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DISPROPORTIONATE OR EXCESSIVE PUNISHMENTS: IS THERE A METHOD FOR SUCCESSFUL CONSTITUTIONAL CHALLENGES?

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I. INTRODUCTION

For at least two thousand years, it has been an accepted tenet of jurisprudential writing that the punishment for a crime should be proportional to the offense committed. Cicero wrote, "care should be taken that the punishment should not be out of proportion to the offense."[1] Sir W.S. Gilbert made this proposition the centerpiece of a highly successful (not to mention profitable) operetta in 1885.[2] Jurists have long commented on the obvious proposition that there should be proportionality in criminal sentencing.[3] Recently, the Federal Sentencing Commission intended proportional sentencing to be a central tenet of the Sentencing Guidelines applicable to all federal criminal prosecutions.[4] Despite widespread acceptance of this basic proposition, however, sentences continue to be widely disparate.

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1. Cicero, (106 - 43 B.C.), *De officiis*, bk. I, ch. XXV. *See also* Cicero, *De officiis*, bk. III, ch. XX ("The Punishment [sic] shall fit the offense.").

2. "My object all sublime - I shall achieve in time - To let the punishment fit the crime - The punishment fit the crime." Sir W.S. Gilbert, *The Mikado,* 1885, Act II.

3. In Williams v. New York, 337 U.S. 241, 247 (1949), Justice Black observed that the "modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime" and that accordingly, sentences should be determined with an eye toward the "[r]eformation and rehabilitation of offenders." *Id.* at 248; *see also* United States v. Grayson, 438 U.S. 41 (1978).

4. *See* Commentaries, United States Sentencing Commission, Guidelines Manual promulgated pursuant to The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984); *see also* Griffin v. Oceanic Contractors, Inc., 458

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Unquestionably, legislatures have the power to define criminal offenses and prescribe punishments.[5] Legislatures have traditionally set a wide range of punishment for many crimes. In Texas, for instance, most non-habitual first degree felons face a possible sentence of five to ninety-nine years in prison or life, and the possibility of paying up to a $10,000 fine.[6] Courts tend to hold that as long as the punishment is within the range established by the legislature, the punishment does not violate the prohibitions against cruel and unusual punishments under either the U.S. Constitution[7] or various provisions of state constitutions. This serves to insulate a court's broad discretion from too stringent a review. Indeed, some appellate courts have questioned their jurisdiction even to consider the reasonableness of a sentence.[8]

Consider the following scenario. A defendant is accused of possessing a small amount of illegal narcotics. He has no previous criminal record. Following an "open plea"[9] of guilty, which results in conviction, the trial court judge assesses a life sentence. Having thrown himself on the mercy of the court, and finding that mercy strained,[10] how

U.S. 564, 575 (1982). The Sentencing Reform Act intended to create "an effective, fair sentencing system." U.S.S.G. Ch. 1, Pt. A intro. comment. "To achieve this end . . . Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." *Id.*; *see also* United States v. Reyes, 8 F.3d 1379, 1386 (9th Cir. 1993) (quoting United States v. Lira-Barraza, 941 F.2d 745, 748 (9th Cir. 1991) (citing S. REP. No. 225, 98th Cong., 1st Sess. 51 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3234) ("[T]he Sentencing Act 'creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently.' ")).

5. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 175 (1976) (holding that legislatively selected punishment is presumed constitutionally valid, legislature is not required to select least severe penalty possible if penalty selected is not "cruelly inhumane or disproportionate to the crime," and those attacking judgment of people's representatives bore a heavy burden); United States v. Klein, 860 F.2d 1489, 1495 (9th Cir. 1988) (holding Congress is "to say what shall be a crime and how it shall be punished" and sentence within statutory limits "may not be overturned . . . as cruel and unusual"). *See also* State *ex rel.* Smith v. Blackwell, 500 S.W.2d 97, 104 (Tex. Crim. App. 1973).

6. TEX. PENAL CODE ANN. § 12.32(a) (Vernon 1979).

7. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

8. *See, e.g.,* Craner v. State, 778 S.W.2d 144, 147 (Tex. App.—Texarkana 1989, no pet.).

> We do not have jurisdiction to review the reasonableness of punishments assessed by the juries and trial courts of this state if those punishments are within the range prescribed by statute for the offense, unless they are so plainly disproportionate to the offense as to shock the sense of humankind and thus constitute cruel and unusual punishment prohibited by the United States and Texas Constitutions.

Id. at 147. *See also* Yeager v. Estelle, 489 F.2d 276, 276 (5th Cir. 1973), *cert. denied*, 416 U.S. 908 (1974); Gaines v. State, 479 S.W.2d 678, 679 (Tex. Crim. App. 1972); U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13.

9. An open plea is where there is no operational plea bargain or recommendation as to sentencing. *See* Jack v. State, 871 S.W.2d 741, 743 (Tex. Crim. App. 1994).

10. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1 (Twayne's New Critical ed.) ("The quality of mercy is not strained.").

can a defendant ever challenge the punishment as excessive to the behavior it seeks to correct? Such a challenge is not easy. There is, however, authority to support the proposition that the punishment assessed cannot be grossly disproportionate to the crime.

This article[11] will begin with a review of several United States Supreme Court cases, from the emanation of the doctrine in *Weems v. United States*[12] to the widely misread and misunderstood case of *Harmelin v. Michigan.*[13] The article then examines the impact of the Federal Sentencing Guidelines on the federal circuit courts as they relate to claims of disproportionality in prison sentences.[14] Next, the

11. This paper does not discuss death penalty cases, which are an exhaustive subject unto themselves. *See* Coker v. Georgia, 433 U.S. 584 (1977) (sentence of death is a grossly disproportionate and excessive punishment for the crime of rape). For an excellent overview of capital proportionality jurisprudence, the authors recommend starting with United States v. Cheely, 36 F.3d 1439 (9th Cir. 1994) (Alarcon, C.J., concurring in part and dissenting in part). It should be noted, however, that the United States Supreme Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *See* Edmund v. Florida, 458 U.S. 782 (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); *see also* Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

12. 217 U.S. 349 (1910).

13. 501 U.S. 957 (1991).

14. Another topic which is beyond the scope of this article is federal forfeitures. This is not to say, however, that federal forfeitures, both civil and criminal, have no bearing on the topic of disproportionality. *See* 18 U.S.C. §§ 981, 982 (1988); 21 U.S.C. §§ 853, 881 (1988). Quite to the contrary. The argument that a forfeiture is disproportionate to the associated conduct is alive and well in the federal courts. *See* United States v. Halper, 490 U.S. 435 (1989) (a $130,000 fixed civil penalty was found disproportionate to the crime of Medicare fraud where the loss was only $585).

The Supreme Court has held that forfeitures are to be analyzed under the Excessive Fines Clause of the Eighth Amendment as opposed to the Cruel and Unusual Punishments Clause. *See* Alexander v. United States, 113 S. Ct. 2766 (1993); United States v. Austin, 113 S. Ct. 2801 (1993). See also *infra* note 143. The Court has not, however, established a test for deciding when a forfeiture is an excessive fine. That task was left to the lower courts and has been met with varying results.

For example, the Fourth Circuit in United States v. Chandler, 36 F.3d 358, 363-66 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995), adopted an "instrumentality" or "nexus" test, derived largely from Justice Scalia's concurring opinion in *Austin*. The crux of this test is that it is the seized property itself which is guilty, since it has been tainted by unlawful use. *See* 113 S. Ct. at 2813 (Scalia, J., concurring). The test seeks to determine how close the relationship is between the property and the offense committed. *Id.* at 2815. Indeed, the Fourth Circuit decided that, in light of *Harmelin v. Michigan*, the Solem v. Helm, 463 U.S. 277 (1983) test could not be applied. The Fourth Circuit went on to conclude that, since the *Solem* principle derived from the "cruel and unusual" clause, as opposed to the "excessive fines" clause, the doctrine of proportionality was not applicable to forfeited property.

In contrast, the Ninth Circuit in United States v. 6380 Little Canyon Rd., 1995 U.S. App. LEXIS 16839 (9th Cir. July 12, 1995), adopted a "two-prong" approach which looks to 1) the nexus between the forfeited property and the offense, and 2) proportionality between the value of the forfeited property and the gravity of the culpable conduct. The Ninth Circuit found that the instrumentality test was too restrictive and specifically accepted "the proportionality test as a check on the instrumentality approach." *Id.* at 18. More importantly, the Ninth Circuit accepted the notion that a

article explores some of the various state court opinions that have considered the issue of proportionality under federal constitutional guidelines and their own state constitutions. Finally, the article proposes an analytical structure to determine whether a sentence is disproportionate in an individual case.

II. THE UNITED STATES SUPREME COURT DECISIONS

A. O'Neil v. Vermont[15]

In 1892, the dissent in *O'Neil* first mentioned the concept that grossly disproportionate sentences violate the Eighth Amendment.[16] In *O'Neil,* the defendant was convicted on 307 counts of selling alcoholic beverages[17] and sentenced to more than fifty-four years in prison.[18] The majority did not discuss whether the sentence violated the Eighth Amendment because the issue had not been assigned to the Court as a federal question,[19] and because the Eighth Amendment was not yet made applicable against the states.[20] In Justice Field's dissent, however, he asserted the Cruel and Unusual Punishments Clause is directed "against all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged."[21]

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forfeiture of real property can be "grossly disproportionate" to the offense from which the forfeiture originates. *Id.* at 17. *See also* Quinones-Ruiz v. United States, 873 F. Supp. 359, 363 (S.D. Cal. 1995); United States v. 427 & 429 Hall St., 853 F. Supp. 1389, 1396-98 (M.D. Ala. 1994); United States v. 6625 Zumirex Drive, 845 F. Supp. 725, 734-35 (C.D. Cal. 1994). There is a good chance that this dispute will ultimately be resolved by the United States Supreme Court.

It should be noted, however, that regardless of the test preferred in the circuits and among the lower courts, there is a cloud on the future of forfeitures not included with the criminal case. Recently, the Ninth Circuit, in United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994) found that separate civil forfeitures after conviction are barred by the Double Jeopardy Clause of the U.S. CONST. amend. V. Since this case is in conflict with decisions from other circuits, *see* United States v. Anderson/Tilley, 18 F.3d 295 (5th Cir. 1994), *cert denied,* 115 S. Ct. 573 (1994); United States v. 18755 North Bay Rd., 13 F.3d 1493, 1497 (11th Cir. 1994); United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993), there is strong probability that the United States Supreme Court will grant any writ of certiorari filed from that decision.

15. 144 U.S. 323 (1892).

16. *Id.* at 338-40 (Field, J., dissenting).

17. *Id.* at 337.

18. *Id.* at 339.

19. *Id.* at 336.

20. *Id.* at 331-32 (Field, J., dissenting). The Vermont Supreme Court had considered and rejected a claim of cruel and unusual punishment, as well as excessive or oppressive punishment. *Id.* at 331.

21. *O'Neil,* 144 U.S. at 339-40 (Field, J., dissenting).

B. Weems v. United States[22]

In 1910, the majority of the United States Supreme Court[23] recognized that a principle of proportionality in sentencing was included in the Eighth Amendment.[24] *Weems v. United States* considered the validity of a Philippines Criminal Code of Procedure provision which authorized a form of corporeal punishment originally adopted from the laws of Spain. In *Weems*, the defendant was convicted for falsifying a "public and official document,"[25] a fairly minor offense. The penalty was fifteen years in *cadena temporal*.[26]

The *Weems* Court concluded the Philippine law was subject to the constraints of the U.S. Constitution prohibiting cruel and unusual punishments.[27] The Court acknowledged the difficulty in making this determination, since what constitutes a cruel and unusual punishment had not been exactly decided by the courts, not even during the debate at the constitutional convention.[28] The Court recognized that ordinarily, *cruel and unusual* implies something "inhuman and barbarous,—torture and the like."[29] The Court compared this sen-

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22. 217 U.S. 349 (1910).

23. *Weems* was decided by only seven justices. Justice Moody was absent due to illness. Justice Lurton did not participate in the decision because he was not a member of the Court when the case was argued. Justice Brewer died before the opinion was delivered. Justice McKenna delivered the opinion for the Court with Chief Justice Harlan and Justice Day concurring. Justice White wrote a dissenting opinion, which Justice Holmes joined.

24. *Weems*, 217 U.S. at 366-67. The Court recognized that in interpreting the Eighth Amendment, it will be regarded as a "precept of justice" that criminal punishments should be graduated and proportioned to the offense. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 843 (1969).

25. *Weems*, 217 U.S. at 362-63.

26. *Id.* at 358, 364. Persons sentenced to *cadena temporal* were required to carry a chain at the ankle, hanging from the wrists, and to be employed at hard, painful labor. *Id.* at 364.

> The punishment prescribed for violating this law was fine and imprisonment in a penal institution at hard and painful labor for a period ranging from twelve years and a day to twenty years, the prisoner being subjected, as accessories to the main punishment, to carrying during his imprisonment a chain at the ankle, hanging from the wrist, deprivation during the term of imprisonment of civil rights, and subjection, besides, to perpetual disqualification to enjoy political rights, hold office, etc., and, after discharge, to the surveillance of authorities.

Id. at 382-83.

27. *Id.* at 367 ("[T]he provision of the Philippine Bill of Rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States, and must have the same meaning.").

28. *Id.* at 368-69.

