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Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment

BY STEVEN GROSSMAN*

INTRODUCTION

There has always been debate about how, why, and to what extent society should punish individuals who violate its norms. In this country that debate has been conducted primarily on two levels. First, in legislatures and among punishment theorists, the debate has revolved around what are the appropriate goals of a criminal justice system and how can a sentencing framework be developed to best accomplish those goals.¹ Second, in the courts, particularly the Supreme Court, the debate has involved the meaning of the ban on cruel and unusual punishment contained within the Eighth Amendment to the Constitution.²

This Article examines the Supreme Court's treatment of the Eighth Amendment with respect to claims of excessive prison sentences. Specifically, it addresses the issue of whether and to what degree the Eighth Amendment requires that a punishment not be disproportionate to the crime. In analyzing all of the modern holdings of the Court in this area,³ this Article finds significant fault with each. The result of this series of flawed opinions from the Supreme Court is that the state of the law with respect to proportionality in sentencing is confused, and what law can be discerned rests on weak foundations.

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¹ See *infra* notes 353-402 and accompanying text.

² The Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

³ These modern holdings are *Rummel v. Estelle*, 445 U.S. 263 (1980), see *infra* notes 7-69 and accompanying text; *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam), see *infra* notes 70-120 and accompanying text; *Solem v. Helm*, 463 U.S. 277 (1983), see *infra* notes 121-228 and accompanying text; and *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion as to Parts I-III; majority opinion as to Part IV), see *infra* notes 229-352 and accompanying text.

This Article begins with an analysis of the modern proportionality decisions of the Supreme Court in non-capital cases. It discusses the various approaches taken by members of the Court and tracks these approaches through each of the cases.⁴ The second portion discusses the philosophical justifications of punishment and the impact these justifications have on attempts to frame a proportionality standard.⁵ This Article concludes by recommending a constitutional standard consistent with accepted philosophical justifications of punishment and embodying principles determined by the Supreme Court to be of critical importance.⁶

I. *RUMMEL V. ESTELLE*

The modern approach to the application of an Eighth Amendment-based proportionality principle for prison sentences began with the Supreme Court's holding in *Rummel v. Estelle*.⁷ William Rummel was sentenced under a Texas recidivist statute that required life imprisonment for anyone convicted three times of a non-capital felony. He argued that such a sentence was disproportionate to the offense of which he was convicted, or even to the sum of the three aggregate felonies that were used to trigger the recidivist statute.⁸

Rummel was convicted by a jury in 1973 of theft for obtaining \$120.75 by false pretenses.⁹ Under the relevant Texas statute, theft of more than \$50 was punishable by two to ten years in prison.¹⁰ The state, however, chose to prosecute Rummel under the Texas felony recidivist statute.¹¹ Rummel's two previous felony convictions were a 1964 plea of guilt to fraudulently using a credit card to obtain \$80 worth of services and a 1969 plea to passing a forged check of \$28.36. Rummel had received prison terms of three and four years respectively for these two

⁴ See *infra* notes 7-352 and accompanying text.

⁵ See *infra* notes 353-84 and accompanying text.

⁶ See *infra* notes 385-402 and accompanying text.

⁷ 445 U.S. 263 (1980).

⁸ *Id.* at 267.

⁹ *Id.* at 266.

¹⁰ *Id.* at 265. The Texas Penal Code has been recodified since 1973, but for the statute as it stood at the time of Rummel's conviction, see TEX. PENAL CODE ANN. art. 1555b(4)(d) (West 1964).

¹¹ *Rummel*, 445 U.S. at 264. Article 63 of the Texas Penal Code, subsequently recodified as TEXAS PENAL CODE ANN. § 12.42d (West 1974), mandated that anyone convicted of a third felony be sentenced to life imprisonment.

prior convictions.¹² After his 1973 conviction, the trial judge imposed the life sentence mandated by the recidivist statute.¹³

The Texas appellate court rejected Rummel's challenge to his sentence both on direct appeal and later on collateral attack.¹⁴ After his petition for habeas corpus was rejected by the federal district court, Rummel was successful in getting his sentence overturned by the United States Court of Appeals for the Fifth Circuit.¹⁵ A panel of that court determined that Rummel's sentence was grossly disproportionate to the offenses he had committed and, therefore, was in violation of the Eighth Amendment's prohibition against cruel and unusual punishments.¹⁶

However, on rehearing, the Fifth Circuit, sitting en banc, reversed the finding of the panel and reinstated Rummel's life sentence.¹⁷ In so doing, the court emphasized the fact that Rummel's sentence should not be considered overly lengthy because he would be eligible for parole in twelve years.¹⁸ Rummel then sought review in the Supreme Court.

The Supreme Court affirmed the holding of the Fifth Circuit, concluding that setting the maximum length of prison sentences for criminal offenses is a role properly handled by legislatures, and not appellate courts.¹⁹ The Court based this conclusion both on its perception of how the Eighth Amendment has previously been interpreted by the Court in this realm²⁰ and on its view of the proper role of judges in the sentencing process.²¹ In both of these areas, the Court set a precedent that

¹² *Rummel*, 445 U.S. at 265-66.

¹³ *Id.* at 266.

¹⁴ *Id.* at 267. See *Rummel v. Estelle*, 509 S.W.2d 630 (Tex. Crim. App. 1974).

¹⁵ *Rummel v. Estelle*, 568 F.2d 1193 (5th Cir.), *vacated on reh'g*, 587 F.2d 651 (5th Cir. 1978), *aff'd*, 445 U.S. 263 (1980).

¹⁶ *Id.* at 1200. The Fifth Circuit relied on *Weems v. United States*, 217 U.S. 349 (1910), for the proposition that the Eighth Amendment contains a requirement for proportional sentencing. *Rummel*, 568 F.2d at 1195. In considering how to apply such a requirement, the court looked at a holding of the U.S. Court of Appeals for the Fourth Circuit, *Hart v. Coiner*, 483 F.2d 136 (1973), *cert. denied*, 415 U.S. 983 (1974). *Rummel*, 568 F.2d at 1197. In *Hart*, the Fourth Circuit laid out four criteria that it asserted could be used to objectify somewhat the determination of whether a particular sentence was grossly disproportionate to the crime committed. See *infra* note 64.

¹⁷ *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978).

¹⁸ *Rummel v. Estelle*, 445 U.S. 263, 268 (1980).

¹⁹ *Id.* at 274, 283-84.

²⁰ *Id.* at 272-75.

²¹ *Id.* at 274-75. The Court maintained that subjective considerations which inevitably enter into determining what constitutes an appropriate sentence are within the province of the legislatures, not the appellate courts. It then rejected the criteria that Rummel advanced as a means of objectifying a proportionality determination by the courts. *Id.* at

led to a series of unpersuasive and unfortunate opinions with respect to the application of the principle of proportionality in sentencing.

The Court in *Rummel* divided its analysis of previous holdings involving Eighth Amendment proportionality into death penalty cases and those involving imprisonment. As to the former, the Court concluded that since death is a unique form of punishment,²² previous Supreme Court decisions in capital cases that had clearly discerned a proscription against disproportional sentencing within the Eighth Amendment were "of limited assistance"²³ in assessing whether jail sentences could be impermissibly long. Regarding non-capital cases, the Court said that successful challenges to the proportionality of such sentences were "exceedingly rare"²⁴ and, in fact, analyzed only one such case, *Weems v. United States*.²⁵

Decided in 1910, *Weems* was the first opinion of the Supreme Court that clearly identified a requirement for proportional sentencing within the Eighth Amendment.²⁶ *Weems*, a disbursing officer for the Coast Guard stationed in the Philippines, was convicted of falsifying a cash book in the amount of 616 pesos. For this offense, *Weems* received a fine plus

275-83.

²² *Id.* at 272. See *infra* notes 41-46 and accompanying text regarding the Court's treatment of capital cases as unique.

²³ *Rummel*, 445 U.S. at 272.

²⁴ *Id.*

²⁵ 217 U.S. 349 (1910).

²⁶ *Id.* at 367. See also LARRY C. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 159 (1975). The first enunciation of the proportionality principle by a member of the Court occurred in the dissent by Justice Field in *O'Neil v. Vermont*, 144 U.S. 323, 337-66 (1892), cited in *Rummel*, 445 U.S. at 285 (Powell, J., dissenting); Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent"*, 27 ARIZ. L. REV. 25, 28 (1985).

The defendant in *O'Neil* was convicted of 307 mail order sales of liquor in what was then a dry state. *O'Neil*, 144 U.S. at 327. His crime could have resulted in the defendant's spending over fifty years at hard labor. *Id.* at 331. The Court rejected the defendant's Eighth Amendment challenge because he had failed to preserve error, *id.*, and because the Eighth Amendment had not yet been deemed to be applicable to the states. *Id.* at 332. Justice Field, in a dissent that was joined by two other Justices, wrote that "punishments which by their excessive length or severity are greatly disproportioned to the offenses charged" violate the Cruel and Unusual Punishments Clause. *Id.* at 339-40 (Field, J., dissenting). Thus, not only did Justice Field identify a proportionality principle, but he also argued that excessive length of sentence alone can constitute disproportionality. *Id.* at 340 (Field, J., dissenting).

fifteen years of a punishment called "*cadena temporal*."²⁷ During the *cadena*, the prisoner is chained from the ankles and wrists and forced to perform what the Court called "hard and painful labor."²⁸ Even after the incarceration period is over, the offender has no marital authority, parental or property rights, and is subject to lifelong surveillance.²⁹ Weems claimed that his punishment was cruel and unusual because of its harsh and oppressive nature, and because the length of the sentence was disproportionate to the offense he had committed. In its decision that his sentence violated the Eighth Amendment, the Supreme Court seemed to accept both of Weems' rationales.³⁰

The Court in *Rummel*, while acknowledging that the earlier holding had found Weems' sentence to be disproportionate to his offense, attributed this finding primarily to the "unique nature" of the *cadena* punishment and not its length.³¹ The *Rummel* Court characterized the *Weems* opinion as "consistently [referring] *jointly* to the length of imprisonment and its 'accessories' or 'accompaniments'."³² *Weems* is correctly viewed, according to the Court in *Rummel*, as applying to its "peculiar facts"³³ and having meaning only when all of those facts, the "triviality of the charged offense, the impressive length of . . . [sentence], and the extraordinary nature of the 'accessories'" are considered together.³⁴ This Gestalt-like approach to the holding in *Weems* is significant because it allowed the Court in *Rummel* to conclude that *Weems* is of little assistance to one whose Eighth Amendment proportionality challenge is based on length of sentence alone.³⁵

The analysis of *Weems* undertaken by the Court in *Rummel* is deficient in that it omits those aspects of the earlier holding which support the position that Weems' sentence violated the Eighth Amendment for two *separate* reasons, its length and its harshness. For example,

²⁷ *Weems*, 217 U.S. at 358, 363-64.

²⁸ *Id.* at 364.

²⁹ *Id.* at 364-65. The Court went on to describe Weems' continuing punishment after his chains were removed: "He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate . . . subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty." *Id.* at 366.

³⁰ *Id.* at 365, 366, 382. See *infra* notes 36-37 and accompanying text.

³¹ *Rummel v. Estelle*, 445 U.S. 263, 272-73 (1980).

³² *Id.* at 273 (emphasis added) (quoting *Weems v. United States*, 217 U.S. 349, 366, 372, 377, 380 (1910)).

³³ *Id.* at 274.

³⁴ *Id.* (quoting *Weems*, 217 U.S. at 366).

³⁵ *Id.* at 273-74.

at one point the Court in *Weems* says of the sentence: "It is cruel in its excess of imprisonment *and* that which accompanies and follows imprisonment. . . . Its punishments come under the condemnation of the bill of rights *both* on account of their degree and kind."³⁶ Furthermore, the Court in *Rummel* placed no weight on those parts of the decision in *Weems* which declared proportionality to be an essential component of the Eighth Amendment without alluding to the nature or uniqueness of the *cadena* sentence.³⁷

Only four years before *Rummel* was decided, the Court seemed to take a somewhat different approach to *Weems*.³⁸ The Court declared that the decision in *Weems*, although acknowledging the cruelty of the *cadena* punishment, "did not rely on that factor, for it rejected the proposition that the Eighth Amendment reaches only punishments that are 'inhuman and barbarous, torture and the like.' Rather, the Court focused on the lack of proportion between the crime and the offense."³⁹ Thus, while *Weems* may not be a definitive holding that length of imprisonment alone can make a sentence unconstitutionally disproportionate to an offense, it offers far stronger support for this position than is suggested by the Court in *Rummel*.⁴⁰

³⁶ *Weems*, 217 U.S. at 377 (emphasis added).

³⁷ *Rummel*, 445 U.S. at 274. At one point the *Weems* Court declared: "It is a precept of justice that punishment for crime should be graduated and proportional to the offense." *Weems*, 217 U.S. at 367. Interestingly, Justice White, in his dissent in *Weems*, interpreted the majority's view of a proportionality requirement quite differently than the Court in *Rummel* would later explain it. White's dissent is predicated on his disagreement with the majority's analysis of the Cruel and Unusual Punishments Clause and his belief that the majority opinion improperly transferred sentencing considerations from the legislature to the judiciary. *Id.* at 385 (White, J., dissenting). While Justice White did express some confusion at the precise meaning of the majority's holding, he interpreted it as imposing on the legislature the "duty of proportioning punishment according to the nature of the crime, and cast[ing] upon the judiciary the duty of determining whether punishments have been properly apportioned . . . and if not[,] to decline to enforce [them]." *Id.* (White, J., dissenting). See also *id.* at 386-87 (White, J., dissenting).

³⁸ See *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion).

³⁹ *Id.* at 171 (quoting *Weems*, 217 U.S. at 368) (citation omitted).

⁴⁰ See Charles W. Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 385 (1980) (arguing that *Weems* is best read as holding that both the conditions and the intensity of a sentence can violate the Cruel and Unusual Punishments Clause); Thomas F. Cavalier, Comment, *Salvaging Proportionate Prison Sentencing: A Reply to Rummel v. Estelle*, 15 U. MICH. J.L. REP. 285, 291-92 (1982). Twenty-three years before *Rummel* was decided, one commentator summarized the then prevailing view of the holding in *Weems* by writing: "Actually the great weight of authority sustains the propriety of the court's inquiring into the severity of the sentence, so that a sentence which is clearly excessive

The *Rummel* Court was similarly dismissive of the relevance of those cases involving capital punishment that had clearly identified a proportionality principle in the Eighth Amendment.⁴¹ *Gregg v. Georgia*, which held that the death penalty was constitutional at least in certain circumstances,⁴² and *Coker v. Georgia*, holding that capital punishment is disproportionate to the crime of raping an adult woman,⁴³ had both been decided only a few years before *Rummel*. Each of these decisions held that punishments excessive in relation to the crimes committed were violative of the proportionality requirement of the Eighth Amendment.⁴⁴ Furthermore, each decision made clear that excessiveness alone, without regard to the barbaric nature of the punishment, was sufficient to invalidate a sentence.⁴⁵ The Court in *Rummel* found these pronouncements on excessiveness, because they appeared in capital cases, to be "of limited assistance" in deciding the constitutionality of terms of imprisonment.⁴⁶

Assuming *arguendo* both that the death penalty is a unique form of punishment and that the Court's pronouncements in capital cases have no bearing on other sentences,⁴⁷ the Court in *Rummel* was still remiss in ignoring the manner in which those capital cases interpreted earlier proportionality holdings of the Court. Such an omission is particularly glaring when those earlier proportionality cases did *not* themselves involve capital sentences. In fact, the interpretations of these earlier cases which appear in both the *Gregg* and *Coker* opinions⁴⁸ reveal the hyper-

is in most jurisdictions said to constitute cruel and unusual punishment." David Fellman, *Cruel and Unusual Punishment*, 19 J. POL. 34, 35 (1957).

⁴¹ *Rummel*, 445 U.S. at 272.

⁴² 428 U.S. 153, 206-07 (1976) (plurality opinion).

⁴³ 433 U.S. 584, 592 (1977) (plurality opinion).

⁴⁴ *Coker*, 433 U.S. at 592; *Gregg*, 428 U.S. at 171-73.

⁴⁵ *Coker*, 433 U.S. at 592; *Gregg*, 428 U.S. at 171-73.

⁴⁶ *Rummel*, 445 U.S. at 272.

⁴⁷ *But see infra* notes 170-71 and 248-60 and accompanying text.

⁴⁸ The plurality opinion in *Gregg* specifically rejected the notion that the *Weems* Court had relied on the nature of the punishment alone in holding that *Weems*' sentence violated the Eighth Amendment. Instead, according to the Court in *Gregg*, the holding in *Weems* was based primarily on the disproportionality between *Weems*' crime and his sentence. *Gregg*, 428 U.S. at 171-72.

The *Gregg* Court found further support for the existence of a proportionality requirement in two other decisions by the Supreme Court involving non-capital sentences. In *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion), a soldier who deserted for one day after escaping from the stockade was sentenced to denationalization. *Id.* at 88. The Court in *Gregg* found it noteworthy that, although the decision in *Trop* was not based on disproportionality, the plurality opinion at one point observed that "[f]ines, imprisonment

bolic nature of the *Rummel* Court's assertion that, with regard to prison sentences, "one could argue without fear of contradiction by any decision of this Court that . . . the length of the sentence actually imposed is purely a matter of legislative prerogative."⁴⁹

The Court in *Rummel*, after examining the judicial history of proportionality in sentencing, turned its attention to the role of appellate courts in attempting to apply a principle of proportionality. The Court was understandably concerned with the possibility that appellate judges might use subjectively proportional sentencing requirements to substitute their views as to what constitutes an appropriate sentence in a given case for that of the trial judge or the legislature.⁵⁰ *Rummel* attempted to demonstrate that his sentence should be deemed unconstitutionally excessive through the application of reasonably objective criteria. *Rummel* argued that both the fact that all of his crimes were nonviolent and the fact that individually (or even collectively) the crimes involved relatively small amounts of money were objective evidence that his crimes were not of a serious nature.⁵¹ The Court, however, considered the seriousness of any crime to be an inherently subjective question and regarded it as a matter for each state to determine according to its particular needs and interests. In this instance the Court found that Texas was primarily responding to the problem of recidivism and not merely to specific crimes.⁵² Once recidivist statutes are deemed to be rational

and even execution may be imposed *depending on the enormity of the crime.*" *Gregg*, 428 U.S. at 172 (emphasis added) (quoting *Trop*, 356 U.S. at 100). The *Gregg* Court also alluded to *Robinson v. California*, 370 U.S. 660 (1962), a case in which a statute that punished for the crime of being a drug addict was invalidated. The plurality opinion in *Gregg* noted that the *Robinson* holding, in discussing proportionality, asserted that "[t]he cruelty in the abstract of the actual sentence imposed was irrelevant." *Gregg*, 428 U.S. at 172. Instead, maintained the *Gregg* Court, "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 172 (quoting *Robinson*, 370 U.S. at 667).

