OPINION

The opinion section explores two sides of a constitutional issue that is currently pending before the United States Supreme Court. Presented in Supreme Court opinion format, student authors provide in depth research, analysis and conclusions based on the pleadings and briefs in a particular case. The majority and dissent are determined by a vote of the Editorial Board after reviewing preliminary drafts of each student's opinion.[*]

HARMELIN v. MICHIGAN: CRUEL AND UNUSUAL PUNISHMENT

Ann Marie Daniel and Sheila Calello

HARMELIN

v.

MICHIGAN

NO. 89-7272

JUSTICE DANIEL delivered the opinion of the Court, in which CHIEF JUSTICE MAGGS, JUSTICE COLATRELLA, JUSTICE OLSEN AND JUSTICE BURNHAM joined.

A Michigan statute makes possession of over 650 grams of cocaine a criminal offense punishable by a mandatory term of life imprisonment

[*] The facts and procedural history described in the Opinion were compiled by reference to: Brief for Appellant, People v. Harmelin, 434 Mich. 863 (1990) (No. 86374); Brief for Appellee, People v. Harmelin, 434 Mich. 863 (1990) (No. 86374); People v. Harmelin, 434 Mich. 863, *petition for cert. filed*, 59 U.S.L.W. 3018 (U.S. April 2, 1990) (No. 89-7272); People v. Harmelin, 434 Mich. 863 *brief for respondent in opposition to petition for cert.*, 59 U.S.L.W. 3018 (U.S. April 2, 1990) (No. 89-7272); Brief for Petitioner, Harmelin v. Michigan, No. 89-7272 (S. Ct. argued Nov. 5, 1990). All of the above briefs and petitions are available at the *Constitutional Law Journal*, Seton Hall Law School, 1111 Raymond Boulevard, Newark, New Jersey, 07102.

without the possibility of parole.[1] This appeal draws into question whether that provision, as applied to the petitioner, violates the eighth amendment's guarantee against cruel and unusual punishment.[2]

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[1] The statute which forms the basis of this appeal is MICH. COMP. LAWS ANN. § 333.7403 (West 1980) (amended by MICH. COMP. LAWS ANN. § 333.7403 (West Supp. 1990)) which provides:

> (1) A person shall not knowingly or intentionally possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.
> (2) A person who violates this section as to:
> (a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv), and:
> (i) Which is in an amount of 650 grams or more of any mixture containing that substance is guilty of a felony and shall be imprisoned for life.
> (ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.
> (iii) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony and shall be either imprisoned for not less than 10 years nor more than 20 years or placed on probation for life.
> (iv) Which is in an amount of less than 50 grams of any mixture containing that substance is guilty of a felony, punishable by imprisonment for not more than 4 years, or by a fine of not more than $2,000.00, or both.
> (b) A controlled substance classified in schedule 1, 2, 3, or 4, except a controlled classified in schedule 1 for which a penalty is prescribed in subdivision (a), (c), or (d), is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not more than $2,000.00, or both.
> (c) Lysergic Acid Diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.
> (d) Marihuana, is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00 or both.

Id.

In addition, under MICH. COMP. LAWS ANN. § 333.7401(3) (West 1980) (amended by MICH. COMP. LAWS ANN. § 333.7401(3) (Supp. 1990)): "An individual subject to a mandatory term of imprisonment under subsection . . . 7403 (2) (a) (i), (ii), or (iii) shall not be eligible for probation, suspension of the sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life." *Id.*

[2] U.S. CONST. amend. VIII.

I. FACTS

Petitioner, Ronald Harmelin, was convicted under Michigan law for possession of 650 or more grams of cocaine and possession of a firearm during the commission of a felony.[3] On April 30, 1987, he was sentenced to a mandatory life term for the cocaine conviction and a mandatory two year term of imprisonment for the felony-firearm conviction.[4]

Petitioner made a timely appeal to the Court of Appeals of Michigan, arguing unlawful search and seizure, ineffective assistance of counsel and that the mandatory life sentence constituted a cruel and unusual punishment in violation of the eighth amendment.[5] On January 9, 1989, the Court of Appeals of Michigan issued an unpublished opinion reversing the petitioner's conviction on grounds not involving the eighth amendment challenge.[6] The prosecutor filed leave to appeal to the Michigan Supreme Court and the petitioner filed a brief in opposition.[7] On March 9, 1989, the court of appeals vacated its January 9; 1989 decision and retained the matter for reconsideration.[8] Petitioner then filed a motion to vacate the March 9, 1989 order for lack of jurisdiction.[9] The court of appeals summarily denied that motion.[10] On April 18, 1989, the court of appeals affirmed the petitioner's conviction.[11] The Michigan Supreme Court denied the petitioner leave to appeal.[12]

We granted certiorari to review only the eighth amendment question presented.[13] We now affirm.

On May 12, 1986, Michigan Police Officers Rix and Blakeney observed a blue Ford LTD exiting the parking lot of the Embassy Motel

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[3] People v. Harmelin, 176 Mich. App. 524, 440 N.W.2d. 75 (1989).

[4] *Id.*

[5] *Id.*

[6] Brief for Appellant at 1, People v. Harmelin, 434 Mich. 863 (1990) (No. 86374) [hereinafter Brief for Appellant].

[7] *Id.* at 2.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] People v. Harmelin, 176 Mich. App. 524, 440 N.W.2d 75 (1989).

[12] People v. Harmelin, 434 Mich. 863, 440 N.W.2d. 75 (1990).

[13] Harmelin v. Michigan, 110 S. Ct. 2559 (1990).

in Oak Park, Michigan at 2:45 a.m.[14] They observed the car at 4:00 a.m. and again at 5:00 a.m. when it ran a red light.[15] The officers affected a traffic stop of the car.[16] Harmelin exited the vehicle and told the officers he was carrying a gun for which he held a permit.[17] Officer Rix noticed several bulges in Harmelin's coat.[18] Pursuant to a pat down of the petitioner, Officer Blakeney felt a hard object and asked what it was.[19] Harmelin responded that it was his marijuana.[20] He was placed under arrest for marijuana possession and was searched pursuant to arrest.[21] Within another coat pocket the officers found a pouch which contained Percodan pills, three vials of white powder and drug paraphernalia.[22] Also found on petitioner's person were ten small bags of white powder and a beeper.[23] Following the arrest, the car was impounded. An inventory search of the car revealed a shaving kit containing two bags which held 672.5 grams of cocaine and $2,700 in cash.[24] The cocaine was valued between $67,000 and $100,000.[25] In addition, petitioner's address book contained coded instructions, apparently related to drug trafficking.[26]

II. BASIS OF HARMELIN'S CLAIM

Petitioner challenges his sentence of life imprisonment without the possibility of parole as being violative of the eighth amendment which states: "Excessive bail shall not be required, nor excessive fines imposed,

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[14] People v. Harmelin, 434 Mich. 863 *Brief for Respondent in opposition to petition for cert.*, at iv, 59 U.S.L.W. 3018 (U.S. April 2, 1990) (No. 89-7272) [hereinafter *Brief for Respondent in opposition to cert.*].

[15] *Id.*

[16] *Id.*

[17] Brief for Appellant, *supra* note 6, at 4.

[18] *Id.*

[19] Brief for Appellee at vi, People v. Harmelin, 434 Mich. 863 (1990) (No. 86374) [hereinafter Brief for Appellee].

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Brief for Respondent in opposition to cert.*, *supra* note 14, at vi, ix.

[25] Brief for Petitioner at 4, Harmelin v. Michigan, No. 89-7272 (S. Ct. argued Nov. 5, 1990) [hereinafter Brief for Petitioner].

[26] *Brief in opposition to cert.*, *supra* note 14, at x.

nor cruel and unusual punishments inflicted."[27] Relying on *Solem v. Helm*,[28] petitioner asserts that "[t]he length of sentence alone is a valid ground for finding cruel and unusual punishment."[29]

We begin with a review of the *Solem* decision. Following his seventh felony conviction, Jerry Helm was sentenced to life imprisonment under a South Dakota recidivist statute.[30] The Court held that although state legislatures are entitled to deference, all length of sentences were reviewable under the proportionality principle.[31] The Court enumerated "objective criteria" which where to be followed by a reviewing court. These criteria included: 1) "look[ing] to the gravity of the offense and the harshness of the penalty," 2) "compar[ing] the sentences imposed on other criminals in the same jurisdiction" and 3) "compar[ing] the sentences imposed for the commission of the same crime in other jurisdictions."[32] Applying these criteria, the Court found the sentence imposed upon Helm constituted a "cruel and unusual" punishment in violation of the eighth amendment.[33]

We now overrule *Solem* in that the application of the above criteria to review state statutory sentences in non-capital cases weighs against the history of the eighth amendment and the principles of federalism.

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[27] U.S. CONST. amend. VIII. The eighth amendment was held to apply to the states through the fourteenth amendment in Robinson v. California, 370 U.S. 660 (1962).

[28] 463 U.S. 277 (1983).

[29] People v. Harmelin, 434 Mich. 863, (1990), *petition for cert. filed*, 59 U.S.L.W. 3018 (U.S. April 2, 1990) (No. 89-7272) at 21 [hereinafter *Petition for cert.*].

[30] *Solem*, 463 U.S. at 279-83. Under the South Dakota recidivist statute, once a defendant has been convicted of three prior felonies, the principal felony is punishable as a class one felony. *Id.* at 281 (citing S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended 1981)). The maximum penalty for a class one felony was a $25,000 fine and life imprisonment. *Id.* at 281-82 (citing S.D. CODIFIED LAWS ANN. § 22-6-1(3) (Supp. 1982)). In addition, parole is unavailable to a person serving a life sentence. *Id.* at 282 (citing S.D. CODIFIED LAWS ANN. § 24-15-4 (1979)).

[31] *Solem*, 463 U.S. at 290. *See also* James, *Eighth Amendment Proportionality Analysis: The Limits of Moral Inquiry*, 26 ARIZ. L. REV. 871, 872 (1984). Under the proportionality doctrine, a punishment must not be more severe than that warranted for the injury caused and the moral blameworthiness displayed. Baker & Baldwin, *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 26 (1985).

[32] Solem v. Helm, 463 U.S. 277, 290-92 (1983).

[33] *Id.* at 303.

III. HISTORY OF THE EIGHTH AMENDMENT

A. ORIGIN OF THE PHRASE "CRUEL AND UNUSUAL" PUNISHMENT AND ITS INCORPORATION INTO THE UNITED STATES CONSTITUTION

It is not unprecedented for this Court to be asked to interpret a constitutional provision when its language is at best indefinite.[34] The difficulty attending the effort to "define with exactness" the constitutional provision prohibiting cruel and unusual punishment[35] is reflected in the history of the phrase "cruel and unusual" and its incorporation into the Bill of Rights. Early in American history, the Virginia Constitution included a provision prohibiting cruel and unusual punishment, drawing its wording from the English Bill of Rights of 1689.[36] This clause was incorporated by the federal government into the Northwest Ordinance of 1787 and later became the eighth amendment to the United States Constitution in 1791.[37] Because of the similarity in the wording of the two clauses, legal historians have examined the punishments which the English drafters sought to prohibit.[38] The history of the English Bill of Rights of 1689 indicates that the cruel and unusual clause was "first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties."[39] The prohibition of cruel methods of punishment had never existed in English law.[40] JUSTICE CALELLO asserts that the cruel and unusual punishment clause of the English Bill of Rights was undertaken to prohibit the violent types of punishment employed in the "Bloody Assize."[41] However, a connection between the "Bloody Assize" and the

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[34] Furman v. Georgia, 408 U.S. 238, 375-76 (1972) (Burger, C.J., dissenting).

[35] Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878). "[O]f all our fundamental guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms." *Furman*, 408 U.S. at 376 (Burger, C.J., dissenting).

[36] Granucci, *"Nor Cruel and Unusual Punishments Inflicted: "The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969).

[37] *Id.*

[38] *Id.* at 853.

[39] *Id.* at 860.

[40] *Id.* at 847.

[41] *See* Dissent, *infra* p. 159. The "Bloody Assize" refers to the treason trials which took place in England beginning in 1685 following an unsuccessful rebellion against King James II. "The penalty for treason at that time consisted of drawing the condemned man

cruel and unusual punishment clause is not supported by English history. Not only were the "cruel" modes of punishment of the "Bloody Assize" still used after the English Bill of Rights was passed, but one of the primary members of the document's drafting committee was the chief prosecutor of the "Bloody Assize."[42]

Despite the similarity in wording, "[f]rom every indication, the Framers of the Eighth Amendment intended to give the phrase a meaning far different from that of its English precursor."[43] Although there is disagreement about the Framers' original intent, the clause is more commonly interpreted as a prohibition of *barbarous* and *inhumane* methods of punishment.[44] It is not characterized as generally prohibiting sentences merely on the basis of *excessive length*.[45]

Debate surrounding the ratification of the Constitution produced contemporary comment which sheds light on the Framers' interpretation of the phrase "cruel and unusual."[46] The states were called to ratify the 1789 draft of the Constitution, which did not include a Bill of Rights.[47] The records of two state conventions indicate objection to the absence of a cruel and unusual punishment clause was based solely on the concern for a prohibition on torturous modes punishments.[48] At the Massachusetts convention, Mr. Holmes argued that without a

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on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disembowelled and his bowels burnt before him, and then beheaded and quartered." Granucci, *supra* note 36, at 853-54 (citing 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 92).

[42] Granucci, *supra* note 36, at 855.

[43] Furman v. Georgia, 408 U.S. 238, 376-77 (1972) (Burger, C.J., dissenting). JUSTICE CALELLO asserts that since the proportionality principle was a part of the English Bill of Rights, it follows that the Framers incorporated the same principles into our Constitution. *See* Dissent, *infra* note 23 and accompanying text. This logic is not supported. The English and American Framers' intentions were not parallel. In England "disembowelling was not eliminated by statute until 1814, . . . [b]eheading and quartering were not abolished until 1870 [and] [t]he burning of female felons continued in England until the penalty was repealed in 1790." Granucci, *supra* note 36, at 856 (citing 54 Geo. 3, c. 146 (1814); 33 & 34 Vic., c. 23 § 31 (1870); 30 Geo. 3, c. 48 (1790)); *See generally* 2 J. PATERSON, COMMENTARIES ON THE LIBERTY OF THE SUBJECT 292-95 (1877). It is not disputed that the eighth amendment prohibits barbaric and inhumane modes of punishment. This prohibition comes from the American Framers' intentions and is removed from the intent of the English clause.

[44] Granucci, *supra* note 36, at 839.

[45] *Id.*

[46] *Id.* at 840-41.

[47] Furman v. Georgia, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting).

[48] *Id. See also* Granucci, *supra* note 36, at 841.

constitutional check on the mode of federal punishment, "[the members of Congress] are no where restrained from inventing the most cruel and unheard of punishments, and annexing them to crimes . . . *racks* and *gibbets*, may be amongst the most mild instruments of their discipline."[49] Patrick Henry, during Virginia's constitutional convention, feared that in the absence of a Bill of Rights, nothing would prevent the implementation of torturous punishments:[50]

> In this business of legislation, your members of congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and infliction cruel and unusual punishments. . . . What has distinguished our ancestors? - That they would not admit of tortures, or cruel and barbarous punishment. But congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany - of torturing to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you, that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture . . . .[51]

The inclusion of the eighth amendment in the Bill of Rights was in reaction to these concerns.[52] During the First Congress, discussion on the cruel and unusual punishment clause focused on the concern that the clause would limit methods of punishment.[53]

Even from this limited commentary on the eighth amendment, it is

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[49] 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 125 (2d ed. 1836) (emphasis original).

[50] Granucci, *supra* note 36, at 841.

[51] 3 J. ELLIOT, *supra* note 49, at 413.

[52] Furman v. Georgia, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting).

[53] Granucci, *supra* note 36, at 842.

> Mr. Livermore [of New Hampshire] - the clause seems to express a great deal of humanity, on which account I have no objection to it; but it seem to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?

1 ANNALS OF CONG. 754 (J. Gales ed. 1789).

the accepted view that the eighth amendment was enacted as a prohibition of "barbarous methods of punishment, and that it was not, therefore, intended as a general prohibition on merely excessive penalties."[54]

B. HISTORICAL REVIEW OF THIS COURT'S TREATMENT OF THE EIGHTH AMENDMENT

Some of the earliest "cases decided under the Eighth Amendment are consistent with the tone of the ratifying debates."[55] In *Wilkerson v. Utah*,[56] *In re Kemmler*,[57] and *Louisiana ex. rel Francis v. Resweber*,[58] the Court was concerned with barbaric and torturous modes of punishment. In those cases the Court held death by shooting or by electrocution was not cruel and unusual punishment.