29. *Weems*, 217 U.S. at 368 (citing McDonald v. Commonwealth, 53 N.E. 874, 875 (Mass. 1899)). However, the Court noted the Massachusetts court had conceded the possibility "that imprisonment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." *Id.* The *Weems* Court also noted that "[o]ther cases have selected certain tyrannical acts

tence to other sentences for like and dissimilar crimes.[30] After an exhaustive discussion of existing precedent,[31] the Court concluded that punishment by *cadena temporal* was repugnant to the Bill of Rights.[32]

It should be noted that the punishment in *Weems* was considered barbaric and was unknown in English Law.[33] It was, thus, the manner of punishment and the conditions of confinement, not the length of imprisonment, which was held violative of the Eighth Amendment. Many courts continue to make this distinction in later decisions, using *Weems* as precedent.

In *Weems*, Justice White, joined by Justice Oliver Wendell Holmes, dissented and found the majority's interpretation of the Cruel and Unusual Punishments Clause "repugnant to the natural import of the [amendment's] language."[34] Further, the dissenters felt that, by "asserting a right of judicial supervision over the exertion of [legislative] power," and disregarding the separation of powers doctrine, the Court substantially curtailed legislative discretion.[35] The dissent expressed doubt that the Eighth Amendment endowed courts with the power to review the discretion of lawmaking bodies in prescribing sentences.[36]

Six years after *Weems*, Justice Holmes wrote for a unanimous Court in *Badders v. United States,*[37] brushing aside a proportionality challenge to concurrent sentences.[38] According to Holmes, there was simply "no ground for declaring the punishment unconstitutional."[39] Indeed, for the next several decades, the United States Supreme Court considered the issue of proportionality on an *ad hoc* basis.[40] No clear and concise rules were advanced for the Court's decisions, and the Court failed to issue any direct holdings relevant to disproportionality.[41]

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of the English monarchs as illustrating the meaning of the clause and the extent of its prohibition." *Id.*

30. *Id.* at 379-80.

31. *Id.* at 369-75.

32. *Id.* at 382.

33. *Id.* at 377.

34. *Weems,* 217 U.S. at 385 (White, J., dissenting).

35. *Id.*

36. *Id.* at 387-89.

37. 240 U.S. 391 (1916).

38. *Id.*

39. *Id.* at 394. The decision in *Badders*, however, appears to rest more on the incredulity of finding five years imprisonment for each of seven counts of mail fraud disproportionate for a felony than on rejection of the proportionality theory.

40. Individual members of the Court continued to recognize the principle of proportionality in the meantime. *See, e.g.,* Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); *id.* at 111 (Brennan, J., concurring); *id.* at 125-26 (Frankfurter, J., dissenting).

41. *See e.g.,* Pico v. United States, 228 U.S. 225, 232 (1913); District of Columbia v. Clawans, 300 U.S. 617, 627 (1937).

C. *Robinson v. California*[42]

In 1962, the Court decided *Robinson v. California* holding for the first time that the Eighth Amendment was applicable to punishments imposed by state courts.[43] In *Robinson*, the Court found a ninety-day sentence for the crime of "addict[ion] to the use of narcotics" excessive.[44] As the Court explained, "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual."[45] The Court cautioned that "the question [of excessive punishment] cannot be considered in the abstract"[46] and required taking into consideration all circumstances surrounding the offense. Under *Robinson*, the Court concluded that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[47] In arriving at this conclusion, the *Robinson* Court focused on the nature of the conduct criminalized rather than the length of the sentence. The Court was of the opinion that California could not imprison a person who is essentially ill.[48]

D. *Rummel v. Estelle*[49]

Eighteen years later, a majority of the Court finally decided a case involving imprisonment for a felony statute under a disproportionality analysis. In *Rummel v. Estelle,* the Court acknowledged the existence

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42. 370 U.S. 660 (1962).

43. *Id.*

44. *Id.* at 667. The Court referred to § 11721 of the California Health and Safety Code, which provided,

> No person shall use, or be under the influence of, or be addicted to the use of narcotics, except when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.

Robinson, 370 U.S. at 661 n.1 (citing CAL. HEALTH & SAFETY CODE § 11721 (repealed 1972) (current version at CAL. HEALTH & SAFETY CODE § 11550 (West 1991)).

45. *Id.* at 667.

46. *Id.*

47. *Id.*

48. *Id.* at 685 (Clark, J., dissenting). *Robinson* was not without dissent. Justice Clark found that "even if interpreted as penal, the sanction of incarceration for 3 to 12 months is not unreasonable when applied to a person who has voluntarily placed himself in a condition posing a serious threat to the State. Under either theory, its provisions for 3 to 12 months' confinement can hardly be deemed unreasonable." *Id.*

49. 445 U.S. 263 (1980).

of the proportionality rule for both capital and non-capital cases.[50] Rummel, the defendant, was convicted of obtaining $120.75 by false pretenses. He also had two prior felonies for fraudulent use of a credit card and one conviction for passing a forged check.[51] Rummel received a mandatory life sentence under Texas law,[52] and he argued that such a sentence amounted to cruel and unusual punishment.[53]

Rummel's status as a recidivist was crucial to the Court's rejection of his claim.[54] The Court did not reject the doctrine of proportionality, but merely considered it inapplicable under the circumstances of the case.[55] Writing for the Court,[56] Justice Rehnquist was inclined to defer to the judgment of the Texas Legislature.[57] Rehnquist noted that, under Texas' liberal policy of allowing "good time credits," Rummel's sentence could not be viewed as life imprisonment because he was eligible for parole in approximately twelve years.[58] Rehnquist stated as follows:

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

50. *Id.* at 272.
51. *Id.* at 286 (Powell, J., dissenting).
52. *Id.* at 264.
53. *Rummel,* 445 U.S. at 265.
54. *Id.* at 284-85.
55. *Id.* at 285.
56. Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, White, and Blackmun joined. Justice Stewart filed a concurring opinion, while Justice Powell filed a dissenting opinion joined by Justices Brennan, Marshall, and Stevens.
57. *Rummel,* 445 U.S. at 284 ("Texas is entitled to make its own judgment as to where such lines lie, subject only to those strictures of the Eighth Amendment that can be informed by objective factors.").
58. *Id.* at 280. The authors are curious as to how eligibility for parole can be factored into a proportionality principle when a jury is the sentencing body, since it has long been held in Texas that the jury cannot consider parole eligibility. *See* Smith v. State, 898 S.W.2d 838 (Tex. Crim. App. 1995); Rose v. State, 752 S.W.2d 529, 532 (Tex. Crim. App. 1987) (en banc). *But see* TEX. CODE CRIM. PROC. ANN. art. 3707 § 4 (Vernon Supp. 1995), which mandates a jury charge on parole eligibility, but at the same time instructs the jury that they cannot consider parole eligibility in affixing a term of imprisonment.

> isolated from society are matters largely within the discretion of the punishing jurisdiction.[59]

The dissent in *Rummel*[60] adamantly maintained that mandatory life imprisonment for this offense, even with the possibility of parole,[61] violated the Eighth Amendment. Justice Powell wrote as follows:

> The scope of the Cruel and Unusual Punishments Clause extends not only to barbarous methods of punishment, but also to punishments that are grossly disproportionate. Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender. The inquiry focuses on whether, [sic] a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice. The Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a non-capital sentence is challenged. Such a limitation finds no support in the history of Eighth Amendment jurisprudence.[62]

The dissent argued that a prison sentence would be excessive if it serves no acceptable social purpose, or was grossly disproportionate to the seriousness of the crime,[63] a sentiment in which the authors heartily concur.

E. Hutto v. Davis[64]

On the heels of *Rummel* came the curious *Hutto v. Davis* case, which was decided four months later without considering a proportionality analysis. *Hutto* is a *per curiam* opinion in which the Court held a proportionality review inapplicable to a forty-year prison sentence and a $20,000 fine assessed by the State of Virginia for possession with intent to distribute nine ounces of marijuana.[65] The defendant, Davis, had sought a federal writ of habeas corpus[66] asserting that the sentence was so grossly disproportionate to the crime as

59. *Rummel,* 445 U.S. at 284-85.

60. *Id.* (Powell, J., dissenting) (Powell was joined by Justices Brennan, Marshall, and Stevens).

61. As the dissent correctly noted, parole in Texas is not a matter of right but of grace. Executive clemency is by no means mandatory. Indeed, Texas holds parole is within the exclusive jurisdiction, power, and authority of the Board of Pardons. *See* TEX. CONST. art. IV, § 11; *Rose,* 752 S.W.2d at 533-34.

62. *Rummel,* 445 U.S. at 307-08 (Powell, J., dissenting).

63. *Id.* at 292.

64. 454 U.S. 370 (1982).

65. *Id.*

66. *Id.* at 371.

to constitute cruel and unusual punishment.[67] The District Court agreed, and issued a writ of habeas corpus,[68] saying as follows:

> After examining the nature of the offense, the legislative purpose behind the punishment, the punishment in the Commonwealth of Virginia for other offenses, and the punishment actually imposed for the same or similar offenses in Virginia, this court must necessarily conclude that a sentence of forty years and twenty thousand dollars in fines is so grossly out of proportion to the severity of the crimes as to constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.[69]

On appeal, the Fourth Circuit initially reversed the district court's decision.[70] On rehearing, sitting *en banc,* the Fourth Circuit affirmed the habeas relief.[71] The Supreme Court granted certiorari and remanded the case for reconsideration in light of *Rummel.*[72]

Upon reconsideration, the Fourth Circuit again concluded the sentence was disproportionate.[73] Subsequently, the Supreme Court,[74] relying solely on *Rummel,* summarily reversed and held that the Fourth Circuit failed to heed the dictates of *Rummel.*[75] The Court said as follows:

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67. *Id.*

68. *Id.*

69. *Id. See also* Davis v. Zahradnick, 432 F. Supp. 444, 453 (W.D. Va. 1977), *rev'd sub nom.* Hutto v. Davis, 454 U.S. 370 (1982). The District Court relied on four factors previously set forth by the Fourth Circuit in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied,* 415 U.S. 938 (1974). *Zahradnick,* 432 F. Supp. at 451-52. Applying the first *Hart* factor, the District Court found "no element of violence and minimal, debatable danger to the person." *Id.* at 452. *Hart*'s second factor calls for an examination of the purposes behind the criminal statute and the existence of less restrictive means of effectuating those purposes. In applying this factor, the District Court was inconclusive but noted the amount of marijuana involved was less than nine ounces, implying that such minimal possession could adequately be deterred with shorter prison sentences. *Id.* Applying the third *Hart* factor, the District Court found that respondent's sentence for possession with intent to distribute exceeded the maximum penalty available for that offense in all but four states, and the sentence for distribution exceeded the maximum penalty available for that offense in all but eight states. *Id.* at 452-53. The fourth *Hart* factor led the District Court to conclude that respondent's sentence was disproportionate when compared to punishments applicable to other offenses under Virginia law. *Id.* at 453. In its final *Hutto v. Davis* opinion, the Supreme Court noted this type of analysis was implicitly rejected by *Rummel. Hutto,* 454 U.S. at 372-73. The majority also noted that the dissent in *Rummel* relied on *Hart. Id.* at 373.

70. Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978). The Fourth Circuit had previously accepted proportionality in prison sentences as a "settled" principle of law. *Hart,* 483 F.2d at 140.

71. Davis v. Davis, 601 F.2d 153, 154 (4th Cir. 1979) (en banc).

72. Hutto v. Davis, 445 U.S. 947 (1980).

73. Davis v. Davis, 646 F.2d 123 (4th Cir. 1981) (en banc).

74. Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (4-1-4 vote) (Powell, J., concurring) (Brennan, Marshall, and Stevens, JJ., dissenting).

75. *Id.* at 373-75.

> *Rummel* stands for the proposition that federal courts should be "[reluctant] to review legislatively mandated terms of imprisonment," and that "successful challenges to the proportionality of particular sentences" should be "exceedingly rare." By affirming the District Court decision after our decision in *Rummel*, the Court of Appeals sanctioned an intrusion into the basic linedrawing process that is "properly within the province of legislatures, not courts." More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases "by virtue of their commissions, not their competence." And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel*. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.[76]

F. Solem v. Helm[77]

Two years later, in *Solem v. Helm,* the United States Supreme Court did an about-face from *Rummel* and unequivocally stated that the Eighth Amendment's Cruel and Unusual Punishments Clause proscribes punishments which are grossly disproportionate to the severity of the crime.[78] The *Solem* Court hastened to add that, while there is *no* penalty which is *per se* constitutional, sentences should be proportionate to the crimes.[79] The Court concluded that the circumstances of the crime and the resulting sentence may compel a conclusion of disproportionality in an individual case.[80]

The defendant in *Solem* was convicted in a South Dakota state court for issuing a "no account" check in the amount of $100.[81] Ordinarily, the maximum punishment was five years imprisonment and a $5,000 fine.[82] Defendant Helm, however, was sentenced to life imprisonment without the possibility of parole under South Dakota's recidivist statute.[83] Helm had six prior felony convictions; three for third-degree burglary and convictions for obtaining money under false pretenses, grand larceny, and a third-offense driving while intoxicated.[84] The case went to the United States Supreme Court on a federal writ of habeas corpus.[85]

76. *Id.* at 374-75 (citations omitted).
77. 463 U.S. 277 (1983).
78. *Id.* at 284.
79. *Id.* at 290.
80. *Id.* at 290-91.
81. *Id.* at 281.
82. *Id.*
83. *Id.* at 281-82.
84. *Id.* at 279-80.
85. *Id.* at 283-84.