In *Coker*, the Court characterized *Gregg* as "firmly embrac[ing] the holdings and dicta from prior cases, to the effect that the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." *Coker*, 433 U.S. at 592 (citations omitted). The declaration in *Coker* is not limited to capital cases, and in fact, of the four supporting cases cited by the Court, only *Furman v. Georgia*, 408 U.S. 238 (1971), involved a death sentence.

⁴⁹ *Rummel*, 445 U.S. at 274. See also *Baker & Baldwin*, *supra* note 26, at 50-51.

⁵⁰ *Rummel*, 445 U.S. at 275. The Court expressed the same concern about subjective judgments in *Gregg*, 428 U.S. at 173, and *Coker*, 433 U.S. at 592.

⁵¹ *Rummel*, 445 U.S. at 275. *Rummel*'s three crimes involved a total of \$229. The crimes, all of a nonviolent nature, were fraudulent use of a credit card, passing a forged check, and obtaining money by false pretenses. *Id.* at 265-66.

⁵² *Id.* at 276.

responses to the problem of repeat offenders, and Rummel did not challenge this, how the statute is structured is a matter of line-drawing, according to the Court.⁵³ Although the *Rummel* Court appeared to reject the concept of appellate courts becoming involved in this line-drawing because, in its view, legislatures should set the parameters and trial judges should make individual sentencing determinations within those parameters, it nevertheless responded to Rummel's attempt to draw such a line and to place his sentence on the cruel and unusual side of the line.⁵⁴

In analyzing the Texas statute, the Court noted that only those felons who have been convicted twice *and* incarcerated twice qualify for mandatory life imprisonment.⁵⁵ The Court apparently found it a significant ameliorating factor in assessing harshness that the statute encompasses only those recidivists who have not been deterred by two previous felony convictions and two separate prison terms.⁵⁶

To Rummel's argument that only two other states sentenced third time felons to mandatory life imprisonment and that even the sentencing schemes in those states were less harsh than that of Texas,⁵⁷ the Court responded that often the differences among the states are "subtle rather than gross."⁵⁸ Also, while the Court agreed with Rummel that the possibility of parole after twelve years did not mean that his sentence should not be regarded as life imprisonment for assessment purposes, it

⁵³ *Id.* at 275. Lines would have to be drawn assessing, first, the seriousness of the crime and then, the harshness of the sentence.

⁵⁴ *Id.* at 275-76.

⁵⁵ *Id.* at 278.

⁵⁶ *Id.* The Court found support for its approach to such recidivist sentencing schemes in *Graham v. West Virginia*, 224 U.S. 616 (1912). *Rummel*, 445 U.S. at 276. In *Graham*, the defendant was sentenced to life imprisonment pursuant to a recidivist statute. The focus of the opinion in that case was on the denial of the defendant's claims of due process, equal protection, and double jeopardy violations. Only one sentence of the eleven page opinion dealt with the Eighth Amendment, and it stated simply that the defendant's punishment was not cruel and unusual. *Graham*, 224 U.S. at 631. It appears that the extent of the Court's Eighth Amendment holding in *Graham* was that recidivist statutes do not automatically constitute cruel and unusual punishment. *Id.* at 617.

⁵⁷ Rummel argued that in those two states, West Virginia and Washington, courts had indicated a willingness to review such mandatory sentences, whereas in Texas no such review occurred. *Rummel*, 445 U.S. at 279. The Court dismissed Rummel's distinction, noting that it would ultimately decide whether such judicial review was required, and in any case, the salient fact was that the legislative judgments in West Virginia and Washington were similar to that of Texas. *Id.*

⁵⁸ *Id.* Examples of "subtle" distinctions offered by the Court are as follows: states that require four rather than three felonies for life imprisonment, states requiring violence as a necessary element of one or more of the triggering crimes, and states giving the sentencer discretion as to whether to impose life imprisonment. *Id.* at 279-80.

“could hardly ignore the possibility” that Rummel might actually serve a lesser period of time.⁵⁹ To the Court, the significance of these complexities in comparing recidivist statutes was not to show the flaws in Rummel’s particular analysis, but instead to demonstrate the inherent difficulty in attempting to derive meaningful conclusions from such comparisons.⁶⁰ Apparently more central to the Court’s holding, however, was its view that even if Texas’ statute were clearly the harshest, our federalist principles make inevitable, and even invite, disparate approaches by the states.⁶¹

Writing for four Justices, Justice Powell’s dissent first disputed the contention of the majority that prior Supreme Court holdings articulating proportionality principles were fact-specific.⁶² Next, Justice Powell attempted to craft a method for assessing whether a sentence is grossly disproportionate to the crime committed. Acknowledging the majority’s assertion that it is important to prevent such an assessment from turning on the “personal predilections” of the reviewing judges,⁶³ Justice Powell expanded the criteria proposed by Rummel for objectifying the review process. Specifically, Powell’s approach would analyze the nature of the offense and then compare the sentence imposed to the sentence for that crime (or series of crimes) in other jurisdictions and to sentences imposed for similar crimes in the same jurisdiction.⁶⁴

⁵⁹ *Id.* at 280-81.

⁶⁰ *Id.*

⁶¹ *Id.* at 282.

⁶² *Id.* at 289-93 (Powell, J., dissenting). Justice Powell asserted that “[i]n both capital and [non-capital] cases this Court has recognized that the decision in *Weems v. United States* ‘proscribes punishment grossly disproportionate to the severity of the crime.’” *Id.* at 290 (Powell, J., dissenting) (quoting *Ingraham v. Wright*, 430 U.S. 651, 667 (1977)). Powell also cited opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), *Robinson v. California*, 370 U.S. 660 (1962), and *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion), in support of his claim that the Court recognized a broad proportionality principle. *Rummel*, 445 U.S. at 290-93 (Powell, J., dissenting).

⁶³ *Rummel*, 445 U.S. at 295 (Powell, J., dissenting).

⁶⁴ *Id.* (Powell, J., dissenting). Justice Powell offered support in prior Supreme Court cases for his use of these three criteria. Regarding the nature of the offense, Powell cited *Coker*, 433 U.S. at 598, wherein the Court acknowledged the seriousness of the crime of rape but noted, “it does not compare with murder, which does involve the unjustified taking of human life.” The Court in *Coker* held that while the death penalty may be an appropriate sentence for murder, it is an “excessive” penalty for rape. *Coker*, 433 U.S. at 598.

With regard to a comparison of the sentence at issue to sentences for the same crime in other jurisdictions, Powell again alluded to *Coker*. *Rummel*, 445 U.S. at 295 (Powell,

Applying those criteria to the instant case, Justice Powell found that because of their nonviolent nature and the relatively small amounts of money involved, Rummel's crimes were not serious in nature.⁶⁵ Next he

J., dissenting). In *Coker*, the Court considered it significant that after *Furman* invalidated most death penalty statutes, only three states reinstated capital punishment for the crime of raping an adult woman, and ultimately after two of those statutes were declared unconstitutional because of their mandatory nature, only one state was left with such a penalty for the rape of an adult woman. *Coker*, 433 U.S. at 593-94. Additionally, Powell cited *Gregg*, 428 U.S. 153, 179-81 (opinion of Stewart, Powell, and Stevens, JJ.) (noting that the enactment of new death penalty statutes in thirty-five states after *Furman* was a factor in determining that the death penalty was not violative of the Eighth Amendment), *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion) (observing that "civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"), and *Weems*, 217 U.S. 349, 380 (1910). *Rummel*, 445 U.S. at 295 (Powell, J., dissenting).

Justice Powell cited *Weems* in support of his third criteria, comparing punishments for other crimes in the same jurisdiction. *Id.* In that case the Court, analyzing Weems' crime, observed that, "[t]here are degrees of homicide that are not punished so severely." *Weems*, 217 U.S. at 380. It then listed other arguably more serious crimes also treated less harshly than was Weems' offense. *Id.*

Seven years before *Rummel* was decided, the United States Court of Appeals for the Fourth Circuit had used "objectifying" criteria to assess the proportionality of a non-capital sentence in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974). The defendant in *Hart* had been sentenced to life imprisonment after his third conviction pursuant to a recidivist statute not unlike the one at issue in *Rummel*. *Id.* at 138. The *Hart* court used precisely the same three factors that Justice Powell would later advocate in his dissent in *Rummel*, as well as a fourth factor that looked at the legislative purpose of the sentence at issue. *Id.* at 140-42. In *Hart*, the court concluded that the defendant's convictions for passing a bad check, transporting bad checks across state lines, and perjury did not warrant life imprisonment. Among other things, the court considered it significant that the crimes at issue were all nonviolent and involved relatively small amounts of money. Furthermore, the court acknowledged that while deterrence of repeat offenders was an appropriate legislative purpose, even such a purpose did not allow for unlimited punishment merely because some deterrence could be achieved (as the court observed, capital punishment would deter even better). Instead the court looked at whether the goal of deterrence could be accomplished with a punishment more commensurate with the crimes committed. *Id.* at 140-41. For a discussion on limiting retributivism see *infra* notes 385-402.

This approach, considering whether a lesser punishment will achieve the relevant sentencing goal, is similar to one facet of the test enunciated by the Supreme Court for sentence excessiveness, at least in capital cases. In *Gregg*, the Court held that excessiveness could result from gross disproportionality or the "unnecessary and wanton infliction of pain," *Gregg*, 428 U.S. at 173 (emphasis added). For a detailed discussion of this "least restrictive means" approach, see Margaret J. Radin, *The Jurisprudence of Death: Evolving Standards For the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1025, 1053 (1978).

⁶⁵ *Rummel*, 445 U.S. at 295 (Powell, J., dissenting) (noting that one of the crimes,

observed that among the minority of states that have mandatory life imprisonment recidivist statutes, the Texas statute is the harshest because the others either (1) require more than three convictions, (2) require that one of the felonies be violent, (3) limit a mandatory penalty to less than life, or (4) grant discretion to the sentencer.⁶⁶

With respect to his third objectifying factor, Justice Powell concluded that Texas allows those who have committed crimes more serious than *Rummel* to receive lesser sentences.⁶⁷ For example, murderers or kidnappers in Texas could be sentenced to prison terms ranging from five to ninety-nine years, and twice-convicted rapists could receive sentences as low as five years imprisonment.⁶⁸ Furthermore, to Justice Powell, any sentencing scheme that equally punishes two people who have committed markedly disparate crimes or series of crimes raises questions as to its proportionality.⁶⁹

The judicial struggle over the application of the Eighth Amendment to proportional sentencing was to be fought primarily on two fronts: interpretation of earlier Supreme Court cases (and later to be added, other historical sources), and the existence of criteria that meaningfully objectify an appellate court's determination as to whether a particular sentence is grossly disproportionate to the crime committed. This struggle would reappear in subsequent Supreme Court cases with the Court apparently changing its mind and then changing its mind again.

theft by false pretenses, was subsequently recodified as a misdemeanor).

⁶⁶ *Id.* at 298 (Powell, J., dissenting). The majority in *Rummel* responded to use of the interjurisdictional factor by observing that although one state will always be at the top of the punishment rung for a particular crime, that fact does not mean that the state's statute is cruel and unusual. While agreeing with this observation, Justice Powell maintained that the use of such a comparison was still a valuable part of a multi-factored assessment of proportionality. *Id.* at 299 n.19 (Powell, J., dissenting).

⁶⁷ *Id.* at 300 (Powell, J., dissenting).

⁶⁸ *Id.* at 301 (Powell, J., dissenting). Justice Powell acknowledged that Texas could opt to punish recidivists more harshly than others convicted of the same crimes. However, he went on to note that the Texas sentencing system distinguishes even among recidivists, based on the seriousness of the crime committed. For example, one convicted twice of unauthorized use of a vehicle does not receive the same sentence as one convicted twice of rape. *Id.* (Powell, J., dissenting).

⁶⁹ *Id.* (Powell, J., dissenting). Justice Powell cited with approval the holding of the United States Court of Appeals for the Fourth Circuit in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974), *see supra* note 64. Powell found it significant that *Hart* did not become a vehicle for appellate judges to substitute their own views regarding appropriate sentences for that of the legislatures and trial judges. *Rummel*, 445 U.S. at 304-05 (Powell, J., dissenting).

II. *HUTTO v. DAVIS*

The Supreme Court's first opportunity to confront an Eighth Amendment proportionality challenge to a non-capital sentence after *Rummel* was the case of Roger Trenton Davis.⁷⁰ Davis had been sentenced by a jury in Virginia to a total of forty years imprisonment and a fine of \$20,000, based on his convictions for distribution and possession with intent to distribute a total of nine ounces of marijuana.⁷¹ Unlike *Rummel*'s case, Davis' sentence did not involve a recidivist statute.

The road that Davis took to the Supreme Court was a long one, starting with the exhaustion of his direct appeals. He was then granted a writ of habeas corpus by the federal district court⁷² only to have that writ reversed by a panel of the United States Court of Appeals for the Fourth Circuit.⁷³ Sitting en banc, the appeals court reinstated the writ granted by the district court.⁷⁴ The Supreme Court, upon a grant of certiorari, vacated the decision of the Fourth Circuit and remanded the case for reconsideration "in light of *Rummel v. Estelle*."⁷⁵ An equally divided court of appeals again affirmed the issuance of the writ by the district court,⁷⁶ causing the state to again appeal to the Supreme Court. This time the Court reversed the court of appeals and, in an unusually stern opinion, reinstated Davis' original sentence.⁷⁷

In granting the writ of habeas corpus, the federal district court relied upon an earlier Fourth Circuit case that had developed criteria for assessing a proportionality challenge to determine that Davis' sentence

⁷⁰ *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam).

⁷¹ *Id.* at 371.

⁷² *Davis v. Zahradnick*, 432 F. Supp. 444 (W.D. Va. 1977), *rev'd sub nom. Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978), *aff'd on reh'g*, 601 F.2d 153 (4th Cir. 1979) (per curiam), *vacated sub nom. Hutto v. Davis*, 445 U.S. 947 (1980), *on remand sub nom. Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982).

⁷³ *Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978), *aff'd on reh'g*, 601 F.2d 153 (4th Cir. 1979) (per curiam), *vacated sub nom. Hutto v. Davis*, 445 U.S. 947 (1980), *on remand sub nom. Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982).

⁷⁴ *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979) (per curiam), *vacated sub nom. Hutto v. Davis*, 445 U.S. 947 (1980), *on remand sub nom. Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982).

⁷⁵ *Hutto v. Davis*, 445 U.S. 947 (1980), *on remand sub nom. Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982).

⁷⁶ *Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982).

⁷⁷ *Hutto v. Davis*, 454 U.S. 370, 372, 375 (1982) (per curiam).

violated the Eighth Amendment.⁷⁸ These criteria were similar to those used later by Justice Powell in his *Rummel* dissent. Applying the criteria to Davis' sentence, the district court concluded that the crimes involved were nonviolent in nature, the legislative purpose of the statute violated could be served by significantly less severe punishment than that received by Davis, the punishment imposed in Virginia was among the harshest allowed in the fifty states, and crimes considerably more serious than marijuana distribution carried maximum sentences of twenty years or less in Virginia.⁷⁹ Additionally, the court seemed to place particular emphasis on the fact that Davis' sentence greatly exceeded that of all others convicted of the same offense in Virginia's recent past.⁸⁰ The court observed that the various opinions of the Supreme Court justices in *Furman v. Georgia*,⁸¹ a case that invalidated Georgia's capital punishment statute, had focused on the erratic nature of the sentence in that case, and that Davis' sentence seemed to be similarly arbitrary.⁸²

⁷⁸ *Davis v. Zahradnick*, 432 F. Supp. 444, 451-52 (W.D. Va. 1977) (citing *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974)), *rev'd sub nom. Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978), *aff'd on reh'g*, 601 F.2d 153 (4th Cir. 1979) (per curiam), *vacated sub nom. Hutto v. Davis*, 445 U.S. 947 (1980), *on remand sub nom. Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982). See *supra* note 64.

⁷⁹ *Id.* at 452-53.

⁸⁰ *Id.* At least some familiar with his case suggest the explanation for Davis' comparatively long sentence "was not marijuana but miscegenation." Mike Sager, *9 Ounces Equals 40-Year Sentence*, WASH. POST, Jan. 22, 1982, at B1, B3. Davis, a black man, apparently had broken a social taboo in rural Wytheville, Virginia by dating white women and ultimately marrying one. He was not shy about his relationship with the woman, and during that time he had a cross burned on his lawn. Additionally, Wythe County newspapers and public officials were at the time paying a great deal of attention to the danger of drugs. Davis, certainly no model citizen, was arrested in January, 1973 and later convicted of selling four LSD tablets. Sixteen articles in the local newspaper were written about Davis and his involvement with drugs. *Id.* at B3. While reasons as to why the local jury that sentenced Davis to such a strikingly long jail sentence are largely speculative, his case argues for some kind of desert-based maximum. See *infra* notes 385-402 and accompanying text.

⁸¹ 408 U.S. 238 (1972).