Solem holds that the eighth amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime

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[54] Granucci, *supra* note 36, at 839.

[55] *Furman*, 408 U.S. at 377 (Burger, C.J., dissenting).

[56] 99 U.S. 130 (1879). In *Wilkerson*, the sentence for premeditated murder of public execution by shooting, was affirmed. The Court reasoned: "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim. (4th ed.) 408; Wharton, Cr.L. (7th ed.), sect. 3405. . . . [I]t by no means follows that the sentence of the court in this case falls within that category. . . ." *Id.* at 136.

[57] 136 U.S. 436 (1890). In *Kemmler*, electrocution was upheld as an acceptable mode of punishment. *Id.* "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhumane and barbarious, something more than mere extinguishing of life." *Id.* at 447. As long as the legislature selects a punishment for humane purposes, it is not unconstitutional merely because it is unusual. Furman v. Georgia, 408 U.S. 238, 323 (Marshall, J., concurring) (discussing In re Kemmler, 136 U.S. 436 (1980)).

[58] 329 U.S. 459 (1947). In *Resweber*, a convicted murderer was sentenced to death by electrocution. *Id.* at 460. Because of a technical malfunction during the first attempt at electrocution, a second attempt was necessary. *Id.* at 460-61. A majority of the Court found the second attempt at electrocution not to violate the eighth amendment. *Id.* at 463-64. "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id.* at 464. The Court reasoned that since the legislature adopted electrocution for humane purposes, and the failure of the first attempt at electrocution was "an unforeseeable accident," a second attempt would not be a purposeful infliction of unnecessary pain. *Id. See also* Furman v. Georgia 408 U.S. 238, 326 (1972) (Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153, 170-71 (1976).

committed."[59] The *Solem* Court cites numerous cases in support of the application of proportionality.[60] While it is true that this "Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime,"[61] the cited cases represent a limited category of cases in which proportionality review is applicable.[62] So while it is permissible for courts to conduct proportionality review of sentences involving bizarre and untraditional modes of punishment,[63] punishment for status crimes, *i.e.*, making drug addiction a crime,[64] and capital punishment,[65] this Court has never, until *Solem*, conducted proportionality review where only the length of imprisonment was challenged.[66]

In *Weems v. United States*,[67] we addressed the constitutionality of a bizarre and unusual sentence. Weems, the defendant, had been convicted under a Philippine law for falsifying public documents.[68] He was fined and given a fifteen year sentence to endure the extraordinary punishment of *cadena temporal*.[69] This punishment consisted of chaining the defendant at the ankles and wrists, and subjecting him to hard and painful labor.[70] In addition, during his imprisonment, his parental and property rights were terminated.[71] Once out of prison, restraints on his freedom would not cease. The defendant would "forever be kept under the shadow of his crime."[72] He would not be able to move freely. The

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[59] Solem v. Helm, 463 U.S. 277, 284 (1983).

[60] *Id.* at 286-88 (citing O'Neil v. Vermont 144 U.S. 323 (1892); Weems v. United States, 217 U.S. 349 (1910); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion); Enmund v. Florida, 458 U.S. 782 (1982)).

[61] Rummel v. Estelle, 445 U.S. 263, 271-72 (1980) (emphasis added).

[62] *Solem*, 463 U.S at 306 (Burger, C.J., dissenting).

[63] *See* Weems v. United States, 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion).

[64] *See* Robinson v. California, 370 U.S. 660 (1962).

[65] *See* Coker v. Georgia 433 U.S. 584 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

[66] Solem v. Helm, 463 U.S. 277, 306 (1983) (Burger, C.J., dissenting). *See also* Hutto v. Davis, 454 U.S. 370, 373 (1982).

[67] 217 U.S. 349 (1910).

[68] *Id.* at 357.

[69] *Id.* at 358, 362-67.

[70] *Id.* at 366.

[71] *Id.*

[72] *Id.*

defendant would be required to give notice and obtain written permission before changing his domicile.[73]

Holding that this punishment violated the eighth amendment, the Court recognized for the first time that a punishment must be graduated and proportioned to the offense.[74] The holding cannot, however, be separated from its unique facts.[75] The *Solem* Court argued, as does today's dissent, that the *Weems* decision was based upon the length of imprisonment.[76] A careful reading of *Weems* rejects that contention, however.[77] The *Weems* Court found *cadena temporal* to be "cruel and unusual" in character because of the combined effect of the fifteen year prison term and the bizarre accompaniments.[78] Thus, *Weems* held that the punishment violated the "bill of rights both on account of degree and *kind*."[79]

In addition, two decisions rendered after *Weems* clearly indicate that the finding of disproportionality in *Weems* should not be used to extend proportionality review to all challenges to length of imprisonment.[80] In *Graham v. West Virginia*,[81] the Court found no eighth

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[73] *Id.*

[74] *Id.* at 366-67. *See also* Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 198 (1986-87).

[75] Rummel v. Estelle, 445 U.S. 263, 273 (1980). "*Weems* can [not] be applied without regard to its peculiar facts: the triviality of the charged offense, the impressive length of the minimum term of imprisonment, and the extraordinary nature of the 'accessories' included within the punishment of *cadena temporal*." *Id.* at 274.

[76] Solem v. Helm, 463 U.S. 277, 287 (1983). *See* Dissent, *infra* p. 163.

[77] Note, Solem v. Helm: *The Court's Continued Struggle to Define Cruel and Unusual Punishment*, 21 CAL. W.L. REV. 590, 595 (1985). "*Weems* represents a disdain for the accompaniments" imposed by *cadena temporal*. *Id.* The punishment imposed in *Weems* was anomalous to traditional Anglo-American justice. *Id.* (citing Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075 (1964)).

[78] Weems v. United States, 217 U.S. 349, 377 (1910). "The Philippine code unites the penalties of *cadena temporal*, principle and accessory, and it is not in our power to separate them, even if they are separable, unless their independence is such that we can say that their union was not made imperative by the legislature." *Id.* at 382 (citing Employers' Liability Cases, 207 U.S. 463 (1908)).

[79] *Weems*, 217 U.S. at 377 (emphasis added).

[80] *See* Rummel v. Estelle, 445 U.S. 263, 274-77 (1980). *See also* Dressler, *Substantive Criminal Law Though the Looking Glass of* Rummel v. Estelle: *Proportionality and Justice as Endangered Doctrines*, 34 SW. L.J. 1063, 1069-70 (1981).

[81] 224 U.S. 616 (1912). Graham had been convicted three times, twice for stealing horses and once for burglary related to an attempted horse theft. *Id.* at 620-21. It is important to note that this Court found the *Graham* facts to be "indistinguishable" from the facts in *Rummel*. *Rummel*, 445 U.S. at 276.

amendment violation where a repeat offender was sentenced to life imprisonment under a West Virginia recidivist statute.[82] Also, in *Badders v. United States*,[83] the Court did not find concurrent five year sentences and $1,000 in fines for seven counts of mail fraud unconstitutional.[84]

In *Trop v. Dulles*,[85] the defendant was convicted of desertion from the United States Army during wartime.[86] As a result of his conviction and dishonorable discharge, Trop lost his citizenship.[87] The Court held expatriation violated the eighth amendment.[88] Just as the punishment in *Weems* was bizarre, the *Trop* Court observed that denationalization was an unfamiliar and uncommon form of Anglo-American punishment.[89] "Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."[90] The underlying policy of the phrase "cruel and unusual" is rooted in traditional Anglo-American criminal justice.[91]

In *Trop* , the constitutional infirmity was not that the penalty was excessive,[92] but that denationalization stripped the individual of all his rights and political status.[93] The Court emphasized the flexibility of the

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[82] *Graham*, 224 U.S. at 621.

[83] 240 U.S. 391 (1916).

[84] *Id.*

[85] 356 U.S. 86 (1958) (plurality opinion).

[86] *Id.* at 87.

[87] *Id.* Section 401(g) of the Nationality Act of 1940 as amended, 54 Stat. 1168, 1169, as amended, 58 Stat. 4, 8 U.S.C. § 1481(a)(8) U.S.C.A. § 1481(a)(8) states:

> "A person who is a national of the United States whether by birth of naturalization, shall lose his nationality by:
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> "(g) Deserting the military of naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces . . . ."

Trop, 356 U.S. at 88 n.1.

[88] *Trop*, 356 U.S. at 101.

[89] Bradley, *supra* note 74, at 198.

[90] Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

[91] *Id.* at 99-100.

[92] The punishment in question was clearly not excessive in relation to the offense since war-time desertion was punishable by death. *See id.* at 99.

[93] *Id.* at 101-02.

phrases "cruel and unusual" in its often quoted statement: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[94] Moreover, the decision's significance is that it addressed expatriation as punishment in *kind* rather than *degree*. As stated by the concurrence in *Trop*: "[I]f expatriation is made a consequence of desertion, it must stand together with death and imprisonment - as a form of punishment."[95]

Eighth amendment review is not limited to assessing the constitutionality of the penalty imposed, but also focuses on whether the proscribed "conduct" is appropriately characterized as criminal. In *Robinson v. California*,[96] a California law, making it illegal to be a drug addict, was invalidated as violative of the eighth and fourteenth amendments.[97] The Court focused on the "crime" and not the method of punishment.[98] It is "cruel and unusual" to impose any punishment at all for the *status* of addiction.[99] "[Cruelty] cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[100] Contemporary human decency limits the power of the states to punish people because of an involuntary condition.[101] The importance of *Robinson* is that the penalty here imposed was not unconstitutional because it was excessive in length, but because a penalty was imposed at all.

The Court has given considerable attention to eighth amendment challenges in cases involving capital punishment. In *Furman v. Georgia*,[102] a fractured Court held that the death penalty, under the state statutes in question, constituted cruel and unusual punishment.[103] This decision, with nine separate opinions, demonstrates the difficulty

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[94] *Id.* at 101. *Accord* Furman v. Georgia, 408 U.S. 238, 327 (1972).

[95] *Trop*, 356 U.S. at 110 (Brennan, J., concurring).

[96] 370 U.S. 660 (1962) (The eighth amendment was held to apply to the states through the fourteenth amendment in this 1962 decision.).

[97] *Id.* at 667.

[98] *Id.* at 666.

[99] *Id.* (emphasis added).

[100] *Id.* at 667.

[101] *Id.* at 666.

[102] 408 U.S. 238 (1972) (per curiam).

[103] *Id.*

inherent in defining "cruel and unusual" punishment.[104]

Gregg v. Georgia[105] is the seminal death penalty case. In upholding the Georgia death penalty statute, this Court stated that the eighth amendment not only prohibits torturous and barbaric penalties but also penalties which are "excessive" in that they do not comport with "the dignity of man."[106] Under the test announced by the *Gregg* Court, a punishment could be found unconstitutionally excessive if it "involve[d] the unnecessary and wanton infliction of pain . . . [or was] grossly out of proportion to the severity of the crime."[107] This analysis was adhered to in *Coker v. Georgia*[108] when the Court invalidated a Georgia statute authorizing the death penalty for rape of an adult woman.[109]

Under JUSTICE CALELLO'S analysis, life imprisonment without the possibility of parole is equal in magnitude to the death penalty.[110] It is accepted, however, that "[t]he penalty of death differs from all other forms of criminal punishment, *not in degree but in kind.* It is unique in its total irrevocability."[111] Therefore, capital punishment cases discussing the prohibition of cruel and unusual punishment provide little guidance when considering non-capital challenges to the eighth amendment because a death sentence is qualitatively different from any prison term,

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[104] Brennan, *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 323 (1986). *See also* Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 485 (1990).

[105] 428 U.S. 153 (1976).

[106] *Id.* at 171-73 (citations omitted).

[107] *Id.* (citations omitted). It is important to note that the Court scrutinized the death penalty in the "abstract ([w]hether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) . . . ." *Id.*

[108] 433 U.S. 584 (1977) (plurality opinion).

[109] *Id.* at 591-600. The death penalty was also found excessive in the case of a defendant who was convicted of felony murder but had neither committed a murder nor intended to take a life. Enmund v. Florida, 458 U.S. 782 (1982). In *Enmund*, the Court examined the constitutionality of capital punishment in the particular set of circumstances before it, as opposed to the "abstract" analysis performed in Gregg v. Georgia, 428 U.S. 153 (1976). In reviewing "excessiveness," the *Enmund* Court simply restated the two part test enumerated in *Gregg*. Bradley, *supra* note 74, at 207.

[110] *See* Dissent *infra* note 148.

[111] Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (emphasis added). *See, e.g., Furman*, 408 U.S. at 287 (Brennan, J., concurring); Rummel v. Estelle, 445 U.S. 263, 272 (1980); Gregg v. Georgia, 153 U.S. 153, 187 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Coker v. Georgia, 433 U.S. 584, 598 (1976) (opinion of White, J.).

irrespective of its length.[112]

While proportionality review may be appropriate in cases involving bizarre untraditional modes of punishments, status crimes and capital punishment, such review should not be extended to cases where merely length of imprisonment is challenged. This reasoning formed the basis of our decision in *Rummel v. Estelle*.[113]

In *Rummel*, the defendant was sentenced under a Texas recidivist statute which called for a mandatory life sentence upon the third felony conviction.[114] Rummel's felonies included: an $80.00 fraudulent use of a credit card, passing a $28.36 forged check, and obtaining $120.75 by false pretense.[115] Rummel challenged his mandatory life sentence on the basis that it was "grossly disproportionate" to the crimes committed and therefore violated the eighth and fourteenth amendments.[116] In *Rummel*, contrary to *Solem* and today's dissent, we explicitly refused to apply the so called "objective test"[117] to scrutinize length of sentence.[118] In that case, we reasoned that although this Court has held that the eighth amendment prohibits grossly disproportionate punishments, this determination has been made in the context of the death penalty and such non-traditional Anglo-American punishments as those imposed in *Weems* and *Trop*.[119] With regard to length of sentence, it can be

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[112] *Rummel*, 445 U.S. at 272. The Court stated: "Death, in its finality, differs, more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Solem v. Helm, 463 U.S. 277, 312 n.4 (1983) (Burger, C.J., dissenting) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). "The greater need for reliability in death penalty cases cannot support a distinction between a sentence of life imprisonment with possibility of parole and a sentence of life imprisonment without possibility of parole . . . ." *Solem*, 463 U.S. at 312 n.4 (Burger, C.J., dissenting).

[113] 445 U.S. 263 (1980).

[114] *Id.* at 264.

[115] *Id.* at 265-66.

[116] *Id.* at 265.

[117] *See supra* note 32 and accompanying text (discussion of the "objective test" announced in Solem v. Helm, 463 U.S. 277 (1983)).

[118] *See* Solem v. Helm, 463 U.S. 277, 308 (1983) (Burger, C.J., dissenting); Rummel v. Estelle, 445 U.S. 263, 275-83, 282 n.27 (1980).

[119] *Rummel*, 445 U.S. at 271-75 (citations omitted). For a discussion of Weems v. United States, 217 U.S. 349 (1910), see *supra* notes 67-79 and accompanying text. For a discussion of Trop v. Dulles, 356 U.S. 86 (1958), see *supra* notes 85-95 and accompanying text.

asserted "without fear of contradiction by any decision of this Court that for crime concededly classified and classifiable as a felony, that is, punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."[120] The Court should not and *cannot* effectively make distinctions between state authorized prison terms.[121] However, the Court did leave room for rare cases which would trigger a proportionality analysis.[122]

The Court subsequently expanded *Rummel*[123] in *Hutto v. Davis*[124] when it applied the *Rummel* test to circumstances not involving a recidivist statute.[125] The *Hutto* Court noted that the Court "has never found a sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual punishment."[126] It is important to note that *Solem* did not overrule *Rummel*, but distinguished it by limiting it to its own facts[127]- recidivist statutes imposing life imprisonment with the possibility of parole. This distinction was clearly

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[120] *Rummel*, 445 U.S. at 274.

[121] *See id.* at 282 n.27 (emphasis added).

> In short, the "seriousness" of an offense or a pattern of offenses in modern society is not a line, but a plane. Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence . . . violates the cruel-and-unusual punishment prohibition of the Eighth Amendment.

Id.

[122] *Id.* at 274 n.11. "[I]f the legislature made overtime parking a felony punishable by life imprisonment," it would be subject to the proportionality review. *Id.*

[123] Baker & Baldwin, *supra* note 31, at 38.