The *Solem* Court found that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibited not only barbaric punishments, but also sentences which are disproportionate to the crime committed.[86] The Court considered earlier British precedents, including the Magna Carta and the English Bill of Rights.[87] The Court found that when the Framers of the Constitution drafted the Eighth Amendment, they adopted the language of the English Bill of Rights and the English principle of proportionality.[88] The Court noted it had explicitly recognized the constitutional principle of proportionality for "almost a century."[89] The Court held the general principle of proportionality applied to felony prison sentences because prison sentences were not specifically excluded by the language of the Eighth Amendment.[90] The Court stated as follows:

> [T]he Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis.[91]

The *Solem* Court held "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant [is] convicted."[92] The Court noted that appellate courts should defer to legislative and trial court judgment to determine the types and limits of punishments.[93] Moreover, the Court set forth a three-part test to determine the constitutionality of a given sentence: 1) the gravity of the offense and the harshness of the penalty; 2) sentences imposed on other criminals in the same jurisdiction; and 3) sentences imposed for the commission of the same crime in other jurisdictions.[94] The Court said as follows:

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86. *Id.* at 284.

87. *Id.* at 284-85.

88. *Id.* at 285-86.

89. *Id.* at 286.

90. *Id.* at 288-89.

91. *Id.* at 289 (citations omitted).

92. *Id.* at 290.

93. *Id.* Interestingly, the only other jurisdiction used by the Court for comparison was Nevada. The Court noted that "[a]t the very least . . . it is clear that Helm could not have received such a severe sentence in 48 of the 50 States." *Id.* at 299-300 (referencing NEV. REV. STAT. § 207.010(2) (1981)).

94. *Id.* at 292. This test looks similar to the Fourth Circuit's test in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974), which the Supreme Court severely criticized in Hutto v. Davis, 454 U.S. 370, 373 (1982).

> Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and non-capital punishments, for the death penalty is different from other punishments in kind rather than degree. For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.[95]

The *Solem* Court suggested that a proportional sentencing inquiry is not dissimilar from the type of inquiry required under the Speedy Trial Clause[96] and the right to a jury trial.[97] Quoting *Barker v. Wingo,*[98] the Court noted that whether a defendant was afforded a speedy trial "necessitates a functional analysis of the right in the particular context of the case."[99] With respect to a jury trial, the Court spoke of "the line-drawing function of the judiciary."[100] The majority concluded that both trial and appellate courts should be allowed to "distinguish one sentence of imprisonment from another . . . [and] properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn."[101]

The *Solem* Court noted that the defendant's crime involved neither violence, nor a threat of violence to another, and was "one of the most passive felonies a person could commit."[102] The Court concluded "[t]he $100 face value of [the defendant's] 'no account' check was not trivial, but neither was it a large amount."[103] In fact, the value was less than one-half the amount South Dakota required for felonious theft.[104] The Court recognized the defendant's recidivist status could not "be considered in the abstract."[105] Additionally, the Court carefully noted that the defendant's prior offenses, although classified as felonies, were relatively minor, nonviolent property crimes.[106] The Court considered a life sentence without the possibility of parole to be

95. *Solem,* 463 U.S. at 294 (footnotes omitted).

96. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." *Id.*

97. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ." *Id.*

98. 407 U.S. 514 (1972) (unanimous opinion).

99. *Solem,* 463 U.S. at 294 (quoting Barker v. Wingo, 407 U.S. 514, 522 (1972)).

100. *Id.* at 295.

101. *Id.*

102. *Id.* at 296 (citations omitted).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 296-97. The Court also noted that the defendant was 36 years old when he was sentenced, and not a professional criminal. *Id.* at 297 n.22. As the Court said,

the most severe punishment a state can impose.[107] The majority concluded that defendant Helm's sentence was "significantly disproportionate to his crime, and therefore prohibited by the Eighth Amendment."[108]

Chief Justice Burger and Justices Rehnquist and O'Connor dissented, finding nothing objectionable about the sentence due primarily to the fact that the defendant was a recidivist.[109] The dissent noted that the majority failed to follow *Rummel* and they expressed doubt that the Eighth Amendment extends to proportionality of prison terms.[110] Chief Justice Burger wrote as follows:

> Although historians and scholars have disagreed about the Framers' original intentions, the more common view seems to be that the Framers viewed the Cruel and Unusual Punishments Clause as prohibiting the kind of torture meted out during the reign of the Stuarts. Moreover, it is clear that until 1892, over 100 years after the ratification of the Bill of Rights, not a single Justice of this Court even asserted the doctrine adopted for the first time by the Court today. The prevailing view up to now has been that the Eighth Amendment reaches only the *mode* of punishment and not the length of a sentence of imprisonment. In light of this history, it is disingenuous for the Court blandly to assert that "[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." That statement seriously distorts history and our cases.[111]

The dissent was concerned that the majority was creating new law[112] and entering into uncharted territory[113] by allowing appellate review

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> The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither [the defendant] nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.

Id.

107. *Id.* at 297.

108. *Id.* at 303.

109. *Id.* at 304 (Burger, C.J., dissenting).

110. *Id.* at 312-13.

111. *Id.* (citation omitted) (alteration in original).

112. *Id.* at 313. "Until today, not a single case of this Court applied the 'excessive punishment' doctrine of *Weems* to a punishment consisting solely of a sentence of imprisonment, despite numerous opportunities to do so." *Id.* at 313 n.6. "This court has applied a proportionality test only in extraordinary cases, *Weems* being one example and the line of capital cases another." *Id.* at 313.

113. *Id.* at 314.

> By asserting the power to review sentences of imprisonment for excessiveness the Court launches into uncharted and unchartable waters. Today it holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly "nonviolent" felony. How about the eighth "nonviolent" felony? The ninth? The twelfth? Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price fixing? The permutations are endless and the Court's opin-

of sentences. Moreover, Chief Justice Burger emphasized it was appropriate for courts to defer to legislative judgment in the matter of sentencing criminal defendants.[114]

G. *Harmelin v. Michigan*[115]

Harmelin v. Michigan is the latest United States Supreme Court case considering the issue of sentence proportionality. The *Harmelin* Court reviewed the constitutionality of a Michigan statute providing for a mandatory life sentence without the possibility of parole for possessing more than 650 grams of cocaine.[116] *Harmelin* did not involve a recidivist statute, and the defendant had no prior felony convictions.[117] The Court upheld the life sentence on grounds that it was not cruel and unusual, but did not reach a clear consensus on the issue of disproportionality.[118]

Justice Scalia, joined by Justice Rehnquist, rejected proportionality as a constitutional doctrine, writing as follows: "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."[119] The remaining seven Justices, however, found a proportionality principle implicit in the Eighth Amendment's Cruel and Unusual

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ion is bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective" factors and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes. Must all these factors be present in order to hold a sentence excessive under the Eighth Amendment? How are they to be weighed against each other? Suppose several states punish severely a crime that the Court views as trivial or petty?

Id. at 314-15 (citation omitted).

114. *Id.* at 314.

The Court's traditional abstention from reviewing sentences of imprisonment to ensure that punishment is "proportionate" to the crime is well founded in history, in prudential considerations, and in traditions of comity. Today's conclusion by five Justices that they are able to say that one offense has less "gravity" than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature. Nor, as this case well illustrates, are we endowed with Solomonic wisdom that permits us to draw principled distinctions between sentences of different length for a chronic "repeater" who has demonstrated that he will not abide by the law.

The simple truth is that "[n]o neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed. The apportionment of punishment entails, in Justice Frankfurter's words, "peculiarly questions of legislative policy." Legislatures are far better equipped than we are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes.

Id.

115. 501 U.S. 957 (1991).

116. MICH. COMP. LAWS ANN. § 333.7413(2)(a)(i) (West Supp. 1990-1991).

117. *Harmelin*, 501 U.S. at 994 (Scalia, J., plurality).

118. *Id.* at 994-95.

119. *Id.* at 965.

Punishments Clause.[120] They did not, however, agree on a unified approach by which to apply this principle.

In his concurrence, Justice Kennedy, joined by Justices O'Connor and Souter, asserted that the Eighth Amendment encompasses a narrow proportionality principle that applies to non-capital sentences.[121] Justice Kennedy recognized the Court's proportionality decisions have been neither clear nor consistent.[122] In his view these cases were capable of reconciliation, and he believed workable guidelines could be promulgated from precedent.[123]

Interestingly, Justice Kennedy, like Justice Scalia and Chief Justice Rehnquist, appeared to disavow the *Solem* three-part test. In Justice Kennedy's view, penological judgment was properly within the purview of the legislatures and not the courts;[124] he was disinclined to interfere with the Michigan Legislature's judgment.[125] Justice Kennedy was also of the opinion that the Eighth Amendment does not mandate the adoption of any one penological theory, but is intended to accommodate varying schemes.[126] He stated that the doctrine of federalism "recognizes the independent power of a State to articulate societal norms through criminal law."[127] Finally, Justice Kennedy be-

120. Chief Justice Rehnquist was the only Justice to join with Justice Scalia in holding the Eighth Amendment contains no proportionality guarantee. The other seven Justices, however, assert that the Eighth Amendment guarantees proportionality in sentencing. *See* Justice Kennedy's concurrence, *id.* at 966; *see also* Justice White's dissent, *id.* at 1009.

121. *Id.* at 997 (Kennedy, J., concurring).

122. *Id.* at 996.

123. *Id.* at 996-98.

124. *Id.* at 998.

125. In this regard, Justice Kennedy said as follows:

> [T]he Michigan Legislature has mandated the penalty and has given the state judge no discretion in implementing it. It is beyond question that the legislature "has the power to define criminal punishments without giving the courts any sentencing discretion." . . . To set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist . . . but rather the collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry. We have never invalidated a penalty mandated by a legislature based only on the length of sentence, and, especially with a crime as severe as this one, we should do so only in the most extreme circumstance
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> . . . .
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> . . . Michigan may use its criminal law to address the issue of drug possession in wholesale amounts in the manner that it has in this sentencing scheme.

Id. at 1006-09 (citation omitted).

126. *Id.* at 999. "The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation. And competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic." *Id.* (citation omitted).

127. *Id.* (citing to McCleskey v. Zant, 499 U.S. 467, 491 (1991)). Indeed, regarding uniformity in sentencing among the states, Kennedy found "some State will always bear the distinction of treating particular offenders more severely than any other State." *Id.* at 1000.

lieved that any proportionality review undertaken by the federal courts should be based as much as possible on objective factors. "The most prominent objective factor is the type of punishment imposed."[128] Thus, Justice Kennedy concluded that the Eighth Amendment did not require strict proportionality between the crime and sentence, rather it forbids only extreme sentences which are grossly disproportionate to the crime.[129]

Justice Kennedy was unable to conclude that the mandatory life sentence in *Harmelin* was disproportionate.[130] He reasoned that Harmelin's crime was far more grave than the crime at issue in *Solem*.[131] In his view, a $100 no account check was not comparable to possession of more than 650 grams of cocaine. Indeed, he found Harmelin's crime threatened to cause grave harm to society, since possession, use, and distribution of illegal drugs represents "one of the greatest problems affecting the health and welfare of our population."[132] Justice Kennedy dismissed the suggestion that Harmelin's crime was non-violent and victimless.[133] His concern was whether a penalty this harsh would have a deterrent effect.[134]

In his dissent, Justice White, joined by Justices Stevens and Blackmun, concluded that the Eighth Amendment includes a "proportionality requirement."[135] Justice White criticized Justices Scalia and Kennedy for their failure to follow precedent, saying as follows: "[w]hile Justice Scalia seeks to deliver a swift death sentence to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell."[136] Justice White found no reason to overrule *Solem*, but would have applied the three-part *Solem* test to find the penalty of life without parole for drug possession unconstitutional under the Eighth Amendment.[137] Justice Marshall, writing separately, agreed with Justice White that the Eighth Amendment imposed a general proportionality requirement.[138] He did not, however, set forth any particularized reason to support his view.

128. *Id.* (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980)).
129. *Id.* at 1001.
130. *Id.* at 1008.
131. *Id.* at 1001.
132. *Id.* at 1002 (quoting Treasury Employees v. Von Raab, 489 U.S. 656, 668 (1989)).
133. *Id.*
134. *Id.* at 1008. "Reasonable minds may differ about the efficacy of Michigan's sentencing scheme, and it is far from certain that Michigan's bold experiment will succeed." *Id.*
135. *Id.* at 1013 (White, J., dissenting).
136. *Id.* at 1018.
137. *Id.* at 1021.
138. *Id.* at 1028 (Marshall, J., dissenting). Paraphrasing Justice White, Justice Marshall stated, "this Court has recognized and applied that requirement in both capital and noncapital cases, and had it done so properly here it would have concluded that Michigan's law mandating life sentences with no possibility of parole even for first-time drug possession offenders is unconstitutional." *Id.*

Post-*Harmelin,* the United States Supreme Court has not considered disproportionality of prison sentences. Meanwhile, the makeup of the Court has changed significantly, and so perhaps has the prospect for a future disproportionality review. While keeping silent on the issue of prison sentences, the current Court discusses disproportionality more obliquely in other circumstances, particularly in the areas of civil damages, civil *in rem* forfeitures, and taxes on criminal activity.[139]

For instance, in *United States v. Halper,*[140] the Court considered the excessiveness of damages and the disparity between actual and punitive damages.[141] In *Austin v. United States,*[142] the Court held civil *in rem* forfeitures are subject to an excessive fines analysis under the Eighth Amendment.[143] Further, in *Department of Revenue v. Kurth Ranch,*[144] a state tax on illegal activities was subject to analysis under

139. As with capital punishment, each of these topics is an exhaustive study in and of itself. The authors chose to limit this paper strictly to the question of disproportionate or excessive terms of imprisonment.