⁸² *Zahradnick*, 432 F. Supp. at 453. The court observed: "If there is any one strand linking together the opinions constituting the judgment of the court in *Furman v. Georgia*, it is that the erratic, freakish, and unusual infliction of punishment raises problems of Eighth Amendment proportions." *Id.* (citation omitted). The court then noted that for convictions of the offenses of possessing, selling or manufacturing marijuana in Virginia's recent past, "[t]he average sentence . . . was three years and two months, the minimum was sixty days and the maximum was fifteen years." *Id.* Comparing this to Davis' sentence of forty years incarceration, the court joined in the conclusion of the man who originally prosecuted Davis that his sentence was "grossly unjust." *Id.*

In reversing the decision of the district court, a panel of the United States Court of Appeals for the Fourth Circuit interpreted quite differently previous holdings of the Supreme Court and the Fourth Circuit. Presaging the debate that would engulf the Supreme Court in proportionality cases beginning with *Rummel*, the panel opinion saw *Weems* as a holding pertaining primarily to the method rather than the length of punishment, and therefore largely inapplicable to Davis' challenge.⁸³ Turning next to the use of disproportionality-determining criteria by the district court, the panel opinion read Fourth Circuit precedent as reserving full application of such criteria for sentences of life imprisonment.⁸⁴ For prison terms measured in years, the panel held that an inquiry into excessiveness need only consider the seriousness of the crime.⁸⁵ Such sentences should be overturned only when the sentence is so disproportionate to the crime as to "shock human sensibilities."⁸⁶

Additionally, the panel appeared to view Davis' crime as considerably more serious than did the district court. The panel opinion stressed that Davis knew the marijuana he was selling was in part destined for prison inmates.⁸⁷ The jury that sentenced Davis was aware of this as well as the fact that "this was not Davis' first trouble with the law in a drug related offense."⁸⁸ When considering these facts about his crime, the panel said that Davis' sentence did not appear to "shock human sensibilities."⁸⁹

Sitting en banc, the Fourth Circuit rejected the holding of its panel and affirmed the granting of the writ.⁹⁰ In a short per curiam opinion, the court based its decision on the positions taken by the district court.⁹¹

⁸³ *Davis v. Davis*, 585 F.2d 1226, 1229-30 (4th Cir. 1978), *aff'd on reh'g*, 601 F.2d 153 (4th Cir. 1979) (per curiam), *vacated sub nom. Hutto v. Davis*, 445 U.S. 947 (1980), *on remand sub nom. Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982).

⁸⁴ *Id.* at 1232.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1233 (quoting *Yeager v. Estelle*, 489 F.2d 276, 276 (5th Cir. 1973)).

⁸⁷ *Id.* at 1233.

⁸⁸ *Id.* at 1228.

⁸⁹ *Id.* at 1233.

⁹⁰ *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979) (per curiam), *vacated sub nom. Hutto v. Davis*, 445 U.S. 947 (1980), *on remand sub nom. Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982).

⁹¹ *Id.* at 154 (citing *Davis v. Zahradnick*, 432 F. Supp. 444 (W.D. Va. 1977), *rev'd sub nom. Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978), *aff'd on reh'g*, 601 F.2d 153 (4th Cir. 1979) (per curiam), *vacated sub nom. Hutto v. Davis*, 445 U.S. 947 (1980), *on remand sub nom. Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982)).

In reversing the United States Court of Appeals for the Fourth Circuit and instructing dismissal of the writ, the Supreme Court wrote a terse per curiam opinion that appeared to foreclose virtually any proportionality challenge in a non-capital case.⁹² The Court observed that the decision in *Rummel* had made clear that any assessment of the excessiveness of a prison term was inherently subjective and therefore "purely a matter of legislative prerogative."⁹³ The per curiam opinion reiterated the *Rummel* holding that because of the unique nature of the death penalty, the Court's pronouncements regarding proportionality requirements in capital cases had little relevance outside that realm.⁹⁴ Furthermore, the Court noted that in *Rummel* it had rejected each of the purported objectifying criteria that had been relied upon by the district court in granting the writ.⁹⁵ The Court in *Davis*, again reiterating what it held in *Rummel*, warned that successful challenges to the proportionality of sentences should be "exceedingly rare,"⁹⁶ and offered the example of life imprisonment for overtime parking as such an extraordinary situation.⁹⁷ So clear to the Court was the message which it had sent in *Rummel*, that for the court of appeals to have again affirmed the granting of the writ to *Davis* upon remand "could be viewed as the [court of appeals'] having ignored consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress."⁹⁸ In other words, the court of appeals had not distinguished, but merely ignored, the holding in *Rummel*.

Justice Brennan, writing for three dissenters, argued that while the language in *Rummel* may be expansive, its holding is limited to the premise that a state may validly choose to punish habitual offenders severely to have a strong deterrent impact on prospective recidivists.⁹⁹

⁹² *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam).

⁹³ *Id.* at 373 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)).

⁹⁴ *Hutto*, 454 U.S. at 373.

⁹⁵ In rejecting the four criteria espoused by the Fourth Circuit in *Hart*, the *Davis* Court reiterated the criticism of the factors it leveled in *Rummel*, that: the absence of violence is not always determinative with respect to what crimes should be considered serious; the drawing of lines is inherently subjective and within the purview of the legislature, not the courts; reliance on comparisons with other states raises federalism concerns; and comparisons to the treatment of other crimes within the state in question are inherently speculative regarding why the legislature chose to treat certain crimes more seriously than others. *Id.* at 373 n.2 (citing *Rummel*, 445 U.S. at 275-76, 282).

⁹⁶ *Hutto*, 454 U.S. at 374 (quoting *Rummel*, 445 U.S. at 272).

⁹⁷ *Id.* at 374 n.3 (citing *Rummel*, 445 U.S. at 274 n.11).

⁹⁸ *Id.* at 374-75.

⁹⁹ *Id.* at 382-83 (Brennan, J., dissenting). Justice Brennan also attacked the majority

According to Brennan, the *Rummel* Court did not advocate abandonment of all disproportionality analysis, but cited approvingly prior decisions such as *Weems*.¹⁰⁰ To Brennan, a sentence of forty years imprisonment, roughly thirteen times greater than the average for others in Virginia convicted of similar crimes, was grossly disproportionate to the crimes of possessing and distributing nine ounces of marijuana.¹⁰¹

Justice Brennan noted two other developments that occurred after Davis' sentence which shed light on his claim of disproportionality. The prosecutor who charged Davis later wrote a letter expressing his view that the sentence was both gravely disparate and "grossly unjust."¹⁰² Additionally, the legislature of Virginia changed the laws under which Davis was punished so that by the time the Supreme Court considered Davis' case, the maximum incarceration he could have received for his two offenses was a total of twenty years.¹⁰³

Justice Powell, who authored the dissent in *Rummel*, also believed that Davis' sentence was disproportionate to his crimes, but felt constrained by the holding in *Rummel* to concur in this case.¹⁰⁴ Powell agreed with the dissenters that *Rummel* left the door somewhat ajar to proportionality challenges¹⁰⁵ and, as the dissent did, found both the letter of the former prosecutor and the change in the maximum sentence to be noteworthy.¹⁰⁶ While Justice Powell observed that consideration of the nature of Davis' crime accompanied by a comparison to the sentences of others similarly situated could "arguably" justify upholding the court of appeals' decision, Justice Powell believed that the facts of

for disposing of the case in a summary manner, without obtaining a full briefing or hearing oral argument. *Id.* at 381 (Brennan, J., dissenting).

¹⁰⁰ *Id.* at 383 (Brennan, J., dissenting). Brennan noted that Virginia had not claimed that Davis was punished harshly, as *Rummel* was, because Davis was a habitual offender. Therefore, in Brennan's view, the holding in *Rummel* was not determinative in Davis' case. *Id.* (Brennan, J., dissenting).

¹⁰¹ *Id.* at 384-85 (Brennan, J., dissenting).

¹⁰² *Id.* at 385 (Brennan, J., dissenting) (quoting Letter from Thomas B. Baird, Jr., prosecutor, to Edward L. Hogshire, Davis' defense attorney (Feb. 28, 1977)).

¹⁰³ *Id.* at 385-86. See VA. CODE ANN. § 18.2-248-1(a)(2) (Michie Supp. 1981); *id.* § 18.2-10(e) (Michie 1975). Justice Brennan was not asserting that this reduction in the maximum to which one could be sentenced for committing Davis' crimes, adopted by Virginia after Davis' sentence, automatically invalidated his sentence. It was, however, indicative to Brennan of recognition by the state that a sentence such as that received by Davis is grossly disproportionate to the crime of possession of marijuana with intent to sell. *Hutto*, 454 U.S. at 386 (Brennan, J., dissenting).

¹⁰⁴ *Hutto*, 454 U.S. at 375 (Powell, J., concurring).

¹⁰⁵ *Id.* at 377 (Powell, J., concurring).

¹⁰⁶ *Id.* at 377-79 (Powell, J., concurring).

Rummel compelled him to uphold Davis' sentence.¹⁰⁷ Specifically, Powell viewed Rummel's commission of "three minor frauds" as less serious than Davis' willingness to distribute marijuana for use by prison inmates, and observed that Rummel's sentence of life imprisonment was longer than Davis' incarceration period.¹⁰⁸

Thus, something of a three way division among the Justices developed in *Davis* with respect to proportionality challenges. It is difficult to discern clearly whether this division was one of degree or one of kind. The majority apparently believed that such challenges should rarely, if ever, be successful, using again the never-in-a-lifetime example of life imprisonment for overtime parking as such a "rare" situation.¹⁰⁹ To Justice Powell, discerning whether such a "rare" situation exists apparently depends on whether the offense and sentence in the challenged case are more disproportionate than those involved in Rummel's case (and presumably hereafter in Davis' case as well).¹¹⁰ The dissenters seem to regard *Rummel* as essentially a case limited to recidivist statutes¹¹¹ and would apparently advocate that appellate courts in other cases engage in proportionality analysis in keeping with the Eighth Amendment's "evolving standards of decency that mark the progress of a maturing society."¹¹² The majority in *Davis* clearly rejected the objectifying criteria used by the Fourth Circuit to assess a proportionality challenge.¹¹³ In fact, it castigated the lower court for not recognizing that the Supreme Court had so held in *Rummel*.¹¹⁴ It is not definitively clear from the concurring opinion of Justice Powell whether he believed there was any vitality left to either the above criteria or the similar factors which he proposed in his *Rummel* dissent. In any event, it appeared to be

¹⁰⁷ *Id.* at 379-80 (Powell, J., concurring).

¹⁰⁸ *Id.* at 380 (Powell, J., concurring).

¹⁰⁹ *Id.* at 374 n.3. See also *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

¹¹⁰ *Hutto*, 454 U.S. at 379-80 (Powell, J., concurring). This perhaps explains why Justice Powell went to such pains in his later opinion for the Court in *Solem v. Helm*, 463 U.S. 277 (1983), a case that overturned a sentence on proportionality grounds, to distinguish Rummel's sentence of life imprisonment with the possibility of parole as less severe than Helm's life sentence which allowed for release only by commutation. Additionally, it may account for Justice Powell's questionable assertion in *Solem* that the Court in *Rummel* "relied heavily" on Rummel's possibility of parole in deciding not to invalidate his sentence. *Solem v. Helm*, 463 U.S. 277, 297 (1983). See *infra* notes 209-24 and accompanying text.

¹¹¹ *Hutto*, 454 U.S. at 382 (Brennan, J., dissenting).

¹¹² *Id.* at 386 (Brennan, J., dissenting) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

¹¹³ *Hutto*, 454 U.S. at 373 n.2.

¹¹⁴ *Id.* at 373.

Justice Powell's view that these criteria, at most, could inform a decision as to whether a challenged sentence was more disproportionate than Rummel's.¹¹⁵ While the dissent did not explicitly address the notion of objectifying criteria,¹¹⁶ it did note that Davis' sentence was much

¹¹⁵ Justice Powell, in his concurring opinion, did not refer explicitly to the objectifying criteria he enunciated in his *Rummel* dissent. He did, however, observe that Davis had been "unable to show — by means of statutory comparisons — that his sentences suffer from a greater degree of disproportionality than Rummel's did." *Id.* at 380. Therefore, Powell's opinion can be interpreted as having at least looked at two of the objectifying factors considered by the district court, intra- and inter-jurisdictional comparisons, and having concluded that, again using *Rummel* as the standard, gross disproportionality was not present. It is appropriate, therefore, to examine how these comparisons were applied in *Rummel* and *Davis*.

The district court found that Davis' sentence exceeded the maximum penalty in all but four states. *Davis v. Zahradnick*, 432 F. Supp. 444, 452-53 (W.D. Va. 1977), *rev'd sub nom. Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978), *aff'd on reh'g*, 601 F.2d 153 (4th Cir. 1979) (per curiam), *vacated sub nom. Hutto v. Davis*, 445 U.S. 947 (1980), *on remand sub nom. Davis v. Davis*, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom. Hutto v. Davis*, 454 U.S. 370 (1982). There was no information, however, as to whether offenders convicted of crimes similar to Davis' in those states were actually sentenced to terms of imprisonment as long as his. *Id.* In *Rummel*, Justice Powell concluded that only two states had recidivist statutes similar to the mandatory life imprisonment statute in Texas. *Rummel v. Estelle*, 445 U.S. 263, 296 (1980) (Powell, J., dissenting).

Regarding the intrajurisdictional comparison, the district court in *Davis* noted that violent felonies in Virginia, such as murder in the second degree, stabbing with intent to kill, and malicious shooting carried maximum sentences half of the sentence Davis received. *Zahradnick*, 432 F. Supp. at 453. For voluntary manslaughter, an offender can receive only one-eighth of the time that Davis received. *Id.* The district court in *Davis* also regarded it significant that distribution of heroin in Virginia was treated no more seriously than distribution of marijuana. *Id.*

In *Rummel*, Justice Powell observed that in Texas only those first-time offenders convicted of capital murder faced mandatory life imprisonment. *Rummel*, 445 U.S. at 300-01 (Powell, J., dissenting). First degree felons, such as those convicted of murder, aggravated rape, or aggravated kidnapping, could receive from five to ninety-nine years imprisonment. *Id.* (Powell, J., dissenting). Additionally, in *Rummel*, Justice Powell took note of the fact that all three-time felons in Texas received the same mandatory life sentence regardless of the gravity of the crimes committed. *Id.* at 301 (Powell, J., dissenting). He wrote: "In my view, imposition of the same punishment upon persons who have committed completely different types of crimes raises serious doubts about the proportionality of the sentence applied to the least harmful offender." *Id.* (Powell, J., dissenting).

¹¹⁶ The dissent, in a footnote, referred to the objectifying factors in *Hart* used by the federal district court in *Davis*, but only to make its point that the opinion of the Fourth Circuit, en banc, affirming the district court, could not be said to have rested on the *Hart* factors. *Hutto v. Davis*, 454 U.S. 370, 384 n.2 (1982) (per curiam) (Brennan, J., dissenting).

harsher than those given to others convicted of similar crimes in Virginia (one of the objectifying factors),¹¹⁷ and it generally approved of the approach taken by the court of appeals (which utilized the Fourth Circuit criteria).¹¹⁸

Davis was particularly noteworthy because, after all was written and done, the Supreme Court had held that a sentence of forty years incarceration for possession and distribution of nine ounces of marijuana was not violative of the Eighth Amendment.¹¹⁹ As *Davis* was not sentenced under a recidivist statute, the focus of any analysis had to be the particular crime committed. If such a lengthy sentence for the sale of a moderate amount of a relatively non-dangerous drug was not deemed disproportionate, it is hard to imagine a sentence that would be so viewed by the Court. At least, it was until one year later when the Court decided *Solem v. Helm*.¹²⁰

III. SOLEM V. HELM

Jerry Helm was convicted of uttering a no-account check in 1979, a felony under South Dakota law.¹²¹ The maximum sentence for that crime ordinarily was five years incarceration and a \$5000 fine.¹²² Helm, however, was sentenced under South Dakota's recidivist statute, which imposed life imprisonment upon conviction of a fourth felony.¹²³ A companion statute prohibited parole for those sentenced to life imprisonment.¹²⁴ Under South Dakota law, Helm's only chance to be released was to petition the governor for a pardon or commutation of his sentence.¹²⁵

Helm's challenge of the sentence on Eighth Amendment grounds was unsuccessful in the South Dakota state courts.¹²⁶ After seeking and being denied commutation of his sentence by the governor, Helm sought habeas corpus relief from the federal courts.¹²⁷ Although the federal

¹¹⁷ *Id.* at 384 (Brennan, J., dissenting).

¹¹⁸ *Id.* at 387-88 (Brennan, J., dissenting).

¹¹⁹ *Id.* at 375.

¹²⁰ 463 U.S. 277 (1983).

¹²¹ *Id.* at 281 n.5. See also S.D. CODIFIED LAWS ANN. § 22-41-1.2 (1979).

¹²² *Solem*, 463 U.S. at 281. See also S.D. CODIFIED LAWS ANN. § 22-6-1(7) (Supp. 1982).

¹²³ *Solem*, 463 U.S. at 281. See also S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended 1981).

¹²⁴ *Solem*, 463 U.S. at 282. See also S.D. CODIFIED LAWS ANN. § 24-15-4 (1979).

¹²⁵ *Solem*, 463 U.S. at 282. See also S.D. CONST. art. IV, § 3.

¹²⁶ *State v. Helm*, 287 N.W.2d 497 (S.D. 1980).

¹²⁷ *Solem*, 463 U.S. at 283.

district court regarded his sentence as harsh, it denied Helm's request for a writ, relying on the Supreme Court's decision in *Rummel*.¹²⁸ Distinguishing Helm's sentence from Rummel's because the latter had the possibility of parole after twelve years, the Court of Appeals for the Eighth Circuit reversed the lower court and directed that the writ be issued.¹²⁹ Examining Helm's offenses, his sentence, and the sentence he could have received in other states, the court of appeals concluded that Helm's sentence was "grossly disproportionate" to the crime committed and violated the Eighth Amendment.¹³⁰ South Dakota then appealed to the Supreme Court.¹³¹

Faced with its relatively recent decisions in *Rummel* and *Davis*, the Supreme Court could have handled Helm's case in several ways. It could have simply reversed the court of appeals, holding that *Rummel* and *Davis* were controlling, and that as Helm's sentence was within the statutory limit, it was purely a matter of legislative prerogative.¹³² Alternatively, the Court could have chosen to explicitly reject the holdings of *Rummel* and *Davis* and affirm the court of appeals.¹³³ As

¹²⁸ *Id.*

¹²⁹ *Helm v. Solem*, 684 F.2d 582 (8th Cir. 1982), *aff'd*, 463 U.S. 277 (1983).

¹³⁰ *Id.* at 587.