[124] 454 U.S. 370 (1982) (per curiam). In *Hutto*, the defendant was found guilty of possession of approximately nine ounces of marijuana with intent to distribute and distribution of marijuana. *Id.* at 370-71. The Court found the imposition of two twenty year sentences which were to run consecutively did not violate the eighth amendment. *Id.*

[125] *Id.*

[126] *Id.* at 371-72 (quoting Davis v. Davis, 585 F.2d 1226, 1229 (4th Cir. 1978)). *Cf.*, Rummel v. Estelle, 445 U.S. 263 (1980); United States v. O'Driscoll, 761 F.2d 589 (10th Cir. 1985), *cert denied*, 475 U.S. 1020 (1986) (Three Hundred year sentence without possibility of parole for ninety nine years was upheld.).

[127] Solem v. Helm, 463 U.S. 277, 303 n.32 (1983); *see also* Baker & Baldwin, *supra* note 31, at 45. This is also the position taken by the dissent today. *See* Dissent, *infra* p. 171-72.

erroneous in light of the *Hutto* decision.[128]

IV. APPLICATION OF THE EIGHTH AMENDMENT TO NON-CAPITAL CASES

It is indisputable that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[129] This standard of decency is not static, but evolves as society matures.[130] Three principles have evolved from this fundamental concept.[131] First, barbaric and torturous modes of punishment do not comport with the dignity of man and are therefore violative of the eighth amendment.[132] Second, the imposition of criminal punishment on the basis of status or condition is limited by the eighth amendment.[133] Third, the constitution prohibits grossly disproportionate punishments.[134] It is this third contention that is disputed in the case at bar.

Problems have arisen in the context of determining when a punishment is grossly disproportionate to the crime committed. Although we have been able to theoretically identify a grossly disproportionate penalty, this Court has struggled to implement a workable standard. The Court in *Gregg* simply stated that an extreme sanction is appropriate to the most severe of crimes, and therefore, capital punishment is not disproportionate to the crime of murder.[135] The Court, however, provided no standard for its determination. It can also be argued that a grossly disproportionate sentence will be one which is immediately apparent without sophisticated analysis - a "shock the conscience" test.[136] In addition, the *Solem* Court and today's dissent, support a three prong "objective test" to review length of sentence

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[128] *Solem*, 463 U.S. at 310-11 (Burger, C.J., dissenting).

[129] Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

[130] *Id.* at 101.

[131] Baker & Baldwin, *supra* note 31, at 49-50.

[132] *See id.* at 49 (citing In re Kemmler, 136 U.S. 436, 446 (1980); Granucci, *supra* note 36, at 847; Weems v. United States, 217 U.S. 349 (1910)); O'Neil v. Vermont, 144 U.S. 323, 339 (1892); Wilkerson v. Utah, 99 U.S. 130, 136 (1879).

[133] Baker & Baldwin, *supra* note 31, at 50 (citing Robinson v. California, 370 U.S. 660 (1962)).

[134] *Id. See* Weems v. United States, 217 U.S. 349, 366-67 (1910).

[135] Gregg v. Georgia, 428 U.S. 153, 187 (1976).

[136] Dressler, *supra* note 80, at 1110.

under the doctrine of proportionality.[137] However, any judicial determination of disproportionality in cases not involving the death penalty or bizarre modes of punishment risks becoming a subjective decision.[138]

Judicial review of a sentence on proportionality grounds should take place only in the rarest of instances.[139] This review should be undertaken only when "the penalty is rendered for a crime technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category."[140] In *Rummel*, the Court determined that for acts "classified and classifiable as felonies, . . . the length of sentence actually imposed is purely a matter of legislative prerogative."[141] To put it another way, an "overtime parking ticket is not properly classified as a felony[,] and that if it were[,] the Supreme Court would intervene on a proportionality ground."[142] In the case at bar, the Michigan statutory scheme correctly defines the conduct of the petitioner as constituting a felony. Harmelin and today's dissent contend that the statute in question was enacted in order to reach only drug "kingpins."[143] No authority is cited for this proposition. The dissent continues to categorize the petitioner as a mere "mule" in the drug transport industry and therefore not a proper target of the statute in question.[144] However, Harmelin was caught on the streets of Michigan with over 670 grams of cocaine, $2,700 in cash and a coded address book. The Michigan legislature made a decision based upon its police power[145] to impose a harsh sentence on those who are in possession of a very large quantity of drugs. Ronald Harmelin was the type of criminal from which the Michigan legislature sought to protect its citizens. Imprisoning him for life without the possibility of parole is

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[137] Solem v. Helm, 463 U.S. 277, 290-92 (1983); *see* Dissent *infra* p. 172.

[138] Rummel v. Estelle, 445 U.S. 263, 274-75 (1980). The "objective test" announced in *Solem* can only reflect the subjective views of the Justices on the bench. Solem v. Helm, 463 U.S. 277, 305 (1983) (Burger, CJ., dissenting).

[139] *Rummel*, 445 U.S. at 272-74.

[140] Furman v. Georgia, 408 U.S. 238, 460-61 (1972) (Powell, J., joined by Burger, CJ., Blackmun, and Rehnquist, JJ., dissenting).

[141] *Rummel*, 445 U.S. at 274.

[142] Dressler, *supra* note 80, at 1122.

[143] *See* Dissent, *infra* notes 138-39 and accompanying text.

[144] *Id.*

[145] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

rationally tailored to the legislators' goals.

Criminal sanctions have historically been within the province of the legislature.[146] Nowhere is this more important than in the war on drugs.[147] In many cases dealing with the eighth amendment, the scope of judicial intervention has been a subject of debate.[148] It is widely accepted, however, that "[t]he function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety."[149] This does not mean, however, that the courts play no role in the determination of the constitutionality of punishments under the eighth amendment.

> Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes *some* obligations on the judiciary to judge the constitutionality of punishment and that there are

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[146] *See* Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 480 (1866). In *Pervear*, the defendant challenged his sentence of three months of hard labor and a fifty dollar fine for illegal possession and sale of intoxicating liquor. *Id.* at 477. The Court dismissed the claim on the basis that the eighth amendment did not pertain to the states. *Id.* at 479-80. In dictum, the Court found "[t]he object of the law was to protect the community against the manifold evils of intemperance. The mode adopted . . . [to prohibit the illegal conduct] [i]s wholly within the discretion of State legislatures." *Id.* at 480. *See also* Mistretta v. United States, 488 U.S. 361 (1989). "Congress, of course, has the power to fix the sentence for federal crime." *Mistretta*, 448 U.S. at 364 (citing United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820)).

[147] Robinson v. California, 370 U.S. 660, 664 (1962).

> "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous habit-forming drugs. . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question."

Id. (quoting Whipple v. Martinson, 256 U.S. 41, 45 (1921)).

[148] Note, *supra* note 77, at 599. *See also* Furman v. Georgia, 408 U.S. 238, 313-14 (1972) (White, J., concurring).

[149] Weems v. United States, 217 U.S. 349, 379 (1910). "In assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity." Gregg v. Georgia, 428 U.S. 153, 175 (1976). *See also* Solem v. Helm, 463 U.S. 277, 308-10 (1983) (Burger, C.J., dissenting); Hutto v. Davis, 454 U.S. 374, 372-73 (1982); Rummel v. Estelle, 445 U.S. 263, 274 (1980).

> punishments that the Amendment would bar whether legislatively approved or not.[150]

It must be recognized that under the eighth amendment the role of the judiciary is limited to protect against constitutional overreaching.[151] We, as members of the Court, must not attempt to act as legislators[152] under the guise of proportionality review.

Line drawing is difficult when it comes to length of sentences. Even penologists have difficulty in agreeing on an "appropriate" sentence.[153] The legislature, as the elected body which represents the people of the state, is more sensitive to society's contemporary expression of decency than is this Court. Therefore, the legislature would reflect the eighth amendment standard more readily than the judiciary, whose members are appointed for life and removed from societal influence. It would be a serious error to allow the judiciary to use the eighth amendment to impose its views on policy and morality:

> [A]n error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.[154]

While it is true that our role, as life tenured members of the judicial branch, is to secure those rights that the Framers believed so dear that they placed them out of the easy reach of majority control, we are bound by the text of the Constitution. Our function in preserving the fundamental liberties of citizens of the United States is not a

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[150] Furman v. Georgia, 408 U.S. 238, 313-14 (1972) (White, J., concurring) (emphasis added).

[151] Gregg v. Georgia, 428 U.S. 153, 174 (1975) (opinion of Stewart, Powell, and Stevens, JJ.).

[152] *Id.*

[153] Rummel v. Estelle, 445 U.S. 263, 283-84 (1980).

[154] Furman v. Georgia, 408 U.S. 238, 468 (1972) (Rehnquist, J., dissenting).

limitless power. So, while we at times feel compelled to right wrongs we perceive in our society, we as members of the judiciary must right those wrongs through the principled interpretation of the law - and not through the creation of them.[155] It is the basic structure of our Constitution as expressed in the tenth amendment that there are certain powers left specifically to the states.[156] The concept of federalism does not weigh against the preservation of fundamental liberties, as the dissent suggests. On the contrary, federalism works to protect our constitutional guarantees.

V. THE *SOLEM* ANALYSIS

The defendant asserts that based upon the criteria enumerated in *Solem*, the punishment imposed upon him is disproportionate to the crime he committed. We reject these criteria because human dignity is not measured by a statistical study based upon value-laden criteria.[157] Even if we were to apply the "objective criteria" as the dissent suggests, petitioner's sentence would not be violative of the eighth amendment.

A. COMPARISON OF THE GRAVITY OF THE OFFENSE WITH THE HARSHNESS OF THE PENALTY

The punishment imposed upon Ronald Harmelin is admittedly harsh. But a harsh sentence is not in and of itself cruel and unusual.[158] Imprisonment for a term of years/life is a traditional Anglo-American punishment,[159] and does not violate the concept of human dignity protected by the eighth amendment.

The dissent has emphasized that the petitioner will not be eligible for parole. The constitutionality of a sentence cannot be based upon

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[155] "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." THE FEDERALIST No. 78, at 396 (A. Hamilton) (G. Wills ed. 1982) (emphasis original).

[156] U.S. CONST. amend. X.

[157] Baker & Baldwin, *supra* note 31, at 59-61.

[158] Note, supra note 77, at 595. *See also* Dressler, *supra* note 80, at 1120.

[159] *See generally* R. CARTER, R. MCGEE, & E. NELSON, CORRECTIONS IN AMERICA (1975); T. DUMM, DEMOCRACY AND PUNISHMENT (1987); HALL, POLICE, PRISON, AND PUNISHMENT (1987); W. KUNTZ, CRIMINAL SENTENCING IN THREE NINETEENTH-CENTURY CITIES (1988); M SHERMAN & G. HAWKINS, IMPRISONMENT IN AMERICA (1981).

the possibility of parole. Parole is a privilege and not a right[160] and therefore has a limited role in the evaluation of a sentence under the eighth amendment. In fact, the Federal Sentencing Reform Act, recently upheld by this Court, abolished parole.[161]

Although the Court in *Rummel* did consider the likeliness of parole in its decision, today's dissent wrongly limits *Rummel* to situations in which there is a possibility of parole.

Petitioner asserts that the chance of rehabilitation is to be considered under the eighth amendment.[162] Criminal sentencing is generally imposed to accomplish one or more of five basic goals: retribution, deterrence, denunciation, incapacitation and rehabilitation.[163] Because the sentence imposed in this case does not provide for any

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[160] Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 175, 193 (1964).

[161] The Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551-3624 (1982 Supp. IV) and 28 U.S.C. § 991-98 (1982 Supp. IV), was upheld in Mistretta v. United States, 488 U.S. 361 (1989). The Act:

> 1. [R]ejects imprisonment as a means of promoting rehabilitation, 28 U.S.C. § 994(k), and it states that punishment should serve retributive, educational, deterrent, and incapacitative goals. 18 U.S.C. § 3553(a)(2).
> 2. [C]onsolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer. This is done by creating the United States Sentencing Commission, directing that commission to devise guidelines to be used for sentencing, and prospectively abolishing the Parole Commission. 28 U.S.C. §§ 991, 994, and 995(a)(1).
> 3. [I]t makes all sentences basically determinate. A prisoner is to be released at the completion of his sentence reduced only by any credit earned by good behavior while in custody. 18 U.S.C. §§ 3624(a) and (b).

Mistretta v. United States, 488 U.S. 361, 367 (1989).

[162] Brief for Appellant, *supra* note 6, at 32.

[163] Comment, *The Constitutionality of the Federal Sentencing Reform Act After* Mistretta v. United States, 17 PEPPERDINE L. REV. 683, 687 (1990).

> *Retribution*, the exaction of payment - "an eye for an eye."
> *Deterrence*, which may be "general" (i.e., discourage others than the defendant from committing the wrong), "special" (discouraging the specific defendant from doing it again), or both.
> *Denunciation*, or condemnation-as a symbol of distinctively criminal "guilt," as an affirmation and re-enforcement of moral standards, and as reassurance to the law-abiding.
> *Incapacitation*, during the time of confinement.
> *Rehabilitation*, or reformation of the offender.

Id. (citing M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER, 106 (1973)).

chance of parole, the rehabilitation purpose is limited. Although rehabilitation is a noteworthy goal, it is not constitutionally required. The Sentencing Reform Act of 1984 "rejects imprisonment as a means of promoting rehabilitation," leaving retribution, education, deterrence and incapacitation as the primary goals.[164] The punishment in question serves three of the penological purposes: retribution, deterrence and incapacitation. Petitioner asserts that incarcerating him, and others like him, for life, without the possibility of parole, will decrease his incentive to turn away from drugs and therefore, he claims, it is a really "horrible thing to happen to a person."[165] Petitioner misses the point. When one is found with over 650 grams of cocaine in his possession, the concern is not only the harm he will cause himself but also with the injury to others who come into contact with the cocaine. Michigan has made a decision to impose a harsh sentence in order to deter others from entering the profession of Ronald Harmelin and to punish those convicted of this particular crime. A harsh sentence is not necessarily prohibited by the eighth amendment.

As to the gravity of the offense, the drug problem in this country has reached an epidemic level.[166] The number of persons arrested for possession of narcotics and dangerous non-narcotic drugs has been steadily increasing.[167] The drug problem has caused an increase in crime, senseless loss of life and severe economic problems.[168] JUSTICE CALELLO concludes that because Harmelin was not charged the with actual manufacturing, distribution or selling of the drugs, his crime is somehow innocuous.[169] How can this be supported? Even Justice Powell, the author of the majority in *Solem* and the dissent in *Rummel* conceded: "I do not suggest that all criminal acts may be separated into precisely identifiable compartments. A professional seller of addictive

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[164] Mistretta v. United States, 448 U.S. 361, 367 (1989).

[165] Brief for Appellant, *supra* note 6, at 32.

[166] *See generally* J. WEISMAN, DRUG ABUSE: THE LAW AND TREATMENT ALTERNATIVES (1978).

[167] According to the U.S. Department of Justice Federal Bureau of Investigation the total arrests for possession of opium, cocaine and derivatives, marijuana, synthetic narcotics and other dangerous non-narcotics in the United States for the years 1979-1988 are: 1979 - 396,171; 1980 - 356,153; 1981 - 409,287; 1982 - 426,901; 1983 - 455,345; 1984 - 461,619; 1985 - 52,774; 1986 - 520,337; 1987 - 573,170; 1988 - 585,606. Federal Bureau of Investigation, Drug Abuse Violations 1978-1986 (data available at the *Seton Hall Constitutional Law Journal*).

[168] TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE, at 1-2 (1967) [hereinafter TASK FORCE REPORT].

[169] *See* Dissent *infra* pp. 173-75.

drugs may inflict *greater* bodily harm upon members of society than the person who commits a single assault."[170]

One of the more effective ways to attack the drug problem is to punish the drug traffickers.[171] The petitioner had over 650 grams of cocaine. It cannot be argued that the possession/trafficking of that amount of cocaine is not a threat to society. How many people would be affected and to what harm would they be exposed? The degree of blameworthiness of the petitioner can be measured in part by the character of the victims and the degree of harm caused to those victims.[172] Although drug trafficking may be limited to the exchange of money for the goods, it surely cannot be categorized as a victimless crime. The dissent finds this drug offense to be less serious than other crimes in that the drug user has a choice whether or not to participate, unlike the victim of a murder.[173] However, we are all affected by this drug menace. High crime rates, senseless loss of life, and children born drug dependent, are just a few of the problems which face our society.[174] These are problems which are caused not solely by the drug user or the drug seller, but the illegal drug "industry" as a whole.[175]

In addition, the petitioner was knowingly in possession of the drugs in question. There is no evidence to support an assertion to the contrary. When questioned by the police, petitioner voluntarily admitted he was in possession of marijuana.[176] Harmelin's culpability is not in question.

