant's sentence to those imposed for other crimes in that jurisdiction; and finally (3) to perform an inter-jurisdictional comparison by looking at sentences imposed for the same crime in other jurisdictions. After applying this three-part analysis, the dissent concluded that Rummel's sentence was disproportionate to the offenses he committed.<sup>37</sup>

In 1983, three years after the *Rummel* decision, the Court appeared to reverse itself in *Solem v. Helm*.<sup>38</sup> The Court found a

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prongs of the dissent's analysis which relied upon some determination of the relative gravity of offenses. Furthermore, after reviewing the charts and tables Rummel submitted to show that he received the harshest penalty of any jurisdiction in the nation, the majority stated that there was no "constitutionally imposed uniformity" of sentencing and that some state would inevitably have the harshest penalty for a crime. *Id.* at 279-82. Thus the federalism argument was utilized to undercut the third prong of the dissent's analysis. See *supra* notes 5 & 8 and accompanying text.

<sup>37</sup> Specifically, Justice Powell concluded that the nature of Rummel's crimes was nonviolent and nonthreatening, causing physical injury to no one; Texas's recidivist statute did not differentiate between types of habitual offenders, making it possible for a defendant who committed three murders to be sentenced identically to a defendant who cashed three fraudulent checks; and Rummel would not have been sentenced to a mandatory life term for three nonviolent property-related offenses in any other jurisdiction. *Id.* at 295-302.

<sup>38</sup> 463 U.S. 277 (1983). Between the *Rummel* and *Solem* decisions the Supreme Court decided a case that sharpened the Court's position on the proportionality principle. Convicted of possession of nine ounces of marijuana with intent to distribute, Trenton Davis was sentenced to 40 years in prison and given a \$20,000 fine under a Virginia statute. Tracing the course of Davis's appeal demonstrates the disarray in proportionality review that has resulted from a lack of consensus on how broad the guarantee is or should be.

Using an objective analysis formulated by the Fourth Circuit in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1972), *cert. denied*, 415 U.S. 938 (1974), see *infra* note 101 and accompanying text, which consisted of essentially the same criteria cited in the *Rummel* dissent, the district court ruled Davis's sentence to be unconstitutionally disproportionate. *David v. Zahrandnick*, 432 F. Supp. 444 (W.D. Va. 1977). A Fourth Circuit panel decision, retreating from the *Hart* analysis and stating that *Weems* was based more on the method than the length of punishment, concluded that the 40 year sentence was within constitutional bounds. *Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978). On rehearing en banc, the court affirmed the district court's finding of unconstitutionality based on the lower court's analysis. *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979). The Supreme Court vacated the en banc judgment, 445 U.S. 947 (1980), and remanded it for further consideration in light of *Rummel*. By an equally divided court, the Fourth Circuit again affirmed the district court's ruling. *Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981).

The Supreme Court, irritated by the Fourth Circuit's apparent disregard of controlling precedent, wrote the last word on Davis's proportionality challenge. In *Hutto v. Davis*, 454 U.S. 370 (1982), the Court held in a per curiam opinion that the 40 year sentence was not disproportionate and therefore did not constitute cruel and unusual punishment.

sentence of life imprisonment without possibility of parole to be unconstitutionally disproportionate when imposed on a seven-time nonviolent felony offender.<sup>39</sup> Instead of following the narrow course for proportionality review set forth in *Rummel*, the *Solem* Court boldly asserted that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted."<sup>40</sup> Cognizant of the fact that appellate courts were not to substitute their judgments for those of sentencing courts and legislatures, the Court applied the *Rummel* dissent's three-prong analysis. The Court found that while Helm's offenses were relatively minor, his punishment was the most severe that could be implemented in South Dakota.<sup>41</sup> It also found that the few crimes punishable by life imprisonment in South Dakota were quite grave in comparison to Helm's offenses.<sup>42</sup> Finally, it found that Helm "was treated more severely than he would have been in any other State."<sup>43</sup> The Court, satis-

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While the *Rummel* court had pointed out the difficulties inherent in a supposedly objective analysis, *Hutto* explicitly rejected each element of the Fourth Circuit's *Hart* test, finding that they could not justify an extensive proportionality review by courts. *Id.* at 373-74 n.2. In restating the holding of *Rummel*, the *Hutto* Court left little doubt about the restricted scope of the proportionality guarantee: "*Rummel* stands for the proposition that federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment,' and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'" *Id.* at 374 (citations omitted). Once again, however, the Court did not close the door entirely on proportionality review, as it reiterated the possibility that the principle would be applicable in the "overtime parking" scenario. *Id.* at 374 n.3.

<sup>39</sup> The factual similarity between the *Rummel* and *Solem* cases makes the differing judgments difficult to explain. Similar to *Rummel*, Jerry Helm's offenses were nonviolent and many were property-related. Over a span of 15 years, Helm had been convicted of obtaining money under false pretenses, third-offense driving while intoxicated, uttering a "no account" check for \$100 and three offenses of third-degree burglary. 463 U.S. at 279-80. The fact that Helm had seven prior convictions compared to *Rummel*'s three prior convictions only adds to the difficulty in distinguishing the outcomes. Also similar to *Rummel*, Helm was prosecuted under a recidivist statute imposing a mandatory term of life imprisonment.

<sup>40</sup> 463 U.S. at 290.

<sup>41</sup> *Id.* at 297. Striving to maintain some semblance of consistency, the Court distinguished *Rummel* by noting that under Texas's generous good time credit system, *Rummel* could theoretically be paroled in 12 years, while Helm had no possibility of parole. *Id.*

<sup>42</sup> *Id.* at 298. The Court listed treason, first-degree manslaughter, first-degree arson and kidnapping. In the Court's view, these were all much more serious offenses than any of those committed by Helm, yet they all received the same punishment.

<sup>43</sup> *Id.* at 300. The analysis conducted by the court of appeals revealed that Nevada was the only state in which Helm might have been given a similar sentence, but that

fied that its decision was based on an objective analysis, concluded that Helm's sentence was unconstitutionally disproportionate.

### C. Harmelin v. Michigan

The inconsistent *Rummel* and *Solem* rulings left the proportionality doctrine in need of clarification. Because *Solem* professed not to overrule *Rummel*, lower courts were unsure of the scope of proportionality review and the degree of deference to be accorded legislative decisions. In 1991, in *Harmelin v. Michigan*,<sup>44</sup> the Court attempted to reconcile the tension between *Rummel* and *Solem*, but instead added to the proportionality doctrine's ambiguities. The Court was presented with the difficult issue of whether a sentence of life imprisonment without possibility of parole was disproportionate to the offense of possession of 672.5 grams of cocaine. In holding that the sentence was not disproportionate, the Court was divided on which approach to adopt.<sup>45</sup>

Justice Scalia, joined only by Chief Justice Rehnquist, took the novel position that the Eighth Amendment's Cruel and Unusual Punishments Clause contained no guarantee of proportionate sentencing.<sup>46</sup> Convinced both that history showed no such guarantee and that judges could not draw objective lines between constitutionally permissible and impermissible sentences for terms of years, Scalia stated that he would simply overrule *Solem*,<sup>47</sup> declining to review the sentence in this or any

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such a sentence was only authorized, not mandated, by Nevada law. *Id.* at 299-300.

<sup>44</sup> 111. S. Ct. 2680 (1991).

<sup>45</sup> The Court was split 5-4 as to whether Harmelin's sentence was constitutional. Justice Scalia's plurality opinion was joined by Chief Justice Rehnquist. Justice Kennedy, joined by Justices O'Connor and Souter, filed a concurring opinion. Justice White wrote a dissenting opinion joined by Justices Blackmun and Stevens. Although agreeing with Justice White, Justice Marshall filed a separate dissenting opinion simply to note his belief that capital punishment is in all instances unconstitutional under the Cruel and Unusual Punishments Clause.

<sup>46</sup> *Id.* at 2686.

<sup>47</sup> *Id.* Justice Scalia harbored no hope that a workable objective analysis could be implemented. He stated that:

The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women has considered proportionate—and to say that it is not. For the real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

other case.

Justice Kennedy, on the other hand, attempted, like many lower courts, to reconcile *Rummel* with *Solem*. He concluded that the Court's decisions had always recognized a "narrow" proportionality principle,<sup>48</sup> as in *Rummel*, but that the comparative analysis of *Solem* was to be retained and utilized only after a threshold comparison had led to an inference that the sentence was grossly disproportionate.<sup>49</sup> Kennedy also gleaned from case law what he determined as the five essential principles of proportionality review. He stated that: (1) the legislature holds a position of primacy in establishing prison terms for crimes; (2) the Eighth Amendment does not dictate adherence to any one penological theory; (3) federalism promotes differing penal schemes; (4) proportionality review must be as objective as possible; and (5) the Eighth Amendment does not require strict proportionality between crime and sentence.<sup>50</sup> Concluding that Harmelin's conduct posed a grave threat to society,<sup>51</sup> Kennedy found that it was not unreasonable for the Michigan legislature to impose such a harsh sentence.

Justice White's dissent castigated both Scalia and Kennedy for not respecting the proportionality doctrine.<sup>52</sup> White insisted that *Solem* was the controlling case and he proceeded to find the sentence imposed upon Harmelin unconstitutionally disproportionate.<sup>53</sup>

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*Id.* at 2697.

<sup>48</sup> *Id.* at 2702.

<sup>49</sup> *Id.* at 2707.

<sup>50</sup> *Id.* at 2703-05.

<sup>51</sup> *Id.* at 2705.

<sup>52</sup> *Id.* at 2709.

<sup>53</sup> *Id.* at 2716-19. Applying the *Solem* analysis, Justice White found that Harmelin's crime of mere possession was nonviolent and the crime required a degree of intent not indicative of a grave offense. Yet the sentence for the crime was the most stringent imposed for any crime in Michigan. Harmelin received a sentence more severe than those given to criminals who committed crimes against persons and property. Only Alabama imposed such a harsh penalty for first-time drug offenders; however Alabama required the possession of at least 10 kilograms of cocaine, compared to only 650 grams required under the Michigan statute. Although the Supreme Court found the sentence in *Harmelin* not to be constitutionally excessive, the Supreme Court of Michigan, in *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992), subsequently held that the Michigan sentencing scheme did violate that state's constitutional prohibition against "cruel or unusual punishment." In reaching its decision, the Supreme Court of Michigan focused on the fact that the Michigan provision was worded differently from the Eighth Amendment, that the Michigan provision was adopted more than 171 years after the Eighth Amendment



## II. THE GONZALEZ DECISION

In August 1989 twenty-one-year-old Hector Gonzalez, an individual involved in drug trafficking on Manhattan's Lower East Side, killed Felix Pichardo, a confidential informant, to prevent him from giving information on narcotics activities to the Drug Enforcement Agency ("DEA").<sup>54</sup> The evidence introduced at trial indicated that Gonzalez had committed premeditated murder.