140. 490 U.S. 435 (1989).

141. *Id.* at 448-49. The Court considered whether a civil penalty "may constitute a second 'punishment' for the purpose of double jeopardy analysis." *Id.* at 441. The Supreme Court first found that the label *criminal* or *civil* was a distinction without a difference, because "a civil as well as a criminal sanction constitutes punishment when the sanction as applied . . . serves the goal of punishment." *Id.* at 448. The Court then stated, "a civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* The Supreme Court ruled that in the rare case where the sanction imposed is overwhelmingly disproportionate to the damage and "bears no rational relation to the goal of compensating the Government for its loss, . . . the defendant is entitled to an accounting of the Government's damages . . . to determine if the penalty sought [following criminal prosecution] constitutes a second punishment." *Id.* at 449-50.

142. 113 S. Ct. 2801 (1993).

143. The issue in *Austin* was whether the Excessive Fines Clause of the Eighth Amendment applied to forfeitures of property under the federal controlled substance forfeiture statute. *Id.* at 2803. Because the Eighth Amendment limits the government's power to punish, the Supreme Court was called on to determine whether the statutory forfeiture was punishment. *Id.* at 2805-06. The Court summarized the history of common law forfeitures, beginning with English law, and concluded with the observation that "this Court . . . consistently has recognized that forfeiture serves, at least in part, to punish the owner." *Id.* at 2807-10. Utilizing the *Halper* test of whether the statute in question serves at least in part to punish, the Court analyzed several factors and stated, "we cannot conclude that forfeiture under [the statute] serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes 'payment to a sovereign as punishment for some offense,' and, as such is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Id.* at 2812 (citation omitted) (footnote omitted). Moreover, because the value of property forfeitable under the statute can vary so dramatically, the Court stated that any relationship between the Government's actual costs and the amount of the sanction was merely coincidental. *Id.* at 2812 n.14. Thus, forfeiture as a penalty has no correlation to any damages sustained by society or to the cost of enforcing the law. The Court remanded the case for a proportionality analysis.

144. 114 S. Ct. 1937 (1994).

the Eighth Amendment for excessive punishment.[145] While these cases have tended to rest on the Excessive Fines Clause of the Eighth Amendment,[146] as opposed to the Cruel and Unusual Punishments Clause, it is clear that the United States Supreme Court has not yet rendered its final decision on disproportionality.

III. CONFUSION IN THE CIRCUIT COURTS

The Supreme Court's lack of consensus in *Harmelin,* and the questions relating to the validity of *Solem,* has created confusion in the federal circuit courts. In the literally hundreds of cases dealing with proportionality since *Harmelin,* the federal courts have not declared a single prison sentence to be disproportionate. Additionally, most circuits consider Justice Kennedy's concurrence in *Harmelin* to be the prevailing view of the Supreme Court.[147]

The Fourth Circuit held Justice Kennedy's opinion limits the scope of *Solem,*[148] noting his quote: "[t]he Eighth Amendment does not require strict proportionality between [the] crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[149] Likewise, the Sixth Circuit adopted Justice Kennedy's view of proportionality, and has not found a sentence unconstitutional.[150]

145. *Id.* The Supreme Court began in *Kurth Ranch* by noting that criminal fines, civil penalties, civil forfeitures, and taxes all generate government revenues, impose fiscal burdens on individuals, deter certain behaviors, and are subject to constitutional constraints. *Id.* at 1945. That Court went on to state that "fines, penalties, and forfeitures are readily characterized as sanctions." *Id.* at 1946. By this language, the Court appeared to indicate that forfeitures are punishment. The issue in *Kurth Ranch* was whether the marijuana tax's purposes were punitive in nature, as are fines, penalties, and forfeitures. The Court concluded that the drug tax was fairly characterized as punishment, and thus could not be imposed in a second proceeding following the first punishment for the criminal offense. *Id.* at 1948. The Court announced that the application of *Halper's* method of determining whether a penalty was remedial or punitive, by evaluating whether the damages assessed were in proportion to damages suffered by the government, was inappropriate because the tax assessed had no relation to costs to the State that are attributable to the defendant's conduct. *Id.*

146. *See supra* note 14.

147. United States v. Bland, 961 F.2d 123, 128-29 (9th Cir. 1992); Bradford v. Whitley, 953 F.2d 1008, 1012 (5th Cir. 1992).

148. United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994).

149. *Id.* at 365 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

150. *See, e.g.,* United States v. Garcia, 20 F.3d 670, 672 (6th Cir. 1994) (a 262-month sentence [21.8 years] for conspiracy with intent to distribute several hundred pounds of marijuana was not disproportionate); United States v. Dunson, 940 F.2d 989, 995 (6th Cir. 1991) (a twenty-year sentence for possession with intent to distribute seven kilos of cocaine was not disproportionate).

For a sentence to be disproportionate, the Ninth Circuit found it must "shock our sense of justice."[151] The court cited *Solem* and *Harmelin* without discussing any dichotomy between the two cases.[152] The Eighth Circuit, relying on Justice Kennedy's concurrence, determined that sentencing with respect to the amount of prison time to be imposed for particular types of crimes is a matter left totally within the discretion of the legislature.[153] The Eighth Circuit found that *Harmelin* underscores the constitutional truism that legislatures have expansive discretion in fixing the terms of confinement.[154]

In *McGruder v. Puckett,*[155] the Fifth Circuit noted that *Harmelin* fails to provide guidance to the bench and bar.[156]

> By applying a head-count analysis, we find that seven members of the Court supported a continued Eighth Amendment guaranty against disproportional sentences. Only four justices, however, supported the continued application of all three factors in *Solem*, and five justices rejected it. Thus, this much is clear: disproportionality survives; *Solem* does not. Only Justice Kennedy's opinion reflects that view. It is to his opinion, therefore, that we turn for direction. Accordingly, we will initially make a threshold comparison of the gravity of [the defendant's] offenses against the severity of his sentence. Only if we infer that the sentence is grossly disproportionate to the offense will we then consider the remaining factors of the *Solem* test and compare the sentence received to (1) sentences for similar crimes in the same jurisdiction and (2) sentences for the same crime in other jurisdictions.[157]

Additionally, several other circuits concluded it was unclear, in light of *Harmelin,* whether *Solem's* three-part proportionality test remained relevant in non-capital cases.[158] Despite these views, most courts adhere to the *Solem* test since the *Harmelin* majority declined to either expressly overrule or approve *Solem.* Moreover, no other circuit court has suggested an alternative to the proportionality principle espoused in *Solem.*

151. United States v. Cupa-Guillen, 34 F.3d 860, 864 (9th Cir. 1994) (quoting United States v. Vega-Mejia, 611 F.2d 751, 753 (9th Cir. 1979) (citing United States v. Washington, 578 F.2d 256, 258-59 (9th Cir. 1978))).

152. *Id.*

153. Simmons v. Iowa, 28 F.3d 1478, 1482 (8th Cir. 1994).

154. *Id.*

155. 954 F.2d 313 (5th Cir.), *cert. denied*, 113 S. Ct. 146 (1992).

156. *Id.* at 315-16.

157. *Id.* at 316.

158. *See, e.g.,* United States v. Kratsas, 45 F.3d 63 (4th Cir. 1995); United States v. Bucuvalas, 970 F.2d 937 (1st Cir. 1992).

A. The Federal Sentencing Guidelines in the Circuit Courts

The Federal Sentencing Guidelines complicate a proportionality analysis in the federal courts.[159] The guidelines were specifically designed to reduce judicial discretion in sentencing.[160] The presumption is that the Federal Sentencing Commission considered proportionality when it established the Federal Sentencing Guidelines. Thus, a successful disproportionality challenge to a sentence based on the guidelines remains difficult, if not impossible.

In *United States v. D'Anjou*,[161] the Fourth Circuit rejected a constitutional challenge to a sentence of life without the possibility of parole imposed pursuant to the Federal Sentencing Guidelines.[162] D'Anjou was convicted for violating certain narcotics and firearms laws. In considering his proportionality challenge, the *D'Anjou* court applied the *Solem* three-part test, noting, however, that "outside the capital sentencing context, an extensive proportionality analysis is required only in those cases involving life sentences without parole."[163]

The *D'Anjou* court found the sentence of life without parole did not amount to a disproportionate punishment, and thus, did not run afoul of the Eighth Amendment.[164] Under *Solem's* first prong, the court found the defendant's offense was extremely grave because 1) drug use was a pervasive, destructive force in American society; 2) the defendant was not merely a user or even a single distributor of drugs, but was the manager of a ring of dealers supplying drugs to distributors and was converting crack from wholesale to retail; 3) the defendant was significantly responsible for the operation, although not the mastermind; and 4) the defendant had distributed more than five kilograms of crack over a six-month period.[165]

Applying *Solem's* second prong, the court found although "it is difficult to undertake the type of comparative analysis that the pre-guidelines *Solem* decision advises,"[166] courts can find "a life sentence for a major drug violation is not disproportionate in comparison with other sentences under the Guidelines."[167] Under *Solem*'s third prong, the court noted, a review of the state statutes within the circuit dis-

159. *See, e.g.*, United States v. Harrington, 947 F.2d 956 (D.C. Cir. 1991); United States v. Davern, 970 F.2d 1490 (6th Cir. 1992); United States v. Katora, 981 F.2d 1398 (3d Cir. 1992); United States v. Reese, 2 F.3d 870 (9th Cir. 1993).

160. *See supra* note 4 and accompanying text.

161. 16 F.3d 604 (4th Cir. 1994), *cert. denied*, 114 S. Ct. 2754 (1994).

162. *Id.* at 612-14.

163. *Id.* at 612.

164. *Id.* at 613.

165. *Id.*

166. *Id.*

167. *Id.*

closed the existence of "similarly severe sentences for narcotics violations of the magnitude involved here."[168]

D'Anjou asserted that his sentence violated the Eighth Amendment because the judge did not consider the relevant mitigating factors before imposing the sentence under the Federal Sentencing Guidelines.[169] The court rejected this argument and held that a sentence of life without parole did not require the consideration of mitigating factors except in a death penalty context.[170] "Since a mitigating factors analysis is not required to avoid an Eighth Amendment violation, this necessarily means that the imposition of life without parole is not cruel and unusual."[171] *D'Anjou* has been followed in the Fourth Circuit,[172] and other circuits have taken this same approach, refusing to use the Eighth Amendment to overturn life sentences for recidivist drug traffickers.[173]

B. Race & Drugs - Groundwork for an Equal Protection Challenge in the Circuit Courts?

In 1986, Congress provided tougher sentencing provisions for offenses involving specific amounts of illegal drugs under the Anti-Drug Abuse Act by amending 21 U.S.C. § 841(b)(1).[174] As a result, the corresponding Sentencing Guidelines[175] imposed a greater penalty for crack cocaine offenses than for offenses involving other forms of cocaine.[176] Under the relevant sentencing scheme, one gram of crack cocaine is equal to one hundred grams of cocaine powder.[177]

In *United States v. Thurmond*,[178] the defendants challenged these amendments as racially biased.[179] In *Thurmond*, the defendants filed a motion to declare the federal sentencing scheme unconstitutional

168. *Id.* (citing N.C. GEN. STAT. § 90-95(h)(3)(c) (1993) (35 years to life sentence for 400 or more grams of cocaine)); S.C. CODE ANN. § 44-53-370(e)(2)(e) (Law. Coop. Supp. 1992) (25 to 30 years with 25 year mandatory minimum for 400 or more grams of cocaine); VA. CODE ANN. § 18.2-248(C) (Michie Supp. 1993) (40 years maximum sentence on first violation).

169. *D'Anjou*, 16 F.3d at 613 (citing Harmelin v. Michigan, 501 U.S. 957 (1991)).

170. *Id. See, e.g.*, Penry v. Lynaugh, 492 U.S. 302 (1989).

171. *D'Anjou,* 16 F.3d at 613-14.

172. *See* United States v. Kratsas, 45 F.3d 63, 68 (4th Cir. 1995).

173. *See* United States v. Angulo-Lopez, 7 F.3d 1506, 1509-10 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1563 (1994); United States v. Johnson, 944 F.2d 396, 408-09 (8th Cir.), *cert. denied*, 502 U.S. 1008 (1991).

174. United States v. Easter, 981 F.2d 1549, 1557 (10th Cir. 1992) (citing Pub. L. No. 99-570, § 1002(2), 100 Stat. 3207 (1986) (codified as amended at 21 U.S.C. § 841(b)(1) (Supp. V 1987))).

175. U.S.S.G. § 2D1.1 (1984).

176. *Easter,* 981 F.2d at 1557. *Cocaine base* is another way of describing what is known as *crack* cocaine.