The dissent is disquieted because the Michigan statute mandated life imprisonment upon the petitioner's first drug conviction. Mandatory life sentences, however, are imposed in Michigan for other first time offenses and have been upheld in the past.[177]

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[170] Rummel v. Estelle, 445 U.S. 263, 295 n.12 (1980) (Powell, J., dissenting) (emphasis added).

[171] Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 890-91 (1987).

[172] Baker & Baldwin, *supra* note 31, at 70 (citing United States v. Greer, 739 F.2d 262 (7th Cir. 1984) and Thompson v. State, 280 Ark. 265, 658 S.W.2d 350 (1983)).

[173] *See* Dissent *infra* note 122 and accompanying text.

[174] *See* TASK FORCE REPORT, *supra* note 168, at 1-2.

[175] Weisman, *supra* note 166, at 25, 32.

[176] *Brief in opposition to cert.*, *supra* note 14, at vii.

[177] Under Michigan laws first degree murder carries a mandatory life imprisonment without parole. MICH COMP. LAWS ANN. § 750.316 (West 1968 & West Supp. 1990). Mandatory nonparolable life imprisonment for first degree murder was held not to violate the eighth amendment in People v. Smith, 108 Mich. App. 338, 310 N.W.2d 235 (1981).

B. Comparison of Sentences for Other Similar Crimes in the Same Jurisdiction

Looking to other crimes in order to set up an objective standard by which to judge the constitutionality of a particular penalty is inherently flawed, because other crimes implicate different societal interests and concerns.[178] There is no question that the petitioner is guilty of a serious offense. The statute in question provides for a five tier punishment scheme under which length of sentence is determined by the quantity of drugs in the defendant's possession.[179] Michigan has carefully discriminated among categories of drug offenders. Petitioner asserts that the only crime that justifies a mandatory life sentence without the possibility of parole is first degree murder.[180] Whether the drug problem in Michigan is more, less or equal to that of murder is a decision we will leave to the state legislature.

The dissent looks to other crimes in Michigan and develops a moral culpability ranking for these offenses.[181] But "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."[182] Furthermore, while following the dissent's own test, Harmelin's sentence must diverge *so substantially* from other crimes as to violate the eighth amendment.[183] It is the opinion of this Court that while a discretionary life term may be less severe than a mandatory life term, the dissimilarity is not substantial.

C. Comparison of the Sentence with Those Imposed for the Same or Similar Offenses in Other Jurisdictions

As noted above, "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any

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[178] Rummel v. Estelle, 445 U.S. 263, 282 n.27 (1980).

[179] *See supra* note 1.

[180] Brief for Petitioner, *supra* note 25, at 35.

[181] *See* Dissent *infra* pp. 180-81.

[182] Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting).

[183] United States v. Lewis, 759 F.2d. 1316, 1334 (8th Cir. 1985), *cert denied*, 474 U.S. 994 (1985) (emphasis added) (Under continuing criminal enterprise statute, life imprisonment without the possibility of parole was upheld because of the severity of the drug offense, and the broad sentencing discretion given to the legislature and courts.)

other State."[184] The problems in Michigan and its response to those problems cannot and should not be compared with those of other states. Michigan's drug problem, and in particular the crime of drug possession, is different than many other states.[185] Thus, state narcotic regulations may take a variety of legal forms.[186]

> A state might impose criminal sanctions for . . . possession of narcotics within its borders . . . . Or a state might choose to attack the evils of narcotics traffic on broader fronts also - through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish.[187]

Even the federal government is prepared to take actions necessary to end the drug problem in America.[188] In short, the range of legitimate state action in the war on drugs is broad, and the wisdom of any particular state remedy within the allowable range is not for the Court to question.[189] A state has limited resources to deal with the problems of crime. While one state may implement extra police in the hope of deterring the drug offender, another state may impose sanctions similar to the ones imposed by Michigan. According to the police power, states have the authority to protect the safety and welfare of their citizens.[190] We, as part of the federal judiciary, should not compare and contrast legitimate strategies.

VI. CONCLUSION

We hold that the mandatory life sentence imposed upon this petitioner is not a cruel and unusual punishment under the eighth amendment as applied to the states through the fourteenth amendment. Therefore, the judgment of the court of appeals is

Affirmed.

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[184] Rummel v. Estelle, 445 U.S. 263, 282 (1980).

[185] *See* Federal Bureau of Investigation, Drug Abuse Violations - Arrests By State 1978 & 1986 (compiled for and available at the *Seton Hall Constitutional Law Journal*).

[186] Robinson v. California, 370 U.S. 660, 664 (1962).

[187] *Id.* at 664-65.

[188] Wisotsky, *supra* note 171, at 890 n.10.

[189] *Robinson*, 370 U.S. at 665.

[190] *Id.* at 664 (citations omitted).

JUSTICE CALELLO, with whom JUSTICE PORTER, JUSTICE JIMENEZ and JUSTICE HIGGINS join, dissenting.

No sentence is *per se* constitutional.[1] Thus, reviewing courts must accept the task of determining whether a challenged sentence violates the eighth amendment's prohibition against cruel and unusual punishment.[2] Traditionally, courts entertaining eighth amendment claims have employed a proportionality analysis which utilizes the objective factors most recently articulated by this Court in *Solem v. Helm*.[3] Today, the majority flatly overrules *Solem* and its progeny and effectively holds that the eighth amendment does not apply to non-capital sentences.[4] Because I am convinced that the Framers of our Constitution intended that the eighth amendment prohibit the imposition of any punishment which is disproportionate to the crime committed,[5] I cannot subscribe to

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[1] Solem v. Helm, 463 U.S. 277, 290 (1983). "[A] single day in prison may be unconstitutional in some circumstances." *Id.* (quoting Robinson v. California, 370 U.S. 660, 667 (1962)).

[2] U.S. CONST. amend. VIII. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. After *Robinson*, the eighth amendment was made applicable to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660, 666-67 (1962).

[3] 463 U.S. at 292. Although courts have long recognized the requirement that a punishment be proportionate to a crime, the Supreme Court first formalized an objective test to determine proportionality in *Solem*. *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982); Weems v. United States, 217 U.S. 349 (1910). *See also* Baker & Baldwin, *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 53 (1987) ("The inexorable logic of case-by-case adjudication obliges proportionality review of all sentences. . . .").

[4] *See* Majority *supra* at p. 135. The Court today relies on Rummel v. Estelle, 445 U.S. 263 (1980). Because of the similar facts in *Rummel* and *Solem*, and because this Court did not overrule *Rummel* in deciding *Solem*, there has been some confusion in the lower courts as to the appropriate eighth amendment review. *See, e.g.*, United States v. Rhodes, 779 F.2d 1019 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986) (The court refrained from applying a proportionality examination to sentences under 21 U.S.C. § 848 (1982).); Whitmore v. Maggio, 742 F.2d 230 (5th Cir. 1984) (Case remanded for application of *Solem*.); Minor v. State, 313 Md. 573, 546 A.2d 1028 (1988) (*Solem* was interpreted differently by the majority, concurrence and dissent). *See also* Note, State v. Davis: *A Proportionality Challenge to Maryland's Recidivist Statute*, 48 MD. L. REV. 520, 530 (1989) (comprehensive analysis of the confusion caused by the *Rummel* and *Solem* decisions).

[5] *Solem*, 463 U.S. at 284. *See also* Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195 (1986-87) ("The concept of proportionality . . . lies at the core of the cruel and unusual punishment clause[,] . . . [a] long recognized substantive component of the eighth amendment. . . .").

the majority's abdication of our constitutional duty to implement this original intent and must respectfully, but vehemently, dissent.

The sentence imposed upon Mr. Harmelin violates the eighth amendment under the objective considerations implicated by traditional proportionality analysis.[6] The principle of proportionality is embedded in history, the common law and a litany of specific cases.[7] Thus, the majority's decision to summarily reject the clear holding of *Solem*, which most recently articulated the proportionality analysis, not only contravenes the doctrine of *stare decisis*, but disregards nearly two hundred years of American jurisprudence. Moreover, the majority's justification for this drastic digression is fundamentally flawed for two critical reasons. First, the majority fails to recognize the responsibilities of this Court as the guardian of the fundamental liberties secured by the Bill of Rights.[8] And second, the majority fails to perceive that the very reason for insulating courts from political influences is to allow judges to ensure the constitutionality of legislative enactments without fear of repercussions at the polls.[9] Finally, although today's holding recognizes that, in "rare cases," lengths of sentences are subject to a proportionality analysis under eighth amendment review,[10] the majority fails to provide courts with an adequate test to guide them in addressing these "rare cases."

I. HISTORY OF THE EIGHTH AMENDMENT

A. PRE-CONSTITUTION ORIGINS

The prohibition of excessive punishments and the concomitant requirement of proportionality were embedded in the English common law and inherent in the Magna Carta.[11] The Magna Carta, which was

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[6] *See infra* note 89 and accompanying text.

[7] *See infra* notes 11-61 and accompanying text.

[8] *See* Spaziano v. Florida, 468 U.S. 447, 471 (1984) (White, J., concurring).

[9] Brennan, *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 328-329 (1986).

[10] *See* Majority *supra* at p. 148.

[11] Note, *Recidivist Statutes - Application of Proportionality and Overbreadth Doctrines to Repeat Offenders* - Wainstreet v. Bordenkircher, 276 S.E.2d 205 (W. Va. 1981), 57 WASH. L. REV. 573, 574 (1982). The Magna Carta in part stated that "[a] free man shall not be [fined] for trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity." *Id.* Thus, as early as the eleventh century, courts were mandated to consider the degree and gravity of the

promulgated in 1215, required that fines and punishments be meted out in accordance with the degree and gravity of the offense.[12] Later, beginning around 1400, the English common law incorporated the proportionality principle of punishment, at least in theory.[13]

The drafters of the English Bill of Rights eventually adopted the proportionality concept during the revolution of 1688.[14] This milestone in the common law forbade the government from conducting the types of inhuman proceedings that took place during the reign of the Stuarts.[15] Upon examination of these proceedings, at least one historian has concluded that the clause against cruel and unusual punishment in the English Bill of Rights had a two-fold purpose.[16] First, the clause was to operate to prohibit sentences that were "unauthorized by statute and outside the jurisdiction of the sentencing court. . . ."[17] Second, the clause was incorporated to reiterate the policy against disproportionate sentences.[18] Thus, from at least the time of the Magna Carta, the

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offense when imposing punishments. *See also* Rummel v. Estelle, 445 U.S. 263, 288-89 (1980) (Powell, J., dissenting).

[12] Note, *supra* note 11, at 574.

[13] *Rummel*, 445 U.S. at 289. Although some commentators believe that the English Common Law, in practice, disregarded proportionality in sentencing, Justice Powell cited authorities supporting the proposition that the guaranties of the clause "were not hollow . . . for the royal courts relied on them to invalidate disproportionate punishments." Solem v. Helm, 463 U.S. 277, 285 (1983). Furthermore, the common law recognized the need for proportionality in prison sentencing once it became an accepted mode of punishment. *Id.* (citing as an example, Hodges v. Humkin, 80 Eng. Rep. 1015, 1016 (K.B. 1615)).

[14] *Solem*, 463 U.S. at 285 n.10.

[15] 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 750 (1833). One such proceeding was known as the "Bloody Assize" which took place during the treason trials in the 17th century. "The punishment for treason at that time consisted of 'drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disembowelled and his bowels burnt before him, and then beheaded and quartered.'" Note, Solem v. Helm: *The Courts' Continued Struggle to Define Cruel and Unusual Punishment*, 21 CAL. W.L. REV. 590, 592 n.15 (1985); *see also* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 854 (1969).

[16] *Rummel*, 445 U.S. at 289 (Powell, J., dissenting) (quoting Granucci, *supra* note 15, at 860).

[17] *Id.*

[18] *Id.* The English courts employed the concept of proportional sentencing soon after its adoption into the English Bill of Rights. For example, in one early case, "the House of Lords declared that a 'fine of thirty thousand pounds, . . . was excessive and exorbitant, against magna charta, the common right of the subject, and the law of the land.'" *Solem*, 463 U.S. at 285 (quoting Earl of Devon's Case, 11 State Tr. 133, 136 (1689)).

English Common Law required that a punishment be proportionate to the degree and gravity of the offense.

B. EARLY AMERICAN INCORPORATION

The drafters of the Virginia Declaration of Rights incorporated the language of the English Bill of Rights *verbatim*.[19] During the Federal Constitutional Convention, the Virginia delegates voiced their concern that the proposed Constitution failed to contain a prohibition against excessive fines or cruel and unusual punishments.[20] Despite some objection, the drafters incorporated the exact language of the English Bill of Rights[21] and the Virginia Declaration of Rights into our Bill of Rights in 1791.[22] Inherent in the incorporated language was the English proportionality principle for sentencing since "one of the consistent themes of the era was that Americans had all the rights of English subjects."[23]

Very little debate took place over whether a clause prohibiting certain excessive punishments and fines should be included in the Bill of Rights.[24] In general, the debates were limited to whether the "import

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[19] *Rummel*, 445 U.S. at 287 (Powell, J., dissenting) (quoting Granucci, *supra* note 15, at 840). See also *Solem*, 463 U.S. at 285 n.10 in which Justice Powell wrote that "[t]here can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of Englishmen."

[20] *Rummel*, 445 U.S. at 287 (Powell, J., dissenting). Patrick Henry, one of the Virginia delegates, expressed his fear that, without such a clause, Congress "may introduce the practice . . . of torturing, to extort a confession of the crime." *Id.* (quoting 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 447-48 (1876)).

[21] STORY, *supra* note 15. *See also* Spaziano v. Florida, 468 U.S. 447, 473 n.9 (1984) (Stevens, J., concurring in part and dissenting in part).

[22] *Solem*, 463 U.S. at 285 n.10. One delegate opposed the adoption of a cruel and unusual punishment clause because "villains often deserve whipping, and perhaps having their ears cut off." *Rummel*, 445 U.S. at 287 (Powell, J., dissenting) (quoting 1 ANNALS OF CONG. 754 (1789) (Rep. Livermore)).

[23] *Solem*, 463 U.S. at 285-86 & n.10. Justice Powell noted that, in part, the Bill of Rights was contrived to extend to the American people *at least* those rights possessed by English subjects. *Id.* at 285 n.10. Thus, the adoption of the English phraseology into our eighth amendment "is convincing proof that [the Framers] intended to provide at least the same protection - including the right to be free from excessive punishments." *Id.* at 286. The majority misconstrues the Framers' intent. At a minimum, the eighth amendment was adopted to protect against the imposition of barbaric and inhuman modes of punishments, but the Framers also intended to incorporate the implied protections against disproportionate sentences.

[24] Brennan, *supra* note 9, at 323.

of [the words cruel and unusual was] too indefinite."[25] The archaic interpretation of this clause had been that merely torturous and inhuman punishments were prohibited.[26] The widespread view today, however, is that the "framers intended to create a constitutional 'right to be free from excessive punishments,'"[27] not just barbaric sentences, and that the language chosen was intentionally vague and indefinite in order to extend freedom of contemporary interpretation based on evolving standards of decency.[28]

C. PROPORTIONALITY APPLICATION IN JUDICIAL DECISIONS

A survey of decisions involving the eighth amendment demonstrates the apparent confusion as to how reviewing courts should construe the clause. JUSTICE DANIEL delineates an adequate examination of the case law in this area and I will not restate her recitation. I must, however, point out some flaws in the majority's interpretation of these cases.

In *In re Kemmler*,[29] the Supreme Court addressed a *habeas corpus* application which challenged that death by electrocution was unconstitutional.[30] The Court defined a cruel punishment to be one that involves lingering death or torturous, inhuman and barbaric conduct, and held that the challenged sentence was not unconstitutional.[31] Contrary to the majority's interpretation of the case, the *Kemmler* Court was not attempting to articulate the broad scope of the clause but rather to explain, in the limited scenario of capital punishment, how the eighth

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[25] *Id.* *See also supra* note 22 and accompanying text. Although Justice Brennan stated that "we do not know why the Framers were particularly attracted to [the English Bill of Rights] language or, for that matter, exactly what the language signified to the English," other historians and scholars have theorized about the meaning of the clause based on its application throughout English history. Brennan, *supra* note 9, at 323. *See, e.g.*, Granucci, *supra* note 15.

[26] Baker & Baldwin, *supra* note 3, at 27. *See also* Granucci, *supra* note 15, at 842; Note, *What is Cruel and Unusual Punishment?*, 24 HARV. L. REV. 54, 55 (1910-11).

[27] Baker & Baldwin, *supra* note 3, at 27-28. *See also Solem*, 463 U.S. at 285-86.