A jury sitting in the United States District Court for the Southern District of New York subsequently convicted Gonzalez of both tampering with an informant and first degree murder.<sup>55</sup> Under the federal homicide statute and the Federal Sentencing Guidelines, the court imposed a sentence of life imprisonment without parole.<sup>56</sup> Gonzalez challenged his sentence as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. He argued that his sentence was unconstitutionally disproportionate to the offense he committed.

The Second Circuit decided Gonzalez's case in January 1991, six months before the *Harmelin* decision. The *Gonzalez* court thus had to resolve the conflicting holdings of *Rummel* and *Solem* by itself. In an analysis that echoed the *Rummel* holding, the Second Circuit held that Gonzalez's sentence was constitutional, unanimously reasoning that the Supreme Court had intended there to be only a narrow proportionality guarantee.<sup>57</sup> While describing its scope of review in minimalist terms, the court emphasized the superior role of the legislature in determining penological schemes, noting that the "legislature's line drawing . . . is primary and presumptively valid."<sup>58</sup> When, in a "rare case,"<sup>59</sup> a court engages in proportionality review, the court stated that it was "confined to deciding whether a sentence . . . [was] within constitutional limits."<sup>60</sup> Only if a chal-

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and that Michigan precedent interpreting the state's prohibition "was more consistent with the reasoning of the *Harmelin* dissenters than with that of the *Harmelin* majority." *Id.* at 873.

<sup>54</sup> *United States v. Gonzalez*, 922 F.2d 1044, 1047 (2d Cir. 1991).

<sup>55</sup> *Id.* at 1048.

<sup>56</sup> See 18 U.S.C. §§ 1111(b), 3559, 3581 (1988); 28 U.S.C. §§ 991-998 (1988).

<sup>57</sup> 922 F.2d at 1053.

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

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

lenged punishment "shocked the collective conscience of society"<sup>61</sup> would it be ruled unconstitutionally disproportionate. A sentence of life imprisonment without parole for premeditated murder was not deemed to be "shocking" to society's conscience. The Second Circuit made no mention of the *Solem* tripartite test.<sup>62</sup>

### III. ANALYSIS

Neither *Gonzalez* nor *Harmelin* bodes well for defendants who challenge their sentences on proportionality grounds. These cases have so narrowed the proportionality guarantee that to be successful the challenged sentence would have to rise to a level of absurdity—a sentence of life imprisonment for overtime parking. This disturbing trend of undue deference to the legislature in fixing punishments is an abdication of the responsibility imposed on courts by the Eighth Amendment.<sup>63</sup> An individual's freedom from disproportionate punishment is in serious jeop-

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<sup>61</sup> *Id.* Alternatively, the court framed its test for disproportionality as whether the offense causes less revulsion than the punishment imposed. If the offense is found to be less revolting than the punishment, the punishment would be held unconstitutionally disproportionate. *Id.*

<sup>62</sup> Though the court's proportionality discussion did lean toward the restrictive *Rummel* holding, the court did not ignore the *Solem* decision. The court compared the facts and holdings of *Rummel* and *Solem*, *id.* at 1052, and noted that they were "difficult to harmonize." *Id.* The court utilized language from *Solem* that was deferential to legislative determinations and that could be dovetailed easily with *Rummel's* holding in grasping for a coherent doctrine.

<sup>63</sup> Dissenting from a denial of *certiorari* in *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), Justice Marshall stated:

It is axiomatic that this Court should approach Eighth Amendment challenges with caution, lest it become "under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country." But neither should the Court abdicate the function conferred by the Eighth Amendment, to determine whether application of a given legislative judgment results in punishment grossly out of proportion to specific offenses. I decline to join the Court in its abdication here.

439 U.S. 1091, 1102 (1979). In *Carmona* appellants challenged the constitutionality of their mandatory indeterminate life sentences for the sale of one individual dose of cocaine and the possession of three and three-eighths ounces of cocaine. The district court, noting that the legislative power to define crimes and establish punishments was subject to judicial scrutiny, 436 F. Supp. 1153, 1162 (S.D.N.Y. 1977), found the sentence unconstitutionally disproportionate. The Second Circuit reversed. When appellants' Eighth Amendment challenge was denied by the circuit court, one of the dissenting judges stated: "I recognize fully, of course, the deference that must be paid to legislative determinations of sentence. Such deference is not unlimited, however. Otherwise, the Eighth Amendment would be the deadest of letters." 576 F.2d at 424.

ardy if such a "hands off" attitude is taken by courts. In addition, this "hands off" approach cannot be justified by fears of judicial subjectivity. Such fears need not be an impediment to meaningful judicial review of sentences when a workable objective comparative analysis is available.

### A. *The Important Role of Proportionality*

The important function the proportionality principle plays in criminal jurisprudence should give courts reason to pause before stripping the doctrine of its value. It is a precept of fairness and justice that greater crimes should merit harsher penalties than lesser crimes.<sup>64</sup> The notion that punishment should be proportional to the seriousness of the offense is fundamental to maintaining an identity between the criminal law and the public's general sense of morality. In this way, proportionate sentencing serves the purpose of instilling respect for penal law. A penal system that imposes severe punishments for minor crimes runs the risk of being discredited and ridiculed.<sup>65</sup>

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<sup>64</sup> See *supra* note 2 (discussing proportionality as an inherently retributive concept); see also *Roberts v. Collins*, 544 F.2d 168 (4th Cir. 1976)(imposition of greater punishment for lesser included offense than is imposed for the greater offense is unconstitutionally disproportionate).

Various criminal codes cite proportionate sentencing as an objective to be achieved. See, e.g., MODEL PENAL CODE § 1.02 (setting forth as goals to differentiate on reasonable grounds between serious and minor offenses and to safeguard offenders against excessive, disproportionate or arbitrary punishment); N.Y. PENAL LAW § 1.05 (McKinney 1988)("To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefore"); CAL. PENAL CODE § 1170(a)(1)(West 1985 & Supp. 1992)(Punishment is "best served by terms proportionate to the seriousness of the offense.")

<sup>65</sup> H.L.A. Hart expresses the concern that where the legal gradation of crimes diverges from a "commonsense scale of gravity," there is a risk of confusing common morality or bringing the law into contempt. HART, *supra* note 2, at 25. Thus, disproportionate sentencing leads people to question their generally held beliefs as to what are serious and what are minor offenses. See also N.H. CONST. of 1784, art. XVII, § 1 ("[W]here the same undistinguishing severity is exacted against all offenses the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye."); A.C. Ewing, *A Study of Punishment II: Punishment as Viewed by the Philosopher*, 21 CANADIAN B. REV. 102, 115 (1943)("To punish a lesser crime more severely than a greater would be either to suggest to men's minds that the former was worse when it was not, or, if they could not accept this, to bring the penal law in some degree into discredit or ridicule."). Ewing also suggests that unnecessarily harsh penalties can make the criminal appear to be the victim of cruel laws and thus detract attention from the criminal act and focus attention on the cruelty of the punishment. *Id.* The stringent sentences imposed under the Federal Sen-

As an element of the Eighth Amendment, the proportionality guarantee also aids in defining the relationship between society and its offending members.<sup>66</sup> The Eighth Amendment demands that states treat convicted individuals "with respect for their intrinsic worth as human beings."<sup>67</sup> The requirement of proportionate sentencing correspondingly restrains the use of legislative power when it is utilized for extreme utilitarian purposes.<sup>68</sup> Thus a sentence of life imprisonment for third-offense

tencing Guidelines and similar state statutes for relatively minor drug offenses have led to a public outcry that sentences are too harsh, as evidenced by the formation of such groups as Families Against Mandatory Minimums ("FAMM"). See *Phil Donahue* (NBC television broadcast, Apr. 8, 1992).

<sup>66</sup> See *Weems v. United States*, 217 U.S. 349, 366-67 (1910) ("Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths . . ."). See also *supra* note 4; *In re Lynch*, 503 P.2d 921, 923 (Cal. 1972) ("By observing this cautious, often burdensome and sometimes unpopular procedure, the courts can often prevent the will of the majority from unfairly interfering with the rights of individuals who . . . may be unable to protect themselves through the political process."); *Carmona v. Ward*, 436 F. Supp. 1153, 1163 (S.D.N.Y. 1977) (Proportionate sentencing protects individuals from "unduly harsh, oppressive, or arbitrary punishments decreed by a majoritarian political system."), *rev'd*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 438 U.S. 1091 (1979).

<sup>67</sup> *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).

<sup>68</sup> Philosopher Jeremy Bentham noted the propensity of those vested with power to disregard the dignity of the individual: An error [in imposing too severe a penalty] is that to which legislators and men in general are naturally inclined: antipathy, or want of compassion for individuals who are represented as dangerous and vile, pushes them onward to an undue severity. It is on this side . . . that we should take the most precautions. Jeremy Bentham, *Principles of Penal Law*, in 1 J. BENTHAM'S WORKS 399 (J. Bowring ed., 1843).

Indeed, the congressional debate surrounding the adoption of the Bill of Rights focused on the question of how much limitation to place on the exercise of legislative power. Some convention participants "felt sure that the spirit of liberty could be trusted, and that its ideas would be represented, not debased, by legislation." *Weems*, 217 U.S. at 372. Patrick Henry, however, "would take no chances. [His] predominant political impulse was distrust of power, and [he] insisted on constitutional limitations against its abuse." *Id.* A principal motivation behind the adoption of the Eighth Amendment was the belief "that power might be tempted to cruelty." *Id.* at 373. See also *Bellavia v. Fogg*, 613 F.2d 369, 376 (2d Cir. 1979) (Mansfield, J., dissenting) ("the Founding Fathers did not vest our legislators with untrammelled discretion to prescribe punishment").