177. *Id.*

178. United States. v. Thurmond, 7 F.3d 947 (10th Cir. 1993).

179. *Id.; see also* United States v. Harris, 809 F. Supp. 843 (D. Kan. 1992).

and presented statistical evidence of such to the trial court.[180] The statistical evidence failed to convince the court that Congress had a racially discriminatory purpose in enacting the provisions.[181] The court noted as follows:

> Legislation that classifies according to race is presumptively invalid and can be upheld only if narrowly tailored to further a compelling governmental interest. This same principle applies to a classification that is neutral on its face but is an obvious pretext for racial discrimination. A neutral law that disproportionately impacts a racial minority does not violate equal protection, however, unless that impact can be traced to a discriminatory purpose. Discriminatory purpose implies that the legislature selected a particular course of action, "at least in part, because of, not merely in spite of, its adverse effects upon an identifiable group."[182]

The Fifth Circuit reached a similar conclusion upon similar facts in *United States v. Cherry*.[183] The court did not dispute the defendant's allegations that the guideline has a disproportionate impact on African-Americans.[184] The court found, however, that impact alone was not dispositive to demonstrate a racially discriminatory purpose.[185] The court looked simply to whether the legislation had a rational basis:

> The 100 to one ratio is extreme, but it is not the province of this Court to second-guess Congress's chosen penalty. That is a discretionary legislative judgment for Congress and the Sentencing Commission to make. Our review is limited to whether the penalty has a rational basis.[186]

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180. 7 F.3d at 950.

181. *Id.* at 951-53. The defendants argued national statistics alone were compelling enough to prove Congress had a racially discriminatory purpose in enacting the sentencing provisions. *Id.* at 951 (citing Shaw v. Reno, 113 S. Ct. 2816 (1993); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886)). The statistics presented by the defendants indicate 95 percent of federal cocaine base prosecutions are brought against African-Americans, while 40 percent of federal cocaine powder prosecutions are brought against whites. *Id.*

182. *Id.* at 952 (citations omitted) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

183. 50 F.3d 338 (5th Cir. 1995).

184. *Id.* at 343. In this regard, the court said as follows:

> It is true that the Sentencing Guidelines punish far more severely the commission of crimes involving crack cocaine than those involving other forms of cocaine. It also may be true that African-American criminal defendants are disproportionately affected by the crack cocaine penalties. In 1992, over ninety percent of the defendants federally prosecuted for crimes involving crack cocaine were African-American. In 1993, over eighty-eight percent of federal crack cocaine distribution convictions involved African-American defendants.

Id. (foot notes omitted).

185. *Id.* at 343.

186. *Id.* at 344.

As if in response to these concerns, the Commission has proposed 1995 amendments[187] which will eliminate the 100:1 ratio and has recommended to Congress that *any* distinction between crack and powder cocaine be abolished.[188] It is recognized that harsher penalties for crack may have a disparate impact on minorities, but the Commission has concluded that there is no "discriminatory animus" behind the proposed change.[189] It remains to be seen what will be the ultimate resolution of an obvious equal protection problem in this area.

IV. STATE LAW

Unlike the federal courts, state courts have broad discretion in sentencing convicted felons.[190] Indeed, the constitutions of Indiana, New Hampshire, Oregon, Rhode Island, and West Virginia specifically provide that punishments shall be proportional to the offense.[191] The Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense"; no reference to cruel or unusual punishment is made.[192] Most states, however, have a constitutional provision which specifically prohibits cruel and unusual punishments.[193]

187. All amendments are scheduled to take effect November 1, 1995 unless Congress takes action. *See* Amendments to the Federal Sentencing Guidelines Policy Statements and Official Commentary, 57 CRIM. L. REP. 2095 et. seq. (May 10, 1995).

188. *See* 1995 Amendment 5, "Reasons for Amendment," 57 CRIM. L. REP. 2095, 2097-98 (May 10, 1995).

189. *Id.*

190. *See generally* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform,* 81 CAL. L. REV. 61 (1993).

191. IND. CONST. art. I, § 16; N.H. CONST. p. 1, arts. XVIII, XXXIII; OR. CONST. art. I, § 16; R.I. CONST. art. I, § 8; W. VA. CONST. art. III, § 5.

192. ILL. CONST. art. I, § 11; *see also* CONN. CONST. amend. art. XVII, § 1 (1994) (no mention of cruel and unusual punishment; only excessive bail or fines).

193. *See, e.g.,* ALA. CONST. art. I, § 15; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art II, § 9; CAL. CONST. art. I, § 17; COLO. CONST. art. II, § 20; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, ¶ XVII; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16 ("All penalties shall be proportioned to the nature of the offense."); IOWA CONST. art. I, § 17; KAN. CONST. B. of R. § 9; KY. CONST. § 17; ME. CONST. art. I, § 9; MD. CONST. DEC. OF R. art. XVI; MASS. CONST. pt. 1, art. XXVI, § 27; MICH. CONST. of 1963 art. I, § 16; MISS. CONST. art. III, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. 1, arts. XVIII, XXXIII ("All penalties ought to be proportioned to the nature of the offense."); N.J. CONST. art. I, § 15; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 9; OR. CONST. art. I, § 16 ("Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."); PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8 ("[A]ll punishments ought to be proportioned to the offense."); S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 23; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VT. CONST. art. XVIII ("firm adherence to justice [and] moderation" in the passage of laws necessarily implies a prohibition against cruel and unusual punishment); VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14.

Under the doctrine of federalism, the United States Constitution sets forth the minimum standards for a cruel and unusual challenge.[194] States are, however, free to find that their citizens are entitled to more protection under their own constitution.[195] Indeed, it has been suggested that since a state cannot provide fewer protections than the federal constitution, "independent state constitutional analysis is pointless unless it is expansive."[196] Since a number of states have applied a disproportionality principle post-*Harmelin*, a review of how some states have addressed this issue will serve to shed light on the progress that this doctrine has made in those jurisdictions.

A. Michigan

In *People v. Bullock*,[197] the Michigan Supreme Court found that a mandatory life sentence for possession of illegal drugs was cruel and unusual under its constitution.[198] The Michigan Supreme Court used *Bullock* to interpret its own constitution more broadly than the Eighth Amendment as applied in *Harmelin*.[199] The *Bullock* court rejected Justice Kennedy's proportionality analysis in *Harmelin,* and resurrected a formula used twenty years earlier by its own court in *People v. Lorentzen*.[200] In *Lorentzen,* the Michigan Supreme Court held imposing an excessive sentence violated the Michigan state constitution and the Eighth Amendment.[201] The *Lorentzen* court adopted a three-part proportionality test similar to the *Solem* test.[202]

194. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

195. *See, e.g.*, Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (holding the Texas Court of Criminal Appeals would no longer *necessarily* interpret TEX. CONST. art. I § 9 in accordance with U.S. CONST. amend. VIII). The Texas court has also diverged from Fourth Amendment interpretation in some areas. *See* Autran v. State, 887 S.W.2d 31, 34-36 (Tex. Crim. App. 1994) (declining to follow Colorado v. Bertrine, 479 U.S. 367 (1987)) (holding that closed containers in automobiles cannot be searched during the course of an inventory search); *but see* Johnson v. State, 882 S.W.2d 17 (Tex. App.—Houston [1st Dist.] 1994, pet. granted).

196. Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1484 (1990).

197. 485 N.W.2d 866 (Mich. 1992).

198. *Id.* at 872.

199. *Id.* at 870-72. The court said, "a proper interpretation of CONST. 1963, art. 1, § 16, in accordance with this Court's long-standing precedent in this area, requires us to strike down the penalty at issue as unjustifiably disproportionate to the crime for which it is imposed, and therefore "cruel or unusual." *Id.* at 872. The Michigan court noted the state constitution prohibited punishments that are cruel *or* unusual, while the Eighth Amendment prohibited only punishments that are cruel *and* unusual. *Id.* This was considered a significant textual difference, which allowed Michigan to interpret the state constitution more broadly than similar provisions in the U.S. Constitution. *Id.*

200. *Id.* at 873 (citing People v. Lorentzen, 194 N.W.2d 827 (Mich. 1972)).

201. 194 N.W.2d 827, 834 (Mich. 1972). The *Lorentzen* court struck down a mandatory minimum sentence of twenty years in prison for selling any amount of marijuana without consideration of the defendant's personality and prior record. *Id.*

202. *Id.* at 829-33.

Applying this *Lorentzen-Solem* analysis, the *Bullock* court held a mandatory life penalty without the possibility of parole for possession of 650 grams or more of cocaine was unconstitutional under Michigan law, even though the same statute would be constitutional under the Eighth Amendment as applied in *Harmelin.*[203] The court noted it is *the penalty itself*, as opposed to the inherent mitigating factors, that compels its conclusion.[204] The court said,

> The penalty is imposed for mere possession of cocaine, without proof of intent to sell or distribute. The penalty would apply to a teenage first offender who acted merely as a courier. Indeed, on the basis of the information before this Court, it appears that prior to the offense giving rise to this case, defendant Bullock, a forty-eight-year-old grandmother, had never been convicted of any serious crime and had held a steady job as an autoworker for sixteen years.[205]

The court relied heavily on Justice White's dissent in *Harmelin,* particularly his intra-jurisdictional analysis.[206] The Michigan court concluded that "the penalty at issue is that it constitutes an unduly disproportionate response to the serious problems posed by drugs in our society. However understandable such a response may be, it is not consistent with our constitutional prohibition of 'cruel or unusual punishment.' "[207] Thus, the Michigan Supreme Court found the penalty of life imprisonment for a first-time drug offender was unconstitutional.[208]

B. South Dakota

Since 1892, excessive or disproportionate sentences have been considered constitutionally offensive in South Dakota.[209] The state applies a two-fold test to determine whether a sentence is disproportionate. First, the court considers whether the punishment is so excessive or so cruel "as to meet the disapproval and condemnation of the conscience and reason of men generally."[210] Secondly, the court de-

203. *Bullock,* 485 N.W.2d at 875-77.
204. *Id.*
205. *Id.* at 875-76.
206. *Id.* at 875-77. The court stated, "[A]s Justice White also noted, no other state in the nation imposes a penalty even remotely as severe as Michigan's for mere possession of 650 grams or more of cocaine." *Id.* at 877 (citation omitted). " 'Of the remaining 49 states, only Alabama provides for a mandatory sentence of life imprisonment without possibility of parole for a first-time drug offender, and then only when a defendant possesses ten kilograms or more of cocaine.' " *Id.* at 877 (citing Michigan v. Harmelin, 501 U.S. 957, 1026 (1991) (White, J., dissenting)).
207. *Bullock,* 485 N.W.2d at 877.
208. *Id.*
209. *See* State v. Becker, 51 N.W. 1018 (S.D. 1892). *See also* State v. Bull, 257 N.W. 2d 715, 720 (S.D. 1977).
210. State v. Shilvock-Havird, 472 N.W.2d 773, 779 (S.D. 1991) (quoting State v. Phipps, 318 N.W.2d 128, 132 (S.D. 1982)).

termines whether the punishment is so excessive or so cruel as to shock the collective conscience of the court.[211]

> [I]t is well settled in South Dakota that a sentence within statutory limits is not reviewable on appeal." [The appellate court] will only engage in extensive review of a sentence where [it is] first determined the sentence is manifestly disproportionate to the crime. "If a sentence is manifestly disproportionate to the crime, [in light of the gravity of the offense and harshness of the penalty] . . . then the other two factors listed in *Helm* [sentence imposed on others in the same jurisdiction and in other jurisdictions] become more focused and require extensive review.[212]

In *Bult v. Leapley,*[213] the South Dakota Supreme Court concluded that a life sentence without the possibility of parole for kidnapping and the concurrent ten-year sentence for sexual contact with a child under age fifteen was so shocking, it was unnecessary to engage in inter- and intra-jurisdictional analysis to ultimately find the sentence disproportionate.[214] "In his application for a writ of habeas corpus Bult contend[s] that the life sentence without the possibility of parole infringe[s] upon his constitutional right to be free from cruel and unusual punishment,"[215] and additionally, was disproportionate to other sentences for inmates serving time in the South Dakota penitentiary for kidnapping.[216] The South Dakota Court expressed concern regarding his sentence, stating as follows:

> The commonly accepted goals of punishment are 1) retribution, 2) deterrence, both individual and general, and 3) rehabilitation. We have recognized that while a life sentence without parole extracts retribution, deters the convict from committing crime, removes him from the street, and puts would-be felons on notice of the high penalty of recidivism, it completely eschews the goal of rehabilitation.[217]

The court noted that imposing a life sentence without parole was meritorious only in rare situations involving "a history of much more serious offenses that by reason of their brutality or calculated destructiveness render irrelevant the goal of rehabilitation."[218] The court found Bult's crime, although brutal and destructive, did not rise to a level rendering rehabilitation irrelevant.[219] The victim was not raped

211. *Id.* (citations omitted).
212. State v. Gehrke, 491 N.W.2d 421, 423 (S.D. 1992) (quoting State v. Janssen, 371 N.W.2d 353, 356 (S.D. 1985) and State v. Weiker, 366 N.W.2d 823, 827 (S.D. 1985) (alterations in original) (citations omitted)).
213. 507 N.W.2d 325 (S.D. 1993).
214. *Id.* at 328.
215. *Id.* at 326.
216. *Id.* Defendant actually presented data in an attempt to demonstrate this point.
217. *Id.* at 327 (citations omitted).
218. *Bult*, 507 N.W.2d at 327 (quoting State v. Weiker, 342 N.W.2d 7, 12 (S.D. 1983)).
219. *Id.* at 328.