[28] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[29] 136 U.S. 436 (1890).

[30] *Id.* at 441. The state court had already decided that since the mode of infliction of death should be humane, death by electrocution was more securely within the confines of the eighth amendment prescription than was the practice of death by hanging because electrocution would result in instantaneous and painless death. *Id.* at 443-44.

[31] *Id.* at 447.

amendment should be applied.[32] The *Kemmler* opinion cannot be construed otherwise since the Court explicitly withheld a comprehensive definition and stated that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted. . . ."[33]

In *O'Neil v. Vermont*,[34] a case not addressed by the majority, the petitioner was fined and sentenced to 19,914 days of hard labor in a house of correction for illegally selling intoxicating liquor.[35] The Court refused to address the eighth amendment challenge because the petitioner failed to allege a federal question.[36] The dissent, however, maintained that the petitioner had presented a proper question for Supreme Court review and proceeded to set forth notable dicta regarding the proportionality requirement of the eighth amendment.[37] Justice Field stated that the eighth amendment not only prohibits "punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like," but also, "all punishments which by their *excessive length* or severity are greatly disproportioned to the offenses charged."[38]

A Supreme Court majority first adopted the concept of proportionality as a requirement of the eighth amendment in *Weems v. United States*.[39] In that case, the trial court found the petitioner guilty of falsifying Philippine government documents and sentenced him to fifteen years of chained hard labor along with various fines and punishments, some of which operated as life-long limits on the

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[32] Weems v. United States, 217 U.S. 349, 370-71 (1910). The *Weems* court explained the *Kemmler* construction of the eighth amendment as a description of "what *might* make the punishment of death, cruel and unusual, though of itself it is not so." *Id.* at 371 (emphasis added).

[33] *Kemmler*, 136 U.S. at 447 (quoting Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878)). *See also Weems*, 217 U.S. at 370 (citation omitted).

[34] 144 U.S. 323 (1892).

[35] *Id.* at 325-27, 330.

[36] *Id.* at 331. At the time of *O'Neil*, the eighth amendment had not yet been made applicable to the states through the fourteenth amendment. *See supra* note 2.

[37] *Id.* at 339-40 (Field, J., dissenting). Justices Harlan and Brewer joined Justice Field in his dissent.

[38] *Id.* (emphasis added). Justice Field continued, stating that the prohibition extends to all "that which is excessive either in the bail required, or fine imposed, or punishment inflicted." *Id.* at 340 (Field, J., dissenting).

[39] 217 U.S. 349 (1910).

petitioner's liberties.[40] The Supreme Court compared the petitioner's punishment with punishments for other crimes in the same jurisdiction and with other jurisdictions' punishments for the same crime and held that the sentence was unconstitutional due to its excessiveness.[41]

Today's majority, as well as some commentators, cling to the delusive notion that because *Weems* involved not only a challenge to the length of sentence but also to the mode of punishment, the holding in that case should be limited to its facts.[42] The majority, however, ignores the language of the *Weems* Court which described the statute as "cruel in excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in character.[43] Its punishments come under the condemnation of the bill of rights, *both on account of their degree and kind.*"[44] The imprisonment itself was excessive as was the deprivation of liberties following imprisonment, and thus, both were cruel and prohibited by the eighth amendment. In any event, federal and state courts have, at a minimum, accepted *Weems* as "establishing the rule that excessiveness as well as mode of punishment may be unconstitutionally cruel."[45]

During the almost fifty years following *Weems*, the Court heard very few eighth amendment cases.[46] Finally, in 1958, the Court discussed the

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[40] *Id.* at 358.

[41] *Id.* at 382.

[42] Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075-76 (1964). In essence, the majority would limit the implications of *Weems* to cases where both the mode and length of sentence were excessive. *See* Majority *supra* p. 141.

[43] The term "unusual" refers to the character of the punishment, its prohibition depending on whether such a punishment is commonly used, how frequently it is prescribed, and the scope of its acceptance. *See* Trop v. Dulles, 356 U.S. 86, 100-01 n.32 (1958); Thompson v. Oklahoma, 487 U.S. 815, 822 n.7 (1988); Wilkerson v. Utah, 99 U.S. 130 (1878). The term "cruel," on the other hand, refers to the excessiveness of a punishment. Although some courts have attempted to distinguish the two terms, most address the phrase as a whole and do not attempt to give different meanings to the words. Note, *supra* note 15, at 590 n.3.

[44] *Weems*, 217 U.S. at 377 (emphasis added).

[45] Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 640 (1966). The *Weems* decision shocked many scholars with its declaration that the judicial branch has an ongoing, dynamic duty to review sentences under the eighth amendment, its requirement of humane justice, and its application of proportionality analysis to challenged sentence. Baker & Baldwin, *supra* note 3, at 30 n.32.

[46] *See* Baker & Baldwin, *supra* note 3, at 30. Two cases did arise soon after *Weems* namely, Graham v. West Virginia, 224 U.S. 616 (1912) and Badders v. United States, 240 U.S. 391 (1916). In both cases, however, the Court rejected the eighth amendment claim

implications of *Weems* in *Trop v. Dulles*.[47] In *Trop*, the Court established the "evolving standards of human decency" test.[48] The trial court found the petitioner guilty of desertion during war time and imposed the sentence of denationalization.[49] The Court found this punishment to be cruel and unusual in violation of the eighth amendment.[50] *Trop* followed *Weems* by approving judicial review of a sentencing statute and by utilizing a comparative analysis to determine a punishment's eighth amendment validity through a flexible standard.[51] The *Trop* court emphasized the indispensable element of humanity in sentencing and stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[52] Furthermore, the Court stated that the validity of a particular punishment depends "upon the enormity of the crime."[53] Thus, the *Trop* Court required that the punishment be proportionate to the magnitude of the crime.[54]

After *Trop*, the Court entertained a number of eighth amendment capital punishment cases,[55] some of which merely acknowledged the

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in a one sentence holding. Thus, very little, if any, insight regarding the proportionality concept of the eighth amendment can be gleaned from these decisions. *See* Baker & Baldwin, *supra* note 3, at 31 n.38 (propounding a possible explanation of the dormancy of the eighth amendment during this period).

[47] 356 U.S. 86 (1958).

[48] *Trop*, 356 U.S. at 101 ("The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[49] *Id.* at 87-88.

[50] *Id.* at 104.

[51] *See* Note, *supra* note 15, at 596.

[52] *Trop*, 356 U.S. at 100. The Court further declared that "the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id. See also* James, *Eighth Amendment Proportionality Analysis: The Limits of Moral Inquiry*, 26 ARIZ. L. REV. 871, 876-77 (1984) (comprehensively discussing the dignity principle of the eighth amendment).

[53] *Trop*, 356 U.S. at 100.

[54] JUSTICE DANIEL argues that the punishment in *Trop* violated the eighth amendment because it was excessive in kind and therefore differs from the case at hand in which the sentence is challenged as being excessive in length. *See* Majority *supra* pp. 142-43. The eighth amendment, however, does not distinguish between kind and length. *See infra* note 93 and accompanying text. Thus, *Trop* merely establishes the principle that, if a punishment is cruel or unusual as interpreted through an evolving standard of decency, it violates the eighth amendment.

[55] Courts have traditionally recognized death penalty cases as being unique and separate from all other types of punishments due to the finality of the punishment. For example, in Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part), Justice Stevens stated that the death penalty, as an expression of

proportionality principle,[56] and others which not only acknowledged the principle but applied it and developed tests to effectuate its purpose.[57] Then, in 1980, the Court decided the problematic case of *Rummel v. Estelle*.[58] Although this case will be discussed in more detail, it bears noting that even the *Rummel* Court recognized the application of proportionality analysis under certain circumstances.[59]

Thus, from our pre-Constitution heritage throughout American jurisprudential history, the proportionality principle as it relates to the eighth amendment prohibition against cruel and unusual punishments has been a vital protection of our liberties. Whether the cases which addressed the eighth amendment expressed the concept as "excessiveness"[60] of punishment or have implicitly implemented a comparative analysis,[61] courts, in general, have been compelled to apply

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the community's outrage, "is qualitatively different from any other punishment . . ." and is totally irrevocable. *Id.* Mr. Harmelin's sentence of life imprisonment with no opportunity for parole is a "complete and permanent deprival of fundamental existence" and thus, similar in magnitude to a sentence of death. Baker & Baldwin, *supra* note 3, at 40.

[56] *See* Solem v. Helm, 463 U.S. 277, 288 (1983) (citing as examples, Hutto v. Finney, 437 U.S. 678, 685 (1978) and Ingraham v. Wright, 430 U.S. 651, 667 (1977), both recognizing "that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription"). In addition, the Court in Pulley v. Harris, 465 U.S. 37 (1984) recognized the validity of proportionality analysis but held that the eighth amendment does not require proportionality review in every death penalty case. *Id.* at 50. The proportionality challenge in *Pulley*, however, was that the sentence imposed on the defendant was disproportionate to sentences imposed in similar cases within the jurisdiction but the true essence of eighth amendment proportionality is that the sentence be proportionate to the offense.

[57] Baker & Baldwin, *supra* note 3, at 32. For example, Gregg v. Georgia, 428 U.S. 153 (1976) established the test which is now used to determine whether capital punishment constitutes cruel and unusual punishment in a given case.

[58] 445 U.S. 263 (1980).

[59] In the words of Chief Justice Rehnquist, "[t]his is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent . . . [such as where] . . . a legislature made overtime parking a felony punishable by life imprisonment." *Rummel*, 445 U.S. at 274 n.11 (1980).

[60] *See* James, *supra* note 52, at 877-78 (Proportionality is one facet of excessiveness.).

[61] Even Chief Justice Rehnquist in *Rummel* took part in a comparative analysis where the Chief Justice discussed Mr. Rummel's third felony, stating that the defendant "committed a crime punishable as a felony in at least 35 States and the District of Columbia. Similarly, a large number of States authorized significant terms of imprisonment for each of Rummel's other offenses at the time he committed them." *Rummel*, 445 U.S. at 269-70. The Chief Justice then proceeded to list, in a lengthy footnote, all of the states having comparable statutes. *Id.* at 270-71 n.10.

some form of the proportionality principle. Although the proportionality concept has perpetual validity in our justice system, the eighth amendment and the standard by which to measure proportionality must be forever evolving based on contemporary mores and our maturing level of humanity and decency. Hence, when the majority argues that the Framers of our Constitution intended to limit the clause to merely types of punishments rather than length, they ignore the ideal of the eighth amendment, which is to apply our changing, and hopefully our improving sense of dignity and humanity to effectuate a penal system that will better society as a whole.

D. THE *RUMMEL* AND *SOLEM* CONFLICT

Rummel v. Estelle[62] was one of the first Supreme Court cases in this century to address the proportionality theory in a non-capital case.[63] In *Rummel*, a Texas court sentenced the petitioner to life imprisonment under Texas' recidivist statute[64] which was triggered after Mr. Rummel was convicted of his third felony.[65]

The United States District Court for the Western District of Texas upheld the sentence.[66] The United States Court of Appeals for the Fifth Circuit held that the life sentence was unconstitutional under the eighth amendment because the punishment was grossly disproportionate to the crime.[67] On rehearing, the Fifth Circuit Court of Appeals, sitting *en banc*, reversed and held that the eighth amendment had not been violated.[68] Subsequently, the United States Supreme Court, in a five to four decision, affirmed in an opinion written by the now Chief Justice

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[62] 445 U.S. 263 (1980).

[63] *See* Note, *supra* note 4, at 526 & n.50.

[64] Recidivist statutes are designed to punish those repeat offenders who have, in essence, flaunted the justice system and have proven to be incapable of rehabilitation. *See Rummel*, 445 U.S. at 278.

[65] TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974). The statute mandated that a person convicted of three felonies other than a capital offense "shall on such third conviction be imprisoned for life in the penitentiary." *See Rummel*, 445 U.S. at 264. Mr. Rummel committed his first felony of fraudulent use of a credit card in 1964. *Id.* at 265. In 1969, he was convicted again for passing a forged check. *Id.* at 265-66. Finally, in 1973, the recidivist statute was triggered when Mr. Rummel was convicted of his third crime of obtaining money under false pretenses. *Id.* at 266. These three crimes totalled a mere $229.11. *Id.*

[66] *Rummel*, 445 U.S. at 264-65.

[67] *Id.* at 267.

[68] *Id.* at 268.

Rehnquist.[69]

The majority in *Rummel* proceeded, as JUSTICE DANIEL has done today, to attempt to distinguish the validity of explicit and binding precedent such as *Weems*, and various death penalty cases.[70] The Court held, in part, that the length of sentence is "purely a matter of legislative prerogative" and is therefore not reviewable under the eighth amendment.[71] The Court, however, openly recognized that courts should apply the proportionality principle in rare cases.[72] In rejecting the petitioner's eighth amendment argument, the Court discarded the objective criteria proposed by Mr. Rummel to aid in judging the proportionality of his sentence.[73] Concluding, the Court upheld the sentence imposed on Mr. Rummel as constitutional and decreed that the establishment of sentences and punishments is best left with the legislature of the punishing jurisdiction.[74]

In 1983, the Supreme Court decided the case of *Solem v. Helm*.[75] The *Solem* Court coalesced almost two hundred years of jurisprudence into a unified and all-encompassing standard for eighth amendment

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[69] *Id.* Justice Stewart wrote a short concurrence, *id.* at 285 (Stewart, J., concurring), and Justice Powell, joined by Justices Brennan, Marshall and Stevens, wrote a biting dissent, which, for the most part, became the majority opinion in *Solem*. *Id.* at 285 (Powell, J., dissenting). In his dissent, Justice Powell defined disproportionality analysis as the measurement of "the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender." *Id.* at 288 (Powell, J., dissenting).

[70] *Id.* at 271-75. The Court distinguished the death penalty cases and strictly limited *Weems* to its "extreme facts." *Id.* at 272-73. *See also supra* note 55 (discussion of the unique nature of death penalty cases).

[71] *Rummel*, 445 U.S. at 274.

[72] *Id.* at 274 n.11.

[73] *Id.* at 275-84. Mr. Rummel had proffered objective criteria similar to the objective factors applied in *Solem*. Since the *Rummel* Court's criticisms of these factors are similar to those made by the majority today, these criticisms will be discussed below as each objective factor is applied in the case at hand.

[74] *Id.* at 284-85. The Supreme Court decided the case of Hutto v. Davis, 454 U.S. 370 (1982) only two years after *Rummel*. In that case, a Virginia court convicted the defendant of possession with the intent to distribute nine ounces of marijuana and was sentenced to 40 years imprisonment. *Id.* at 371. Because the district court and the court of appeals applied an objective test and refused to apply *Rummel*, the Supreme Court reversed the lower courts' decisions. *Id.* at 371-72. *Davis*, however, can only be construed as an reaffirmation of *Rummel* and as a "slap on the wrists" of the lower federal courts for not following Supreme Court precedent. *See id.* at 375; Baker & Baldwin, *supra* note 3, at 36-37 (The majority in *Davis* "simply concluded, virtually, *sans* analysis, that there was no objective basis for the district court's holding.").

[75] 463 U.S. 277 (1983).

review. In *Solem*, Mr. Helm was convicted of writing a no account check.[76] The state chose to prosecute Mr. Helm under South Dakota's recidivist statute since this was Helm's seventh conviction.[77] The trial court, as mandated by the recidivist statute, sentenced Mr. Helm to life imprisonment without an opportunity for parole.[78]

The South Dakota Supreme Court upheld the punishment in a three to two decision.[79] After Mr. Helm served two years of his sentence, the governor denied Mr. Helm's request for commutation to a fixed term of years.[80] In 1981, Mr. Helm sought *habeas corpus* relief in the United States District Court for the District of South Dakota.[81] Although the district court conceded that Helm's sentence was harsh, it denied the writ in light of *Rummel*, which was decided only a year earlier.[82] However, on appeal, the United States Court of Appeals for the Eighth Circuit distinguished *Rummel* on the basis that Mr. Rummel enjoyed an opportunity for parole, but Mr. Helm did not. Thus, the appellate court reasoned that the punishments were qualitatively different.[83] After an examination of the nature of Mr. Helm's offense and punishment and a comparative analysis of other jurisdictions' sentences for the same crime, the court of appeals held that Mr. Helm's punishment was grossly disproportionate to his crime and, therefore, directed the district court to issue a writ.[84] The United States Supreme Court, in a five to four decision, affirmed.[85]

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[76] *Id.* at 281.