¹³¹ *Solem*, 463 U.S. at 284.

¹³² See *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980).

¹³³ Understandably, the Court was reluctant to overturn a decision that it had rendered only three years earlier and had relied upon in a decision the previous year. However, the *Solem* Court could have used its conclusion that *Weems* and other cases clearly identified a proportionality requirement in the Eighth Amendment to hold that the entire premise upon which the opinion in *Rummel* was based was flawed. See *Solem*, 463 U.S. at 286-90. Furthermore, the relatively cursory per curiam opinion in *Davis* did not undertake a reassessment of *Rummel*, but merely applied the Court's reasoning in that case to *Davis*' sentence. See *Hutto*, 454 U.S. at 374-75.

The Court could have found further support for the notion that *Rummel* relied upon a flawed premise by alluding to its decision in *Enmund v. Florida*, 458 U.S. 782 (1982), a case decided after *Rummel* and *Davis*. The holding in *Enmund* was that the sentence of death for a robber who aided and abetted a felony during which a murder was committed, but who did not kill or intend to kill was disproportionate to his crime of felony murder and violated the Eighth Amendment. *Id.* at 797-801. In *Enmund*, the Court cited Justice Field's dissent in *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) and noted that it was quoted in *Weems v. United States*, 217 U.S. 349, 371 (1910), to the effect that the Eighth Amendment is directed against punishments that are disproportionate because of their length or severity. *Enmund*, 458 U.S. at 788. It also cited *Robinson v. California*, 370 U.S. 660, 667 (1962), and *Weems*, 217 U.S. at 363, two non-capital cases, as examples of cases where the Court had found sentences to be unconstitutionally excessive even though no intentional wrongdoing was proven. *Enmund*, 458 U.S. at 800.

a middle-of-the-ground approach, the Court could have abandoned the analysis employed in *Rummel* and *Davis* without actually overturning their holdings. Finally, the Court could have decided, as did the court of appeals, that the two previous cases were distinguishable from Helm's, in part because Helm received a harsher sentence than did Rummel or Davis.¹³⁴ The Court ultimately opted for a combination of the latter two approaches, distinguishing *Rummel* and *Davis*, albeit unpersuasively, and adopting an entirely different method for handling proportionality challenges.¹³⁵

Justice Powell's opinion for the Court in *Solem* began with an expansion of the historical argument for proportional sentencing previously advanced in his *Rummel* dissent.¹³⁶ His premise was that the framers of the Eighth Amendment, in banning cruel and unusual punishments, had adopted the requirement of proportional sentencing, notwithstanding the omission from the Amendment of any explicit reference to proportionality.¹³⁷ Justice Powell argued that English Common Law, later embodied in the English Bill of Rights, included a prohibition of disproportional sentencing.¹³⁸ Therefore, according to

Even more significantly, the Court in *Enmund* determined that the defendant's sentence was disproportionate only after analyzing in depth the nature of the crime involved, *id.* at 797-801, comparing it to other crimes warranting the sentence the defendant received, and looking to see how other states punished the crime at issue. *Id.* at 789-93. The Court used these same factors in *Coker v. Georgia*, 433 U.S. 584, 592-600 (1977) (plurality opinion), a case decided prior to *Rummel*. The *Solem* Court could have found it significant that, after *Rummel* rejected the use of these factors as either too subjective, entirely within the legislative purview, or encroachments upon principles of federalism, the Court in *Enmund* accepted them as the basis for their proportionality analysis. See *Enmund*, 458 U.S. at 788-89, 797; *Rummel*, 445 U.S. at 274-84. Therefore, had the Court in *Solem* chosen to reject the holding in *Rummel*, it could have used *Enmund* as evidence that, after *Rummel*, the Court had undercut both the theoretical and pragmatic arguments advanced in *Rummel*.

¹³⁴ See *Helm*, 684 F.2d at 585.

¹³⁵ *Solem*, 463 U.S. at 289-92.

¹³⁶ *Id.* at 284-86.

¹³⁷ *Id.* at 285, 286.

¹³⁸ The Eighth Amendment, according to Justice Powell was "based directly" on the Virginia Declaration of Rights, written by George Mason, who had incorporated the precise language of the English Bill of Rights in the Declaration. *Id.* at 285-86 & n.10. But see Anthony F. Granucci, "Nor Cruel & Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839 (1969). Professor Granucci argues that while the Cruel and Unusual Punishments Clause in the English Bill of Rights was intended, among other things, to bar disproportionate penalties, there is evidence that the framers of the American Bill of Rights misinterpreted this provision, believing it applied only to barbarous punishments. *Id.* at 860-65.

Powell, when the framers of the Eighth Amendment chose to use the exact language of the parallel provision in the English Bill of Rights, they intended to adopt the principle of proportional sentencing as well.¹³⁹

Justice Powell next turned his attention to prior Supreme Court holdings involving the issue of proportional sentencing. Unlike the opinion of the Court in *Rummel*, Justice Powell, saw no ambiguity in *Weems* with respect to its endorsement of an Eighth Amendment-based proportionality requirement.¹⁴⁰ Additionally, Powell identified further support for a proportionality requirement in cases in which the Court had held a ninety day jail sentence for drug addiction to be excessive,¹⁴¹ and capital punishment to be unconstitutionally disproportionate to the crime of raping an adult woman¹⁴² and to some felony murders.¹⁴³

While conceding that in both *Rummel* and *Davis* the Court had indicated that proportionality challenges to the length of jail sentences would rarely be successful, Justice Powell interpreted both decisions as leaving the door somewhat open to such challenges.¹⁴⁴ By confronting the language in *Rummel* that seemed to foreclose proportionality

Justice Scalia would later take note of this point in *Harmelin v. Michigan*, 501 U.S. 957, 966-75 (1991) (plurality opinion of Scalia, J.), in support of his assertion that the Eighth Amendment contains no proportionality principle. If Granucci's point is correct regarding misinterpretation of the English Bill of Rights by the framers, others have argued that the original purpose of the English document is therefore irrelevant in fleshing out the parameters of the Eighth Amendment. See, e.g., Schwartz, *supra* note 40, at 380. Schwartz also points out that the assertion that the English Bill of Rights outlawed disproportionate penalties is weakened somewhat by the fact that such punishments continued with frequency after 1689. *Id.* See also *Harmelin v. Michigan*, 501 U.S. 957, 974-75 (1991) (plurality opinion as to Parts I-IV; majority opinion as to Part V).

Schwartz takes issue with another historical justification for the proposition that the Eighth Amendment contains a proportionality principle. This justification, less direct than the previous one, is based on the belief that figures deemed to be instrumental in laying the foundation for the Eighth Amendment, such as John Adams, Thomas Jefferson and George Mason were influenced by the proportionality views of classical eighteenth century criminologist Cesare Beccaria. Schwartz, *supra* note 40, at 381-82; see Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. U.S. Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 813-20 (1975). Charles Schwartz argues that the connections between Beccaria and the Americans are both tenuous and unpersuasive. Schwartz, *supra* note 40, at 381-82.

¹³⁹ *Solem*, 463 U.S. at 285-86.

¹⁴⁰ *Id.* at 287.

¹⁴¹ *Id.* (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)).

¹⁴² *Id.* at 288 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)).

¹⁴³ *Id.* (citing *Enmund v. Florida*, 458 U.S. 782 (1982)).

¹⁴⁴ *Id.* at 289-90.

challenges to the length of sentences, Justice Powell offered an interpretation that is at best unpersuasive and perhaps somewhat disingenuous. The Court in *Rummel* wrote: "[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative."¹⁴⁵ Speaking for the Court in *Solem*, Justice Powell imposed on the words "one could argue" an interpretation that is literal to the extreme. To Powell, the Court in *Rummel* with these words "did not adopt the standard proposed but merely recognized that the argument was possible."¹⁴⁶ In addition to imposing this meaning on "one could argue," Justice Powell, as the dissent in *Solem* points out, apparently ignored the words that followed: "without fear of contradiction."¹⁴⁷ Taken together, these words would hardly support Justice Powell's interpretation that the Court in *Rummel* was apparently posing a hypothetical argument, similar to some sort of academic exercise. However, apparently unwilling to hold that the Court was wrong in *Rummel* when it declared that appellate courts have no role in ensuring that sentences are proportional,¹⁴⁸ Justice Powell and the majority in *Solem* were forced into this interpretation. Unfortunately, this tortured interpretation of the language in *Rummel* gave fodder to the dissent¹⁴⁹ and demeaned an opinion that otherwise could have been a strong voice for the constitutional requirement of proportional sentencing.

Justice Powell went on to note the anomaly that would result from a finding that the length of jail sentences was beyond the reach of the Eighth Amendment.¹⁵⁰ As both the more serious punishment of death¹⁵¹ and the less serious sentence of a fine¹⁵² are limited by

¹⁴⁵ *Id.* at 288 n.14 (emphasis added) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)).

¹⁴⁶ *Id.* at 288 n.14.

¹⁴⁷ *Id.* at 307 (Burger, C.J., dissenting) (quoting *Rummel*, 445 U.S. at 274).

¹⁴⁸ *Rummel*, 445 U.S. at 274.

¹⁴⁹ After noting that the majority opinion had quoted "incompletely" the passage from *Rummel*, Chief Justice Burger wrote: "In context it is clear that the *Rummel* Court was not merely summarizing an argument, as the Court suggests, but was stating affirmatively the rule of law laid down." *Solem*, 463 U.S. at 307 (Burger, C.J., dissenting) (citations omitted). See also *Baker & Baldwin*, *supra* note 26, at 46 (regarding the "strained" reading of the opinion in *Rummel* by the Court in *Solem*).

¹⁵⁰ *Solem*, 463 U.S. at 288-90.

¹⁵¹ See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982) (applying a disproportionality analysis to a death sentence for felony murder).

¹⁵² See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (imposing parallel limitations on bail, fines, and other punishments).

Eighth Amendment proportionality requirements, it would be a strange constitutional scheme that would leave the intermediate penalty of incarceration free from such a restriction.

Thus the Supreme Court in *Solem* concluded that early constitutional history¹⁵³ as well as prior holdings¹⁵⁴ of the Court compelled the conclusion that a prison sentence must be proportional to the crime committed.¹⁵⁵ While it gave legislatures and trial courts considerable deference in establishing the lengths of jail sentences, the Court, in requiring a comparison between crime and sentence, asserted that no sentence was per se constitutional.¹⁵⁶ Some method then must be devised, according to Justice Powell, to assess the proportionality of a sentence to the offense committed.¹⁵⁷ Principally, this method must not be limited to a single criterion which could hamper the ability of the federal judicial system to render individualized sentences.¹⁵⁸ With this in mind, Justice Powell offered objectifying criteria that the Court had used in other cases for assessing the constitutionality of a sentence.

First, the *Solem* Court, through Justice Powell, advocated looking to the nature of the crime and its seriousness.¹⁵⁹ The Court had previously focused on the nature of the crime in *Robinson* and *Weems*,¹⁶⁰ as well as in *Coker* when it decided that the death penalty could not be imposed for the crime of raping an adult woman.¹⁶¹ Second, the Court regarded as "helpful" a comparison between the sentence at issue and sentences for similar or more serious crimes in the subject jurisdiction.¹⁶² Justice Powell noted that the *Enmund* Court had observed that other murderers facing capital punishment in Florida at the time "were more culpable" than was *Enmund*.¹⁶³ Third, the Court viewed as "useful" a comparison between the sentence at hand and that which offenders receive for the

¹⁵³ See *supra* notes 136-39 and accompanying text.

¹⁵⁴ See *supra* notes 140-49 and accompanying text.

¹⁵⁵ *Solem*, 463 U.S. 277, 290 (1983).

¹⁵⁶ *Id.*

¹⁵⁷ Speaking for the Court, Justice Powell concluded that once one acknowledges the existence of a proportionality principle within the Eighth Amendment, a means must be found for applying the principle to specific sentences. *Id.* at 290 n.17.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 290-91.

¹⁶⁰ *Id.* at 291 (citing *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Weems v. United States*, 217 U.S. 349, 363, 365 (1910)).

¹⁶¹ See *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977) (plurality opinion).

¹⁶² *Solem*, 463 U.S. at 291.

¹⁶³ *Id.* (citing *Enmund v. Florida*, 458 U.S. 782, 795-96 (1982)). See also *Weems*, 217 U.S. at 380-81 (listing serious crimes subject to less serious penalties).

same crime in other jurisdictions.¹⁶⁴ The Court again alluded to *Enmund*, where it had observed that in very few other states would there be a realistic chance that capital punishment would be imposed on a felony murderer who did not actually, nor ever intend to, take a life.¹⁶⁵

Although the objectifying criteria set out by Justice Powell in *Solem* had some basis in that the criteria had been previously adopted in prior Supreme Court cases,¹⁶⁶ Justice Powell ignored the fact that the Court in *Rummel* and *Davis* specifically rejected the use of these three factors.¹⁶⁷ In *Rummel*, the Court regarded the first two factors as inherently subjective and the third as merely the inevitable result of federalism at work.¹⁶⁸ Following *Rummel*, the per curiam opinion in *Davis* rejected the use of essentially the same factors by the United States Court of Appeals for the Fourth Circuit, noting that the *Rummel* Court had rejected them as well.¹⁶⁹

Instead of ignoring explicit statements in *Rummel* and *Davis* rejecting the objectifying factors, the Court in *Solem* would have been better served had it expanded upon and more greatly emphasized a point it made earlier in its opinion: although death is a unique form of punishment, it is incorrect to regard all analysis in capital cases as wholly inapplicable to non-capital cases, as did the Court in *Rummel*.¹⁷⁰ Developing that point would have served as a response to the rejection of a factored approach for assessing propor-

¹⁶⁴ *Id.* at 291-92.

¹⁶⁵ *Id.* at 292 (citing *Enmund*, 458 U.S. at 792). See also *Coker*, 433 U.S. at 593-97; *Weems*, 217 U.S. at 380 (similar crime was punishable by two years imprisonment and a fine).

¹⁶⁶ The Court considered the first factor, nature of the crime, in *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Coker*, 433 U.S. at 597-98; and *Weems*, 217 U.S. at 363, 365.

The *Enmund* Court used the second factor, comparing the sentence at issue with that of similar crimes in the subject jurisdiction. *Enmund*, 458 U.S. at 795-96.

The third factor, comparing the sentence at issue with that of the sentence for the same crime in other jurisdictions, was also used in *Enmund*, 458 U.S. at 792.

¹⁶⁷ *Hutto v. Davis*, 454 U.S. 370, 373 & n.2 (1982) (per curiam); *Rummel v. Estelle*, 445 U.S. 263, 275-82 (1980). It is important to note that while the court in *Rummel* rejected the three factors adopted by the court in *Solem*, the court identified no acceptable means of proportionality to replace them. *Id.* at 275-82. Perhaps the court in *Rummel*, in effect, rejected the need to do any proportionality analysis with regard to the excessiveness of prison sentences. See generally *supra* notes 19-61 and accompanying text.

¹⁶⁸ *Rummel*, 445 U.S. at 275-82; see *supra* notes 50-61 and accompanying text.

¹⁶⁹ *Hutto*, 454 U.S. at 373 & n.2; see *supra* notes 95-97 and accompanying text.

¹⁷⁰ In *Solem*, Justice Powell noted that when the proportionality principle was previously used by the Court in capital cases, no distinction with non-capital cases was ever drawn. *Solem v. Helm*, 463 U.S. 277, 289 (1983). While conceding that there is some limit to the application of principles enunciated in capital cases to other cases because of the uniqueness of the death penalty, Justice Powell argued that proportionality analysis still has some viability in non-capital cases. *Id.* at 289-90.

tionality challenges. Specifically, the Court in *Solem* might have acknowledged that the severity and finality of capital punishment compel certain procedures for the protection of the defendant in capital cases which might otherwise not be necessary. However, once those procedures are deemed necessary to non-capital sentences as well, what capital cases tell us about the most sensible means to make the procedures meaningful and effective is relevant, if not controlling, in future cases. Here, once the Court held that courts need to assess the proportionality of challenged prison sentences, the particular factors already used to assess such challenges in capital cases, as well as those used by the Court in other cases, are most instructive.¹⁷¹

Although it largely ignored the fact that the Court in *Rummel* and *Davis* had rejected the above enumerated objectifying factors, the Court in *Solem* did take issue with the assertion in these earlier decisions that an assessment of the seriousness of a crime was too subjective a determination to inform a decision as to the proportionality of a sentence.¹⁷² The Court pointed out that based on clearly established principles, it is well accepted that certain crimes are considered more serious than others.¹⁷³ Without enunciating all such principles, the Court stated that seriousness can be determined by looking to: The harm caused by the crime,¹⁷⁴ the use of violence,¹⁷⁵ the magnitude of the crime,¹⁷⁶ and the culpability of the offender.¹⁷⁷

¹⁷¹ In fact, when describing the objectifying factors to be used in assessing the proportionality of Helm's sentence, Justice Powell alluded to the use of similar factors in capital cases. *Id.* at 291-92.

¹⁷² *Id.* at 292. The Court, in *Rummel*, considered the seriousness of any crime to be an inherently subjective question and regarded it as a matter for the states. *See supra* text accompanying note 52. However, the *Solem* Court did not take that approach. Studies indicate that there is something of a broad societal consensus regarding the general seriousness of crimes. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 63-76 (1985). Where differences have been observed regarding the view of the gravity of certain crimes among participants in such studies, these differences often occur among people of varied ages and educational levels. NIGEL WALKER, WHY PUNISH? 97 (1991). Presumably, appellate judges, among whom there would be fewer educational and age disparities than among the populace as a whole, would find even more common ground with respect to assessing the seriousness of particular crimes.

¹⁷³ *Solem*, 463 U.S. at 292-93. For example, stealing a million dollars is certainly more serious than stealing a hundred dollars. *Id.* at 293.

¹⁷⁴ *Id.* at 292.

¹⁷⁵ *Id.* at 292-93 (noting that violent crimes are more serious than nonviolent crimes).

¹⁷⁶ *Id.* at 293 (noting that a lesser included offense should not be punished more than the greater offense, that completed crimes are more serious than attempts, and that an accessory's penalty should not be higher than that of the principal).