The critical view expressed by Bentham and Henry seems particularly applicable to the contemporary legislative response to the illegal drug trade and drug use. In lieu of more education and drug treatment, legislators are quick to condemn and impose extremely harsh sentences. It is not surprising that many of the most difficult proportionality cases involve drug offenses. Drug offenders routinely invoke the proportionality guarantee as a safeguard against supposed legislative excesses. See, e.g., *United States v. Ortiz*, 742 F.2d 712 (2d Cir.), *cert. denied*, 469 U.S. 1075 (1984); *People v. Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975); *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 438 U.S. 1091 (1979); *Bellavia v. Fogg*, 613 F.2d 369 (2d Cir.

illegal parking designed to deter the public from engaging in such conduct would be an unconstitutional exercise of the legislature's power to prescribe punishment.<sup>69</sup>

As the scope of proportionality review has become more restricted, courts have become more silent about the importance of the guarantee as a check on legislative power.<sup>70</sup> By adhering to the overly deferential "shock the conscience" standard of review which weakens the proportionality guarantee, *Gonzalez* has undervalued the functions served by the proportionality principle.

### B. *The Separation of Powers Dilemma: Overly Deferential to the Legislature*

As the *Weems* Court recognized, proportionality review inherently involves a clash between legislative and judicial powers. To have a meaningful and consistently applied proportionality guarantee, courts must mark the line that separates the proper degree of deference to the legislature from the proper degree of scrutiny used in reviewing legislative decisions. Although this line is difficult to draw, there is wide agreement on general principles.<sup>71</sup> There is virtually no dispute that legislatures hold the

1979); *Hutto v. Davis*, 454 U.S. 370 (1982); *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991). See also *Turner v. United States*, 396 U.S. 398, 427 (1970) (Black, J., dissenting) ("Unfortunately, grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden shortcuts that might suppress and blot out more quickly the unpopular and dangerous conduct.") (cited in Justice White's *Harmelin* dissent).

<sup>69</sup> In *Terrebonne v. Butler*, 848 F.2d 500 (5th Cir. 1988), see *infra* note 109, the Fifth Circuit, unwilling to interfere with the goals of the Louisiana legislature, upheld a sentence of life imprisonment without parole for a 21-year-old drug addict who was a third-time drug offender. With no lack of sympathy, the court stated that "[i]n this instance, the tiger trap has sprung on a sick kitten; and the point that Louisiana doubtless wishes to make by punishing drug dealers in a signal manner finds a pathetic exemplar in the hapless Terrebonne." *Id.* at 505. Nonetheless, the court could not "[tamper] with Louisiana's attempts to bring its critical narcotics problem under control." *Id.*

<sup>70</sup> Discussions of the importance of proportionality review as a check on legislative power figure prominently in decisions which hold challenged sentences to be unconstitutionally disproportionate. See *supra* note 66. Conversely, such discussions are noticeably lacking in decisions which have curbed the scope of the review. See, e.g., *Rummel v. Estelle*, 445 U.S. 263 (1980); *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991).

<sup>71</sup> In his concurring opinion in *Harmelin*, Justice Kennedy set forth general principles that have guided proportionality review. *Harmelin*, 111 S. Ct. at 2705 (Kennedy, J. concurring); see *supra* notes 48-51 and accompanying text. The cases are replete with such broad statements and, although they serve as good starting points, they add little to

power to define crimes and prescribe punishments, that courts are not to second-guess the wisdom of these legislative decisions or that the courts have the duty to strike down sentences which are unconstitutionally excessive.<sup>72</sup> Once these safe generalities are cleared away, however, disagreements quickly arise in defining what is "constitutionally excessive."

No matter where courts draw the line, most register at least a perfunctory amount of deference by noting their subordinate position to legislatures. Even cases that have allowed courts a broad scope of review, such as *Solem*, never fail to note legislatures' primary role in establishing penal policy.<sup>73</sup> Other cases, however, take the deferential stand much further, resulting in a "hands off" approach to sentencing reviews. Judge Thornberry, dissenting from the Fifth Circuit decision that found William Rummel's life term sentence for three property-related offenses unconstitutionally disproportionate, stated:

Perhaps, if I were a prosecutor, I would not have sought an indictment charging the defendant with an habitual count; if I were a state lawmaker I would vote to amend the statute so that it would not be applied as has been done here; or if I were governor . . . I would consider the petitioner a prime candidate for clemency. But I do not hold these offices and my decision must be guided by the eighth amendment rather than my feelings of compassion and justice.<sup>74</sup>

Some courts buttress their deference to legislatures by emphasizing their institutional incompetence to make legislative types of policy decisions. For instance, in reaching its decision in *Gonzalez*, the Second Circuit considered the legislature's line drawing to be presumptively valid since a legislative body can "con-

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an understanding of the scope of the proportionality guarantee. For instance, the *Gonzalez* court offered no insight into its position on proportionality review by stating "appellate examination is confined to deciding whether a sentence reviewed is within constitutional limits." *Gonzalez*, 922 F.2d at 1053.

<sup>72</sup> Chief Justice Rehnquist and Justice Scalia, who do not think a sentence can be unconstitutionally excessive, would disagree with the assertion that courts have a duty to strike down unconstitutionally excessive sentences.

<sup>73</sup> *Solem v. Helm*, 463 U.S. 277, 290 (1983). The boilerplate language proceeds thus: "Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . . ." *Id.* See also *Hutto v. Davis*, 454 U.S. 370, 377 (1982) (Powell, J., concurring).

<sup>74</sup> *Estelle v. Rummel*, 568 F.2d 1193, 1201 (5th Cir. 1978) (Thornberry, J., dissenting).

duct hearings, take surveys, and hear a broad range of public opinion in determining what is appropriate punishment."<sup>75</sup>

Yet this legislative deference by courts fails to take into account that the political arena may give inadequate weight to the rights of individuals.<sup>76</sup> Judge Thornberry might believe that were he a prosecutor, legislator or governor he would act to mitigate the harshness of the mandatory sentence there at issue, but if he held one of these offices, he might be under greater political pressure to support harsh and disproportionate sentences for the greater good of his constituency. Instead of viewing the isolated position held by judges as an impediment to proportionality review, their position should be seen as allowing them to rein in the excesses of the political branches. The *Gonzalez* court may

<sup>75</sup> 922 F.2d 1044, 1053 (2d Cir. 1991). See also *Terrebonne v. Butler*, 848 F.2d 500, 506-07 (5th Cir. 1988) ("We may be competent to contemplate outrageous disproportion and declare that it cannot be; certainly, however, we are not equipped, nor do our procedures lend themselves to equipping us, with the factual knowledge and common sense of what is proportional [and] what punishments *should* be administered for particular offenses . . .").

Taking the position that courts have neither the resources nor expertise to make inherently legislative decisions, William Hughes Mulligan, former Judge for the Second Circuit states:

I believe that state legislatures usually do not act aberrantly and are normally responsive to and reflect community standards. Unlike federal judges who serve for life, the legislator must answer to his constituency after relatively brief terms of office. The deference we must pay the legislative determination is due not only to constitutional concepts of separation of powers and federalism, but also because of the institutional difficulty of the judiciary making the social, moral, and penological decisions inherent [in proportionality review].

Mulligan, *supra* note 6, at 649.

<sup>76</sup> Those who place great faith in the political process often forget that not all citizens enjoy equal participation in government. One commentator seeks to remind readers of this important reason for placing limits on legislative authority:

[There is a] suggestion that interpretation of the guarantees of the Bill of Rights ought to be exclusively committed to the "political process." This formula contains almost too much irony to be taken wholly seriously. Those who need the Bill of Rights need it because they cannot prevail in the "political process" . . . Those who wrote these guarantees into the Constitution must have known this; what other conceivable reason is there for placing constitutional prohibitions on Congress . . . [I]n virtually all cases the interest shielded is a minority interest, and often one that is intensely unpopular.

CHARLES L. BLACK, JR. *THE PEOPLE AND THE COURT* 103-04 (1960). See also *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (Notwithstanding a rising tide of judicial acquiescence in state economic regulation, Justice Stone noted in this famous footnote that greater judicial scrutiny may be warranted where "prejudice against discreet and insular minorities may . . . tend[] seriously to curtail the operation of . . . political processes.").

be correct that legislators have many tools to aid them in making informed decisions that are not available to courts, but this, of course, does not mean that legislative results will necessarily comport with the requirements of the Cruel and Unusual Punishments Clause. That is a determination to be made by the judiciary.<sup>77</sup> At least one commentator answers the separation of powers dilemma by counseling less deference to legislators and greater protection of individual rights:

Courts face a choice . . . between impinging on the sovereignty of local legislative decisionmaking or on an individual's constitutional right to protection from excessive punishment. Since a finding of invalidity under the eighth amendment only requires a state to pursue its penal goals through more moderate sanctions, courts should resolve doubts . . . in favor of the individual. . . .<sup>78</sup>

It is no doubt proper for courts to recognize that the legislature has preeminence in defining penal schemes and that those determinations cannot be invalidated merely because of a difference of opinion on the efficacy of those choices. At the same time, courts cannot abdicate their constitutional duty.<sup>79</sup> Al-

<sup>77</sup> See *In re Lynch*, 503 P.2d 921, 923 (Cal. 1972) ("[T]he final judgment as to whether the punishment [the legislature] decrees exceeds constitutional limits is a judicial function."). The judiciary's role in the government structure was well expressed by Alexander Hamilton:

[T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments . . . [Judges are] to guard the Constitution and the rights of individuals from the effects of those ill humors, which the acts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves . . . and which . . . have a tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST No. 78 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1966). This view of the judiciary is not unchallenged. See, e.g., LEARNED HAND, THE BILL OF RIGHTS 73 (1958) ("[I]t certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve.").

<sup>78</sup> Gilchrist, *supra* note 2, at 1150. In a similar vein, Charles L. Black, Jr. does not defer to what he terms the "slogan" of judicial restraint and he unapologetically characterizes the "negative" action of judicial review—finding statutes unconstitutional—as a "positive good," in that it can free people from "constriction or fear." BLACK, *supra* note 76, at 88.

<sup>79</sup> Judge Mulligan challenges Justice Marshall's view, *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), cert. denied, 439 U.S. 1091, 1102 (1979) (Marshall, J., dissenting), see *supra* note 63, of the judiciary's proper role in proportionality review: "so-called judicial activists, of course, will maintain that the refusal to set aside admittedly harsh sentences constitutes an abdication of the constitutional mandate, but this requires an understand-



though courts may be wary of infringing on legislative prerogatives, the Cruel and Unusual Punishments Clause "cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights."<sup>80</sup> Courts must diligently guard the demarcation between legislative and judicial power and insure that the judiciary's role is not encroached upon, for, at a minimum, courts are "coequal guardian[s] of the Constitution."<sup>81</sup> Cases such as *Rummel*, *Hutto*, *Harmelin* and *Gonzalez* have shifted the balance too far in the legislature's favor.<sup>82</sup>

### C. *Fears of Judicial Subjectivity*

The judiciary's willingness to exert its power of review when faced with sentencing challenges is closely linked to faith in its ability to make objective proportionality decisions. Therefore, the key to a meaningful proportionality guarantee is the articulation of a sensible and workable objective standard to review sentencing challenges. All sides of the proportionality principle debate agree that proportionality review should be guided by objective criteria to the maximum extent possible. This agreement springs from a common belief that courts should not infuse their subjective values into sentencing reviews. As the various opinions in *Rummel*, *Solem* and *Harmelin* demonstrate, the degree to which one believes judicial subjectivity can be curbed dictates the contours of one's construction of the proportionality doctrine.