or injured, and the defendant returned her to her home.[220] The court noted the defendant was afflicted with learning disabilities and self-image problems, which could be ameliorated with counseling, and his criminal history consisted of nothing more than "two brushes with the law while he was a juvenile."[221] The court found it significant that there was no evidence of any prior sexual offenses or sexual dysfunctionality which could lead to a conclusion that Bult was an "incorrigible criminal incapable of rehabilitation."[222] The court concluded the appellant's sentence was disproportionate.[223]

Later in *State v. Pack*,[224] however, the South Dakota Supreme Court noted that the proportionality review employed in *Bult* was limited to the unique facts and circumstances of that case.[225] In *Pack*, the South Dakota Supreme Court considered a claim of excessive sentencing for a defendant who pled guilty to two counts of rape and was sentenced to two consecutive fifteen-year terms.[226] Upon release, the defendant was ordered to attend a sexual offender program and to receive substance abuse counseling from a mental health counselor who was to determine whether the defendant would be allowed to have contact with minor children.[227]

On appeal, the defendant challenged his sentence as unconstitutional under both the United States Constitution and the South Dakota Constitution.[228] The South Dakota Supreme Court affirmed the sentence, applying its disproportionality analysis.[229] The court did not reach the issue of "inter and intra jurisdictional [sic]" proportionality because the sentence did not meet the threshold test of "shocking the conscience" of the court.[230]

It is clear that South Dakota recognizes and employs a proportionality principle in sentencing.[231] Furthermore, the South Dakota courts

220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. 516 N.W.2d 665 (S.D. 1994).
225. *Id.* at 667 n.5.
226. *Id.* at 666.
227. *Id.*
228. *Id.* The South Dakota Constitution provides "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." S.D. CONST. art. VI, § 23. No mention is made of "unusual punishment." *Id.*
229. *Pack*, 516 N.W.2d at 667-69.
230. *Id.* at 669.
231. South Dakota encourages defense attorneys to make a record in the trial court of information or data relevant to proportionality. *Pack*, 516 N.W.2d at 699 (Amundson, J., concurring). Indeed, South Dakota utilizes a data base of sentencing information funded by taxpayers' dollars. A defendant may request statistical data from the agency; of course, the data must support defendant's claim and detail some facts on which the compared sentences are based. *See* State v. Geirke, 491 N.W.2d 421 (S.D. 1992). The information must be paid for by the defendant. As was noted by the dissenting judge in *Pack*, this burdens an indigent defendant and may deprive him of

are willing to strike down a sentence as unconstitutionally disproportionate in extreme cases.

C. *Arizona*

In *State v. Bartlett*,[232] the Arizona Supreme Court found a forty-year sentence for two counts of sexual conduct with a minor constituted cruel and unusual punishment under the Eighth Amendment of the United States Constitution.[233] The United States Supreme Court subsequently vacated the opinion and remanded the case to the Arizona Supreme Court for further consideration in light of *Harmelin*.[234] Not considering this an absolute mandate to abandon their prior opinion, the Arizona Supreme Court found, in light of *Harmelin*, the sentence was disproportionate to the crime.[235]

The Arizona Supreme Court originally applied the three-prong *Solem* test.[236] The court did not read *Harmelin* as a major deviation from that standard, and indeed, felt other courts misinterpreted the *Harmelin* holding.[237] The Arizona court applied Justice Kennedy's test and found the forty-year sentence to be disproportionate.[238] The court noted that *Bartlett I* expressly considered many of the principles identified by Justice Kennedy, including the role of the legislature in fixing sentences for specific crimes.[239] The court concluded successful challenges to sentence proportionality are exceedingly rare.[240]

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the vital information essential to make a case in trial court, not to mention thwarting the will of the people who finance this program:

> For what purpose are these statistics compiled in the Criminal Justice Information System? To gather dust in the archives at Pierre? To readily make available statistics to the state prosecutors of South Dakota for their information, as well as the Department of Criminal Investigation, Highway Patrol, State Police Radio, Driver Improvement, and Game, Fish & Parks? But to then deny these statistics to the defense lawyers of this state so that they cannot effectively represent the constitutional rights of their client?

Pack, 516 N.W. 2d at 670 (Henderson, J., dissenting). Since the requested data is vital to effectively represent the indigent defendant and to present criteria under the proportionality review analysis, access to the information is essential.

232. 792 P.2d 692 (Ariz. 1990) (hereinafter *Bartlett I*).

233. *Id.* at 703. The defendant had apparently raised this same ground under the Arizona State Constitution. However, the court did not reach that ground due to its disposition under the federal constitution. *Id.* at 703-04.

234. Arizona v. Bartlett, 501 U.S. 1246 (1991) (mem.) (remanding for further consideration in light of Harmelin v. Michigan, 501 U.S. 957 (1991)).

235. State v. Bartlett, 830 P.2d 823 (1992) (hereinafter *Bartlett II*).

236. *Bartlett I*, 792 P.2d at 696-704.

237. *Bartlett II*, 830 P.2d 823, 826 n.2 (citing with disapproval United States v. LaFleur, 952 F.2d 1537, 1547 (9th Cir. 1991); People v. Knott, 586 N.E.2d 479, 497 (Ill. App. Ct. 1991); State v. Ortega, 817 P.2d 1196, 1220 (N.M. 1991) (Baca, J., concurring in part and dissenting in part)).

238. *Id.* at 826.

239. *Id.* at 826-27 n.3.

240. *Id.* at 827 n.3 (quoting Solem v. Helm, 463 U.S. 277, 289-90 (1983)).

In *Bartlett*, the twenty-three year old defendant was prosecuted for the statutory rape of two teenage girls. The girls were below the legislatively mandated age of consent in Arizona[241] though they had in fact consented to the sexual conduct. In determining whether the sentence was disproportionate, the Arizona court balanced factual consent against the fact the two victims were legally incapable of consent.[242] The court used four factors to determine disproportionality.[243] First, the severity of this crime as minimized by the absence of violence; neither girl was physically injured or emotionally traumatized.[244] Secondly, the defendant had no prior criminal record, which reduced the gravity of his offenses.[245] Third, the girls were willing participants.[246] Fourth, the Court concluded the evolution of the law and present sentencing standards were out of step with the severity of the sentence.[247]

The Arizona court recognized the legislature's role in respect to penal laws and punishments assessed.[248] The court, however, reasoned that it was still the duty of the judiciary to review, where appropriate, the constitutionality of these legislative judgments. The court stated as follows: "Legislatures must of necessity paint with a broad brush, leaving it to the courts to measure constitutionality by applying law to facts — the true judicial function."[249] The court noted that many punishments which were once accepted are now considered cruel and unusual, saying "[t]he eighth amendment, [sic] after all, is either a barrier to legislative action or nothing but empty words."[250]

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241. *Id.* at 827. At the time of the case, a person had to be 15 years of age in Arizona to legally consent to sexual relations. *Id.; see also* 1990 Ariz. Sess. Laws, ch. 384, § 2. The statute was subsequently amended to lower the age to 14. *See* ARIZ. REV. STAT. ANN. § 13-1405(B).

242. *Bartlett II*, 830 P.2d at 827.

243. *Id.* at 828-29.

244. *Id.* at 828.

245. *Id.*

246. *Id.* The court stated "[w]e must . . . recognize that sexual conduct among post-pubescent teenagers is not uncommon." *Id* (quoting *Bartlett I*, 792 P.2d at 698.).

247. *Bartlett II*, 830 P.2d at 829. The court noted the changing social and penological judgments with respect to this particular crime, saying as follows:

> While statutory rapes, along with many other felonies, may once have been a capital crime, societal standards have changed. Indeed, the modern trend in the law has been to separate the crime of statutory rape from other violent forms of rape, and concomitantly to reduce the severity of the sentence. The "minimum" sentence imposed in this case, however, for consensual sexual intercourse with two willing post-pubescent girls is comparable to the minimum sentence imposable had Defendant been provoked, become violent, killed the girls, and been convicted of second degree murder.

248. *Id.*

249. *Id.*

250. *Id.* at 830.

> At one time, the stocks or punishment by flogging might not have been cruel and unusual. One supposes that castration would be an effective and prompt punishment for this crime, and surely a more certain, less expensive and perhaps more "rational" method of controlling sexual promiscuity, than forty years' imprisonment without possibility of parole. Informed by our reading

Arizona applies a disproportionality principle and will vacate a sentence when its courts make a threshold finding of gross disproportionality.[251]

D. Texas

1. Criminal Cases

The Texas Court of Criminal Appeals[252] has ruled on the issue of proportionality only in capital murder cases.[253] Nevertheless, some intermediate appellate courts have applied a proportionality analysis. The Dallas Court of Appeals and the Austin Court of Appeals have considered the issue in non-capital cases with respect to prison sentences.[254]

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of the standards of present-day civilization, we nevertheless venture that today such punishments are cruel and unusual, even were the legislature to authorize them by statute.

Id. (citation omitted).

Surprisingly, the justice who authored *Bartlett I* dissented. Justice Corcoran took the view that his colleagues, rather than applying the more narrow test espoused by Justice Kennedy in *Harmelin* had merely re-applied *Solem*. 830 P.2d at 832 (Corcoran, J., dissenting). He noted that the Arizona Legislature has the constitutional authority to require a twenty-three year old first offender for statutory rape to be sentenced to forty years without the possibility of early release as part of the State's "war against the sexual abuse of children." *Id.* at 837. Justice Corcoran made a clear comparison to *Harmelin*, stating as follows:

> [A] defendant in Michigan may constitutionally be sentenced to life imprisonment without possibility of early release for a first felony conviction of possession of more than 650 grams of cocaine. . . . I read Harmelin as reinforcing society's declaration of war against drugs."

Id.

251. *Id.* at 827.

252. Texas has a dual system of courts of last resort. The Supreme Court of Texas hears only civil cases and has no criminal jurisdiction *per se*. The Texas Court of Criminal Appeals hears only criminal cases. Texas also has a system of fourteen intermediate Courts of Appeal that hear both civil and criminal cases.

253. In Arnold v. State, 873 S.W.2d 27, 39 (Tex. Crim. App. 1993), the Court of Criminal Appeals held that neither a sentence of life imprisonment nor a sentence of death is constitutionally disproportionate for a defendant convicted of capital murder; no third sentencing option is required. The *Arnold* court looked to Andrade v. McCotter, 805 F.2d 1190, 1193 (5th Cir.), *cert. denied,* 475 U.S. 1112 (1986), wherein the Fifth Circuit addressed the question in the context of a challenge to the constitutionality of the Texas capital murder statute pursuant to Jurek v. Texas, 428 U.S. 262 (1976).

254. As with federal forfeitures, the concept of disproportionality has been discussed in Texas in greater detail in civil forfeiture cases. See *Ex parte* Camara, 893 S.W.2d 553 (Tex. App.—Corpus Christi 1994, no pet. h.); *Ex parte* Tomlinson, 886 S.W.2d 544 (Tex. App.—Austin 1994, pet. ref'd.); Fant v. State, 881 S.W.2d 830 (Tex. App.—Houston [14th Dist.] 1994, pet. granted); Johnson v. State, 882 S.W.2d 17 (Tex. App.—Houston [1st Dist.] 1994, pet. granted); Ward v. State, 870 S.W.2d 659 (Tex. App.—Dallas 1992, pet. ref'd); *Ex parte* Rogers, 804 S.W.2d 945 (Tex. App.—Dallas 1990, no pet.). For example, in *Rogers*, the court found that forfeiture of $6,406.00 cash, two cars, one mobile home, one television, and two safes, all property purchased by proceeds from drug sales, was not so disproportionate to government expenses and the damage caused by Roger's alleged drug distribution activities as to render the forfeiture nonremedial. *Id.*

In *Johnson v. State*,[255] the Dallas Court of Appeals held that prison sentences are subject to a proportionality analysis under the Eighth Amendment.[256] The court said, "[t]he punishment must be proportionate to the crime."[257] Interestingly, the court relied on *Solem*, without mentioning *Harmelin*.[258] The Dallas Court, nevertheless, rejected Johnson's argument[259] that his 50-year sentence for possession of cocaine with intent to deliver was excessive.[260]

> Because of the substantial deference reviewing courts accord the legislatures and trial courts, appellate review rarely requires extended analysis to determine the constitutionality of the sentence.
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> . . . .
>
> The crime in this case was aggravated possession of cocaine with intent to deliver. The purple bag Johnson dropped contained 162 separately wrapped ten-dollar rocks of crack cocaine. This evidence supports an inference that Johnson was selling cocaine to the end users of the drugs. The court is entitled to consider the damage caused to society by drug dealers like Johnson. The fact that he had no prior convictions supports the trial court's decision to sentence him midway in the range of punishment.
>
> The record supports the trial court's interpretation of the testimony about Johnson's gun. Although Johnson dropped the gun while fumbling with it, it is a reasonable deduction from the evidence that Johnson began fumbling with the gun after pulling it to shoot [the officers]. We hold that Johnson's sentence of fifty years is not excessive.[261]

No state constitutional challenge was raised.