[77] *Id.* at 279-81. Mr. Helm's prior crimes consisted of three convictions for third-degree burglary, one conviction of obtaining money under false pretenses, one conviction of grand larceny, and one conviction of third offense driving while intoxicated. *Id.* The recidivist statute required at least three prior convictions plus the principal felony. *Id.* at 281 (citing S.D. CODIFIED LAWS ANN. § 22-7-8 (1977) (amended 1981)).

[78] *Id.* at 282. Although there was a possibility that Mr. Helm would be pardoned, or his sentence commuted, the Court refused to equate a pardon or commutation to parole. *Id.* at 300-03. Justice Powell, writing for the majority, stated that commutation is "an ad hoc exercise of executive clemency," whereas parole is "a regular part of the rehabilitative process." *Id.* at 300-01.

[79] *Id.* at 283.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 283-84. The court of appeals found that South Dakota had "rejected rehabilitation as a goal of the criminal justice system" but Texas had not. *Id.*

[84] *Id.* at 284.

[85] *Id.* at 283.

Writing for the Court, Justice Powell began with a recitation of the eighth amendment and an observation that the final clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[86] In support of this statement, Justice Powell set out a comprehensive history of the proportionality principle from the Magna Carta in 1215 through *Hutto v. Davis*[87] in 1982.[88] Next, in order to guide federal and state courts in determining whether a sentence violates the eighth amendment, the Court formulated the following objective factors to consider: first, the harshness of the penalty and the gravity of the offense; second, sentences imposed on other criminals for different crimes within the same jurisdiction; and finally, sentences imposed in different jurisdictions for the same crime.[89] After applying these factors to Mr. Helm's sentence, the majority found the punishment to be "significantly disproportionate to [the] crime, and . . . therefore prohibited by the Eighth Amendment."[90]

Justice Powell could not have been more precise in defining the scope and application of the eighth amendment to state and federal sentences. The Justice stated that "[t]he Constitution *requires* us to examine Helm's sentence to determine if it is proportionate to his crime."[91] The Court refuted South Dakota's claim, and the dissent's position, that the proportionality principle is inapplicable to prison sentences.[92] Justice Powell stated that not only is the constitutional language devoid of a distinction between the length and kind of

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[86] *Id.* at 284. The Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.* at 290. Although Justice Powell recognized an absolute duty to review sentencing under the eighth amendment, the Justice acknowledged that substantial deference should be given both to the legislature's broad law making authority and the trial court's sentencing discretion. *Id.* *See infra* notes 171-79 and accompanying text (Although substantial deference should be given to the legislatures the courts are nonetheless vested with the authority to ensure legislative enactments are within constitutional boundaries.).

[87] 454 U.S. 370 (1982).

[88] *Solem*, 463 U.S. at 284-88 (1983).

[89] *Id.* at 290-91.

[90] *Id.* at 303.

[91] *Id.* (emphasis added). Although Justice Powell directed that great deference be given to the legislatures and state courts in formulating punishments, the Justice pointed out that "no penalty is *per se* constitutional . . . a single day in prison may be unconstitutional in some circumstances." *Id.* at 290.

[92] *Id.* at 288 & n.14. Former Chief Justice Burger wrote the dissent, joined by Justices White and O'Connor and the now Chief Justice Rehnquist. *Id.* at 304 (Burger, C.J., dissenting).

punishments, but no historical support exists for such a proposition.[93] Furthermore, to take such a stance would require the Court to discard well-developed, long-standing case law.[94] Finally, Justice Powell distinguished the sentence in *Rummel* from the sentence in *Solem* because Rummel was given the opportunity for parole, whereas Solem's only chance for early release was commutation.[95] Even the *Rummel* Court acknowledged the difference between a life sentence without possibility of parole and a sentence where parole is possible, regardless of how slight that possibility may be.[96]

E. RESOLVING *RUMMEL* AND *SOLEM*

The dissent in *Solem* criticized the majority for "blithely discard[ing] any concept of *stare decisis*, trespass[ing] gravely on the authority of the states, and distort[ing] the concept of proportionality of punishment by tearing it from its moorings in capital cases."[97] The *Solem* majority's interpretation of *Rummel* induced this harsh rebuke despite that the *Solem* Court did not overrule *Rummel*. Rather, as the Court stated, its opinion was "entirely consistent with prior cases - including *Rummel v. Estelle*," a case that did not "foreclose proportionality review of sentences of imprisonment."[98] The *Solem* Court countered that to narrow the principle of proportionality, as the dissent had suggested, would, in itself, be discarding precedent.[99] Consequently, *Solem* limited the *Rummel*

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[93] *Id.* at 288-90 (citing Hutto v. Finney, 437 U.S. 678 (1978), Ingraham v. Wright, 430 U.S. 651 (1977), Weems v. United States, 217 U.S. 349 (1910), and Hodges v. Humkin, 80 Eng. Rep. 1015 (K.B. 1615)).

[94] *Id.* *See also supra* notes 29-61 and accompanying text.

[95] *Solem*, 463 U.S. 277, 300-03 (1983). The Court stated that Solem's "sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement, (footnote omitted) a fact on which the [*Rummel*] Court relied heavily." *Id.* at 297. *See also supra* note 78.

[96] *Solem*, 463 U.S. at 301 n.28. Chief Justice Rehnquist wrote: "If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony." Rummel v. Estelle, 445 U.S. 263, 281 (1980).

[97] *Solem*, 463 U.S. at 304 (Burger, C.J., dissenting).

[98] *Id.* at 288 n.13, 303 n.32.

[99] *Id.* at 288 n.13. *See also* Baker & Baldwin, *supra* note 3, at 47 (*Solem*, as opposed to *Rummel* or *Davis*, "is more consistent with the policies implied in the text, history of the eighth amendment, and precedents.").

holding to its facts, noting that the petitioner in *Rummel* eventually enjoyed the opportunity for parole.[100]

Although *Rummel* initially appeared to clarify the application of the eighth amendment where punishments are challenged as unconstitutional, closer scrutiny of the decision reveals two critical deficiencies in the Court's rationale. First, although the Court conceded that the proportionality principle should apply in "rare cases,"[101] it failed to delineate what a "rare case" would be. Second, the Court failed to provide a standard or test to determine whether a challenged punishment in such a "rare case" is cruel and unusual.[102] Thus, rather than being the ultimate standard for eighth amendment review, *Rummel* has been viewed as an aberration of the proportionality doctrine and should be strictly limited to its facts.[103]

Accordingly, in *Solem*, the Court intended to limit the holding in *Rummel* to its immediate set of facts. Any broader implication would distort the proportionality concept which is so deeply ingrained in our pre- and post-constitutional system of jurisprudence. It is unlikely that the majority in *Rummel* intended the decision to be as far reaching as the dissent in *Solem* or JUSTICE DANIEL would have us believe. If

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[100] *Solem*, 463 U.S. at 303 n.32, 304. Justice Powell stated, "since the *Rummel* Court - like the dissent today - offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation." *Id.* at 303 n.32.

[101] Rummel v. Estelle, 445 U.S. 263, 272 (1980). Had the majority in *Rummel* drawn the line for applying proportionality analysis between capital and non-capital cases (although this proposition has no foundation in the development of the eighth amendment), the line would be clear and *Rummel* would be more digestible. *See supra* note 93 and accompanying text. But the *Rummel* Court goes on, stating that the proportionality concept may be applied in "rare cases." *Rummel*, 445 U.S. at 274 n.11. Thus, the line becomes fuzzy and we are again left with our hands thrown up in the air in frustration and confusion. Life imprisonment for a parking ticket is our only clue to the rare case but, even in that scenario, it is clearly not the mode or nature of punishment - imprisonment - which is cruel or unusual.

[102] *Solem*, 463 U.S. at 290-91 n.17, 303 n.32 ("It offers no guidance, however, as to how courts are to judge those admittedly rare cases."). *See also* Baker & Baldwin, *supra* note 3, at 45 ("Because [*Rummel* and *Davis*] admitted the possibility [of successful proportionality challenges] but offered no guidance for determining the proportionality issue, the [*Solem*] majority deemed itself free to develop its own analytical framework within the factual constraints of the two prior cases.").

[103] Baker & Baldwin, *supra* note 3, at 49; Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After* Rummel v. Estelle, 1980 DUKE L.J. 1103, 1129; Dressler, *Substantive Criminal Law Through the Looking Glass of* Rummel v. Estelle: *Proportionality and Justice as Endangered Doctrines*, 34 SW. L.J. 1063, 1090-94 (1981).

Chief Justice Rehnquist had intended *Rummel* to be the definitive standard for eighth amendment challenges, the Chief Justice would have formed his decision as such, providing both guidance by which to determine a "rare case" and a test by which to judge constitutionality. Instead, *Solem* represents this Court's definitive articulation of the proportionality requirement of the eighth amendment as a comprehensive, uniform standard to be employed in all eighth amendment cases.

II. APPLICATION OF THE *SOLEM* FACTORS

In any case in which a sentence is challenged as violating the eighth amendment's prohibition against cruel and unusual punishment, courts should apply the objective factors set forth in *Solem v. Helm*.[104] The three factors are: (i) "the gravity of the offense and the harshness of the penalty;" (ii) a comparison of the "sentences imposed on other criminals in the same jurisdiction;" and, (iii) a comparison of "the sentences imposed for commission of the same crime in other jurisdictions."[105] Application of these factors to Mr. Harmelin's sentence unquestionably reveals a violation of his eighth amendment rights.

A. THE GRAVITY OF THE OFFENSE & HARSHNESS OF PENALTY

In determining the gravity of the offense, courts should consider the harm caused or threatened to the victim or to society,[106] the moral

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[104] *Solem*, 463 U.S. at 290. *See also* Baker & Baldwin, *supra* note 3, at 53 ("The reviewing court must begin and end the inquiry with the three factors. . . .").

[105] *Solem*, 463 U.S. at 290-292. In *Solem*, Justice Powell noted that application of these factors assumes that courts are capable of judging at least the relative gravity of an offense and of comparing different sentences. *Id.* at 292-94. The Justice stated that this assumption is justified because "courts traditionally have made these judgments - just as the legislatures must make them in the first instance." *Id.* at 292. For example, in Baldwin v. New York, 399 U.S. 66 (1969), the Court was faced with a sixth amendment right to a jury issue. In an opinion by Justice White, the Court discussed the difference between a petty offense and a serious offense. *Id.* at 68-69. There the Court used the length of maximum sentence available for such crimes as an indicator of society's regard of the crime. *Id.* at 70-71. Although this standard is clearly inapplicable in this case, it does illustrate a line-drawing function of the courts.

[106] *Solem*, 463 U.S. at 292. *See also* Baker & Baldwin, *supra* note 3, at 70 ("Victimless crimes" are not necessarily less severe offenses than those resulting in tangible victims because some degree of social interest must be taken into account. Thus, indirectly, the harm threatened or caused to society is also considered.).

culpability of the defendant and the egregiousness of the crime,[107] "the absolute magnitude of the crime,"[108] and the violent nature of the crime.[109] Under the first prong, courts should focus on the "blameworthiness of the defendant rather than on the benefit to society of increased punishment" when assessing the gravity of a given offense in relationship to the harshness of the punishment.[110]

In our criminal justice system, judges have the duty of determining the gravity of one's offense or his moral culpability. Once a criminal is found guilty by a jury, judges determine appropriate sentences by considering factors such as the defendant's age and criminal record.[111] Furthermore, in criminal cases, courts have traditionally examined the defendant's motive for committing the crime to determine whether he possessed the requisite state of mind.[112] Thus, courts are capable of judging the gravity of a given offense and of ascertaining an appropriate punishment.

In this case, Mr. Harmelin was convicted of possession of over 650 grams of cocaine and was given a mandatory sentence of life imprisonment without opportunity for parole.[113] At the time he was stopped by the police officers but before his arrest, Mr. Harmelin informed the officers that he had a gun and a permit, and he told the police where the weapon was located.[114] He did not resist the arresting

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[107] *See* Note, *supra* note 11, at 575-76 (The proportionality doctrine is based on a retributive theory of punishment in that "the moral culpability of the defendant, not public safety or law enforcement necessity, justifies punishing an individual."). The author then defined moral culpability as the defendant's personal guilt based on the harmfulness of the act and his personal culpability. *Id.* at 576.

[108] *Solem*, 463 U.S. at 293. For example, "[s]tealing a million dollars is viewed as more serious than stealing a hundred dollars . . . ." *Id.*

[109] *Id.* at 292. The *Solem* Court also noted that lesser included offenses should not be punished more harshly than the underlying offense. For example, attempted murder should not receive a harsher punishment than murder itself. *Id.* at 293.

[110] Baker & Baldwin, *supra* note 3, at 69. *See also* Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting) (Justice Powell noted that proportionality analysis "focuses on whether, a person deserves such a punishment, not simply on whether punishment would serve a utilitarian goal.").

[111] Baker & Baldwin, *supra* note 3, at 70 ("Indeed, the first factor of eighth amendment proportionality analysis bears a striking resemblance to the trial court's sentencing decision in an indeterminate system.").

[112] *Solem*, 463 U.S. at 293. Often, states will statutorily classify crimes by severity based upon a negligent, reckless, knowing, intentional or malicious state of mind.

[113] *See* Majority *supra* p. 133.

[114] *Id.* at p. 134.

officers nor did he demonstrate a violent nature.[115] His crime of possession was not a crime against society or an individual since he was not charged with the actual manufacture, distribution or selling of cocaine.[116] Furthermore, Mr. Harmelin had *no prior record.*[117]

Courts and commentators have noted the difficulty of determining the severity of drug crimes.[118] Nonetheless, it is generally accepted that drug offenses are categorized as non-violent crimes since the category of violent crimes is usually limited to murder, forcible rape, aggravated assault and robbery.[119] In fact, Michigan courts have categorized drug possession as a non-violent crime.[120] JUSTICE DANIEL argues that drug crimes are severe because the drug problem in the United States has reached "epidemic levels" and because the harm to society of possessing over 650 grams of cocaine is great.[121] Mr. Harmelin, however, was not charged with the separate offense of possession with the intent to

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[115] Brief for Petitioner, *supra* note 25, at 2, Harmelin v. Michigan, No. 89-7272 (S. Ct. argued Nov. 5, 1990) [hereinafter Brief for Petitioner].

[116] *Id.* at 5. Mr. Harmelin was charged under the Michigan statute entitled "Possession of controlled dangerous substance; penalties." MICH. COMP. LAWS § 333.7403 (1978), and not under a separate and different statute entitled "Unlawful manufacture, delivery, or *possession with intent to manufacture or deliver*; unlawful dispensing, prescription or administration; penalties." MICH. COMP. LAWS § 333.7401 (1978) (emphasis added). It may be assumed then, that the evidence did not substantiate a claim that Mr. Harmelin intended to deliver, or that he had manufactured, the cocaine.

[117] Brief for Petitioner at 5.

[118] *See, e.g.*, Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 905 (1987) (calling for Brandeis briefs regarding the actual harm caused by drug related offenses).

[119] *See, e.g.*, STATISTICAL ABSTRACT OF THE UNITED STATES 1990, 177 (110th ed. 1990) (source: Bureau of the Census, United States Department of Commerce) [hereinafter STATISTICAL ABSTRACT OF THE UNITED STATES 1990] (Arrest statistics are broken down by types of crimes under the general headings of serious crimes and non-serious crimes where drug abuse violations were categorized under non-serious crimes.); THE WORLD ALMANAC AND BOOK OF FACTS 1990, 849 (M. Hoffman ed. 1989) (In a chart describing various crime rates in the United States from 1981-1988, types of crimes were categorized as to violent versus property crimes where violent crimes included only murder, forcible rape, robbery and aggravated assault.).

[120] People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972) (A mandatory prison sentence of 20 years for the non-violent crime of sale of marijuana, under the circumstances, shocked the conscience.). *But see* Young v. Miller, 883 F.2d 1276 (6th Cir. 1989).