At one extreme are those who believe that allowing any proportionality review opens the door to legislating by courts.<sup>83</sup>

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ing of what our constitutional mandate really is . . . I submit that our responsibility is narrow indeed." Mulligan, *supra* note 6, at 649. *But see* *Hutto v. Davis*, 454 U.S. 370, 377 (1982) (Powell, J., concurring)("[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.").

<sup>80</sup> *Furman v. Georgia*, 408 U.S. 238, 269 (1972)(Brennan, J., concurring).

<sup>81</sup> *In re Lynch*, 503 P.2d at 923.

<sup>82</sup> *See Rummel v. Estelle*, 445 U.S. 263, 306-07 (1980)(Powell, J., dissenting)("The Court has, in my view, chosen the easiest line rather than the best.").

<sup>83</sup> *See* Schwartz, *supra* note 6, at 417. Schwartz expresses Justice Scalia's view when he states that "the insuperable problems associated with the slippery slope call for a rejection of activist intervention by the courts under a proportionality analysis." *Id.* To

Adopting this position in his *Harmelin* opinion, Justice Scalia tries to illustrate how attempts to gauge the severity of crimes and the appropriate punishments would be little more than judicial guesswork.<sup>84</sup> Convinced that no objective criteria exist that can guide the inherently subjective proportionality inquiry, Scalia is content to rule that there is no proportionality guarantee under the Eighth Amendment. This approach is tantamount to throwing the baby out with the bathwater. Discarding this constitutional doctrine simply disregards the important function it plays in government as a counterweight to unbridled legislative action.<sup>85</sup>

Another approach which effectively saps the strength from the proportionality doctrine is the view that the Eighth Amendment "encompasses a narrow proportionality principle."<sup>86</sup> Since there are supposedly few objective standards to guide courts when deciding a challenge to a term of imprisonment, "successful challenges to the proportionality of particular sentences [will

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demonstrate his fear of legislating by the courts, he cites oral argument from the *Rummel* case:

Question (White): Well, what kind of a standard do you think we ought to have?

Answer [defendant]: Your Honor, the standard ought to be—and I think the Court could enact a fairly narrow standard if it chose—

Question (Stewart): Enact?

*Id.*

<sup>84</sup> Justice Scalia analyzes each of the three steps of the *Solem* tripartite analysis and finds that the first two involve the imposition of subjective values. First, to determine the inherent gravity of the offense, the court must of necessity rely upon "how odious and socially threatening" it believes the offense to be. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2698 (1991). Second, to compare the sentences imposed for similarly grave offenses in the same jurisdiction, the court must again rely on its own notions of gravity by comparing what it considers to be comparable crimes. *Id.* Although conceding that the third factor, comparing sentences imposed for the same crime in other jurisdictions, does not raise subjectivity problems, Scalia, who wrote the majority opinion, finds fault in that it infringes upon federalist principles by presuming a uniformity of sentencing across jurisdictions. *Id.*

Scalia's position should be contrasted with what has been termed the "commonsense scale of values." Gilchrist, *supra* note 2, at 1126 n.38. This scale would mark distinctions between intentional and unintentional harm, violent crimes and property crimes, and the extent of harm actually caused or intended. Consideration of these characteristics makes assessment of the gravity of offenses less subjective than Scalia would suppose. See *infra* notes 112-13 and accompanying text.

<sup>85</sup> Although Justice Scalia does not believe that a workable objective standard is possible, he does not find that there was ever a guarantee of proportionate sentencing and thus would not characterize his position as discarding the doctrine. See *supra* note 18.

<sup>86</sup> *Harmelin*, 111 S. Ct. at 2702 (Kennedy, J., concurring).

be] exceedingly rare."<sup>87</sup> While professing not to abandon proportionality review, Justice Kennedy adopts this narrow approach in *Harmelin*, essentially leaving the proportionate sentence guarantee an "empty shell."<sup>88</sup> What is most problematic in Kennedy's analysis is the type of "rationality" review he performs to determine whether Harmelin's sentence of life imprisonment without parole was a reasonable penalty for the Michigan legislature to impose for the offense of drug possession. Kennedy cites statistics, including the number of doses in 650 grams of cocaine and the percentage of violent arrestees who test positive for illegal drugs.<sup>89</sup> After making the point that illegal drugs are intimately linked to violent crime, he concludes that the Michigan legislature could have had a rational basis for imposing such a harsh penalty. Under Kennedy's analysis, only if the legislature's action is deemed unreasonable will the sentence be considered grossly disproportionate. This "rationality" test poses an almost insurmountable barrier to any finding of gross disproportionality and, while not explicitly declaring so, Kennedy thus leaves proportionality review a dead letter.<sup>90</sup>

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<sup>87</sup> *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

<sup>88</sup> It is Justice White who accuses Justice Kennedy of leaving the *Solem* tripartite analysis an "empty shell." *Harmelin*, 111 S.Ct. at 2714 (White, J., dissenting). Justice White's charge is well founded. By asserting that the *Solem* comparative analysis is employed only after an initial finding of gross disproportionality, Justice Kennedy relegates the analysis to an inferior role which he terms a "validat[ion of] an initial judgment" of gross disproportionality. *Id.* at 2707. Failing to recognize that the *Solem* analysis was a cumulative one, Justice Kennedy then disregards two of the most useful objective factors the courts have to measure proportionality.

<sup>89</sup> *Harmelin*, 111 S. Ct. at 2705-06.

<sup>90</sup> This deferential standard is reminiscent of the Court's full-scale withdrawal from review of economic legislation in the post-*Lochner* era. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (in holding a state regulation of opticians not to be in violation of the Due Process Clause of the Fourteenth Amendment, the Court stated that "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"). When a court applies a rationally related means test, it essentially hypothesizes as to what the legislature may have considered when it passed the challenged statute. So, without knowing what facts the Michigan legislature actually considered when passing its mandatory sentencing bill, Justice Kennedy does the work for the legislature and gives it the benefit of the doubt. See also *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2469 (1991) (Souter, J., concurring).

It is, of course, true that this justification has not been articulated by Indiana's legislature or by its courts . . . [But] [t]his asserted justification for the statute may not be ignored merely because it is unclear to what extent this purpose motivated the Indiana legislature in enacting the statute. Our appropriate

Nor was the Second Circuit's analysis in *Gonzalez* a proper response to fears of judicial subjectivity. In his *Rummel* dissent, Justice Powell remarked that although the Court recognized a narrow proportionality principle that would be applicable in an "exceedingly rare" case,<sup>91</sup> it did not offer any standard to indicate when such a rare case would arise.<sup>92</sup> *Gonzalez* demonstrates

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focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional.

*Id.*

In addition to questioning the wisdom of applying this "hands off" approach in the criminal context, criticisms of the approach with respect to economic legislation are also illuminating. See R. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Cr. Rev. 34 ("Why did the Court move all the way from the inflexible negativism of the old majority to the all-out tolerance of the new? Why did it not establish a halfway house between the extremes, retaining a measure of control over economic legislation but exercising that control with discrimination and self-restraint?"). Applying this rationale to proportionality review, Justices Scalia and Kennedy have accorded undue tolerance to prescribed sentencing schemes by legislatures, while the *Solem* analysis offers a method of "retaining a measure of control . . . but exercising that control with discrimination and restraint." *Id.*

<sup>91</sup> *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

<sup>92</sup> 445 U.S. at 307 n.25 (Powell, J., dissenting) ("The Court concedes, as it must, that a mandatory life sentence may be constitutionally disproportionate to the severity of an offense . . . . Yet its opinion suggests no basis in principle for distinguishing between permissible and grossly disproportionate life imprisonment."). Dissenting in *Hutto v. Davis*, Justice Brennan questioned how the Court could overturn the Fifth Circuit's decision that Davis's sentence was one of the "exceedingly rare" cases in which the proportionality guarantee applied, when the Court did not demonstrate how it determined that it was not such a "rare case." *Id.*, 454 U.S. 370, 384 (1982) (Brennan, J., dissenting). See also *Solem v. Helm*, 463 U.S. 277, 290 n.17 (1983) ("The dissent concedes—as it must—that some sentences of imprisonment are so disproportionate that they are unconstitutional under the Cruel and Unusual Punishments Clause. It offers no guidance, however, as to how courts are to judge these admittedly rare cases. We reiterate the objective factors that our cases have recognized."); *Solem*, 463 U.S. at 303-04 n.32 ("*Rummel* should not be read to foreclose proportionality review of sentences of imprisonment. *Rummel* did not reject a proportionality challenge to a particular sentence. But since the *Rummel* court—like the dissent today—offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation."); *Terrebonne v. Blackburn*, 624 F.2d 1363, 1371 (5th Cir. 1980) (Johnson, J., concurring) (Although *Rummel* states that proportionality review is to be informed by objective factors, the Court does not indicate what objective factors are available to the courts.).

There seems to be a contradiction in attacking a broad scope of review as lacking an objective analysis and simultaneously recognizing a narrow scope of review without offering any objective criteria to inform that decision. By holding that any attempt at proportionality review will be subjective, Justice Scalia appears to retain the logical consistency lost by those who adhere to a narrow proportionality guarantee.

that Powell's observation was correct. Lacking any definitive standard of review set forth by *Rummel*, *Gonzalez* turned to a "shock the conscience" standard to gauge whether the defendant's sentence fell within the narrow category of cases that offended the Constitution. Although not unknown to proportionality review,<sup>93</sup> this standard was not utilized by *Rummel* and none of the cases cited in *Gonzalez* adhered to such a test.<sup>94</sup> It would seem that *Gonzalez* was simply filling the vacuum left by the restrictive Supreme Court cases which were critical of any objective analysis and yet offered little guidance to courts in these rare cases.