Furthermore, in *Lackey v. State*,[262] the Dallas Court of Appeals said, "[t]his Court will review a sentence to determine whether it is grossly disproportionate to the crime."[263] As with *Johnson*, the chal-

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Much of the current dispute in Texas is over whether the laws vis-à-vis civil forfeitures are remedial or punitive. Compare *Fant v. State* where the Houston Court of Appeals [14th Dist.] held that Texas forfeiture law is punitive and invokes double jeopardy protection, *Fant*, 881 S.W.2d at 833-34, with *Johnson v. State* where the Houston Court of Appeals [1st Dist.] held that Texas forfeiture law is primarily remedial, and double jeopardy considerations are not implicated unless the forfeiture is "overwhelmingly disproportionate to the damage appellant caused." *Johnson*, 882 S.W.2d at 20. With both *Fant* and *Johnson* pending before the Texas Court of Criminal Appeals in the upcoming 1995-1996 term, some resolution should be had on at least this question.

255. 864 S.W.2d 708 (Tex. App.—Dallas 1993), *aff'd on other grounds,* 1995 WL 379880 (Tex. Crim. App. June 28, 1995).

256. *Id.* at 725.

257. *Id.*

258. *Id.*

259. *Id.* at 724-25.

260. *Id.* at 725.

261. *Id.* (citation omitted).

262. 881 S.W.2d 418, 420 (Tex. App.—Dallas 1994, pet. ref'd).

263. *Id.* (citing Harmelin v. Michigan, 501 U.S. 957, 1004-06 (1991) (Kennedy, J., plurality opinion)).

lenge was brought under the Eighth Amendment and not under applicable provisions of the state constitution.[264] The court concluded that a sentence of thirty-five years for shoplifting $145 worth of clothing was not disproportionate.[265] Under the facts of this case, defendant Lackey had several prior convictions which upgraded her misdemeanor offense to a felony based on the habitual criminal provisions of section 12.42(d) of the Texas Penal Code.[266] The court noted that an "extensive criminal record demonstrates a pronounced and prolonged inability to bring her conduct within the social norms prescribed by the criminal laws of the State of Texas."[267]

In *Francis v. State*,[268] the Austin Court of Appeals considered a similar claim of proportionality under the Texas Constitution.

> Appellant urges us to apply under the Texas Constitution the three-part test for disproportionality suggested in *Solem v. Helm*, by which we would be guided by (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.
>
> The power to define criminal offenses and prescribe their punishments resides in the legislature. The Court of Criminal Appeals has stated that article I, section 13 is not violated when the punishment assessed is within the limits prescribed by statute, as it is in this cause. Assuming, however, that proportionality review is required by the Texas Constitution, appellant has failed to demonstrate that the punishment in this cause is disproportionate to the offense.[269]

The court concluded the record did not support a disproportionality claim.[270] The court found the defendant received a twenty-year sentence and the record contained no evidence of sentences assessed to other criminals for like crimes in either the county or the state in which the conviction was decided.[271] The court determined the sentence imposed was not cruel and unusual.[272] No specific ruling as to disproportionality was made.[273]

264. *Lackey*, 881 S.W.2d at 419.
265. *Id.* at 420.
266. *Id.* at 421.
267. *Id.* at 422.
268. 877 S.W.2d 441 (Tex. App.—Austin 1994, pet. filed).
269. *Id.* at 443-44 (citations omitted).
270. *Id.* at 444.
271. *Id.*
272. *Francis*, 887 S.W.2d at 444.
273. *Id.*

2. An Analogy to Civil Cases for Texas?

Texas courts[274] have long held that the Texas Constitution prohibits grossly excessive exemplary damages, requiring such damages to be proportioned to the amount of any actual damages.[275] Indeed, in *Pennington v. Singleton,*[276] the Texas Supreme Court held that the Excessive Fines Clause of the Texas Constitution[277] includes civil penalties.[278] The reasonableness of any award is measured on a case-by-case basis.[279] An analysis to civil law in Texas might prove useful for courts considering disproportionality claims in criminal cases.[280]

In *Underwriters Life Insurance Co. v. Cobb,*[281] the Corpus Christi Court of Appeals determined as follows:

> The amount of exemplary damages awarded must be rationally related to actual damages, and this relationship is a tool to aid the court in determining, depending on the facts of each case, whether the award was excessive. Other factors to be considered in determining the reasonableness of exemplary damages are the nature of the wrong, the character of the defendant's conduct, the degree of the defendant's culpability, the situation and sensibility of the parties, and the extent to which the conduct offends the public sense of justice and propriety.[282]

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274. Federal courts also hold that grossly excessive damages are prohibited under Texas law. *See, e.g.,* Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377, 1383 (5th Cir. 1991).

275. *See* Janice Kemp, *The Continuing Appeal of Punitive Damages: An Analysis of Constitutional and Other Challenges to Punitive Damages, Post-*Haslip *and* Moriel, 26 TEX. TECH L. REV. 1, 49 (1995); R. Tim Hay, *Admiralty—Tort Damages and Procedure—Properly Invoked General Maritime Law is Waived in Wrongful Death Actions When a Party Fails to Object to Evidence of Damages Not Recoverable Under General Maritime Law*, 25 ST. MARY'S L.J. 783 (1994).

276. 606 S.W.2d 682, 690 (Tex. 1980); *see also* State Farm Mut. Auto. Ins. Co. v. Zubiate, 808 S.W.2d 590, 604-05 (Tex. 1991).

277. TEX. CONST. Art. I, § 13

278. The United States Supreme Court, however, has interpreted the Federal Excessive Fines Clause to be inapplicable to punitive damage awards between private parties. See Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

279. Interfirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 909 (Tex. App.—Texarkana 1987, no writ) ("Exemplary damages must be reasonably proportioned to actual damages, but there can be no set formula for the ratio between the amount of actual and exemplary damages. This determination must depend upon the facts of each particular case.").

280. In the area of civil cases, this issue is complicated by the recent enactments of the Texas Legislature. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1994). In attempting to regulate actual to exemplary damage ratios, the Texas Legislature enacted a statute to limit the amount of exemplary damages to four times the amount of actual damages, or $200,000 whichever is greater. The applicability of this statute is limited to causes of action defined by § 33.001 of the Texas Civil Practice and Remedies Code entitled "Comparative Responsibility." TEX. CIV. PRAC. & REM. CODE ANN. § 41.002(a) (Vernon Supp. 1994).

281. 746 S.W.2d 810 (Tex. App.—Corpus Christi 1988, no writ).

282. *Id.* at 817-18.

In *Preston Carter Co. v. Tatum*,[283] a potential buyer of real estate sued an agent for breach of its agency agreement and fiduciary duty. Following a jury trial, the trial court entered judgment for the plaintiffs for actual damages and exemplary damages.[284] The Dallas Court of Appeals reversed the jury award of actual damages with respect to all but $40,200 and suggested a remittitur reducing the exemplary damages.[285] The plaintiffs appealed. The Texas Supreme Court remanded the exemplary damages for recalculation.[286] Later, on remand, the court of appeals held the exemplary damages excessive and reduced them following the reduction of the compensatory damages.

> An award of exemplary damages rests largely in the discretion of the jury and will not be set aside as excessive unless the amount is so large as to indicate that it is the result of passion, prejudice, or corruption, or that the evidence has been disregarded. The supreme court has declared, however, that verdicts are not always right and, if uncontrolled, will in some cases lead to oppression. Excessiveness may be indicated when the jury has probably considered improper items of alleged compensatory damages in assessing exemplary damages. Here it is probable that in assessing exemplary damages of $300,000 the jury considered the improper and highly speculative conclusions presented by [plaintiff] in an effort to recover elements of damages now held to be improper. Accordingly, . . . we conclude that a reasonable award of exemplary damages would be no more than $75,000 and that the award of $300,000 is excessive by $225,000.[287]

In *Ford Motor Co. v. Durrill*,[288] the issue of exemplary damages was addressed in a wrongful death and survival action based on a products liability claim.[289] The jury awarded plaintiffs $6,836,633 in actual damages and $100,000,000 in exemplary damages.[290] The trial court ordered a remittitur of $80,000,000 of the exemplary damages as a condition of overruling Ford's motion for a new trial.[291] On appeal, the defendant complained of the lack of evidence to support the $20 million exemplary damage award.[292] In deciding whether a further remittitur was warranted, the court of appeals stated "[i]t has been said that the ratio between the actual damages and the exemplary damages should be reasonably proportional. However, the rule of

283. 708 S.W.2d 23 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).
284. *Id.* at 23.
285. *Id.* at 23-4.
286. *Id.* at 24.
287. *Id.* at 25 (citations omitted).
288. 714 S.W.2d 329 (Tex. App.—Corpus Christi 1986), *vacated upon agr.*, 754 S.W.2d 646 (Tex. 1987).
289. *Id.* at 333.
290. *Id.*
291. *Id.*
292. *Id.* at 343.

reasonable proportionality does not, by itself, fix a particular ratio."[293] The court found that it would not disturb a judgment absent a clear showing of "passion, bias and predjudice or . . .evidence [that] . . .the conclusion . . .shocks our conscience."[294] After reviewing the defendant's conduct, degree of culpability, and the extent the defendant's conduct offended the public's sense of justice and propriety, the court determined the verdict, even as remitted by the trial court, still shocked the conscience of the court and found a more reasonable remittitur of $10,000,000 was in order.[295]

In *Texas National Bank v. Karnes*,[296] the co-signer of a note brought suit against a bank for removing funds from a savings account after the vehicle securing the note was repossessed.[297] The trial court entered judgment for the plaintiffs for actual damages of $3,474.41 and exemplary damages of $50,000.[298] The court of appeals found some amount of exemplary damages would be proper and reasonable, but reduced the $50,000 exemplary damage award to $20,000.[299] The Supreme Court of Texas subsequently reversed and vacated the exemplary damage award because no actual damages were found based on a tort cause of action.[300]

In *Jim Walters Homes, Inc. v. Reed*,[301] homeowners brought an action against a housing contractor for violating the Texas Deceptive Trade Practices Act, breach of contract, breach of express and implied warranties, and gross negligence.[302] The trial court entered judgment for the plaintiffs for actual damages of $11,884 and exemplary damages of $500,000.[303] The trial court, however, reduced the exemplary damages to $450,000.[304] On appeal, the Corpus Christi court further reduced this amount to $225,000 and stated "[a]lthough this conduct is reprehensible, we do not believe that it is of a character that warrants an award of exemplary damages in this amount."[305] The Supreme Court of Texas later reversed the exemplary damage award because no actual damages were found based upon a tort cause of action.[306]

293. *Id.* at 346.
294. *Id.*
295. *Id.* at 347.
296. 711 S.W.2d 389 (Tex. App.—Beaumont), *rev'd in part*, 717 S.W.2d 901 (Tex. 1986).
297. *Id.*
298. *Id.*
299. *Id.* at 396-97.
300. 717 S.W.2d 901, 903 (Tex. 1986).
301. 703 S.W.2d 701 (Tex. App.—Corpus Christi 1985), *aff'd in part, rev'd in part*, 711 S.W.2d 617 (Tex. 1986).
302. *Id.* at 703.
303. *Id.* at 704.
304. *Id.*
305. *Id.* at 707.
306. *Reed*, 711 S.W.2d at 618.

Finally, in *Texaco, Inc. v. Pennzoil Co.*,[307] a prospective stock buyer brought suit alleging tortuous interference with a contract.[308] On appeal, the court found the punitive damages of $3 billion were excessive, and ordered a remittitur of $2 billion dollars.

> Considering the type of action, the conduct involved, and the need for deterrence, we are of the opinion that the punitive damages are excessive and that the trial court abused its discretion in not suggesting a remittitur. . . . There is a point where punitive damages may overstate their purpose and serve to confiscate rather than to deter or punish. In this case, punitive damages of one billion dollars are sufficient to satisfy any reason for their being awarded.[309]

It is clear the Texas Constitution requires a proportionality review of civil judgments. Why should the same considerations not apply when liberty issues are at stake?

V. THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE VERSUS THE EQUAL PROTECTION CLAUSE

When two individuals perform identical criminal acts and one receives a grossly disparate sentence, logic dictates that the individual receiving the disproportionate sentence should have a claim under the Equal Protection Clause of the United States Constitution.[310] Unequal treatment should equate to a denial of equal protection of the law. Traditional Equal Protection Clause analysis, however, has focused on the analytical structure of "suspect classes,"[311] a concept which does not lend itself easily to questions of proportionality. As a result, courts have tried to resolve the question of proportionality by bashing the round peg of proportionality review into the square hole of the Eighth Amendment's Cruel and Unusual Punishments

307. 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dism'd*, 485 U.S. 994 (1988).

308. *Id.* at 784.

309. *Id.* at 866. *See also* Pennington v. Singleton, 606 S.W.2d 682, 690 (Tex. 1980); Commonwealth Lloyd's Ins. Co. v. Thomas, 825 S.W.2d 135 (Tex. App.—Dallas 1992), *vacated by agr.*, 843 S.W.2d 486 (Tex. 1993); Interfirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 909 (Tex. App.—Texarkana 1987, no writ); Preston Carter Co. v. Tatum, 708 S.W.2d 23, 24 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

310. U.S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Id.

311. *See, e.g.*, United States v. Palmer, 3 F.3d 300, 305 (9th Cir. 1993) (amended opinion); United States v. Sitton, 968 F.2d 947, 953 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1306 (1993); United States v. Diaz, 961 F.2d 1417, 1420 (9th Cir. 1992); United States v. Redondo-Lemos, 955 F.2d 1296, 1300-01 (9th Cir. 1992).