¹⁷⁷ *Id.* at 293 (observing that state courts may take into account whether the criminal conduct was malicious, intentional, reckless, or negligent). Other models for gauging seriousness exist, but generally they involve an assessment of the same or similar factors

Regarding the harshness of the punishment imposed, the Court in *Solem* had no difficulty in concluding that longer jail terms are harsher than shorter ones, and that capital punishment is harsher than all jail sentences.¹⁷⁸ The difficulty arises in determining where to draw the lines of acceptability.¹⁷⁹ Two examples of when the Court has engaged in such judicial line-drawing are in cases confronting the issues of when the right to a speedy trial is violated¹⁸⁰ and when the right to a jury trial is triggered.¹⁸¹

Having discussed the first and second criteria elucidated by Justice Powell in *Solem*, it is necessary to discuss the third criterion, which compares sentences among jurisdictions. In addressing criticism against the use of this factor, the Court in *Solem* acknowledged that a wide range of sentences inevitably exists due to the nature of our federal system, as

as those used by the Court in *Solem*.

von Hirsch sees two major components to seriousness: harm and culpability. The harmfulness of a criminal act, to von Hirsch, embodies all of the foreseeable consequences of the act. He defines culpability or accountability as an assessment of the intent, motive or circumstance of the offender. VON HIRSCH, *supra* note 172, at 64-65.

In rating the harm of an act, von Hirsch adopts the categorization into serious, intermediate and lesser harms. *Id.* at 67 (citing JOEL FEINBERG, HARM TO OTHERS 37-45, 185-214 (1984)). Serious harms are those that invade "welfare interests." *Id.* at 67 (citing JOEL FEINBERG, HARM TO OTHERS 37-45, 185-214 (1984)). Welfare interests are those interests crucial to choosing and ordering the way we live. *Id.* Crimes that cause serious physical injury or economic crimes that deprive persons of their entire means of support would fall into this category. *Id.* at 68-69. Intermediate harms are considered to be those that invade our "security interest" or which "cushion a welfare interest." *Id.* at 69. Having one's home burglarized or being periodically beaten would be considered intermediate harms. *Id.* Lesser harms invade "accumulative interests," those things that allow us to pursue the good life. *Id.* at 70. Common petty theft would be an example of a harm that invaded an "accumulative interest." *Id.*

Degree of culpability, according to von Hirsch, is determined by the offender's state of mind (purposeful, knowing, reckless, or negligent), the existence of excuse (i.e. necessity or duress), mental disturbance that does not constitute legal insanity, and the motives of the offender. *Id.* at 71-73. See also Baker & Baldwin, *supra* note 26, at 69, focusing on the culpability of the offender, looking at whether it was a crime to property or person, whether the conduct was intentional or negligent, and whether the harm was actual or threatened.

¹⁷⁸ *Solem*, 463 U.S. at 294.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 294-95 (citing *Barker v. Wingo*, 407 U.S. 514 (1972) (identifying objective factors to be used in determining whether or not a particular delay in bringing a defendant to trial was excessive)).

¹⁸¹ *Id.* at 295 (citing *Baldwin v. New York*, 399 U.S. 66 (1970) (drawing the line at six months incarceration in determining when defendant had the right to a jury trial under the Sixth Amendment)).

well as the need for individualized sentencing.¹⁸² However, this does not justify dismissing this factor, according to the Court, but argues for the use of a combination of factors with no factor alone determining disproportionality.¹⁸³

Having defended its adoption of the three objectifying criteria, what remained for the Court was to apply the particular facts of *Solem*. In applying the first objectifying factor, the gravity of the crime, the Court noted that Helm's crime of uttering a no-account check for \$100 was "one of the most passive felonies a person could commit."¹⁸⁴ The crime was completely nonviolent and involved a relatively small amount of money.¹⁸⁵ Although acknowledging that it was proper to sentence Helm for his past crimes as well, the Court regarded these prior crimes also as "relatively minor."¹⁸⁶ Notably absent from the Court's assessment of the gravity of Helm's crimes was any comparison between the seriousness of Helm's criminal record and that of Rummel.¹⁸⁷ This omission is particularly glaring as the Court's assessment of the harshness of Helm's sentence relied significantly on a comparison to Rummel's sentence.¹⁸⁸ Perhaps this omission occurred because, in the words of the dissent, "by comparison Rummel was a relatively 'model citizen.'"¹⁸⁹

Regardless of why this omission occurred, it is necessary to compare the criminal records of Helm and Rummel. It is fair to say that Helm's criminal record was significantly worse than Rummel's both as to the quantity and the quality of criminal activity. Regarding quantity, Helm was being punished as a recidivist after being convicted of his seventh felony,¹⁹⁰ whereas Rummel had committed only three felonies.¹⁹¹ As

¹⁸² *Solem*, 463 U.S. at 291 n.17. See also *Rummel v. Estelle*, 445 U.S. 263, 282 (1980) (recognizing that under the notions of federalism, states will have differing views of the severity of crimes).

¹⁸³ *Solem*, 463 U.S. at 290 n.17.

¹⁸⁴ *Id.* at 296 (citing *State v. Helm*, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting)).

¹⁸⁵ *Id.* at 296-97.

¹⁸⁶ *Id.* at 296-97. The Court took note of the fact that Helm's prior crimes were also nonviolent and involved small amounts of money. Additionally, the Court observed that Helm was an alcoholic and that incarcerating him for life was unlikely to substantially advance any goals of punishment. *Id.* at 296-97 n.22.

¹⁸⁷ While averring that the focus of its proportionality determination would be on the crime triggering the recidivist statute, the Court acknowledged the relevance of Helm's prior convictions to its assessment of proportionality. *Id.* at 296 n.21.

¹⁸⁸ *Id.* at 297. See *infra* notes 209-24 and accompanying text.

¹⁸⁹ *Solem*, 463 U.S. at 304 (Burger, C.J., dissenting).

¹⁹⁰ *Id.* at 279-80.

¹⁹¹ *Rummel v. Estelle*, 445 U.S. 263, 266 (1980). It is also noteworthy that while

to the quality of the crimes involved, the Court is technically correct in stating that Helm's three burglaries and third offense intoxicated driving crimes were nonviolent.¹⁹² However, it could be maintained, as the dissent stated, that each posed the possibility of violence.¹⁹³ Rummel's three convictions, it should be recalled, each involved some entirely nonviolent act of dishonesty to obtain small amounts of money.¹⁹⁴ These crimes would seem quite similar to Helm's triggering bad check offense, which the Court characterized as among the least serious types of felonies.¹⁹⁵ However, unlike Rummel, Helm had been convicted of burglary.¹⁹⁶ Burglary requires an illegal entry and can be viewed as more serious criminal conduct, involving greater risks of harm.¹⁹⁷ Further, Helm, as a repeat burglar, raised the likelihood that at least some of his criminal activity could have caused injury.

Regardless of one's conclusion after comparing the criminal records of Rummel and Helm, the Court in *Solem* weakened its opinion by failing to attempt such a comparison. For a Court championing other comparisons, this failure is particularly noteworthy. Had the Court rejected the holding in *Rummel*, it could have ignored, or at least downplayed, the relevance of the facts in that case, including Rummel's criminal record. By attempting to reconcile these two entirely different, if not opposing, decisions while ignoring the obvious need to compare criminal records, the Court again weakened its holding.

In comparing South Dakota's treatment of other comparable and more serious crimes, the next objectifying factor, the Court noted that only crimes far more serious than Helm's, such as murder or kidnapping, could result in life imprisonment.¹⁹⁸ Acknowledging that Helm's sentence as a recidivist compelled it to consider his prior crimes as well, the Court maintained that even for second or third time felons to receive life imprisonment, the crimes at issue had to be far graver than those committed by Helm.¹⁹⁹ While this may be true, it could be argued that

Rummel's third felony conviction barely qualified him for life imprisonment under Texas' recidivist statute, Helm's seven felonies were well beyond South Dakota's requirement of four felony convictions.

¹⁹² *Solem*, 463 U.S. at 297.

¹⁹³ *Id.* at 315-16 (Burger, C.J., dissenting).

¹⁹⁴ *Rummel*, 445 U.S. at 266.

¹⁹⁵ *Solem*, 463 U.S. at 278.

¹⁹⁶ *Id.* at 279.

¹⁹⁷ *Id.* at 279 n.1.

¹⁹⁸ *Id.* at 298.

¹⁹⁹ *Id.* at 298-99. The Court alluded to South Dakota criminal statutes which allowed, but did not require, life imprisonment for serious crimes such as first-degree manslaughter.

the state has related, but somewhat separate, goals in incarcerating for life someone who, by being convicted of seven felonies in eleven years, has demonstrated complete disregard for society's laws. Such a goal can take the form of general deterrence, by communicating to other potential recidivists that there is a limit to their felonious criminal activity.²⁰⁰ It can take the form of retribution or just deserts by making the societal statement that those who continuously ignore our laws against committing non-petty crimes deserve to be incarcerated for life.²⁰¹ While neither of these goals necessarily justifies the specific sentence in Helm's case, the Court should have considered these traditional sentencing goals.²⁰² This is especially true because at one point the Court, noting

ter, attempted murder and kidnapping, and to other statutes which did not permit life sentences even for third convictions of crimes such as aggravated assault or heroin dealing. Notwithstanding that Helm's sentence was the product of the sum total of his seven convictions, the Court thought it significant that Helm's triggering crime was far less serious than other crimes for which South Dakota offenders receive milder sentences.

Id.

²⁰⁰ See generally HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 39-45 (1968); Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); *infra* notes 361-64 and accompanying text.

²⁰¹ Noted desert theorist Andrew von Hirsch posits two approaches to retribution-based assessment of criminal records. VON HIRSCH, *supra* note 172, at 80-81. The less desirable approach, according to von Hirsch, is an examination of and focus upon the offender's entire criminal career to determine what sentence he or she deserves. *Id.* Such an approach is contrary to the primary purpose and strength of our judicial system, determining the culpability of the defendant for the particular crime charged, and the seriousness of that crime. von Hirsch argues that the system is not designed to inquire with any rigor into such issues regarding prior criminal conduct. *Id.*

von Hirsch prefers an approach that focuses on the present crime but attaches relevance to the prior criminal record with respect to the defendant's plea that as a fallible human, he or she is deserving of some degree of sympathy. *Id.* at 81-82. Such sympathy should be afforded or denied, according to von Hirsch, in proportion to the blameworthiness of the defendant's criminal past. In other words, the disapprobation directed at the offender due to his criminal act "should be dampened somewhat because the act was out of keeping with his previous behavior." *Id.* at 83.

²⁰² In theory, a life sentence for recidivists can also be based on a third justification for punishment — incapacitation. This justification for punishment is premised on the belief that certain criminals, because of the seriousness of their offenses and the likelihood of their committing future crimes, pose such a threat that they need to be separated from society. See 1-5 NICHOLAS N. KITTRIE & ELYCE H. ZENOFF, *SANCTIONS, SENTENCING, AND CORRECTIONS* 13 (1981) (stating that separation from society by incapacitation is appropriate when the safety of society is at risk, such as with murder, rape and residential burglary). Presumably the nature of the offenses committed by both Helm and Rummel would not be serious enough to justify life imprisonment based on the need for either's incapacitation.

Helm's alcohol addiction, commented that a life sentence in this case "is unlikely to advance the goals of our criminal justice system in any substantial way."²⁰³ The only goal it alluded to was that of rehabilitation, which, according to the Court, was unlikely to occur without the incentive of Helm's possible release from prison.²⁰⁴

In applying the final objectifying factor, the Court in *Solem* adopted the finding of the court of appeals that in only one other state could Helm, as a recidivist, have received life imprisonment for the crime he committed.²⁰⁵ Furthermore, as the Court noted, even in that state, Nevada, a life sentence would be discretionary,²⁰⁶ and there was no information that such a sentence had actually been imposed on anyone whose offenses were as "minor" as Helm's.²⁰⁷

After concluding that each of the three objectifying criteria pointed to the disproportionality of Helm's sentence, the Court turned to the severity of the sentence itself.²⁰⁸ Specifically, the Court rejected the state's attempt to compare Helm's sentence with the sentence received by Rummel.²⁰⁹ The Court noted that under Texas law Rummel was eligible for parole, and that parole could be granted as early as ten years into his sentence and could be reasonably expected in twelve years.²¹⁰ Under South Dakota law, Helm had no possibility of parole and could be released only through executive clemency.²¹¹ The Court in *Solem* recognized that "the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*."²¹² The Court characterized parole as a "regular part of the rehabilitative process,"²¹³ usually embodying specific procedures and standards. While one may legitimately have an expectation of parole at some time, the granting of executive clemency with regard to commutation, according to the Court, is purely ad hoc.²¹⁴ The Court further noted that

²⁰³ *Solem*, 463 U.S. at 297 n.22.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 299 (citing *Helm v. Solem*, 684 F.2d 582, 586 (8th Cir. 1982), *aff'd*, 463 U.S. 277 (1983)).

²⁰⁶ *Id.* at 299-300 (citing NEV. REV. STAT. § 207.010(2) (1981)).

²⁰⁷ *Id.* at 300.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 301-02 (citing TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15b (West 1979)).

²¹¹ *Id.* at 297, 302-03.

²¹² *Id.* at 300.

²¹³ *Id.*

²¹⁴ *Id.* at 301. In support of the distinction it draws between executive clemency and parole, the Court alluded to its earlier decisions in *Connecticut Board of Pardons v.*

Dumschat, 452 U.S. 458 (1981); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); and *Morrissey v. Brewer*, 408 U.S. 471 (1972). In *Dumschat*, the Court held that life prisoners have no constitutional right to commutation. 452 U.S. at 465. In *Morrissey*, individuals free on parole were deemed to have due process protection when the state seeks to have their parole revoked. 408 U.S. at 471. In *Greenholtz*, the Court held that but for a unique provision in the Nebraska parole statute, the possibility of being paroled does not afford a due process liberty interest. 442 U.S. at 7-8. The view expressed by the Court in *Solem* that these decisions elucidate the fundamental difference between commutation and parole is open to question. *Solem*, 463 U.S. at 300-01.

For example, the *Solem* Court discerned a significant difference between parole and commutation in that the former is a "regular part of the rehabilitative process" and "the normal expectation in the vast majority of cases," *id.* at 300, whereas the latter is "an ad hoc exercise of executive clemency." *Id.* at 301. In *Dumschat*, the inmate argued that, based on Connecticut's regular practice of commutation, he had an expectation of commutation amounting to a liberty interest. The Court responded to this argument by noting that merely because a privilege has been granted generously does not create an entitlement out of that privilege, and that requests for a parole or for commutation were both "appeals for clemency." *Dumschat*, 452 U.S. at 465. Although it was considering the existence of a liberty interest for due process purposes rather than assessing the harshness of a sentence, the Court in *Dumschat* seemed to downplay any constitutional distinction based on the likelihood of release where the decision to release remained purely discretionary.

The Court in *Solem* cited *Morrissey* in support of the distinction it drew between parole and commutation based on the "established" nature of parole. *Solem*, 463 U.S. at 301 (quoting *Morrissey*, 408 U.S. at 477). *Morrissey*, however, involved an individual then at liberty whose parole the state was seeking to revoke. *Morrissey*, 408 U.S. at 472-73. The Court went to great lengths to distinguish the position of such a person from one who is in prison only hoping for release through parole or commutation. *Id.* at 482, 479-80. In considering the sentences of both Rummel and Helm, the Court was looking at individuals both of whom would be in the latter position, thereby possessing a liberty interest inferior to that of the offender in *Morrissey*.

The *Solem* Court further sought to bolster its argument by referring to the passage in *Dumschat* wherein the Court commented on "the vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." *Solem*, 463 U.S. at 301 (quoting *Dumschat*, 452 U.S. at 466). Omitted from this quotation as it appears in *Solem* are the connecting and somewhat limiting words, "particularly on the facts of *Greenholtz*." *Dumschat*, 452 U.S. at 466. *Greenholtz* held that due process protections are normally not available to inmates seeking parole. The Court in *Greenholtz* recognized that the statute at issue in that case, however, had both "unique structure and language." *Greenholtz*, 442 U.S. at 12. That statute mandated parole unless certain conditions existed. Therefore, according to the Court, it created a modified liberty interest because it went considerably beyond the discretionary nature of other parole statutes. *Id.* Placed in the context of *Greenholtz*, therefore, the quote from *Dumschat* used by the Court in *Solem*, 463 U.S. at 301, is not as strong a statement regarding the parole/commutation distinction as it is purported to be.

Furthermore, as it had done in *Morrissey*, the Court in *Greenholtz* emphasized the difference between the state's seeking to take away one's freedom and its decision to deny

South Dakota in fact had rarely commuted life sentences,²¹⁵ and even if commutation occurred, that would only make Helm eligible for parole.²¹⁶

The distinction drawn by the Court in *Solem* between parole and commutation through executive clemency, based on their respective likelihoods, is a reasonable one. It would skew an attempt to apportion crime to punishment were the Court to ignore the difference between a sentence that will likely result in the defendant's release and one for which the possibility of release is just one step beyond the theoretical. What is debatable is the Court's assertion in *Solem* that the opinion in *Rummel* "relied heavily" on Rummel's possible parole.²¹⁷

The Court in *Rummel* specifically rejected the state's attempt to treat Rummel's sentence as something less than life imprisonment because of the possibility of parole.²¹⁸ It did, however, note that an assessment of Rummel's sentence "could hardly ignore"²¹⁹ the possibility of release, and this possibility distinguished Texas' statute from one that contains no parole possibility. Still, it is noteworthy that the Court in *Rummel* devoted part of one paragraph to this point in an opinion that focuses far more heavily on why there is no proportionality requirement in the Eighth Amendment.²²⁰

The context of the *Rummel* Court's discussion of the possibility of parole also suggests something less than heavy reliance on this point in reaching its decision. The purpose of the section of the opinion in which the Court discusses the possibility of parole is to demonstrate that

parole to an incarcerated inmate. *Greenholtz*, 442 U.S. at 9. The *Greenholtz* Court observed that the decision to release on parole involves "purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release." *Id.* at 10. The same could be said of commutation. The parole decision, according to the *Greenholtz* Court, is "[u]nlike the revocation decision, [because] there is no set of facts which, if shown, mandate a decision for the individual." *Id.* Again, the same could be said for commutation.