The *Gonzalez* standard is troubling in that it undermines the primary justification for restrictive review—the minimizing of judicial subjectivity. The "shock the conscience" standard has been roundly criticized as inviting the use of the judiciary's personal views in making proportionality determinations.<sup>95</sup> In a va-

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<sup>93</sup> In *Weems* the government argued that the Eighth Amendment was violated when punishments were "so cruel as to shock the conscience and reason of men." 217 U.S. 349, 356 (1910). See also *Rogers v. United States*, 304 F.2d 520, 521 (5th Cir. 1962) (The test for cruel and unusual punishment is whether the challenged punishment "is so greatly disproportionate to the offense committed as to be . . . shocking to the sense of justice."); *Capuchino v. Estelle*, 506 F.2d 440, 442-43 (5th Cir. 1975) (following *Rogers* court, the court summarily concludes that life sentence under a recidivist statute is not "shocking to the sense of justice"); *What is Cruel, supra* note 30, at 55 ("The fear of judicial intermeddling voiced by one of the dissenting judges [in *Weems*] seems scarcely warranted, for the power to prevent disproportionate punishment is to be exercised only when the punishment shocks public feeling.")

<sup>94</sup> Aside from the Supreme Court decisions, *Gonzalez* cited *United States v. Aiello*, 864 F.2d 257 (2d Cir. 1988) and *Terrebonne v. Butler*, 848 F.2d 500 (5th Cir. 1988). Neither of these decisions employed the test used in *Gonzalez*.

<sup>95</sup> Justice Black waged something of a war against the "shock the conscience" standard used in constitutional law. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 665 (1961) (rejecting the "shock the conscience" standard), Justice Black states that the test "makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution . . . [T]he practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted . . . a conviction is overturned and a guilty man may go free." (quoting *Irvine v. California*, 347 U.S. 128 (1954) (Black, J., concurring)); *Jackson v. Denno*, 378 U.S. 368, 407 (1964) ("shock the conscience" is one of several "vague but appealing catch phrases" that "give judges wide and unbounded power") (Black, J., concurring); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 703 (1965) (utilization of a "shock the conscience" standard does not aid in interpreting the Constitution, but in amending it) (Black, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479 (1965) ("[The] Due Process Clause with an 'arbitrary and capricious' or 'shocking to the conscience' formula was liberally used by this Court to strike down economic legislation in the early decades of

riation of the "shock the conscience" test, *Gonzalez* asserted that "when the offense causes less revulsion than the punishment imposed for its commission,"<sup>96</sup> then the punishment is

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this century . . . . That formula [is] no less dangerous when used to enforce this Court's views about personal rights than those about economic rights."(Black, J., dissenting); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 519-20 (1969)("shock the conscience" is a "flexible term without precise boundaries" that allows judges to invalidate laws they simply do not like)(Black, J., dissenting); *Foster v. California*, 394 U.S. 440, 450 (1969)("shock the conscience" standard permits judges to hold laws unconstitutional based on "their own conceptions of fairness and justice")(Black, J., dissenting); *Simpson v. Union Oil Co. of California*, 396 U.S. 13, 15 (1969)(jury award of \$160,000 in private antitrust suit "does not shock my conscience")(Black, J., concurring and dissenting); *In re Matter of Winship*, 397 U.S. 358, 377-78 (1970)(referring to the "shock the conscience" test, Black states that he would "prefer to put [his] faith in the words of the written Constitution itself, rather than to rely on the shifting, day-to-day fairness standards of individual judges")(Black, J., dissenting). *See also* *Sniadach v. Family Finance Corporation*, 395 U.S. 337, 350 (1969)(Black, J., dissenting); *Williams v. Florida*, 399 U.S. 78, 107 (1970)(Black, J., concurring and dissenting).

Although the "shock the conscience" test usually focuses on whether the court's conscience is shocked, it is sometimes cast in terms of whether the collective conscience of society is shocked. This difference in formulation is of no practical significance. In *Furman v. Georgia*, 408 U.S. 238, 359-61 (1982), Justice Marshall cited Judge Frank's critical view of a standard that rested on whether the "conscience and sense of justice of the people" was shocked: "[S]uch a standard—the community's attitude—is usually an unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels." (quoting *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir. 1952)).

Also lacking faith in baseless standards of review, proportionality critics are in good company with those who attack the "shock the conscience" test. Dissenting from *Solem*, Chief Justice Burger quoted from one of Justice Black's many condemnations of the "shock the conscience" test:

Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a "shock the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test willfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics.

*Solem v. Helm*, 463 U.S. 277, 317-18 (1983)(Burger, C.J., dissenting)(quoting *Boddie v. Connecticut*, 410 U.S. 371, 393 (1971) (Black, J., dissenting)); *see also* *People v. Broadie*, 37 N.Y.2d 100, 111, 332 N.E.2d 338, 342, 371 N.Y.S.2d 471, 476 (1985) ("Apart from a subjective evaluation which looks to the extent to which the conscience of the court is shocked by punishments imposed, there have developed standards to determine whether punishments are constitutionally disproportionate."); *In re Lynch*, 503 P.2d 921, 930 (Cal. 1972) (court adopts a "shocks the conscience and offends fundamental notions of human dignity" test but proceeds to use objective factors to decide whether that standard has been transgressed).

<sup>96</sup> *United States v. Gonzalez*, 922 F.2d 1044, 1053 (2d Cir.), *cert. denied*, 112 S. Ct. 660 (1991).

deemed "grossly disproportionate"<sup>97</sup> and therefore unconstitutional. It would appear that the question of who decides what is "less revolting" falls to the judiciary and the problem of judicial subjectivity once again arises. Certainly in *Gonzalez's* case it was a simple matter to conclude that the crime—first degree murder—was not less revolting than the sentence—life imprisonment without parole. However, the Second Circuit's analysis would not be as helpful if the question were whether the crime of possession of 672.5 grams of cocaine were less revolting than the sentence of life imprisonment without parole. The answer to that question would lean heavily on the individual philosophy of the appellate judge and would therefore fail to be an objectively informed decision. In *Gonzalez* the Second Circuit has both unnecessarily restricted the scope of proportionality review and also unnecessarily set forth a subjective proportionality test.

#### D. *The Solem Tripartite Analysis*

The fears of judicial subjectivity which resulted in the various formulations outlined above should not compel jurists to either abandon or constrict the proportionate sentencing guarantee. The tripartite analysis set forth in *Solem* offers courts reasonably objective criteria to follow in a proportionality review.<sup>98</sup> Although not perfect, the *Solem* test does sufficiently minimize judicial subjectivity so as to make proportionality review more than ruling by judicial fiat.

The *Solem* tripartite analysis did not suddenly spring to life in the 1983 Supreme Court decision as a new and untested method of proportionality review. As noted earlier, both Justice Field's dissent in *O'Neil* and the majority in *Weems* performed limited forms of comparative analyses.<sup>99</sup> If, as Justice Scalia says, "the proof of the pudding is in the eating,"<sup>100</sup> then the objective analysis has proved its value in many lower court decisions. For instance, the Fourth Circuit formulated a widely utilized four-part proportionality test in *Hart v. Coiner*.<sup>101</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> See *supra* notes 38-43 and accompanying text.

<sup>99</sup> See *supra* notes 24 & 29.

<sup>100</sup> *Harmelin*, 111 S. Ct. at 2700.

<sup>101</sup> 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974). Drawing its analysis from *Furman v. Georgia*, 408 U.S. 282 (1972), the court outlined the following factors

Although the *Hart* dissent predicted that the majority's decision would cause "chaos,"<sup>102</sup> subsequent use of the analysis neither resulted in extensive appellate court review when the challenge could be easily decided nor led to the wholesale overturning of legislative schemes.<sup>103</sup> Even though the *Hart* factors were criticized in *Rummel* and rejected in *Hutto*, they were reconstituted in *Solem* as a tripartite analysis.<sup>104</sup> Notwithstanding the ambiguity surrounding the scope of the *Hart-Solem* test, the tripartite

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to be considered cumulatively: the nature and gravity of the offense, taking into account the degree of violence and danger to the person; the legislative purpose behind the punishment, determining how well the punishment prescribed meets the legislative goals and whether the goals can be met with less severe punishment; the comparison of the challenged punishment with the punishment that would be received in other jurisdictions for the same crime; and the comparison of the challenged punishment with punishments that would be received in the same jurisdiction for other offenses. *Hart*, 483 F.2d at 140-42. Strikingly similar to the case presented in *Rummel*, the defendant in *Hart* was convicted under a state recidivist statute on his third offense. The underlying offenses consisted of writing a \$50 check for insufficient funds, transporting forged checks across state lines and perjury. Applying the four-part test, the defendant's mandatory life sentence was held unconstitutionally disproportionate. *Id.* at 143.

<sup>102</sup> *Id.* at 149 (Boreman, J., dissenting).

<sup>103</sup> In most cases the application of the proportionality analysis resulted in the affirmation of the prescribed sentence. *See, e.g.,* *Wood v. South Carolina*, 483 F.2d 149 (4th Cir. 1973) (although startling, five-year sentence not unconstitutionally disproportionate for making obscene phone calls given that objective factors do not show disproportionality); *United States v. Wooten*, 503 F.2d 65 (4th Cir. 1974) (sentence of two years on conviction of possession of firearm by convicted felon not cruel and unusual); *Griffin v. Warden, West Virginia State Penitentiary*, 517 F.2d 756 (4th Cir. 1975) (defendant convicted under the same recidivist statute as *Hart*, but defendant's offense involved violence and danger to life and property and therefore life sentence was not grossly disproportionate); *United States v. Williamson*, 567 F.2d 610 (4th Cir. 1977) (eight-year term for possession of a firearm as a convicted felon not unconstitutionally disproportionate). *See also* *Chapman v. Estelle*, 593 F.2d 687, 688 n.1 (5th Cir. 1979) (defendant sentenced to life imprisonment under Texas's recidivist statute for two burglaries and a forgery; court held sentence not unconstitutional, noting that "[e]ven . . . the Fourth Circuit, where *Hart v. Coiner* is the law, would likely reject" defendant's Eighth Amendment claim).

In a few cases, however, sentences were overturned. *See* *Roberts v. Collins*, 544 F.2d 168, 170 (4th Cir. 1976) ("[T]he Constitution does not sanction the imposition of a greater punishment for a lesser included offense than lawfully may be imposed for the greater offense."); *Thacker v. Garrison*, 445 F. Supp. 376 (W.D.N.C. 1978) (where unarmed defendant broke into unoccupied building and broke door of safe with tools found in the building, 48-50 year sentence under safecracking statute aimed at professional safecrackers was unconstitutionally disproportionate to the crime committed).