[121] *See* Majority *supra* p. 153. Ironically, the majority makes the exact "subjective" determination that it claims courts are incapable of making. *Id.* The Court's position that possession of over 650 grams of cocaine is a great harm to society is in itself a delineation of the gravity of the offense.

distribute. Thus, absent such an intent, Mr. Harmelin's possession of cocaine alone posed no threat of harm to society.[122] Thus, his crime is a less serious offense in that it was non-violent and posed no direct harm to individuals or society as a whole.[123]

Solem also requires reviewing courts to consider the harshness of the punishment under the first prong of the proportionality test.[124] It is appropriate to examine the various theories of punishment when determining the severity of a given sentence since the punishment must be tailored to further legitimate penological goals.[125] Another important aspect of this analysis is whether the sentence was mandatorily imposed or whether it was imposed at the trial judge's discretion.[126] Finally, courts should assess the likelihood that the full sentence will be served based on the possibilities for early release, such as parole, commutation or good time credits.[127]

Generally, there are four theories or purposes of punishment.[128] First, is the retribution theory which focuses on the blameworthiness of

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[122] An argument may be made that drug offenses - selling, manufacture, distribution and possession - are as harmful to society as murder itself. The comparison, however, is tenuous at best and contradicts our criminal justice system which requires some level of *mens rea*. Furthermore, the victim of a murder is the unfortunate and involuntary prey of a violent and monstrous mind. In contrast, the drug user, a so-called victim of a drug crime has, a choice whether or not he will become a part of the drug disease that is prevalent in our country. Granted, the drug dealer, distributor or manufacturer is certainly not without fault. He acts as a catalyst to corruption, he presents temptation to the weak, and promises great wealth to the needy. Nonetheless, we cannot discount the fact that the user or buyer made the ultimate decision and that the drug offender lacked the state of mind of a murderer.

[123] Although Mr. Harmelin was also charged with felony-firearm, he had a permit for the gun. Brief for Petitioner at 2. Moreover, the eighth amendment challenge was limited to the sentence imposed under the drug possession statute.

[124] Solem v. Helm, 463 U.S. 277, 290-91 (1983).

[125] Baker & Baldwin, *supra* note 3, at 70. *See generally* Enmund v. Florida, 458 U.S. 782 (1982) (Capital punishment for felony murder failed to fulfill a penological purpose and was therefore unconstitutional.).

[126] Baker & Baldwin, *supra* note 3, at 70.

[127] *Id.* at 70-71 (Clearly, "a sentence imposed without the possibility of premature release is more severe than one with that possibility.").

[128] The majority in this case adds a fourth purpose - education - which we believe is incorporated into the rehabilitation and deterrence rationales. *See* Majority *supra* note 163 and accompanying text.

the defendant.[129] Accordingly, under a retribution theory, the defendant's state of mind and the gravity of the offense are the focal points.[130] A second penological rationale is rehabilitation.[131] Under this theory, the offender is seen "[a]s a kind of social malfunctioner . . . [who] needs to be 'treated' or reeducated, reformed or rehabilitated."[132] A third theory is deterrence which, in essence, uses the individual offender as an example to all other "potential" offenders in hopes that the severity of the punishment will dissuade others from committing the same crime.[133] Finally, incapacitation as a purpose for punishment seeks to completely segregate the offender for the protection of society.[134]

The statute under which the Michigan court sentenced Mr. Harmelin clearly discounted rehabilitation as an appropriate penological goal since under a life sentence without parole, there is no incentive to reeducate or reform Mr. Harmelin who will be living out the rest of his life in

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[129] Note, *supra* note 15, at 600 n.60. Although the retribution theory was once viewed as society's opportunity for revenge, that perspective is no longer the generally accepted construction of the retribution theory of punishment. *Id.*

[130] *See generally id.* Hence, the retribution theory is embedded in the proportionality analysis. *Id.* at 601 n.63, 611. Clearly, however, the proportionality concept does not further merely retributive goals. For example, the first prong of the proportionality test takes into account the opportunity for parole or early release which indicates concern for aspects of rehabilitation and incapacitation of the offender.

[131] *See* Rummel v. Estelle, 445 U.S. 263, 278 (1980) (discussion regarding the justification for recidivist statutes that punish repeat offenders more severely than first time offenders because repeat offenders demonstrate that they are incapable of rehabilitation).

[132] Note, *supra* note 15, at 600 n.61; *see also* Pugsley, *Retributivism: Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 383 (1978). The rehabilitation theory of punishment seems to comport closely with the core of the eighth amendment - the prohibition of "the infliction of uncivilized and inhuman punishments." Brennan, *supra* note 9, at 329. Justice Brennan noted that the eighth amendment requires states to "treat [their] members with respect for their intrinsic worth as human beings" even if they commit the most brutal crimes. *Id.* Thus, humanity in dealing with our criminal offenders is paramount under the eighth amendment since "even the vilest criminal remains a human being possessed of common human dignity." *Id.* at 330. To rehabilitate the vilest criminal would not only be humane, but would serve the interests of society as well as those of the individual offender.

[133] *See* Note, *supra* note 15, at 601 n.62 (describing the deterrent theory as "a threat to curtail future criminal behavior"). This theory also seeks to deter the individual offender from repeating his crime. Clearly, this aspect of the deterrence theory is inapplicable in this case because Mr. Harmelin will never again be a part of society under Michigan's sentence.

[134] *Id.* at 601 n.63.

closely-regulated incarceration.[135] Thus, as the majority noted, the Michigan statute is designed to further retribution, deterrence, and incapacitation goals.[136] Application of the statute in this case, however, tends to distort these goals, rendering them worthless and unattainable.

The retributive aspirations of the statute as applied to Mr. Harmelin clearly overcompensate. Rather than taking "an eye for an eye," as the theory is described by JUSTICE DANIEL,[137] the sentence imposed on Mr. Harmelin, in essence, takes "a life for an eye" and is therefore disproportionate. Similarly, in an effort to deter and incapacitate drug kingpins,[138] the statute, as applied to Mr. Harmelin, misses its mark since Mr. Harmelin was no more than a "mule of transport."[139] Thus, the deterrence and incapacitation goals are rendered ineffectual.[140]

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[135] As the majority notes, the Sentencing Reform Act, 28 U.S.C. § 994(k) (1982), rejects rehabilitation as a practical goal of punishment. *See* Majority *supra* note 163 and accompanying text. Under the required human decency standard, however, it is difficult to imagine a penological system devoid of efforts for rehabilitation, especially for first time offenders such as Mr. Harmelin since first time offenders, unlike recidivists, have not demonstrated their inability to reform.

In Barker v. Wingo, 407 U.S. 514 (1972), for example, Justice Powell, writing for the Court, noted that a lengthy sentence "has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." *Id.* at 520 (footnote omitted) (quoting James V. Bennett, Director of the Bureau of Prisons, Hearing on Federal Bail Procedures before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 88th Cong., 2d Sess., 46 (1964)). Justice Powell commented that "[t]he time spent in jail is simply dead time." *Id.* at 532-33.

[136] *See* Majority *supra* p. 163.

[137] *Id.*

[138] Brief for Petitioner at 34. The petitioner argues that he was merely a "mule of transport," that neither his life style nor his bank accounts reflected "drug kingpin" status. *Id.* at 17.

[139] *Id.*

[140] One commentator criticized the so-called war on drugs as creating a "drug exception" to the Bill of Rights. *See* Wisotsky, *supra* note 118, at 891. The author noted:

> [that the *failed* goal of the crackdown on drugs] was to make the system more effective in catching drug violators, to facilitate their conviction once indicted, and to punish them more severely upon conviction. According to this theory, publicity about the heightened certainty of conviction and the greater severity of punishment would deter others from trafficking in drugs.

Id. This case presents a clear example of how overzealous legislatures and courts, in an effort to stop drug abuse, have forgotten their individual roles as the protectors of our fundamental rights. *See* STATISTICAL ABSTRACT OF THE UNITED STATES 1990, *supra* note 119, at 184-85 (The data demonstrates how the "crackdown" did, in fact, result in

Consequently, Michigan has excessively deterred and incapacitated Mr. Harmelin.[141]

Courts should also consider the possibility of early release when analyzing the harshness of a particular punishment.[142] Although the presence or absence of the opportunity for parole cannot be the threshold for judicial review of a punishment,[143] *Solem* mandates that courts consider this factor.[144] Concededly, parole is a privilege not a right.[145] While on parole, "the duly convicted person is not freed from the legal consequences of his guilt. He is merely enjoying a conditional favor, postponing his punishment which may be withdrawn."[146] Whereas consideration of parole is not appropriate during sentencing, contrary to the majority's argument, it is an appropriate consideration for eighth amendment review and for determining the likelihood that Mr. Harmelin

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more arrests, more convictions and longer jail sentences but not in lower drug abuse crime rates. Thus, the ultimate goal of deterrence was not reached.).

[141] In 1986, there were 447,185 inmates in state prisons of which over 81% were repeat offenders. STATISTICAL ABSTRACT OF THE UNITED STATES 1990, *supra* note 119, at 188 (source: United States Bureau of Justice Statistics). Clearly then, statutes like Michigan's which impose harsher prison sentences do not deter or rehabilitate as is evidenced by these repeat offenders who were neither deterred nor rehabilitated during their prior terms in prison. In addition, drug offense arrest rates have been increasing steadily in the face of harsher sentences for drug related offenses, and Michigan is no exception. *See infra* notes 180-88 and accompanying text.

[142] *See supra* note 127 and accompanying text. The policy underlying parole is "reformation . . . [which] 'can best be accomplished by fair, consistent and straight forward treatment of the person sought to be reformed.'" Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 175, 186 (1964).

[143] Baker & Baldwin, *supra* note 3, at 71. "The threshold must be loss of liberty" for eighth amendment review. *Id.* at 53. *See also*, California v. Ramos, 463 U.S. 992 (1983) (The jury should not be able to consider opportunity for parole when deciding whether to impose capital punishment.).

[144] The *Solem* Court differentiated the opportunity for parole that was given to Mr. Rummel and the opportunity for commutation of sentence which was Mr. Helm's only chance of early release. Solem v. Helm, 463 U.S. 277, 303 (1983). Justice Powell described the commutation as an "*ad hoc* exercise of clemency." *Id.* Because of the marked difference between a life sentence with the opportunity for parole and a life sentence with no real chance for early release, Justice Powell held that the two sentences were different in kind. *Id. See also* Rummel v. Estelle, 445 U.S. 263, 281 (1980) (Chief Justice Rehnquist noted, "[i]f nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony.").

[145] Sklar, *supra* note 142, at 182.

[146] *Id.* (quoting Ex Parte Boyd, 73 Okla. Crim. 441, 122 P.2d 162 (1942)).

will actually have to serve his entire prison term.[147]

Mr. Harmelin's punishment of life imprisonment with no possibility of parole is the harshest punishment available in the state of Michigan, which constitutionally prohibits the death penalty.[148] Mr. Harmelin's punishment was imposed under a type of aggravated drug offense scheme where the severity of the punishment increases as the quantity of drugs in possession increases.[149] Clearly, the theoretical basis of such a punishment scheme is deterrence, retribution and incapacitation, thus, eliminating any rehabilitation concerns. Mr. Harmelin's sentence, including the denial of parole, was statutorily mandated, leaving no discretion with the trial judge.[150] Although Mr. Harmelin had no prior record, this was not a consideration in his sentencing since the judge was bound by statute to impose the maximum sentence. Undoubtedly, Mr. Harmelin's punishment of imprisonment for life without opportunity for parole is the harshest punishment that the state could impose. Mr. Harmelin committed a non-violent offense causing little if any tangible harm to society, yet he received the harshest punishment possible in Michigan. Thus, the harshness of Mr. Harmelin's sentence clearly

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[147] The majority points out that the Sentencing Reform Act eliminates parole but the Act allows for early release on the basis of good time credits. *See* Majority *supra* note 161. The statute under which Mr. Harmelin was sentenced forbids even that. *See* MICH. COMP. LAWS § 333.7401(3) (1989).

[148] MICH. CONST. art. IV, § 46. The fact that Mr. Harmelin had no opportunity for parole made the sentence of life imprisonment even more severe. Baker & Baldwin, *supra* note 3, at 71 ("[A] sentence imposed without the possibility of premature release is more severe than one with that possibility."). Furthermore, "[m]andatory life imprisonment without parole is second only to the death penalty in its complete and permanent deprival of fundamental existence. Before such a punishment can be imposed, the Constitution's threshold prohibiting apparent grossly disproportionate sentences must be overcome." *Id.* at 40-41.

[149] Wendorf, *The War on Crime: 1981 Legislation*, 33 BAYLOR L. REV. 765, 781 (1981). The aggravated drug offense was born out of the states' needs to more severely punish dealers of commercial quantities. *Id.* The statute under which Mr. Harmelin was charged has a minimum punishment of not more that four years for possession of under 25 grams of a controlled substance with increasing length of sentences and fines for more than 25 grams, more than 50 grams, more than 225 grams, and finally, more than 650 grams. MICH. COMP. LAWS § 333.7403 (1988).

[150] MICH. COMP. LAWS § 333.7401 (1978) governed the sentencing in this case. The statute provided that any person convicted under § 7403 and sentenced to life imprisonment "shall not be eligible for probation, suspension of sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life." MICH. COMP. LAWS § 333.7401(3) (1978). The statute has since been revised to prohibit reduction of a mandatory term by any type of sentence credit reduction. MICH. COMP. LAWS § 333.7401(3) (1989).

outweighs the gravity of the offense. As a result, Mr. Harmelin's sentence fails the first prong of the proportionality test.

B. INTRASTATE COMPARISON OF SENTENCES

The second objective factor that courts should consider when conducting proportionality analysis entails an examination of sentences imposed within the jurisdiction for other crimes.[151] Reviewing courts compare other crimes within the sentencing jurisdiction that warrant the punishment at issue.[152] This factor can be traced back to *Weems*[153] in which the plaintiff argued, pursuant to the Penal Laws of the United States, that "[w]hether the punishment in a given case is cruel or unusual depends, of course, in some degree, upon the punishment inflicted for other offenses."[154] Disproportionality is indicated then "[i]f a crime of greater moral culpability carries a lesser punishment."[155]

In Michigan, the only other crimes punishable by mandatory life imprisonment without opportunity for parole are first degree murder[156] and the crime of placing explosives in a building, vehicle or vessel with the intent to destroy and cause injury to a person.[157] Michigan courts, by statute, *may* impose life imprisonment for other crimes, but such a sentence remains within the court's discretion. Life imprisonment is permitted, for example, for criminal sexual assault,[158] assault with the intent to commit murder,[159] solicitation of murder[160] and second degree

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[151] Solem v. Helm, 463 U.S. 277, 290-92 (1983).

[152] *Id.* at 298. One commentator noted that the second and third prong of the *Solem* proportionality analysis take a "positivist approach to proportionality determinations" in adhering to the theory that "society may only be analyzed by objective, empirical means." James, *supra* note 52, at 879. Thus, the validity of a given proposition or action, for example, a punishment, depends on the "pre-existing legal rules . . ." and "rejects abstract notions of justice and other moral values and normative standards." *Id.*

[153] 217 U.S. 349 (1910).

[154] *Id.* at 353.

[155] Note, *supra* note 11, at 578.

[156] MICH. COMP. LAWS § 750.316 (1980) defines first degree murder and mandates that one convicted of first degree murder "be punished by imprisonment for life." A different statute directs that anyone punished under a statute mandating life imprisonment shall not be eligible for parole. MICH. COMP. LAWS § 769.9 (1978).

[157] MICH. COMP. LAWS § 750.207 (1931).

[158] MICH. COMP. LAWS § 750.520(b) (1984). This crime encompasses such heinous acts as sexually abusing children under thirteen years old or victims whom the offender knew were mentally disabled.

[159] MICH. COMP. LAWS § 750.83 (1931).

murder.[161] In Michigan, a person could place glass, razor blades or pins in food with the intent to harm the consumer and the maximum prison sentence a court could impose would be ten years.[162]

The punishments for such morally culpable and atrocious crimes as solicitation of murder or the sexual assault of young children are clearly less severe than the punishment imposed on Mr. Harmelin for mere *possession* of cocaine.[163] Thus, Mr. Harmelin's sentence fails the second prong of the proportionality test since Michigan has imposed its harshest sentence of life imprisonment without parole on a non-violent, first time offender but has incarcerated fatally violent and destructive criminals for substantially shorter terms.[164]

C. INTERSTATE COMPARISON OF PUNISHMENTS

The third objective factor under the proportionality doctrine is the comparison of punishments in other states for the same crime.[165] The assumption under this factor is that the penal codes of other jurisdictions "are the most objective evidence of absolute proportionality."[166] When determining whether a particular sentence is disproportionate under the third factor, some consideration may be given to the individual state concerns and needs which originally induced the legislature to enact the statute.[167]

This consideration for local concerns of the states forms the foundation for the majority's argument that federalism precludes judicial

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[160] MICH. COMP. LAWS § 750.157(b) (1986). Under this statute, a hired murderer could have actually killed for money, but the soliciting party could be sentenced to any term of years within the trial judge's discretion. *Id.* Solicitation of any other felony, even if the underlying felony is punishable by life, warrants a *maximum* sentence of five years. *Id.*

[161] MICH. COMP. LAWS § 750.317 (1931).

[162] MICH. COMP. LAWS § 750.397(a) (1975).