Thus, while distinctions can be drawn between the possibilities of parole and executive commutation, the *Solem* Court's implication that the decisions in *Greenholtz*, *Morrissey*, and *Dumschat* demonstrate the fundamental nature of these distinctions is questionable.

²¹⁵ *Solem*, 463 U.S. at 302 & n.29.

²¹⁶ *Id.* at 302-03.

²¹⁷ *Id.* at 297.

²¹⁸ *Rummel v. Estelle*, 445 U.S. 263, 280 (1980). The Court so held because of Rummel's "inability to enforce any 'right' to parole." *Id.* See also *supra* note 214.

²¹⁹ *Rummel*, 445 U.S. at 281.

²²⁰ *Id.*

Rummel's proposed comparisons are more complex than he suggests.²²¹ This complexity is then offered to support the Court's view that such comparisons are necessarily unrevealing and unhelpful in assessing proportionality.²²² The Court's central point in this section seems to be that even if a court could see through this complex comparison to conclude that a particular state's treatment of a crime is the harshest in the fifty states, our federalist system always will result in one state's being the harshest.²²³ Such a result, according to the Court in *Rummel*, hardly indicates that such a sentence is therefore "grossly disproportionate" to the crime.²²⁴ This is because each state has its own reasons for punishing some crimes more harshly and others more leniently than do other states. Thus the discussion of the possibility of parole as an ameliorating factor in Rummel's sentence appears to be ancillary and is used primarily by the Court in *Rummel* for a different purpose and to a lesser extent than suggested by the Court in *Solem*.

The result of the holdings in *Rummel*, *Davis*, and *Solem* was to send a mixed and confusing message with respect to the Supreme Court's approach to the requirement of proportional sentencing.²²⁵ Reconciling the three holdings, all still deemed by the Court to be good law,²²⁶ was no easy task for lower courts attempting to assess proportionality challenges. Is there a clear proscription against grossly disproportionate sentences; to what types of cases does this proscription apply; and how do we assess such challenges were all questions that seemed to produce different answers when looking at *Rummel* and *Davis* as opposed to *Solem*.²²⁷ It is therefore hardly surprising that eight years after *Solem* was

²²¹ *Id.* at 280-82.

²²² *Id.*

²²³ *Id.* at 282.

²²⁴ *Id.* at 281.

²²⁵ Baker & Baldwin, *supra* note 26, at 47.

²²⁶ One commentator suggests the possibility that the *Solem* Court may have refused to overturn the decision in *Rummel* to preserve its factual holding that life imprisonment may be a permissible sentence for one who commits three nonviolent felonies or to signal to lower courts that most challenges to the proportionality of sentences should still be rejected. Barton C. Legum, Comment, *Down the Road Toward Human Decency: Eighth Amendment Proportionality Analysis and Solem v. Helm*, 18 GA. L. REV. 109, 133-34 (1983).

²²⁷ For example, certain courts attempting to reconcile *Rummel* and *Solem*, have concluded that extensive proportionality analyses should be performed only in cases involving life imprisonment without the possibility of parole. See *United States v. Owens*, 902 F.2d 1154, 1158 (4th Cir. 1990); *United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir.), *cert. denied*, 488 U.S. 983 (1988); *United States v. McCann*, 835 F.2d 1184, 1187-90 (6th Cir. 1987), *cert. denied*, 486 U.S. 1026 (1988); *Chandler v. Jones*, 813 F.2d 773,

decided the Court again waded into the proportionality morass.²²⁸ Unfortunately, once again the result was an unsatisfying mixture of confusion and division.

IV. *HARME LIN V. MICHIGAN*

Ronald Harmelin was convicted of possessing 672 grams of cocaine under a Michigan law that mandated life imprisonment without parole for possessing a large amount of drugs.²²⁹ After some initial success in challenging his conviction in the Michigan Court of Appeals,²³⁰ both his conviction and his sentence were ultimately affirmed by the Michigan courts.²³¹ The United States Supreme Court granted certiorari²³² to review Harmelin's claim that his sentence was cruel and unusual because it was grossly disproportionate to his crime and because it was statutorily imposed, giving the judge no discretion.²³³ A badly fractured Court rejected both of Harmelin's arguments.

Five Justices joined in Part V of Justice Scalia's opinion for the Court, holding that while severe mandatory punishments could be considered cruel, they were not historically unusual.²³⁴ These Justices

778-80 (6th Cir. 1987); *United States v. Rosenberg*, 806 F.2d 1169, 1175-76 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987); *Tice v. State*, 491 So. 2d 1065, 1066-67 (Ala. Crim. App. 1986); *State v. Carlton*, 733 S.W.2d 23, 25-28 (Mo. Ct. App. 1987).

Other courts used the *Solem* criteria to conduct such analyses regardless of whether the defendant was sentenced to life imprisonment. *See United States v. Gracia*, 755 F.2d 984, 989-90 (2d Cir. 1985) (defendants' sentences ranged from four to nine years); *United States v. Restrepo*, 676 F. Supp. 368, 377-78 (D. Mass. 1987) (defendant sentenced to five years); *Olds v. State*, 484 So. 2d 517, 519 (Ala. Crim. App. 1985) (defendant sentenced to two concurrent 25 year sentences); *State v. Griffin*, 744 P.2d 8, 9-10 (Ariz. Ct. App. 1986) (defendant sentenced to 21 years); *Brown v. Commonwealth*, 818 S.W.2d 600, 600-01 (Ky. 1991) (defendant sentenced to 10 years).

²²⁸ *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion as to Parts I-III; majority opinion as to Part IV).

²²⁹ *Id.* at 961.

²³⁰ *Id.* (citing *Michigan v. Harmelin*, 440 N.W.2d 75 (Mich. Ct. App. 1989), *leave to appeal denied*, 434 Mich. 863 (Mich. 1990) (reversing Harmelin's conviction initially because evidence used at his trial was deemed to be in violation of the Michigan Constitution)).

²³¹ *Harmelin*, 440 N.W.2d at 80, *leave to appeal denied*, 434 Mich. 863 (Mich. 1990).

²³² 495 U.S. 956 (1990).

²³³ *Harmelin v. Michigan*, 501 U.S. 957, 961-62 (1991) (plurality opinion as to Parts I-III; majority opinion as to Part IV).

²³⁴ *Id.* at 996. Only Chief Justice Rehnquist joined in all sections of Justice Scalia's opinion. Justice Kennedy, together with Justices O'Connor and Souter, concurred in the judgment, but accepted Scalia's reasoning only with respect to mandatory punishment not,

agreed that the obligation in capital cases for the sentencer to consider all mitigating factors related to the crime and the offender does not apply to non-capital sentences.²³⁵ Contrary to the defendant's assertion that, as with capital punishment, life imprisonment without parole is a unique sentence, the Court held that such a sentence is actually more similar to other sentences of life imprisonment.²³⁶ Therefore, according to a majority of the Court, no special protection, such as the requirement to consider mitigating factors, applies to sentences like that imposed on Harmelin.²³⁷ Unfortunately for courts that would have to wrestle with proportionality challenges in the future, the members of the Court agreed on little else.

Although five Justices agreed that Harmelin's sentence was not grossly disproportionate to his crime and that the Court is not required to take into account mitigating factors in non-capital cases,²³⁸ they disagreed as to the specifics of the Eighth Amendment proportionality analysis.²³⁹ Only Chief Justice Rehnquist joined in Justice Scalia's opinion, which construed both Anglo-American history and judicial precedent as evidence of the fact that the Eighth Amendment contains no prohibition on grossly disproportionate prison sentences.²⁴⁰

Justice Scalia took issue with the historical analysis performed by the Court in *Solem*. Specifically, he rejected the notion advanced by the Court in *Solem* that the prohibition against cruel and unusual punishments contained in the English Declaration of Rights had anything to do with disproportionate punishments.²⁴¹ Among other reasons for this, Justice Scalia pointed to the fact that, although the drafters of the Declaration were familiar with the concept of proportionality, they eschewed use of the words "disproportionate" or "excessive" in favor of "cruel and unusual," when describing forbidden punishments.²⁴² Further, Scalia argued, it is even more unlikely that the framers of the Eighth Amend-

in itself, being unconstitutional. *Id.* at 996-1009 (Kennedy, J., concurring).

²³⁵ *Id.* at 995.

²³⁶ *Id.* at 996.

²³⁷ *Id.* at 995-96.

²³⁸ Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter joined in the judgment given in Justice Scalia's opinion. These same five Justices also agreed that there was no requirement to consider mitigating factors except in capital cases. *Id.* at 960, 994.

²³⁹ Justices Kennedy, O'Connor, and Souter disagreed with Justice Scalia's Eighth Amendment proportionality analysis. *Id.* at 996 (opinion of Kennedy, J.). Scalia's proportionality analysis can be found in *Harmelin*, 501 U.S. at 966-85.

²⁴⁰ *Id.* at 961.

²⁴¹ *Id.* at 966. See also *supra* notes 137-39 and accompanying text.

²⁴² *Harmelin*, 501 U.S. at 967.

ment meant for the cruel and unusual clause to embody disproportionality, both because of its wording and subsequent interpretation of the clause.²⁴³

Turning next to previous holdings of the Supreme Court in this area, Justice Scalia revisited the debate surrounding the Court's holding in *Weems* that had occupied the Justices in both *Rummel* and *Solem*.²⁴⁴ Justice Scalia conceded that language in the *Weems* opinion could support the assertion that the sentence in that case was cruel and unusual due to its length and independent of the mode of the *cadena* punishment.²⁴⁵ Subsequent cases however, according to Scalia, evidence the fact that the Court intended no such principle to emerge from *Weems*.²⁴⁶ At best, concluded Scalia, the message of *Weems* regarding disproportionality based on length of imprisonment alone is murky and should be no basis to create a proportionality requirement in the Eighth Amendment in the absence of explicit language.²⁴⁷

²⁴³ *Id.* at 975-85. This author confesses to sharing the viewpoint expressed in Justice Kennedy's concurring opinion that whether and to what extent we apply a standard of proportionality should not depend on who "has the best of the historical argument." *Id.* at 996 (Kennedy, J., concurring). The Court recognized in *Trop v. Dulles* that what constitutes cruel and unusual punishment embodies an "evolving sense of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). In *Weems*, the Court observed that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." *Weems v. United States*, 217 U.S. 349, 373 (1910).

Clearly, cruelty meant different things to eighteenth century Americans than it does to twentieth century Americans. By way of illustration, one member of our first Congress said: "It is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off, but are we in [the] future to be prevented from inflicting these punishments because they are cruel." 26 ANN. L. REV. 871, 875 n.41 (quoting 1 ANNALS OF CONG. 754 (Gates & Seton eds., 1789)).

It would seem preferable to rely on more contemporary assessments of what constitutes cruel punishment. Radin, *supra* note 64, at 1033 (1978). See also *Browning Ferris Indus. v. Kelco*, 492 U.S. 257, 264 n.4 (1989) (observing that the original meaning of the Eighth Amendment has far more importance to questions involving the applicability of the Cruel and Unusual Punishments Clause than it does to the scope of that clause) (quoting from *Ingraham v. Wright*, 430 U.S. 651, 670-71 n.39 (1977)).

²⁴⁴ See *supra* notes 26-40 & 140 and accompanying text.

²⁴⁵ *Harmelin*, 501 U.S. at 990-94.

²⁴⁶ *Id.* at 992 (citing *Graham v. West Virginia*, 224 U.S. 616 (1912) (rejecting the claim that a sentence of life imprisonment for a third offense for horse theft was cruel and unusual)).

²⁴⁷ *Id.* at 992-94. Justice Scalia supported his view that *Weems* cannot be regarded as an unequivocal bar to excessive punishments by noting that for over fifty years after that decision, no Supreme Court case implemented such a prohibition.

As the Court did in *Rummel*, Justice Scalia regarded previous decisions that required proportionality assessments in capital cases to be limited to only other capital cases.²⁴⁸ He reasserted the view expressed in *Rummel* that “[p]roportionality review is one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides.”²⁴⁹ However, if, as Justice Scalia argued, there is no proportionality requirement in the language or history of the Eighth Amendment, nor in early Supreme Court cases applying the Amendment, from whence does even such a limited proportionality principle emerge? Perhaps, as the Court suggested in *Trop v. Dulles*, it comes from the recognition of the Eighth Amendment as an evolving standard.²⁵⁰ If it arises from the Eighth Amendment as *Coker*²⁵¹ and *Enmund*²⁵² plainly hold, where is the explicit language in the Amendment, its history or in early Supreme Court cases that restricts such a requirement to capital cases only? It is particularly apt to ask this of Justice Scalia, who asked these same questions of proponents of a broader proportionality principle.²⁵³

²⁴⁸ *Id.* at 994 (citing *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion)).

²⁴⁹ *Id.* at 994.

²⁵⁰ *Trop v. Dulles*, 356 U.S. 86, 99, 100-01 (1958) (plurality opinion). The Court reaffirmed this concept of the Eighth Amendment recently in *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). The Court in *Trop* could be viewed as having recognized some form of proportionality principle through negative implication when it wrote, “Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime.” *Trop*, 356 U.S. at 99. *See also Coker*, 433 U.S. at 592 (citing *Trop* for the proposition that the Eighth Amendment bars excessive punishments).

²⁵¹ 433 U.S. at 592 (plurality opinion).

²⁵² 458 U.S. at 788.

²⁵³ Justice Scalia, in support of his assertion that the Eighth Amendment was not intended to bar disproportionate punishment, noted that neither the Amendment itself nor the English Declaration of Rights, from which the Eighth Amendment is said to derive, explicitly refers to “disproportionate” or “excessive” punishments. *Harmelin v. Michigan*, 501 U.S. 957, 966-67, 977 (1991) (plurality opinion with respect to this point). He expressed doubt as to why the framers of each document would not use explicit terms that were familiar to them had they actually intended to ban disproportionate punishments. *Id.* at 977-79. Furthermore, he criticized Justice White’s dissenting opinion in *Harmelin*, which argued that the Eighth Amendment was intended to ban disproportionate punishments, because Justice White chose what he regarded as a “reasonable” interpretation of cruel and unusual punishments rather than identifying “the most plausible” meaning of the words. *Id.* at 976-77 n.6 (emphasis in original) (citing *id.* at 1010 (White, J., dissenting)).

In Justice Scalia's opinion, the only explanation for the Court's limitation of proportionality review in capital cases requires acceptance without analysis of the unsupported argument in *Rummel* that the reasoning in *Coker* and *Enmund* is limited to capital cases.²⁵⁴ In fact, neither *Coker* nor *Enmund* specifically limited proportionality review to capital cases. Significantly, in support of the existence of a proportionality principle within the Eighth Amendment, the Court in *Coker* cited *Robinson*,²⁵⁵ *Trop*²⁵⁶ and *Weems*,²⁵⁷ all non-capital cases.²⁵⁸ Furthermore, after enunciating the proportionality requirement in *Coker*, the Court discussed how "[a] punishment might fail the test [of excessiveness]."²⁵⁹ Nothing in that two part test suggests even indirectly that it was meant to be limited to capital cases.²⁶⁰

Justice Scalia believed that only one Supreme Court case clearly identifying a principle of proportionality was directly on point: *Solem v. Helm*.²⁶¹ As to *Helm's* elaboration of a proportionality principle, Justice Scalia concluded that the Court was "simply wrong."²⁶² According to Justice Scalia, it was wrong regarding its explanation of the genesis of the Eighth Amendment,²⁶³ wrong in its interpretation of *Weems*,²⁶⁴ and wrong because it misread the holdings in *Rummel* and *Davis*.²⁶⁵

Accordingly, it is now fair to ask Justice Scalia the following: now that the Supreme Court has indisputably identified a proportionality requirement in the Eighth Amendment for capital cases, from what language in the Amendment could the requirement be interpreted as limited to capital cases? Specifically, does "the most plausible" meaning to be attached to the words of the Amendment contain such a limitation?

²⁵⁴ *Id.* at 993-94.

²⁵⁵ *Robinson v. California*, 370 U.S. 660 (1962).

²⁵⁶ *Trop v. Dulles*, 356 U.S. 86 (1985) (plurality opinion).

²⁵⁷ *Weems v. United States*, 217 U.S. 349 (1910).

²⁵⁸ *Coker v. Georgia*, 433 U.S. at 592.

²⁵⁹ *Id.* See also *Enmund*, 458 U.S. at 788-99.

²⁶⁰ *Harmelin*, 501 U.S. at 1014 (White, J., dissenting). As Justice White observed, had the Court construed the Eighth Amendment as limiting only the modes of punishment without regard to the seriousness of the crime, it should have declared the death penalty either to be cruel and unusual punishment for all crimes or for no crimes.

²⁶¹ *Id.* at 964-65 (citing *Solem v. Helm*, 463 U.S. 277 (1983)).

²⁶² *Id.* at 965.

²⁶³ *Id.* at 965-83; see *supra* notes 241-43 and accompanying text.

²⁶⁴ *Harmelin*, 501 U.S. at 990-92; see *supra* notes 244-47 and accompanying text.