<sup>104</sup> In his *Rummel* dissent Justice Powell touted the Fourth Circuit analysis, stating that "the body of Eighth Amendment law that has developed in that Circuit constitutes impressive empirical evidence that the federal courts are capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy." *Rummel v. Estelle*, 445 U.S. 263, 306 (1980) (Powell, J., dissenting).



analysis provides a practical and objective way to give the proportionality guarantee meaning.<sup>105</sup>

In view of the Second Circuit's post-*Solem* proportionality decisions, it is unclear why the *Gonzalez* court failed to use the *Solem* tripartite test and why it instead adopted a "shock the conscience" test of proportionality. With a challenged sentence that was obviously proportionate to the offense, *Gonzalez* need not have engaged in an extended review, but could have readily held the sentence constitutional with only a cursory application of the *Solem* test. One year after the *Solem* decision the Second Circuit, in *United States v. Ortiz*,<sup>106</sup> applied the tripartite analysis and found that a ten-year sentence was not disproportionate for the possession of heroin with intent to distribute. Applying the *Solem* test, the court found the sentence to have no consti-

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<sup>105</sup> The circuit courts have interpreted *Solem* in different ways. For example, the Fourth Circuit confined *Solem* to its facts, maintaining that a full analysis was only required where the challenged sentence was life imprisonment without possibility of parole. See *United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988) (*Solem* does not require proportionality review of any sentence other than life imprisonment without parole); *United States v. Owens*, 902 F.2d 1154 (4th Cir. 1990) (finding 14-year sentence for conspiracy to file false tax returns constitutional, court adheres to the position that *Solem* only requires extensive analysis when challenged sentence is life imprisonment without parole); *United States v. Polk*, 905 F.2d 54 (4th Cir. 1990) (also confining *Solem* to its facts). The Third Circuit has adopted a similar approach. See *United States v. Rosenberg*, 806 F.2d 1169 (3d Cir. 1986), cert. denied, 481 U.S. 1070 (1987); *United States v. Whyte*, 892 F.2d 1170 (3d Cir. 1989).

Other circuits seem to apply the proportionality principle on a case-by-case basis. See, e.g., *United States v. Restrepo*, 676 F. Supp. 368 (D. Mass. 1987) (applying the tripartite analysis, court held mandatory five-year sentence for possession with intent to distribute at least 500 grams of cocaine constitutional); *Tuitt v. Fair*, 822 F.2d 166 (1st Cir. 1987) (defendant's sentence of life imprisonment imposed under habitual offender statute not unconstitutionally disproportionate given the violent nature of defendant's predicate crimes); *United States v. Gilliard*, 847 F.2d 21 (1st Cir. 1988) (applying the "Solem/Rummel standard," 15-year sentence with no possibility of parole held proportionate for conviction under Armed Career Criminal Act); *United States v. Brown*, 859 F.2d 974 (D.C. Cir. 1988) (simply stating that the penalty Congress prescribed was not cruel and unusual, court held mandatory 5-year sentence for narcotics possession constitutional); *United States v. Glantz*, 884 F.2d 1483, 1487 (1st Cir. 1989) ("no lengthy analysis is necessary" to conclude that eight-year sentence is proportionate to extortion conviction); *United States v. Cyrus*, 890 F.2d 1245 (D.C. Cir. 1989) (ten-year sentence for drug possession does not approach same level as gross inequity as shown in *Weems* and *Solem*); *United States v. Holland*, 729 F. Supp. 125 (D.D.C. 1990) (in determining whether 55-year sentence for various drug offenses is disproportionate, only part of the *Solem* test that is relevant is the assessment of gravity of crime and harshness of penalty).

<sup>106</sup> 742 F.2d 712 (2d Cir. 1984).

tutional infirmity.<sup>107</sup> Nor did the Second Circuit decision that *Gonzalez* relied upon, *United States v. Aiello*,<sup>108</sup> utilize a "shock the conscience" standard. There the defendant was convicted of operating a continuing criminal enterprise for the distribution of narcotics and was sentenced to a life term without parole. In a very brief statement, the court noted the three factors to be assessed in a proportionality review and then summarily concluded that the defendant's sentence, though harsh, was proportionate to the grave crime he committed.<sup>109</sup> Although these and other Second Circuit cases either did not endorse a broad standard of review or did not even acknowledge the use of an objective analysis to inform their proportionality decisions,<sup>110</sup> none of

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<sup>107</sup> The court found that although only a retailer, Ortiz participated in an extensive narcotics operation which could have readily led to violence, thereby making the crime grave. Ortiz's sentence, on the other hand, was five years less than the statutory maximum. The court found that it was not unconstitutionally disproportionate to sentence street peddlers of heroin as severely as robbers and forgers and that Ortiz's sentence was consistent with the majority of federal sentences. *Ortiz*, 742 F.2d at 715-17.

<sup>108</sup> 864 F.2d 257 (2d Cir. 1988).

<sup>109</sup> *Id.* at 265. *Gonzalez* could have decided its proportionality issue in a similar one paragraph analysis and thereby preserved the *Solem* test.

The other authority cited in *Gonzalez*'s proportionality discussion, *Terrebonne v. Butler*, 848 F.2d 500 (5th Cir. 1988), had a case history almost as long as that of *Hutto v. Davis*, 454 U.S. 370 (1982); see *supra* note 38. Ricky J. Terrebonne, a 21-year-old heroin addict who had two prior felony convictions, was convicted of distributing heroin and was sentenced under a Louisiana statute to a mandatory life term with no possibility of parole. Hearing the case for the fourth time, the Fifth Circuit, sitting en banc, held the sentence to be within constitutional bounds. The court noted from the outset that it found the *Solem* criteria to be "of little assistance" and further characterized the two comparative prongs of the analysis as "discretionary criteria." *Id.* at 503. Nevertheless, it begrudgingly applied the tripartite analysis. Applying the intra-jurisdictional comparison, the court constructed what it termed a "pyramid of severity of offenses" and concluded that heroin dealing could be placed on the same level as second-degree murder, aggravated rape and aggravated kidnapping. *Id.* Applying the inter-jurisdictional comparison, the court found that the Louisiana provision was not "bizarre or outlandish," *id.* at 505, and emphasized that jurisdictions often faced "widely disparate situations." *Id.* at 504. Finally, in an analysis similar to that Justice Kennedy would conduct three years later in *Harmelin*, the court cited the grave narcotics problem and its collateral effects. *Id.* at 505. The court simply would not entertain the notion that heroin dealing could ever be a minor offense. Although *Gonzalez* may have drawn skepticism of the *Solem* analysis from this case, it certainly did not find support for the substitution of the *Solem* analysis with a "shock the conscience" standard.

<sup>110</sup> The failure to use the *Solem* analysis does not necessarily indicate the rejection of objective factors in proportionality review. As *Gonzalez* noted, *Solem* held that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate," *Solem*, 463 U.S. 277, 290 n.16 (1983), since the vast majority of sentences that are challenged, such as *Gonzalez*'s sentence, are undoubtedly proportionate. This explains the many cases that summarily dispose of pro-

them purported to establish an alternative standard of review to that of *Solem*. *Gonzalez* clearly strikes out in a new direction with its "shock the conscience" test, a direction that, if followed, places meaningful proportionality review in jeopardy.

### E. *Imperfections in the Solem Analysis*

Although the *Solem* test has not led to a flood of judicial legislating, the analysis does not eradicate all dangers inherent in proportionality review. Critics have certainly not fabricated the dangers that lurk when courts begin reviewing sentences. These dangers, however, do not justify courts' turning their backs on the *Solem* test. So long as reviewing courts are aware of the pitfalls and are "sensitiv[e] to principles of federalism and state autonomy,"<sup>111</sup> the analysis still serves a useful role in giving meaning to proportionality review.

#### 1. Assessing the Gravity of the Offense

The first danger involves the assessment of the gravity of the challenged offense, which is an integral part of the first two prongs of the *Solem* analysis. This assessment can lead to the imposition of subjective views if commonly accepted criteria for gauging the severity of offenses are not relied upon. Though Chief Justice Rehnquist and Justice Scalia contend that there are no commonly accepted criteria,<sup>112</sup> successful proportionality

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portionality challenges with little or no analysis. *See, e.g.,* *United States v. Panza*, 750 F.2d 1141 (2d Cir. 1984)(with no reliance on *Solem* analysis, three-year sentence for conspiracy to defraud automobile insurance companies not shown to be grossly disproportionate); *United States v. Romano*, 825 F.2d 725 (2d Cir. 1987)(with no reliance on *Solem* analysis, 20-year sentence for conspiracy to distribute and possess with intent to distribute heroin held not unconstitutionally disproportionate given the serious nature of the offense); *Bethea v. Scully*, 834 F.2d 257, 261 (2d Cir. 1987)(with no reliance on the *Solem* analysis, two concurrent terms of 25 years to life for two felony-murder convictions due to arson held not unconstitutionally disproportionate given the "despicable disregard for human life" and the particular facts of the crime). Some Second Circuit decisions have performed somewhat more extensive reviews. *See* *United States v. Persico*, 853 F.2d 134 (2d Cir. 1988)(applying each of the *Solem* factors and quickly disposing of them, court holds 25-year sentence for three counts of loansharking and conspiracy offenses not unconstitutionally disproportionate).

<sup>111</sup> *Rummel v. Estelle*, 445 U.S. 263, 306 (1980) (Powell, J., dissenting)("[T]he federal courts are capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy.")

<sup>112</sup> *See supra* note 6 and accompanying text.

reviews have taken into account such factors as the amount of violence or injury to persons and the offender's degree of intent.<sup>113</sup> When courts fail to apply these generally accepted standards, there is a risk that the assessment will devolve into legislating by the judiciary, threatening the viability of proportionality review.

Although distinctions between degrees of gravity may be apparent in some cases, not all offenses bear characteristics that mark them as being either necessarily grave or minor.<sup>114</sup> Crimes categorized as *malum in se*, such as Gonzalez's offense of first-degree premeditated murder, are easier to gauge than crimes labeled *malum prohibitum*, such as sodomy.<sup>115</sup> So, while the "commonsense scale of values" will quickly show that a forty-year sentence imposed for murder is not disproportionate, it will be of limited assistance in determining whether the same sen-

<sup>113</sup> These criteria constitute the "commonsense scale of values." Gilchrist, *supra* note 2, at 1126 n.38; see *supra* note 84. To support this scale of values, the author notes: "A statistical study, asking respondents from a cross-section of society to indicate the relative seriousness of 140 specific kinds of crimes, reveals that there are widely shared views on the relative seriousness of crimes, based on a few characteristics of these crimes." *Id.* The *Solem* Court adopted the tripartite proportionality analysis only after assuring itself that courts were able to discern the gravity of offenses "at least on a relative scale." *Solem v. Helm*, 463 U.S. 277, 292 (1983). The Court offered as "generally accepted criteria" the amount of harm caused or threatened, the absolute magnitude of the crime (for instance the dollar amount stolen or destroyed) and the lack or presence of intent. *Id.* at 293-94.