[163] *See supra* notes 121-22 and accompanying text.

[164] A repeat offender "could commit the foulest atrocities, such as holding people captive for years as sexual slaves, hacking off limbs, or poking out eyes of children, or attempting to assassinate public officials, without even the *possibility* of receiving a sentence" as harsh as Mr. Harmelin's. Brief for Petitioner at 36 (emphasis original).

[165] Solem v. Helm, 463 U.S. 277, 290-92 (1983).

[166] Baker & Baldwin, *supra* note 3, at 72.

[167] *Id. See also* Baldwin v. New York, 399 U.S. 66, 77 (1970) (Burger, CJ., dissenting) (noting that "[w]hat may be a serious offense in one setting . . . may be considered less serious in another area . . ."); Weems v. United States, 217 U.S. 349, 384 (1910) (White, J., dissenting) (noting the "necessity for a familiarity with local conditions").

review of a prescribed state punishment.[168] JUSTICE DANIEL argues that the application of objective factors requires the courts to undertake line-drawing which is beyond the judiciary's constitutional powers.[169] Furthermore, JUSTICE DANIEL maintains that length of sentence is purely a matter of legislative prerogative since states have wide latitude in addressing and remedying their individual problems.[170]

Surely the legislatures cannot formulate sentences which abrogate an individual's liberties without any checks by the courts.[171] Justice Brennan, after an exhaustive historical analysis of the eighth amendment, urged "respect for what [he] believe[d] the Framers insisted of judges: namely, to accept the responsibility and burden and challenge of working with the majestic generalities of their magnificent Constitution."[172] Furthermore, Justice Brennan astutely noted that

> "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." (footnote omitted). It would effectively write the clause out of the Bill of Rights were we to permit legislatures to police themselves by having the last word on the scope of the protection that the clause is intended to secure against their own overreaching.[173]

"Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears

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[168] *See* Majority *supra* pp. 146-52.

[169] *Id.* p. 150.

[170] *Id.* pp. 148-79.

[171] *See* Wisotsky, *supra* note 118, at 905 ("At a bare minimum, [*Solem*] establishes that Congress is not free to impose whatever penalty it chooses on drug offenders. The imposition of prison terms is limited by a legal principle of proportionality.").

[172] Brennan, *supra* note 9, at 326.

[173] *Id.* at 328-29 (quoting West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943)). *See also* Weems v. United States, 217 U.S. 349, 372-73 (1910) (Because extensive powers are vested in the legislatures to "give criminal character to the actions of men, with power unlimited to fix terms of imprisonments with what accompaniments they might," the early drafters, fearing that this power would tempt cruelty, enacted the cruel and unusual punishment clause.).

in the Bill of Rights."[174] Thus, although courts should give substantial deference to the legislatures when applying the proportionality doctrine,[175] it is the duty of the judiciary to interpret laws and to ensure that legislative enactments are within constitutional boundaries.[176]

Only one statement is necessary to address the majority's proclamation of federalism as an excuse when reviewing eighth amendment challenges: the United States Supreme Court is the ultimate interpreter of the Constitution.[177] Although this Court should give some attention to the local needs of the states under aspects of federalism, we cannot shirk our principal duty to preserve the fundamental liberties afforded to all Americans under the Constitution. This Court is the final guardian of our Bill of Rights and thus, we may not avoid eighth amendment review through a proclamation of "federalism."

Furthermore, contrary to JUSTICE DANIEL'S opinion, line-drawing has always been a function of the courts whether determining an appropriate sentence, ruling on a question of evidence, or formulating jury instructions.[178] Although legislatures are empowered to enact statutes and prescribe sentences which they believe comport with the evolving standard of decency, "[u]ltimately, the Court's basic concept of contemporary human decency must control. Judging remains

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[174] Furman v. Georgia, 408 U.S. 238, 269 (1972) (Brennan, J., concurring). *See also* Baker & Baldwin, *supra* note 3, at 54.

[175] Solem v. Helm, 463 U.S. 277, 290 (1983). In *Weems v. United States,* the majority held:

> We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws of the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, *unless that power encounters in its exercise a constitutional prohibition.* In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. . . . The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not interfered with lightly, nor by any judicial conception of their wisdom or propriety. *They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge.*

Weems, 217 U.S. at 378-79 (emphasis added).

[176] "'Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is ultimately for us to judge whether the Eighth Amendment' is violated by challenged practice." Spaziano v. Florida, 468 U.S. 447, 471 (1984) (quoting Enmund v. Florida, 458 U.S. 782, 797 (1982)).

[177] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-79 (1803).

[178] *See* Baker & Baldwin, *supra* note 3, at 40 (Courts are competent to evaluate harm, determine culpability and draw lines, all of which "are standard techniques of the judicial art.").

inescapable."[179]

No other state or federal statute imposes life imprisonment without parole on a first time offender for possession of over 650 grams of cocaine.[180] Some states, for example Arkansas,[181] Connecticut,[182] Idaho,[183] and Rhode Island,[184] *permit* imprisonment for life of first time offenders of possession of large amounts of cocaine, but none *mandate* a life sentence, nor do they eliminate the possibility of parole.[185]

Even federal anti-drug acts do not impose life imprisonment on first time offenders.[186] Under the federal statute for the same crime committed by Mr. Harmelin - the possession of over 650 grams of cocaine - an offender would receive a maximum sentence of not less than five years and not more than 40 years.[187] Under a federal statute, a person convicted of possession of over five kilograms (5,000 grams) of cocaine would receive a *maximum* penalty of not less than ten years and not more than life, and the same offender would be eligible for parole after he served one third of his sentence.[188] Accordingly, in comparison to other state and federal sentencing schemes, Michigan's statute imposing life imprisonment with no opportunity for parole stands alone in its lack of discretion, its length, and its elimination of opportunity for parole.

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[179] *Id.* at 32.

[180] *See* Brief for Petitioner, *supra* note 115, at Appendix. (Comparable Drug Penalties In Other States).

[181] ARK. STAT. ANN. § 5-64-401 (1971).

[182] CONN. GEN. STAT. § 21a-278(a) (1987).

[183] IDAHO CODE § 37-2732 (1989).

[184] R.I. GEN. LAWS § 21-28-4.01 (1989).

[185] Texas's statute for possession of 400 grams or more of cocaine imposes a minimum sentence of ten years and a maximum of 99 years. TEXAS CODE ANN. § 481.115(d)(2) (1983). *See also* Brief for Petitioner, *supra* note 115, at 43. (discussing the various state laws and the length of time that a defendant would have to serve before he would be eligible for parole).

[186] *See* 21 U.S.C. § 841(b)(1)(B)(ii) (1988).

[187] *Id.* The petitioner, in his brief, noted that even under the new Sentencing Guidelines, the minimum sentence that Mr. Harmelin could receive would be five and one quarter years to eight and one half years. Brief of Petitioner at 45-46 (citing UNITED STATES SENTENCING COMMISSION GUIDELINES, § 2d.1 (November 1987)). The maximum sentence he could receive, assuming his crime was enhanced under the firearm possession and drug organizer provisions, would be approximately eight years to just over ten years. *Id.*

[188] 21 U.S.C. § 841(b)(1)(B)(ii) (1988) and 18 U.S.C. § 4205(a) (1986) (repealed May, 1990).

Nor has Michigan demonstrated any unique or peculiar concerns that should be taken into account under the concept of federalism.[189] A survey of the number of drug abuse arrests in each state for the years 1986 through 1988 does not indicate that Michigan has a drug problem more severe than other state.[190] Nor are the social problems and implications associated with possession of controlled and dangerous substances uniquely serious in Michigan.[191] In 1986 and 1987, Michigan ranked thirtieth among the fifty states and Washington D.C. in the number of drug abuse arrests per capita.[192] In the most recent compilation of statistics for the year 1988, Michigan rose to twenty-third in the number of drug abuse arrests per capita.[193] Thus, although it appears Michigan has a drug problem, so does almost every other state in this country and Michigan's problem is not, by far, the worst.[194]

An argument may be made that only statistics from the year the statute was enacted or the year of conviction are relevant. But even these statistics do not indicate that Michigan had a more severe drug problem than most other states. In 1978, the year the Michigan drug statute was enacted, Michigan ranked fifteenth in the number of arrests for possession of cocaine, opium or their derivatives.[195] In 1986, the year of Mr. Harmelin's conviction, Michigan ranked nineteenth in terms of number of arrests.[196] Thus, Michigan was not faced with a unusual drug problem in either 1978 which would justify enactment of such a drastic statute or in 1986 which would justify the sentence imposed on Mr. Harmelin.

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[189] *See supra* note 167 and accompanying text.

[190] *See infra* notes 192-93 and accompanying text.

[191] *See infra* notes 195-96 and accompanying text.

[192] Federal Bureau of Investigations, Drug Abuse Violations: Arrest by State - 1986 & 1987 [hereinafter Drug Abuse Violations]. In 1986, Michigan had 15,661 drug abuse arrests, making it the eleventh highest among the fifty states and Washington, D.C. *Id.* The states having the ten highest number of arrests, from highest to lowest, were California, New York, Texas, Florida, New Jersey, Illinois, Maryland, Pennsylvania, North Carolina and Georgia. *Id.* In 1987, Michigan had 19,556 drug abuse arrests with California, New York, Florida, Texas, New Jersey, and Illinois ranking higher. *Id.*

[193] Drug Abuse Violations, *supra* note 192. The six highest ranked states from 1988 remained the same from 1987. *Id.* Michigan ranked fifteen in terms of overall crime rate measured by offenses known to the police per 100,000 people. STATISTICAL ABSTRACT OF THE UNITED STATES 1990, *supra* note 119, at 171 (source: United States Federal Bureau of Investigation).

[194] *See* Drug Abuse Violations, *supra* note 192.

[195] Drug Abuse Violations, *supra* note 192.

[196] *Id.*

Although Michigan's drug problem, as reflected by its drug arrests, is comparable to the problem in almost every other state, it imposes the harshest punishments for drug crimes in the United States. The punishment's severity cannot be justified by claiming that Michigan had to expend more money in order to combat its drug problem. In 1987, for example, eleven states spent more per capita than Michigan for police protection and corrections.[197] Thus, it is clear that Michigan has not exhausted its other resources, which would have a lesser effect on a defendant's constitutional rights in Michigan's battle against its common and indistinct drug problem.

Michigan is not, however, without its individual afflictions. According to a 1990 survey, for example, Michigan ranked first among the eleven largest states in the percentage of unemployment.[198] Moreover, Detroit, which has long been a drain on the state's resources, may be in danger of losing coveted federal funds due to its severe population decrease.[199] These problems, however, are not qualitatively unique and, more importantly, bear marginal connection to the drug problem in Michigan. If anything, the unemployment problem and the threat of loss of federal funds foster drug crimes, especially when the lure of drug money is enhanced by a depressed economy. As a result, more severe punishments will not counter the increasing drug problem as long as greater afflictions such as these pervade the state.

Thus, there is no unique problem facing Michigan which justifies its uniquely harsh, mandatory sentence for possession of cocaine. Granted, as the majority asserts, legislatures are free to address their individual state concerns in a reasonable manner.[200] This deference, however, is not unlimited, for the eighth amendment imposes restrictions on state's

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[197] STATISTICAL ABSTRACT OF THE UNITED STATES 1990, *supra* note 119, at 181 (source: Bureau of the census, United States). Washington, D.C., having the highest per capita drug crime rate, expended the most money per capita among all the states followed by Arkansas, New York and Nevada. *Id.*

[198] N.Y. Times, Sept. 8, 1990, at A10, col. 2 (source: Bureau of Labor Statistics). Michigan's unemployment rate was 7.9%. The other states included in the survey and their corresponding unemployment rates were as follows: California - 5.4%, Florida - 6.7%, Illinois - 6.5%, Massachusetts - 6.7%, New Jersey - 4.8%, New York - 5.0%, North Carolina - 3.6%, Ohio - 5.0%, Pennsylvania - 4.9%, and Texas - 5.9%. *Id.*

[199] Wilkerson, *Detroit Desperately Searches For Its Very Lifeblood: People*, N.Y. Times, Sept. 6, 1990, at A1. Since 1950 to 1990 Detroit's population has been cut almost in half. *Id.* Presently, the census has reported a population of 970,000 and unless Detroit is able to count at least one million people, it will lose a substantial portion of its federal funding. *Id.*

[200] *See* Majority *supra* p. 156.

discretion. The apparent enormity of a crisis cannot justify deprivation of constitutionally mandated boundaries intended to offer protection to all Americans, especially during times of crisis.[201] If the rules were bent each time a governmental unit was faced with a seemingly unsolvable or impossible problem our Constitution would be rendered worthless. The Constitution sets the bounds for all government bodies, state as well as federal.[202]

The eighth amendment, in particular, requires proportionality in sentencing which should serve as a guide to legislatures when determining appropriate sentencing schemes. If the legislatures overstep these bounds, it is the courts which must nudge them back into line, albeit with due respect and substantial deference. Clearly, then, Mr. Harmelin's sentence fails the third and final prong of the proportionality test since no other jurisdiction in the United States imposes life imprisonment without opportunity for parole on a first time offender for possession of cocaine.

III. APPLICATION OF THE MAJORITY'S STANDARD

Rummel v. Estelle,[203] the case primarily relied on by the majority, is deficient as a definitive standard for eighth amendment review for at least two reasons. First, the *Rummel* Court would permit proportionality analysis in "rare cases" but it fails to identify or define such a case. Secondly, in the event that a rare case is before a court, the majority offers no standard by which to determine whether the challenged sentence violates the eighth amendment's prohibition against cruel and unusual punishment.

In this case, the majority overrules *Solem v. Helm*[204] and attempts to fill the gaps left by *Rummel* by setting forth a possible definition of a "rare case." But was *Solem* such a departure from the historical underpinnings of the eighth amendment to warrant overturning of the decision? Certainly not. Less than three years after *Rummel* was decided, the *Solem* Court recognized the shortcomings of *Rummel* as a

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[201] "[I]n times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts." Coolidge v. New Hampshire, 403 U.S. 443, 445 (1971).

[202] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-79 (1803); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816).

[203] 445 U.S. 263 (1980).

[204] 463 U.S. 277 (1983).

universal standard for eighth amendment review and therefore limited *Rummel* to its specific facts.[205] Consequently, this Court mandated that all punishments be subject to eighth amendment review, which would inherently include a proportionality analysis.[206] Furthermore, the *Solem* court delineated objective factors to be used to test a punishment against the eighth amendment.[207] Thus, although JUSTICE DANIEL provides us with a possible definition of a "rare case" which may have constituted a piece of the *Rummel* puzzle, the definition has no place in the already complete *Solem* portrait. Hence, the attempted *Rummel* solution comes too late.

The majority addresses the suggestion that eighth amendment review of a punishment is permissible only if the sentence appears to be grossly disproportionate under a "shock the conscience" test.[208] But to determine whether review is appropriate, JUSTICE DANIEL follows *Rummel* and suggests that only when the crime is improperly classified as a felony should the court intervene.[209] Otherwise, defining punishments is purely a matter of legislative prerogative since the legislature is more closely in tune to the contemporary expressions of decency.[210]

Under this narrow and restrictive definition, Mr. Harmelin's sentence is clearly unreviewable by the courts since drug possession is properly defined as a felony. But even if review were permitted, neither *Rummel* nor today's majority provide a standard by which the sentence should be measured against eighth amendment challenges. The inadequacy of the decision today transforms *Solem's* consolidation of the proportionality doctrine into an unusable, impractical analysis, and it renders courts unable to protect the eighth amendment rights guaranteed by the Constitution.

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[205] *See supra* note 101-03.

[206] *See supra* note 86 and accompanying text.

[207] *See supra* note 89 and accompanying text.

[208] *See* Majority *supra* p. 147.

[209] *Id.* at p. 148.

[210] *Id.* pp. 148-49.

IV. CONCLUSION

In the words of George Washington, "[r]etaliation is certainly just and sometimes necessary, even where attended with the severest penalties; But when the Evils which may and must result from it, exceed those intended to be redressed, prudence and policy require that it should be avoided."[211] The evils in this case have certainly overcome the statutory purpose, and more importantly, the constitutional right of all Americans to be free from cruel and unusual punishments which are disproportionate to their crimes. The objective criteria set forth in *Solem* would have preserved the eighth amendment which today the majority has reduced to mere words. Because I would uphold *Solem* and apply its prescribed criteria, I would reverse the holding below and find Mr. Harmelin's sentence to be unconstitutional under the eighth amendment.

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[211] MAXIMS OF GEORGE WASHINGTON 157 (collected and arranged by J.F. Schroeder 1989).