²⁶⁵ *Harmelin*, 501 U.S. at 965-83. The Court in *Solem*, according to Justice Scalia, incorrectly interpreted *Rummel* and *Davis* by taking language out of context, see *supra* notes 145-49 and accompanying text, by drawing conclusions unsupported by the reasoning in those cases, and, at least once, by clearly ignoring a conclusion arrived at in *Rummel* and affirmed in *Davis*. *Harmelin*, 501 U.S. at 965. As to the last point, Justice Scalia, referring to *Solem's* adoption of the three criteria for assessing proportionality,

In addition to rejecting the historical and jurisprudential foundations for a proportionality principle, Justice Scalia addressed the wisdom of employing such a principle in non-capital cases. He did this by examining the three objectifying factors for assessing proportionality that were used by the Court in *Solem*. Assessing the first factor, Justice Scalia acknowledged that crimes of violence will always be deemed to be serious in nature.²⁶⁶ The problem he identified involves determining what other crimes are serious and assessing how serious they are compared to some violent crimes.²⁶⁷ This determination, according to Justice Scalia, is inherently subjective and not susceptible to objective analysis.²⁶⁸

The inability to assess objectively the seriousness of a crime, Scalia reasoned, results as well in the failure of the second of *Solem's* objectifying factors.²⁶⁹ This factor compares treatment of the offense in question with that of other equally serious or more serious offenses in the same jurisdiction.²⁷⁰ As one crime cannot be deemed to be objectively more serious than another, according to Justice Scalia, it is fruitless to look for other crimes to use as vehicles for comparison. To Justice Scalia, differential treatment by a state of two arguably serious crimes merely means that the legislature, for any of a number of appropriate reasons, perceives greater danger in one type of serious crime than it does in another.²⁷¹ It is not the function of the courts in such situations, according to Justice Scalia, to substitute their judgment for that of the duly elected representatives of the people regarding which crime is more serious.²⁷²

As for *Helm's* third objectifying factor, Justice Scalia conceded that comparing how other states punish the crime at issue can be done with "clarity and ease."²⁷³ He contended, however, that such a comparison has no bearing on an Eighth Amendment challenge.²⁷⁴ Justice Scalia's view, mirroring that expressed by the Court in *Rummel*, is that our principles of federalism permit, if not encourage, such differential

wrote: "*Davis* had expressly, approvingly, and quite correctly described *Rummel* as having 'disapproved each of [the] objective factors.'" *Id.* (emphasis in original) (quoting *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (per curiam)).

²⁶⁶ *Harmelin*, 501 U.S. at 987.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 988. *But see supra* notes 172-81 and accompanying text.

²⁶⁹ *Harmelin*, 501 U.S. at 988-89.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* *But see infra* notes 317-18 and accompanying text.

²⁷³ *Harmelin*, 501 U.S. at 989.

²⁷⁴ *Id.*

treatment of crimes based on the different interests of the states involved.²⁷⁵ Therefore, permitting different treatment of crimes by individual states will inevitably result in a few states dealing with certain crimes more harshly than others.²⁷⁶

Justice Scalia is correct in his observation that defining seriousness involves a significant amount of subjectivity²⁷⁷ and in his recognition of the fact that a federalist system will inevitably result in disparate treatment of crimes in different jurisdictions. Open to question, however, is his conclusion that these observations negate the effectiveness of the objectifying factors. While each of Scalia's points illustrates that no precise calculus of what comprises a constitutional prison length can be drawn from the objectifying factors, neither do they negate the ability of the factors to point to sentences that are *grossly disproportionate* to the crimes committed.²⁷⁸

²⁷⁵ *Id.* at 990 (citing *Rummel v. Estelle*, 445 U.S. 263, 282 (1980)).

²⁷⁶ *Id.* at 989-90. *But see infra* notes 333-35 and accompanying text.

²⁷⁷ The terms "cruel" and "unusual" themselves are rather imprecise, and any attempt to interpret them necessarily involves some degree of subjectivity. Radin, *supra* note 64, at 997.

²⁷⁸ "Gross disproportionality" is the standard for cruel and unusual punishment identified in Justice Kennedy's concurring opinion in *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring), *Solem v. Helm*, 463 U.S. 277, 288 (1983), *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion), *Ingraham v. Wright*, 430 U.S. 651, 667 (1977), *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). *See also Rummel*, 445 U.S. at 271-72; and *Weems v. United States*, 217 U.S. 349, 371 (1910) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)).

While it would be difficult to distinguish a harsh but proportionate sentence from one that is somewhat disproportionate, a clearer, although still imprecise, line can be drawn between tough but permissible sentences and those that far exceed acceptable norms. The use of the three objectifying factors helps to accomplish this. For example, in the recent case of *Thomas v. State*, 634 A.2d 1 (Md. 1993), the Maryland Court of Appeals considered the defendant's challenge to sentences for two separate battery convictions. The first battery involved what the court described as basically a slap, resulting in no real injury. *Id.* at 7. The sentence of twenty years for this crime, the court held, was grossly disproportionate to the severity of the crime. *Id.* at 7-8. The second conviction resulted from the defendant's hitting the victim with a steam iron three times, causing her to lose consciousness, bleed profusely, and suffer an eight centimeter laceration. *Id.* at 9. The court found the sentence of thirty years for this battery to be "harsh and severe" but not grossly disproportionate. *Id.* at 10. This second sentence might have been found to be somewhat disproportionate to the crime but was understandably left intact by the court. While no precise line of gross disproportionality can be drawn, as Justice Scalia claimed, a reasonable assessment of the seriousness of the first battery would lead to the conclusion that the sentence for it crossed the line of Eighth Amendment acceptability. It is better to struggle with drawing an admittedly imprecise line than to leave such an unjust sentence intact.

In attacking attempts to define seriousness, Justice Scalia alluded to the various goals of sentencing that may lead a legislature to treat certain crimes more harshly.²⁷⁹ He noted that proportionality is a term grounded in the principle of retribution or just deserts.²⁸⁰ While the notion that the punishment should fit the crime is essential to the retributionist theory of punishment, it is perfectly proper for a legislature to create a sentence for a certain crime with deterrence, incapacitation or rehabilitation as concerns. A focus on these other theories of punishment would necessarily skew any proportion between crime and punishment, but still be perfectly within the legislature's purview, according to Scalia.²⁸¹

Notwithstanding the legislature's appropriate use of non-retributionist theories of punishment, there are limitations on the ability of these theories to justify grossly disproportionate sentences. If, as the Court held in *Solem* (and seven Justices seem to hold in *Harmelin*),²⁸² sentences that are grossly disproportionate to the crimes committed violate the Eighth Amendment, then the fact that such sentences serve to further various sentencing goals cannot by itself insulate such sentences from proportionality challenges. As the Court said in *Rummel*, although a state may wish to deter overtime parking, it cannot do so by punishing such behavior with a grossly excessive prison sentence.²⁸³ Similarly, while certain offenders may be deemed incapable of being rehabilitated and

One needs only to recall the facts in *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam), to see how use of the intrajurisdictional factor can be helpful in assessing gross disproportionality. *Davis* was sentenced to forty years in prison based on his convictions for possession and distribution of nine ounces of marijuana. *Id.* What makes clear the gross disproportionality of this sentence beyond its facial harshness is the fact that *Davis*' sentence was thirteen times greater than the average received by others convicted contemporaneously in Virginia of the same types of crimes as *Davis*, and twenty-five years longer than the next harshest sentence imposed for these crimes. *Id.* at 378 n.8 (Powell, J., concurring).

In *United States v. Gracia*, 755 F.2d 984 (2d Cir. 1985), use of the other factor, a comparison with sentences for the same crime in other jurisdictions, helped the court reach its conclusion that a sentence of nine years imprisonment for criminal contempt violated the Eighth Amendment. In that case, the U.S. Court of Appeals for the Second Circuit noted that no other federal court of appeals had ever affirmed a sentence in excess of five years imprisonment for criminal contempt. *Id.* at 990.

²⁷⁹ *Harmelin*, 501 U.S. at 989. He mentioned specifically the goals of deterrence and rehabilitation. For a discussion of these punishment goals see *infra* notes 361-64, 376 and accompanying text.

²⁸⁰ *Harmelin*, 501 U.S. at 989. For a discussion of retribution see *infra* notes 365-70 and accompanying text.

²⁸¹ *Harmelin*, 501 U.S. at 989.

²⁸² See *infra* note 288 and accompanying text.

²⁸³ *Rummel*, 445 U.S. at 288.

requiring lengthy incapacitation, there is a limit on how long they can be incarcerated if the sentence length is grossly disproportionate to the offense committed.²⁸⁴

As with his discussion of the inability to define seriousness precisely, Justice Scalia's argument that different states will inevitably punish a given offense more harshly than others also ignores the point that too much is too much. Justice Scalia's own example of federalism at work serves to prove this point. To demonstrate his position, Justice Scalia pointed to the fact that one state can legitimately choose to reward an act that another chooses to punish. The example he offered is that of a state that criminalizes the killing of an endangered animal while another state offers a bounty for the same act.²⁸⁵ The more apt situation to consider when assessing gross disproportionality, however, is whether the first state could sentence someone to decades of prison for killing the animal, a term well beyond what other states impose.

Justice Scalia was able to garner the support of only one other member of the Court for his approach to proportionality challenges under the Eighth Amendment.²⁸⁶ Justice Kennedy, writing for himself and two

²⁸⁴ One case demonstrating this is *In re Lynch*, 503 P.2d 921 (Cal. 1972). Lynch was convicted of indecent exposure, a misdemeanor in California which called for a punishment of up to six months incarceration. However, under a state law then in force, a second indecent exposure conviction warranted an indeterminate sentence of one year to life imprisonment. *Id.* at 922. The Supreme Court of California held this sentence as applied to Lynch to be unconstitutionally excessive. *Id.*

After tracing a proportionality principle, based in part on excessiveness, through Justice Field's dissent in *O'Neil* and the Supreme Court's holdings in *Weems* and *Furman*, the California court turned next to how it would assess the validity of proportionality-based claims. The court acknowledged that it was the legislature's province to consider matters such as the "public will," "relevant policy factors," and sentencing goals and strategies. However, it affirmed the role of the judiciary in overturning sentences that are severely disproportionate to the offense committed. *Id.* at 930. The crucial point is that regardless of the claimed benefits to be achieved from any particular sentence, some type of proportionality limitation is mandated by the ban on cruel and unusual punishments.

In Lynch's case, the court acknowledged that a second conviction for indecent exposure increased the risk that the offender would commit the crime again, but asserted that such a risk does not warrant a penalty so out of proportion to the offense committed. *Id.* at 936-37. In analyzing the seriousness of the crime, how other second offenders are treated in California, and how other states deal with similar situations, *id.* at 936-39, the court found Lynch's sentence to be violative of at least California's cruel and unusual punishment clause. *Id.* at 940. For a thorough critique of California's indeterminate sentencing system, see JESSICA MITFORD, *KIND AND USUAL PUNISHMENT* (1971).

²⁸⁵ *Harmelin*, 501 U.S. at 989.

²⁸⁶ *Id.* at 961. Only Chief Justice Rehnquist joined in all aspects of Justice Scalia's opinion.

other Justices, joined Scalia only in the judgment upholding Harmelin's sentence. He also joined the portion of Scalia's opinion rejecting the defendant's claim that his sentence was invalid because it was not individualized.²⁸⁷

The opinion of Justice Kennedy is significant for a variety of reasons. First, it makes clear that a majority of the Justices accept the existence of at least some form of proportionality principle within the Eighth Amendment for both capital and non-capital sentences.²⁸⁸ Justice Kennedy interpreted the opinions in *Weems*,²⁸⁹ *Rummel*,²⁹⁰ *Davis*,²⁹¹ and even the dissenting opinion in *Solem*,²⁹² as upholding the existence of such a principle.²⁹³ While acknowledging that *Solem* takes a different approach to application of proportionality principles than either *Rummel* or *Davis*, Justice Kennedy recognized certain common threads running through each of these cases. It is these common threads that he attempted

²⁸⁷ *Id.* at 996. Justices O'Connor, Kennedy, and Souter refused to join Scalia's opinion as to the following: Scalia's conclusion, based on Anglo-American history and an analysis of Supreme Court cases, that the Eighth Amendment, except for death penalty cases, contains no bar to disproportionate sentences other than that created in *Solem*, *id.* at 961-85; Scalia's assertion that *Solem* was wrongly decided and should be overruled, *id.* at 961; and Scalia's blanket rejection of the three criteria for determining gross disproportionality, *id.* at 986-90.

²⁸⁸ Justice Kennedy, explicitly opting to avoid the historical debate between Justices White and Scalia, argued that "*stare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years." *Id.* at 996. Combined with the four dissenting Justices who argued strongly for the existence of a proportionality principle, *id.* at 997 (White, J., joined by Blackmun and Stevens, J.J., dissenting), *id.* at 1017 (Marshall, J., dissenting), and Justices O'Connor and Souter, who joined in Kennedy's opinion, this forms a solid majority of seven Justices favoring some type of proportionality principle. *Accord* *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir.), *cert. denied*, 113 S. Ct. 146 (1992) (affirming prisoner's conviction and sentence under habitual offender statute); *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992) (holding a sentence of life without parole not cruel and unusual punishment); *Thomas v. State*, 634 A.2d 1, 5 (Md. 1993) (holding that a 30 year sentence imposed on a second count of common law battery does not violate the Eighth Amendment). Differences clearly do exist among the Justices, however, over the breadth of this principle and how best to apply it.

²⁸⁹ *Weems v. United States*, 217 U.S. 349 (1910).

²⁹⁰ *Rummel v. Estelle*, 445 U.S. 263 (1980).

²⁹¹ *Hutto v. Davis*, 454 U.S. 370 (1982).

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

²⁹³ *Harmelin*, 501 U.S. at 997-98 (Kennedy, J., concurring). Justice Kennedy seemed to adopt the dubious reasoning in *Solem*, *see supra* notes 144-49 and accompanying text, that both *Rummel* and *Davis* "recognized the possibility of proportionality review," but refused to apply it to the facts of those cases. *Harmelin*, 501 U.S. at 998.

to fashion into a framework for applying a proportionality requirement to sentences.

According to Justice Kennedy, the first principle to be discerned from previous cases is the need for courts to defer to legislative judgments concerning what constitutes an appropriate sentence for a particular crime.²⁹⁴ The issues of how and whether a state wishes to punish an offense involve political determinations about the needs and interests of the particular state as well as critical judgments as to what goals of punishment are to be used and in what combination. To Kennedy, such matters are fundamentally legislative in nature.²⁹⁵

The second principle Kennedy saw emerging from previous cases is that legislatures are free to use any of a number of punishment theories in structuring a sentencing system.²⁹⁶ Further, according to Kennedy, these theories can be applied in varying combinations and degrees by both legislatures and sentencing courts.²⁹⁷

Next, Kennedy determined that the Court, through its previous holdings, had recognized that disparate treatment of the same crime by different states was an inevitable byproduct of federalism.²⁹⁸ Differences regarding punishment of a particular offense are due to the variety of philosophies and concerns that underlie each state's sentencing system. To Justice Kennedy, this made any interstate sentencing comparison an "imperfect enterprise."²⁹⁹

The final principle Justice Kennedy extricated from the earlier cases is the importance of relying on objective factors, where feasible, to assess proportionality.³⁰⁰ To Kennedy, the most important objective factor is the type of punishment imposed. As the penalty of death has long been viewed by the Court as unique, a clear line can be drawn between it and a sentence involving jail time.³⁰¹ Justice Kennedy, however, did not discern such a clear line separating sentences involving shorter and longer

²⁹⁴ *Harmelin*, 501 U.S. at 998-99 (Kennedy, J., concurring) (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983); *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980); *Weems v. United States*, 217 U.S. 349, 379 (1910)).

²⁹⁵ *Id.* (Kennedy, J., concurring) (citing *Gore v. United States*, 357 U.S. 386, 393 (1958)).

²⁹⁶ The theories of punishment most frequently used are retribution, incapacitation, rehabilitation, and deterrence (both general and specific). See *infra* notes 353-71 and accompanying text.

²⁹⁷ *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring).

²⁹⁸ *Id.* at 1000 (Kennedy, J., concurring).

²⁹⁹ *Id.* (Kennedy, J., concurring).

³⁰⁰ *Id.* (Kennedy, J., concurring).

³⁰¹ *Id.* (Kennedy, J., concurring).

periods of incarceration. The significance of this to Justice Kennedy is that courts should be exceedingly reluctant to entertain proportionality challenges to non-capital sentences.³⁰²

Justice Kennedy began by comparing Harmelin's crime and sentence to that of Helm.³⁰³ While Harmelin's sentence of life imprisonment without parole was the second most serious that could be imposed, it was the same sentence that Helm had received. However, Helm's wrongdoing, even if it encompassed all of the crimes considered in his sentence as a recidivist, was less serious than that of Harmelin, according to Kennedy.³⁰⁴ He defended this assertion by refuting Harmelin's contention that his offenses, like Helm's, were nonviolent. To Justice Kennedy, drug consumption, in addition to its effects on the user, may result in violent crime (1) due to the physiological and psychological change it causes in the user, (2) to provide funds to purchase drugs, or (3) as part of the drug transaction.³⁰⁵ Because of the potential danger in drug use and its prevalence in society, Justice Kennedy concluded that Michigan's admittedly harsh treatment of Harmelin could be viewed as an appropriate attempt to achieve deterrence and retribution. Once such a determination was made, Kennedy saw no reason to examine further whether the sentence was excessive.³⁰⁶

Comparison of Harmelin's sentence to what he could have received in other states and a look at how other serious offenses are treated in Michigan, factors used by the Court in *Solem*, were deemed unnecessary by Justice Kennedy.³⁰⁷ He did not read *Solem* as requiring use of the comparative factors in every challenge to a sentence based on disproportionality. Instead, Kennedy saw the need for such comparisons only where the Court first determined that the sentence was grossly disproportionate to the seriousness of the crime.³⁰⁸ In support of his approach, Justice Kennedy noted that comparative analyses in both *Weems* and *Solem* were undertaken only after determinations that the sentences were grossly disproportionate to the crimes committed in each case.³⁰⁹ By contrast,

³⁰² *Id.* (Kennedy, J., concurring).

³⁰³ *Id.* (Kennedy, J., concurring).

³⁰⁴ *Id.* (Kennedy, J., concurring).

³⁰⁵ *Id.* at 1002 (Kennedy, J., concurring).

³⁰⁶ *Id.* at 1005 (Kennedy, J., concurring).

³⁰⁷ *Id.* (Kennedy, J., concurring).

³⁰⁸ Justice Kennedy concluded that while the Court in *Solem* used all three factors, "it did not announce a rigid three-part test" for assessing all proportionality challenges. *Id.* at 988-90 (Kennedy, J., concurring).