<sup>114</sup> In his *Rummel* dissent, Justice Powell indicated there may be some instances where it would be difficult to discern the gravity of an offense:

The Court suggests that an inquiry into the nature of the offense at issue . . . inevitably involves identifying subjective distinctions beyond the province of the judiciary. Yet the distinction between forging a check for \$28 and committing a violent crime . . . is surely no more difficult for the judiciary to perceive than the distinction between the gravity of murder and rape. I do not suggest that all criminal acts may be separated into precisely identifiable compartments. A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault. But the difficulties of line-drawing that might be presented in other cases need not obscure our vision here.

*Rummel*, 445 U.S. at 295-96 n.12 (Powell, J., dissenting)(citations omitted).

<sup>115</sup> *Malum in se* is defined as "an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law." BLACK'S LAW DICTIONARY 959 (6th ed. 1990). A person committing murder or larceny, for instance, will know from the nature of their acts that they are engaging in prohibited conduct. Conversely, *malum prohibitum* is defined as "a thing which is wrong because prohibited." *Id.* at 960. For example, an ex-felon who relocates to a new area would have no inherent indication that it was a crime not to register himself at his new place of residence.

tence is proportionate for sodomy.<sup>116</sup>

Drug offenses are among those crimes difficult to characterize objectively. Proportionality review of drug offense sentences reveals that courts, unguided by any criteria, often manipulate facts to cast the offense in whatever light is desired. In characterizing a drug offense a court may either concentrate on the specific facts and circumstances of the offense or, more commonly today, examine the crime in the context of the larger societal problem with which it is associated, thus aggravating the severity of the crime.<sup>117</sup>

<sup>116</sup> One could argue that sodomy does not necessarily evidence the characteristics of violence or injury that are associated with grave crimes. In *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Powell, J., concurring), Justice Powell proffered the idea that a Georgia statute imposing a term of up to 20 years imprisonment for a sodomy conviction could be prohibited by the Eighth Amendment. Justice Powell noted that Georgia made a single act of private, consensual sodomy a felony, much like serious felonies such as battery, arson or robbery.

<sup>117</sup> In *People v. Lorentzen*, 194 N.W.2d 827 (Mich. 1972), the court held that a minimum 20-year sentence imposed on a 23-year-old first offender for the sale of marijuana was unconstitutionally disproportionate. In reaching that conclusion, the court described the crime in relatively innocuous terms. In the district court's decision of *Carmona v. Ward*, 436 F. Supp. 1153 (S.D.N.Y. 1977), *rev'd*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979), which held that defendants' indeterminate life sentences were disproportionate for the sale of one dose of cocaine and the possession of three and three-eighth ounces of cocaine, the court stated that there was a limit to the "extent to which the statistical, or assumed, connection between a particular offense and collateral crimes may be used to justify a particularly harsh penalty . . ." *Id.* at 1169.

These cases from the 1970s should be contrasted with the more recent drug decisions where emphasis is placed on the collateral effects of the defendant's crime. It would seem that a greater societal concern about illegal drugs has led to a different characterization of the offenses. The Eighth Amendment's protection against disproportionate punishment should not, however, vary according to society's sense of urgency. *See, e.g.*, *Harmelin v. Michigan*, 111 S. Ct. 2680, 2706 (1991) (Kennedy, J., concurring) ("[T]he threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole."); *United States v. Brown*, 859 F.2d 974, 977 (D.C. Cir. 1988) (distribution of narcotics is a "national menace"); *United States v. Holland*, 729 F. Supp. 125, 133 (D.D.C. 1990) (the defendants "supplied thousands of men, women and children with crack"); *Terrebonne v. Butler*, 848 F.2d 500, 504 (5th Cir. 1988) ("[E]xcept in rare cases, the murderer's red hand falls on one victim only . . . but the foul hand of the drug dealer blights life after life . . . sparing not even the unborn"). The Supreme Court has indicated a willingness to utilize a "secondary effects" doctrine in as sensitive an area as free speech. In his concurring opinion in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2468-69 (1991) (Souter, J., concurring), Justice Souter emphasized that an Indiana law prohibiting nude dancing that was challenged on First Amendment grounds could be sustained due to the state's "substantial interest in combating the secondary effects of adult entertainment establishments," such as prostitution, increased sexual assaults and other criminal activity. The

These divergent approaches to characterizing drug offenses are well demonstrated in *Harmelin*. While Justice Kennedy may correctly emphasize the grave public health threat of illegal drug use, the numerous victims of the drug trade and the link between illegal drugs and violence, Justice White may just as validly characterize Harmelin's offense as a mere crime of possession, which does not require the degree of intent of more serious crimes and which cannot be directly linked to subsidiary effects. Clearly, proportionality review will not be a respected judicial function if judges are simply expressing their personal views as to the proper sentence for a drug offense. The *Solem* test, however, guards against unprincipled review precisely because it is a tripartite analysis. Justice White has the stronger hand in *Harmelin* because his conclusion of unconstitutionality is based upon *more* than his characterization of the severity of the defendant's offense. It rests also upon the fact that Michigan imposes life terms without parole only for first degree murder and drug possession with intent to distribute and upon the finding that Michigan imposes a sentence on offenders, such as Harmelin, which is far more severe than that of any other jurisdiction. *Solem* unequivocally states that it was a "combination of objective factors"<sup>118</sup> which made proportionality review viable. Aware that it was possible to have many sentences that fell within constitutional bounds, the *Solem* Court noted that no one factor would be sufficient to identify a grossly disproportionate sentence.<sup>119</sup> Given that the degree of judicial subjectivity in these

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use of a "secondary effects" analysis in gauging the severity of a crime, however, risks making a defendant bear the burden for an ever-widening circle of activities with which she will have increasingly attenuated ties. Although attenuated links may be permissible when dealing with conspiracies, simple convictions do not have the dangerous propensities that merit the casting of such a large net. If a jurisdiction wants to address some of these "secondary effects," it should meet them directly. See *Barnes*, 111 S. Ct. at 2472-75 (White, J., dissenting)(if Indiana were concerned with prostitution and other associated activities, it has the authority to criminalize such behavior); *Carmona v. Ward*, 436 F. Supp. 1153, 1169 n.62 (S.D.N.Y. 1977)(where there is a correlation between prostitution and robberies and assaults, jurisdictions will strictly enforce the prostitution laws rather than increasing the penalties for the other offenses).

<sup>118</sup> *Solem v. Helm*, 463 U.S. 277, 290-91 n.17 (1983).

<sup>119</sup> The predecessor *Hart* proportionality test was characterized as a "cumulative" analysis that also looked to all of the combined factors for a determination. *Hart v. Coiner*, 483 F.2d 136, 140 (4th Cir.), cert. denied, 415 U.S. 938 (1973). The notion that a court's review should be based on several factors can be traced back to *Weems*. *Weems v. United States*, 217 U.S. 349 (1910); see *supra* note 29.

drug cases can be palliated by the comparative prongs of the *Solem* analysis, Justice White's incredulity as to how Justice Kennedy can relegate those factors to irrelevant roles is understandable.<sup>120</sup>

## 2. Federalism and Sentencing Comparisons

The second danger in proportionality review includes the federalism concerns arising from the inter-jurisdictional analysis of sentences. There is a possibility that a state's sovereignty over its penal laws will be encroached upon if it is made to conform to penal schemes of other states. Proponents of proportionality review do not, however, claim that a sentence for a given crime need be uniform across all jurisdictions. As noted above, the *Solem* test contemplates that there will be many possible sentences which are constitutionally permissible. The tripartite analysis is designed to test a challenged sentence on three fronts so that only grossly disproportionate sentences are found unconstitutional. Furthermore, case law has long recognized that local responses to penal problems, which do not fit into national norms, are permissible.<sup>121</sup> Moreover, this fear that the "local condi-

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<sup>120</sup> *Harmelin v. Michigan*, 111 S. Ct. 2680, 2715 (1991). Justice Kennedy was not the first person to give short shrift to the full *Solem* analysis. Lower courts often concentrated on only one factor of the analysis, claiming to be conducting "abbreviated" reviews. *See, e.g.*, *United States v. Gaggi*, 811 F.2d 47 (2d Cir. 1987) (engaging in an abbreviated *Solem* analysis that did not include an inter-jurisdictional comparison, sentence imposed for conviction of car theft conspiracy held constitutional given the violent nature of the conspiracy); *United States v. Holland*, 729 F. Supp. 125 (D.D.C. 1990) (the only part of the *Solem* test that is relevant is the assessment of the gravity of the crime and the harshness of the penalty). *Solem* did state that in most cases a reviewing court would not be required to engage in an extended analysis, however the Court never made clear how the scope of review might be limited. *Solem v. Helm*, 463 U.S. at 290 n.16 It is certain, however, that the Court could not have intended either that one factor predominate over another or that one or more of the factors be discarded. A better reading of the "no extended analysis required" language is that courts should conduct something like a "quick look" at each of the prongs of the test to determine the constitutionality of a sentence. To read the language otherwise would be to disregard the very reason for having a tripartite test. For a good example of a "quick look" analysis, see *United States v. Perisco*, 853 F.2d 134 (2d Cir. 1988).