Clause.[312] The authors respectfully suggest that this approach may *never* succeed with any degree of certainty and predictability. One obvious solution is to adopt the approach of those states which constitutionally mandate proportional sentencing and to create a separate body of constitutional law devoted to disproportionality. Another solution, with more universal application, is to consider adapting the analytical structure used by both federal and state courts to evaluate the exercise of peremptory challenges on racial minorities in jury selection for disproportionality in sentencing claims.[313]

In *Swain v. Alabama*,[314] the United States Supreme Court declared that exercising peremptory challenges for racially discriminatory purposes was unconstitutional.[315] In *Batson v. Kentucky*,[316] the United States Supreme Court went further and required that for a defendant to prevail on an equal protection claim, it must be shown that the prosecutor exercised peremptory challenges systematically against a minority.[317] Today, a defendant may establish a *prima facie* case of discrimination in jury selection by showing he is a member of a given racial group,[318] that shared group members were excluded from his jury, and that the facts and circumstances of his case raise an inference of exclusion based on racial discrimination.[319] When a *prima facie* case is established, the burden shifts to the prosecution to show a racially neutral explanation for the strikes.

The prosecution, however, cannot show a neutral explanation based merely on the assumption the jurors would be partial to the defendant because of their shared race.[320] Once the prosecution comes forward with racially neutral explanations, the burden shifts to the defendant to show the racially neutral explanation given is an excuse or is not based upon the record of the case.[321] Once both sides have made their respective showings, the trial judge resolves the issue, and that decision is reviewable on appeal under a clearly erroneous standard.[322]

312. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

313. Batson v. Kentucky, 476 U.S. 79, 80 (1986).

314. 380 U.S. 202 (1965).

315. *Id.* at 223-24.

316. 476 U.S. 79 (1986).

317. *Id.* at 80.

318. The same rules apply to gender. *See* J.E.B. v. Alabama, 114 S. Ct. 1419 (1994).

319. *Batson*, 476 U.S. at 80.

320. *Id.*

321. Griffith v. Kentucky, 479 U.S. 314, 316 (1987).

322. Hernandez v. New York, 500 U.S. 352, 365 (1991). The clearly erroneous standard applies to the trial court's determination that the prosecutor's exercise of peremptory challenges was not based on intentional discrimination on the basis of race. The fact that bilingual Latinos, who were peremptorily challenged, looked away when asked if they would accept the official translator's version of witness' answers and the fact that the prosecutor did not believe they would, constituted proof of nondiscriminatory intent. The trial court's decision, therefore, was not clearly erroneous. The

These procedures can be easily adapted to a disproportionality of sentencing analysis. After a sentence is pronounced, a defendant can make an objection on specific grounds that the sentence assessed is grossly disproportionate to the crime under both federal and state constitutional provisions.[323] A Motion for New Trial may be available to raise the issue depending, of course, on the local jurisdiction's new trial provisions.[324] In either event, counsel must be prepared to go forward and make a *prima facie* showing the particular sentence is disproportionate to the particular offense.[325] How extensive this showing needs to be is uncertain. The defendant should be prepared to demonstrate the sentence assessed *to this defendant* is not in keeping with other sentences for like crimes.[326] The nature of the crime, the age of the defendant, the defendant's criminal record, or lack thereof, are all contributing factors that should be demonstrated. Failure to object, however, and go forward with a *prima facie* showing of disproportionality could waive error.[327]

Where a state offense has a corresponding federal crime, the Federal Sentencing Guidelines provide a ready source of comparative data. One of the stated purposes of enacting the Sentencing Guidelines was to ensure the punishment is proportionate to the offense committed.[328] The Sentencing Commission considered all relevant factors in establishing a reasonable range of punishment for an accused based upon the accused's particular background and other factors relevant to proper punishment.[329] Where a client has the

ultimate burden is on the defendant to show a racially discriminatory exercise of peremptory challenges by the prosecutor.

In Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991), the Court expanded the *Batson* analysis to apply to a private party in a civil case. The logic appears to be that state action results from government authorization of peremptory challenges. The Court held that the procedures of *Batson* apply equally in civil cases.

It is not the purpose of this article to conduct an exhaustive review of either *Batson* or its progeny. The examples given are solely for the purpose of analogy and reflect the authors' understanding of the current state of the law in this area.

323. *See e.g.*, FED. R. CIV. P. 52(a); TEX. R. APP. P. 52(a).

324. In Johnson v. State, 882 S.W.2d 17, 20 n.8 (Tex. App.—Houston [1st Dist.] 1994, pet. granted), the Houston Court of Appeals said as follows:

> We note that the State presented no evidence regarding its costs or damages. However, in light of the fact that appellant never made the argument in the trial court that the amount of the forfeiture was disproportionate to the damages incurred by the State, and considering that the trial court entered an "agreed" final judgment of forfeiture of $11,547, we do not find it necessary to remand this case to the trial court for consideration of the proportionality of the forfeiture.

325. *See, e.g.,* Williams v. Clarke, 40 F.3d 1529, 1534 (8th Cir. 1994) ("Williams did not raise the proportionality review issue before the district court or before the state courts, and we will not consider the issue for the first time in this appeal.").

326. *See* Smallwood v. State, 827 S.W.2d 34, 39-40 (Tex. App.—Houston [1st Dist.] 1992) (O'Connor, J., dissenting).

327. *See, e.g.,* TEX. R. APP. P. 52(a).

328. *See supra* note 4 and accompanying text.

329. *Id.*

necessary resources, a private pre-sentence report emphasizing the mitigating factors is advisable.

What constitutes a *prima facie* case, under *Batson*, generates some level of disagreement. The authors prefer the standard as enunciated by the Texas Court of Criminal Appeals in *Tompkins v. State*.[330]

> A prima facie case represents the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true. The party with the burden of proof must produce at least this much evidence to avoid a finding that the allegation is not true as a matter of law. Once produced, however, the allegation must be found true unless it is contradicted, impeached, or rebutted by other evidence. In the present context, such other evidence must include a racially neutral explanation by the prosecuting attorneys, and must be legally adequate to support a judgment in favor of the State. If it is, an issue of fact is joined which can only be resolved by an assessment of evidentiary weight and credibility. It is the burden of the accused to persuade the trial judge by a preponderance of the evidence that the allegations of purposeful discrimination are true in fact.[331]

The term *inference* is generally defined as "a permissible deduction from the evidence before the court which the jury may accept, reject, or accord such probative value as they desire."[332]

To establish "the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true,"[333] the Texas Court of Criminal Appeals subsequently found in *Keeton v. State*[334] that the record of voir dire as a whole must be examined. As Judge Miller noted, in *Keeton,* an inference of racially motivated jury selection could be demonstrated by the strikes themselves.[335] In *Batson*, the Supreme Court noted "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination."[336] The *Batson* Court further declared, "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*."[337] Under *Batson*, it is easy for an accused to establish a *prima facie* case of discrimination in jury selection. The *Batson* Court shifted what historically was an impossible burden for the accused to meet for a *prima facie* case.[338]

330. 774 S.W.2d 195 (Tex. Crim. App. 1987) (en banc), *aff'd by an equally divided court,* 486 U.S. 1004 (1988).
331. *Id.* at 201-02.
332. BALLENTINE'S LAW DICTIONARY 619 (3d ed. 1969).
333. Tompkins v. State, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987) (en banc).
334. 749 S.W.2d 861 (Tex. Crim. App. 1987) (en banc).
335. *Id.* at 867.
336. Batson v. Kentucky, 476 U.S. 79, 97 (1986).
337. *Id.* at 95.
338. *Id.* at 97-98; *see also* Speaker v. State, 740 S.W.2d 486, 490-92 (Tex. App.—Houston [1st Dist] 1987, no pet.) (Levy, J., concurring).

Proportionality challenges can be addressed like *Batson* challenges. First, the defendant would have the burden of objecting at trial and must argue to the trial court that the sentence is disproportionate to the offense under the particular circumstances. After objecting, the defendant, however, has the duty to establish "the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true."[339] The burden would then shift to the prosecution to establish facts which support the sentence. The prosecution must then establish facts concerning a particular defendant's sentence.

Under *Batson*, the Supreme Court held that not all excuses are adequate to rebut a *prima facie* showing of racial discrimination in the exercise of peremptory challenges.[340] The *Batson* Court specifically required the racially neutral excuse proffered by the prosecution to be "related to the particular case to be tried."[341] Similarly, in order to rebut a *prima facie* showing of a disproportionate sentence, the prosecution would need to explain how the reasons supporting the sentence relate to the particular case and the particular defendant.

When the defendant and the prosecution complete their respective showings, the trial judge would determine whether the sentence is disproportionate. The defendant, making a *prima facie* showing, should prevail in the absence of an adequate showing by the prosecution. Absent that, the appellate court is given an adequate record to review.

Courts may be less troubled by a relatively weak prosecution explanation for the sentence when all the remaining explanations are persuasive. Other courts since *Batson* have determined what is sufficient for the prosecution to rebut a *prima facie* showing of racially discriminatory exercise of peremptory challenges.[342] Under this proposed analytical framework, courts must determine what showing by the prosecution will overcome a *prima facie* case of unconstitutionally disproportionate sentencing. In the past, courts have managed to find the necessary balances in *Batson* challenges, and no doubt will be equally adept at resolving disproportionality challenges.

Finally, appellate briefs claiming constitutional violations, under both state and federal constitutions, must provide argument, analysis, and authority supporting and explaining each separate constitutional claim.[343] The briefs must show how constitutional protections differ under a given state constitution as opposed to the federal constitution. Since there is little law on the subject, this will require creative appel-

339. Tomkins v. State, 744 S.W. 2d 195, 201 (Tex. Crim. App. 1987) (en banc).
340. *Batson*, 476 U.S. at 98.
341. *Id.*
342. United States v. Rose, 872 F.2d 249, 250 (8th Cir. 1989); United States v. Terrazas-Carrasco, 861 F.2d 93, 94 (5th Cir. 1988); United States v. Williams, 934 F.2d 847, 849 (7th Cir. 1991).
343. *See, e.g.*, Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991); State v. Harris, 844 S.W.2d 601 (Tenn. 1992); People v. Bullock, 485 N.W.2d 866 (Mich. 1992).

late briefing. While it is unlikely courts will look with favor on a claim of disproportionality when the defendant is a recidivist, the first offender who draws a life sentence for a passive non-violent crime may well benefit.

VI. CONCLUSION

Based upon the pertinent case law, common threads can be ascertained to guide the defendant in arguing sentencing disproportionality. Disproportionality is a constitutional concept that survives *Harmelin v. Michigan*. It is, however, difficult to establish, and will be applied only in rare cases. An appropriate challenge contemplates the appropriate crime, preferably a non-violent and victimless one. Habitual offenders, or recidivists, are not likely to succeed in such a challenge, unless all prior offenses are minor.

Mandatory sentences pose special problems. Arizona, Michigan, and South Dakota have pointed out that it is the proper function of the judiciary to review legislative enactments with respect to statutory punishment and individual sentences.[344] Legislative discretion, however, is given great deference and deemed proper in the vast majority of cases. Thus, in any jurisdiction with sentencing guidelines, or with a narrow range of sentencing, a disproportionality challenge probably requires a showing that the unique facts of the particular case were not taken into consideration by the drafters of the guidelines.

Furthermore, the availability of parole must be considered. A severely long sentence may be considered ameliorated by the possibility of parole, particularly in states with large prison populations, and where liberal good time credit policies are essential to keep the prisons open and operating. On the other hand, a sentence without parole can bolster a disproportionality argument.

Counsel should remember that when a penalty is unconstitutional on its face, it is disproportionate *in all cases.* The classic example often noted is "punish[ing] overtime parking by life imprisonment."[345] If the statute is not unconstitutional on its face, the defendant must be prepared to demonstrate the sentence assessed *to this defendant* is grossly disproportionate and/or not in keeping with other sentences for like crimes.

This is an evolving area of the law. As with all such areas, however, the lack of specific precedent, other than recognizing that the concept of disproportionality exists, lends itself to inventive action by counsel,[346] particularly in the area of any given state's interpretation of its

344. *See Bullock*, 485 N.W.2d at 866; Bult v. Leapley, 507 N.W.2d 325 (S.D. 1993); *Bartlett II*, 830 P.2d at 829.

345. Harmelin v. Michigan, 501 U.S. 957, 962 (1991) (White, J., dissenting); *see also* Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980).

346. As was so eloquently noted by South Dakota Justice Amundson in his concurring opinion in *Pack*:

constitutional provisions. Where a sentence is truly disproportionate, either to the offense, or to the accused's individual culpability, a constitutional challenge may prove the only means of attack.

> The reality of life in the defense world is that you have to zealously represent your client's interest or else defend against an ineffective assistance of counsel claim. This court stated in State v. Sheridan, 383 N.W.2d 865, 867 (S.D. 1986) (Henderson, J., specially concurring): To assert disproportionality, all trial counsel must, in the words of old timers, 'root hog, or die!' In other words, counsel must dig, work, sweat, read, study, and produce statistics, criteria, history of cases, studies, court records, etc. A foundation must be established at the trial level for the appellate advocacy to come.

516 N.W.2d at 669. Real guidance may also be found in the dissenting opinion in Smallwood v. State, 827 S.W.2d 34, 38-40 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (O'Connor, J., dissenting).