<sup>121</sup> *See, e.g.*, *Territory v. Ketchum*, 10 N.M. 718 (1893) (penalty of death upon any person who makes an assault upon any railroad train with intent to commit murder or robbery is permissible, given the circumstances of terror and danger engendered by this particular crime); *Carmona v. Ward*, 576 F.2d 405 (2d Cir. 1978), *cert. denied*, 439 U.S. 1091 (1979) (mandatory life sentence for drug offense not cruel and unusual punishment given the drug trafficking crisis faced by New York); *Bellavia v. Fogg*, 613 F.2d 369 (2d Cir. 1979) (same); *Harmelin*, 111 S. Ct. at 2704 (divergences in underlying theories of

tions" exception will swallow the rule of proportionality guarantee is unwarranted. It is possible to objectively compare crime statistics from state to state to determine whether a jurisdiction is suffering from peculiar conditions that merit deviation from the norm.<sup>122</sup>

#### F. *Proportionality Review After Harmelin*

Having proved its usefulness and having shown that the dangers inherent in proportionality review are not fatal to its viability, the *Solem* test must still be interpreted in light of *Harmelin*. The fractured *Harmelin* opinion has left lower courts as unsatisfied with the guidance provided for proportionality review as they were after *Solem* diverged from the restrictive approach set forth by *Rummel*. To avoid becoming enmeshed in a debate over whether to follow Justice Scalia's total abandonment of proportionality review or Justice Kennedy's narrow scope of review, many courts have looked to *Harmelin*, not for its reasoning, but for its use as a benchmark against which to compare challenged sentences. This straight-forward comparison provides a neat and uncomplicated method of deciding proportionality challenges when controlling precedent is unclear. If a defendant has been convicted of possession with intent to distribute or has been convicted of possessing 650 or fewer grams of cocaine, the defendant's sentence will be deemed constitutionally proportionate, given that Harmelin's sentence of life imprisonment without parole for the mere possession of 650 grams of

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sentencing and in length of prescribed prison terms are the inevitable and beneficial result of the federal structure). These allowances for peculiar local circumstances are consistent with the view that the proportionality guarantee does not require a strict proportionality between sentence and crime. See *supra* note 5.

<sup>122</sup> In most cases where courts have found that a challenged sentence for a drug offense was severe in comparison to other states and where the courts noted the severe drug problems confronted by the jurisdiction, it is questionable if a sufficient showing of a peculiar local problem was made. For example, in *Terrebonne v. Butler*, 848 F.2d 500 (5th Cir. 1988), the court acknowledged that Louisiana's sentence for drug trafficking was the most severe in the nation and also made reference to the state's "critical narcotics problem" and the legislators' concern with the local conditions. *Terrebonne*, 848 F.2d at 504-06. The court did not show, however, that Louisiana's drug problem was any more severe than that of other states. The court could easily have referred to crime data to support its position, but this was not done. The negation of the inference of gross disproportionality which arises from the inter-jurisdictional prong requires more than a court merely saying that the jurisdiction's problems are unique.



cocaine was held constitutional.<sup>123</sup> *Harmelin* obviously provides a very low benchmark against which to measure.

Even courts that have not sidestepped the issue of how to interpret *Harmelin* find little protection for defendants who challenge severe sentences.<sup>124</sup> Reviewing courts face an illusory choice between Scalia's abandonment of proportionate sentencing and Kennedy's lip service to its continued existence. No matter what route a court may choose, the outcome will almost always be identical.<sup>125</sup> It is difficult to believe that this is the

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<sup>123</sup> Unfortunately, many cases have adopted this approach which sheds little light on the contours of the proportionality guarantee. *See, e.g.*, *United States v. Dunson*, 940 F.2d 989 (6th Cir. 1991) (20-year term imposed for possession of 7 kilograms of cocaine with intent to distribute not unconstitutional); *United States v. Harvey*, 946 F.2d 1375, 1378 (8th Cir. 1991) ("regardless of what kind of proportionality review is required, a life sentence without parole for a drug crime of *Harmelin's* magnitude . . . is not cruel and unusual punishment" and therefore defendant's sentence of life imprisonment without parole for the possession with intent to distribute of 50 grams of cocaine is not unconstitutional); *United States v. Torres*, 941 F.2d 124, 128 (2d Cir. 1991) (in light of *Harmelin*, "there can be little question that . . . a sentence of life imprisonment without parole for [acting] as leaders of multimillion dollar heroin trafficking organization does not constitute 'cruel and unusual punishment'"); *United States v. Short*, 947 F.2d 1445 (10th Cir. 1991) (twenty-year sentence for the manufacturing of methamphetamine not unconstitutionally disproportionate); *United States v. Kramer*, 955 F.2d 479 (7th Cir. 1992) (punishing marijuana trafficking with life imprisonment without parole is not disproportionate in light of *Harmelin*); *Serrano Sepulveda v. United States*, 787 F. Supp. 24 (D.P.R. 1991) (ten-year sentence for possession of 14.94 kilograms of cocaine not disproportionate when compared to *Harmelin's* sentence); *United States v. Garrett*, 959 F.2d 1005 (D.C. Cir. 1992) (thirty-year sentence for possession of cocaine with intent to distribute not disproportionate); *United States v. Willis*, 956 F.2d 240 (11th Cir. 1992) (life sentences for conspiring to possess and possessing with intent to distribute at least 5 kilograms of cocaine is constitutional). This comparative technique is also a shorthand method when the defendant has been convicted of prior drug offenses. *See United States v. Gordon*, 953 F.2d 1106 (8th Cir. 1992) (where defendant has been convicted of a series of drug offenses, it cannot be argued that defendant's sentence of 262 months was disproportionate in light of *Harmelin*).

<sup>124</sup> In *United States v. Gordon*, 953 F.2d 1106 (8th Cir. 1992), the court held that a sentence of 262 months imposed under the Federal Sentencing Guidelines Career Offender provision for a series of three controlled substance offenses was not grossly disproportionate. A concurring judge notes that both he and the district court were troubled by the failure of the Career Offender provision to make finer distinctions between prior crimes, but that "unfortunately *Harmelin* requires us to affirm." *Id.* at 1109 (Heaney, J., concurring).

<sup>125</sup> Thus far lower courts have distanced themselves from Justice Scalia's fringe view that there is no Eighth Amendment proportionality guarantee, thereby saving the *Solem* analysis from total irrelevance. *See, e.g.*, *United States v. Contreras*, 937 F.2d 1191, 1195 (7th Cir. 1991) ("a firm majority of the Court agrees that the eighth amendment's proportionality guarantee explicated in *Solem* remains viable"); *United States v. Hopper*, 941 F.2d 419, 422 (6th Cir. 1991) ("although only two Justices would have held that the

best the Court could do in balancing the rights of defendants with the needs of society.

Unfortunately courts have readily and uncritically accepted Kennedy's flawed interpretation of the *Solem* test.<sup>126</sup> In the process Kennedy has undercut the effectiveness of proportionality review. The most serious shortcoming of Kennedy's approach is his failure to apply the multi-faceted test in gauging the proportionality of a sentence; he establishes the first prong of the *Solem* analysis (which evaluates the severity of the crime in relation to the harshness of the sentence) as a threshold determination that must be met before the comparative prongs of the analysis may be used to validate the initial judgment of gross disproportionality. Since proportionality review can hardly be characterized as a science, the necessity of informing a judgment with as many objective factors as possible is apparent. By discarding what are admittedly the more objective prongs of the *Solem* test, Kennedy has undoubtedly made proportionality review a more dangerous subjective task.<sup>127</sup> Kennedy justifies this

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eighth amendment has no proportionality requirement, five Justices agree that there is no requirement of strict proportionality"); *United States v. Lemons*, 941 F.2d 309 (5th Cir. 1991)(even while citing *Harmelin*, court proceeds to use *Solem* analysis to find 10-year sentence for nine counts of bank fraud constitutional).

<sup>126</sup> Kennedy may find satisfaction by taking account of both *Rummel* and *Hutto* and may chastise the *Harmelin* dissenters for ignoring these decisions. *Harmelin*, 111 S. Ct at 2707. At this stage in the development of proportionality review, however, it is perhaps best to refrain from performing linguistic gymnastics in order to preserve the Court's divergent opinions. By misinterpreting the *Solem* test, Justice Kennedy finds himself in no better position than the dissent.

<sup>127</sup> In lower court decisions that have applied Justice Kennedy's threshold approach, it is often unclear upon what the determinations are based. Notwithstanding the application of Justice Kennedy's threshold approach, some courts still seek out more objective grounds for their decisions. This need to make principled proportionality decisions dates back to *O'Neil* and *Weems*. See *supra* notes 24 & 29. For instance, in *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991), the defendant was challenging a 30-day sentence imposed for unloading raw fish without obtaining a commercial fishing permit. The court held that there was no inference of gross disproportionality given the seriousness of the violation and the short duration of the sentence. As if to validate its judgment, which was not based upon any objective criteria, the court stated that "even if [it] were to conclude that *Tart's* sentence raised a threshold inference of gross disproportionality," comparable crimes received similar terms of imprisonment. *Id.* at 504 n.16. The court then cited cases of refusing to stand in an elevator in a federal building and illegal fishing to support its position. Similarly, in *United States v. Lawden*, 955 F.2d 128, 131 (1st Cir. 1992), the court held that a seven-year sentence for distribution of 77 grams of LSD was constitutionally proportionate. The *Lawden* court noted that "[e]ven if inter-jurisdictional comparison still remains material under *Harmelin*, a doubtful proposition," the defendant could still have received up to ten years imprisonment if he had been con-

cutting back of the *Solem* test by noting *Solem's* announcement that no extended analysis would be required in most cases. Kennedy has misinterpreted this language as permitting inquiry into only one of the factors.<sup>128</sup> *Solem* clearly did not stand for this proposition: the Court could not have intended to enunciate a test of various factors from which courts were to pick and choose. Given that Kennedy believes one of the general principles of proportionality review is the objective determination of constitutionality, it is unclear how he can endorse this subjective test. Kennedy further undermines the *Solem* analysis by mixing a rationality element into the first prong of the *Solem* test. *Solem* never states that the first prong would turn on whether a legislature could rationally impose a given sentence on a crime. Kennedy has again injected a new element into the analysis that throws courts further off course from the sound and objective *Solem* test.

#### CONCLUSION

*Gonzalez* should not stand as a guide for future proportionality challenges in the Second Circuit. The "shock the conscience" test adopted by the court not only fails to curb the imposition of the judiciary's values on legislative determinations, but it also unduly restricts the scope of the proportionality guarantee, thereby undervaluing its role as a safeguard against legislative excesses. When faced with proportionality challenges far more difficult to decide than that of Hector Gonzalez, the Second Circuit will need an objective method to make these decisions. The *Solem* analysis can provide the necessary framework for an informed and objective proportionality review. Whether a defendant in the Second Circuit is accorded a meaningful guarantee of proportionate sentencing ultimately depends upon which path the Second Circuit follows.

*Allyn G. Heald*

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victed in state court. *Id.*

<sup>128</sup> Justice Kennedy's choice of a threshold test invites the question of why he chose that particular prong as the hurdle to further inquiry into proportionality. Assuming the key to a clearer rule for proportionality review is the selection of one *Solem* factor, Justice Kennedy chose the *wrong* factor to serve as the threshold. It would be better to use the inter-jurisdictional prong as the threshold test and proceed from there. Only if a sentence were markedly different from that of other jurisdictions would an inference of gross disproportionality arise and then that initial judgment could be validated by the less objective criteria.