³⁰⁹ *Id.* (Kennedy, J., concurring) (citing *Solem v. Helm*, 463 U.S. 277, 298-300 (1983); *Weems v. United States*, 217 U.S. 349, 377-81 (1910)).

in both *Rummel* and *Davis*, cases in which the Court found no gross disproportionality between sentence and crime, the Court rejected attempts to use comparative analyses.³¹⁰ Therefore, concluded Justice Kennedy, comparative analysis should be employed only to confirm initial determinations of gross disproportionality.³¹¹

It is noteworthy that Justice Kennedy avoided the historical debate involving the antecedents of the Eighth Amendment.³¹² Instead he focused on more recent approaches to proportionality as evidenced in twentieth century Supreme Court cases. The Eighth Amendment has long been seen as an "evolving" set of principles.³¹³ Therefore, modern proportionality approaches should not be governed by determinations based on conflicting historical analyses of what principles were embodied in the English Bill of Rights and to what degree they were adopted by the framers.³¹⁴

The first three common threads that Justice Kennedy drew from previous cases are similar to the points raised by Justice Scalia in his opinion rejecting any proportionality requirement in non-capital cases.³¹⁵ To Justice Kennedy, however, these principles, when combined with his view of the Court's earlier recognition of some form of proportionality requirement, lead to the conclusion that the Eighth Amendment bans only those punishments that are grossly disproportionate to the crime committed.³¹⁶

Few would argue with Justice Kennedy's view of legislative primacy in sentencing, the ability of each legislature to use various sentencing theories in different combinations, or the inevitable result that some jurisdictions will treat certain crimes more harshly than other jurisdictions. Merely recognizing these principles, however, without acknowledging the important limits that attach to each, risks devaluing any proportionality requirement and making its application less effective.

The Eighth Amendment was designed specifically to check legislative excesses.³¹⁷ While legislatures establish punishment schemes, when a

³¹⁰ *Id.* (Kennedy, J., concurring) (citing *Rummel v. Estelle*, 445 U.S. 263, 281 (1980)).

³¹¹ *Id.* (Kennedy, J., concurring).

³¹² *Id.* at 996 (Kennedy, J., concurring).

³¹³ *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion); see *supra* note 243.

³¹⁴ See *supra* note 243.

³¹⁵ *Harmelin*, 501 U.S. at 988-90 (Kennedy, J., concurring).

³¹⁶ *Id.* at 1001 (Kennedy, J., concurring) (citing *Solem v. Helm*, 463 U.S. 277, 288, 303 (1983)).

³¹⁷ Referring to the Cruel and Unusual Punishments Clause, the Court in *Weems v. United States* declared:

particular sentence is unconscionable, it is "not our discretion but our duty" to interfere, as the Court said in *Weems*.³¹⁸ While a standard of "gross disproportionality" will appropriately require less frequent judicial intervention, when required, such intervention is crucial, in part, because of its infrequency.

Although Justice Kennedy's attempt to harmonize the opinions of the Supreme Court in previous proportionality cases may be somewhat more persuasive than was Justice Powell's attempt to do so in *Solem*,³¹⁹ it raises many questions as well. Kennedy's conclusion that prior cases are universal in their acceptance of a sentencing proportionality principle, albeit a narrow one, is at least defensible. Cases such as *Weems*, *Robinson*, *Coker*, and *Solem* seem to stand for such a principle,³²⁰ and even *Rummel* and *Davis* could be said to leave the door slightly ajar to a more limited proportionality principle.³²¹ His assertion, however, that

With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause.

217 U.S. 349, 372-73 (1910).

In his concurring opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan described *Weems* as having "recognized that this 'restraint upon legislatures' possesses an 'expansive and vital character' that is 'essential . . . to the rule of law and the maintenance of individual freedom.'" *Id.* at 267 (Brennan, J., concurring) (citing *Weems*, 217 U.S. at 376-77). Later in his opinion Justice Brennan wrote: "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 in the Bill of Rights." *Id.* at 269 (Brennan, J., concurring). See also the comments of Holmes and Patrick Henry to their respective state conventions lamenting the fact that no such limitation upon legislative punishments appeared in the Constitution prior to the adoption of the Bill of Rights and why such a proscription was needed. *Id.* at 258-60 (citing respectively 2 J. ELLIOT'S DEBATES 111 and 3 J. ELLIOT'S DEBATES 447 (2d ed. 1876)); *Furman*, 408 U.S. at 313-14 (White, J., concurring); JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* 223 (1979).

³¹⁸ *Weems*, 217 U.S. at 378. See also *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Furman*, 408 U.S. at 267-8 (Brennan, J., concurring); *In re Kemmler*, 136 U.S. 436, 446-47 (1890); *Carmona v. Ward*, 436 F. Supp. 1153, 1168 (S.D.N.Y. 1977) (asserting that while legislatures have latitude in setting punishments for crimes, "there necessarily remains a constitutional limitation upon the State's freedom to undertake even the most enlightened and well motivated approaches to the most intractable and corrosive social problems," and it falls to the courts to enforce this limitation).

³¹⁹ See *supra* notes 137-49, 167-70, 205-24 and accompanying text.

³²⁰ See *supra* notes 25-40, 48, 62, 64, 136-65 and accompanying text.

³²¹ *Hutto v. Davis*, 454 U.S. 370, 373-74 & n.3 (1982) (per curiam); *Rummel v. Estelle*, 445 U.S. 263, 272, 274 & n.11 (1980).

the use of two of the three proportionality criteria adopted by the Court in *Solem* is discretionary is far less convincing. Justice Kennedy purported to discern this discretion from the Court's language in *Solem* regarding use of the two comparative factors.³²² In *Solem* the Court said "it may be helpful to compare sentences imposed on other criminals in the same jurisdiction" and "the courts may find it useful" to engage in interjurisdictional comparison.³²³ To Justice Kennedy this meant that courts may also decide that there is no need to engage in such comparisons where there is no clear gross disproportionality after assessing the seriousness of the offense and harshness of the punishment.³²⁴ This turned out to be a conclusion of some significance, since many courts faced with challenges to the proportionality of a sentence after the decision in *Harmelin* have adopted Justice Kennedy's approach.³²⁵

Justice Kennedy's interpretation of the purportedly permissive language in *Solem* is supported neither by other language in *Solem*, nor by a more careful reading of the above-referred language itself.³²⁶ Regarding the language in *Solem* cited by Kennedy, the Court appeared to be saying that assessments of gross disproportionality are informed by comparisons that show whether the sentence in question stands out from others. If the challenged sentence stands out from others, then indeed the comparisons may be "helpful" or "useful." After noting that intrajurisdictional comparisons "may be helpful," the Court in *Solem* continued, "If

³²² *Harmelin v. Michigan*, 501 U.S. 957, 1004-05 (1991) (plurality opinion as to Parts I-III; majority opinion as to Part IV).

³²³ *Solem v. Helm*, 463 U.S. 277, 291 (1983) (emphasis added).

³²⁴ *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring).

³²⁵ See *United States v. Hill*, 30 F.3d 48 (6th Cir.), cert. denied sub nom. *Hickey v. United States*, 115 S. Ct. 350 (1994); *United States v. Easter*, 981 F.2d 1549 (10th Cir. 1992), cert. denied, 113 S. Ct. 2448 (1993); *McGruder v. Puckett*, 954 F.2d 313 (5th Cir.), cert. denied, 113 S. Ct. 1461 (1992); *Bradford v. Whitley*, 953 F.2d 1008 (5th Cir.), cert. denied, 113 S. Ct. 91 (1992); *United States v. Pavlico*, 961 F.2d 440 (4th Cir.), cert. denied, 113 S. Ct. 144 (1992); *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), cert. denied, 113 S. Ct. 1382 (1993); *United States v. Lowden*, 955 F.2d 128 (1st Cir. 1992); *United States v. Salmon*, 944 F.2d 1106 (3d Cir. 1991), cert. denied, 502 U.S. 1110 (1992); *State v. Bartlett*, 830 P.2d 823 (Ariz. 1992), cert. denied, 113 S. Ct. 511 (1993); *State v. Sasak*, 871 P.2d 729 (Ariz. Ct. App. 1993); *State v. Brown*, 825 P.2d 482 (Idaho 1992); *State v. Lee*, 841 S.W.2d 648 (Mo. 1992); *State v. Riley*, 497 N.W.2d 23 (Neb. 1993); *Downs v. Commonwealth*, 616 A.2d 39 (Pa. 1992); *State v. Gehrke*, 491 N.W.2d 421 (S.D. 1992), denial of post-conviction relief aff'd by, *Gehrke v. Lee*, 56 F.3d 68 (8th Cir. 1995); *State v. Harris*, 844 S.W.2d 601 (Tenn. 1992); *State v. Borrell*, 482 N.W.2d 883 (Wis. 1992).

³²⁶ Kelly A. Patch, *Harmelin v. Michigan: Is Proportionate Sentencing Merely Legislative Grace*, 1992 WIS. L. REV. 1697, 1716-18.

more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive.³²⁷ Therefore, it appears that the Court in *Solem* is not qualifying the need to conduct the comparative assessments, but merely noting that the comparisons are “useful” or “helpful” in determining disproportionality only when they show that the challenged sentence stands out from others.³²⁸ Immediately following this discussion of the benefits of using the three proportionality criteria, the Court in *Solem* wrote: “In sum, a court’s proportionality analysis under the Eighth Amendment *should* be guided by objective criteria”³²⁹ and then enumerated each of the three above criteria.³³⁰

Justice Kennedy further supported his limited use of the two comparative proportionality analyses with his observation that such analyses were performed in *Weems* and *Solem* only *after* the sentences were deemed grossly excessive for relatively minor criminal activity. By contrast, Kennedy asserted, in *Rummel* and *Davis*, cases in which sentences were not viewed as unduly excessive, the Court rejected comparative analyses.³³¹ The fact that the Court chose to examine the harshness of the sentence and the seriousness of the crime prior to engaging in comparative analyses in *Weems* and *Solem* hardly suggests, as Kennedy asserted, that a clear finding of gross disproportionality is required to even engage in such analyses. Instead it is more likely that the Court recognized that it made little sense to compare a crime to others of equal seriousness unless it was first determined how serious the crime at issue was. Similarly, the rejection by the Court in *Rummel* and *Davis* of

³²⁷ *Solem*, 463 U.S. at 291.

³²⁸ Similarly, regarding interjurisdictional comparisons, the Court in *Solem*, after saying such comparisons “may” be useful, gave examples of cases where the results of interjurisdictional comparisons showed that the sentence at issue stood out from others. *Id.* at 291-92 (citing *Enmund v. Florida*, 458 U.S. 782, 792 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 380 (1910)).

³²⁹ *Solem*, 463 U.S. at 292 (emphasis added).

³³⁰ The Court in *Solem* did not foreclose the possible use of additional objectifying criteria as well. *Id.* Specifically, some have suggested the use of a fourth factor: first an examination of local conditions and the legislative goals sought by specific punishment statutes, and then an assessment of whether these goals are rationally related to the sentence in question. See *Hart v. Coiner*, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974); Margaret R. Gibbs, Note, *Eighth Amendment – Narrow Proportionality Requirement Preserves Deference to Legislative Judgment*, 82 J. CRIM. L. & CRIMINOLOGY 955, 975-76 (1992).

³³¹ *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (plurality opinion as to Parts I-III; majority opinion as to Part IV) (Kennedy, J., concurring).

the comparative analyses hardly supports Kennedy's conditional use of these comparisons, as both opinions rejected any judicial assessment of the seriousness of the crime (Kennedy's favored criterion) as well.³³²

Aside from its strained attempt at justification through synthesis of earlier Supreme Court opinions, Justice Kennedy's conditional approach to use of the comparative analyses criteria can be criticized for its lack of efficacy as well. As Justice Kennedy noted, one clear principle that emerges from the Court's previous holdings on proportionality is that judicial determinations of the excessiveness of a sentence should not be nor appear to be merely the individual predilections of the judges involved.³³³ The exclusive use of the harshness of the crime criteria (even if this one-criteria approach is used only when there appears to be no gross disproportionality between crime and sentence) runs counter to this principle. As Justice White pointed out in his dissenting opinion in *Harmelin*, it is far more subjective to base proportionality determinations on merely the view of the deciding judges regarding the seriousness of the crime than it is to have their judgment informed by the way in which the state treats other criminals and how other states deal with the crime at issue.³³⁴ Therefore, while Justice Kennedy was certainly correct in noting that comparative analysis may be "an imperfect enterprise," this type of analysis is still an informative and objectifying one.³³⁵

³³² *Id.* (Kennedy, J., concurring). In fact, the criterion that examines the seriousness of the crime was the *first* one rejected by the Court in both *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980), and *Hutto v. Davis*, 454 U.S. 370, 373 n.2 (1982) (per curiam).

³³³ *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) (citing *Solem*, 463 U.S. at 290 ("[C]ourts should be guided by objective factors that our cases have recognized."); *Rummel*, 445 U.S. at 274-75); *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)) ("Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices . . ."); *Enmund*, 458 U.S. at 788 ("[O]ur judgment should be informed by objective factors to the maximum possible extent."). See also MARVIN E. FRANKEL, *CRIMINAL SENTENCES* 79 (1973) ("[T]he power to send people to prison for long stretches ought to be exercised in a system of law on grounds more objective and rational than vague sentiment").

³³⁴ *Harmelin*, 501 U.S. at 1021 (White, J., dissenting) ("[O]nly when a comparison is made with penalties for other crimes and in other jurisdictions can a court begin to make an objective assessment about a given sentence's constitutional proportionality . . ."). See also Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1136 (1979); Baker & Baldwin, *supra* note 26, at 55-56; Allyn G. Heald, Note, *U.S. v. Gonzalez: In Search of a Meaningful Proportionality Principle*, 58 BROOK. L. REV. 455, 491 (1992); Mark Alden James, Note, *Eighth Amendment Proportionality Analysis: The Limits of Moral Inquiry*, 26 ARIZ. L. REV. 871, 879 (1984).

³³⁵ When assessing the seriousness of *Harmelin's* crime, Justice Kennedy apparently

The problem in using only the seriousness of the crime criterion is illustrated by a look at how Kennedy applies his proportionality approach to Harmelin's crime. A comparison with Justice White's application of all three criteria in his dissent evidences a reasonable difference of opinion regarding the seriousness of possessing over 650 grams of cocaine. Although Kennedy regarded the sentence of life without parole as harsh, he argued that Michigan has the right to determine that the goal of deterring possession of large amounts of cocaine warrants such a sentence.³³⁶ He rejected Harmelin's claim that drug possession should be regarded as a victimless crime, and described how the effects of drugs harm not only the user, but society as well.³³⁷ Specifically, Justice Kennedy called attention to the connection between drug use and the commission of violent crime.³³⁸

Justice White, in his dissent, conceded that the use of drugs is serious,³³⁹ but not so serious as sale or possession with intent to sell, neither of which Harmelin was convicted.³⁴⁰ White compared the collateral consequences of drugs, a factor upon which Justice Kennedy appeared to rely heavily, to those of alcohol.³⁴¹ Such consequences, White asserted, could lead to penalties, but not to oppressively harsh ones.³⁴² Furthermore, in a state such as Michigan, where there is no capital punishment, life imprisonment is the harshest punishment possible.³⁴³ To apply such a harsh punishment mandatorily, without regard to the fact that Harmelin was a first offender and without any suggestion that Harmelin's particular offense was especially egregious, is even more problematic for Justice White.³⁴⁴

did find it useful, however, to compare the nature of that crime with those committed by Helm. *Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring).

³³⁶ *Id.* at 1003 (Kennedy, J., concurring). Justice Kennedy also referred to the penological goal of retribution as a possible justification for Harmelin's sentence.

³³⁷ *Id.* at 1002 (Kennedy, J., concurring).

³³⁸ *Id.* at 1002-03 (Kennedy, J., concurring). Justice Kennedy saw this connection occurring in three possible ways: (1) the drug-induced state of the offender leads him to violent crime, (2) the drug user to obtain money for drugs may resort to criminal activity (i.e., robbery or burglary), and (3) violent crime is often endemic to the business of selling drugs. *Id.* (citing Goldstein, *Drugs and Violent Crime*, in *PATHWAYS TO CRIMINAL VIOLENCE* 16, 24-36 (N. Weiner & M. Wolfgang eds., 1989)).

³³⁹ *Id.* at 1022 (White, J., dissenting).

³⁴⁰ *Id.* at 1025 (White, J., dissenting).

³⁴¹ *Id.* at 1023-24 (White, J., dissenting).

³⁴² *Id.* at 1022 (White, J., dissenting).

³⁴³ *Id.* at 1025-26 (White, J., dissenting).

³⁴⁴ *Id.* at 1027 (White, J., dissenting).

In sum, Justice Kennedy and the two Justices who joined in his opinion viewed Harmelin's crime as more serious than did Justice White and the three other Justices who joined with him.³⁴⁵ Further, the views of both groups of Justices seem to be reasonable. Under Justice Kennedy's approach, once the determination is made that no gross disproportionality exists based on an assessment of the seriousness of the crime, analysis stops. In such a situation the subjective views of the judges would appear to be not just *a* factor in the decision, but *the* determining factor.³⁴⁶ It would be wiser to turn, as did Justice White, to the two comparative analyses to inform any determination of gross disproportionality.³⁴⁷

In so doing, Justice White observed that Michigan's harshest penalty is reserved for only two other crimes, both of which are surely more serious than drug possession.³⁴⁸ Furthermore, arguably more serious crimes against the person, such as murder in the second degree and armed robbery, do not carry mandatory life sentences.³⁴⁹ It is also significant,

³⁴⁵ Justices Blackmun and Stevens joined in Justice White's dissenting opinion. *Id.* at 1009. Justice Marshall dissented separately, but noted that, except for the comments on capital punishment in Justice White's opinion, he was entirely in agreement with White's opinion. *Id.* at 1027-28 (Marshall, J., dissenting).

³⁴⁶ It should be understood that in applying terms such as "cruel" and "unusual," complete objectivity can never be attained. See Baker & Baldwin, *supra* note 26, at 59 (asserting that the Eighth Amendment was "designed to preserve human dignity not objective science"); Joshua Dressler, *Proportionality and Justice as Endangered Doctrines*, 34 SW. L.J. 1063, 1104-06 (1981); Note, *The Supreme Court's 1979 Term*, 94 HARV. L. REV. 75, 96 (1980); see also *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (observing that the Cruel and Unusual Punishments Clause "admits of few absolute limitations," and reaffirming that interpretations of the Clause should utilize our "evolving sense of decency") (quoting from *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

Perhaps the best means of describing the purpose of the three-factor approach for proportionality determinations is not to view it as a pretense of pure objectivity, but instead as "an effort to gauge tangible reflection of the common mind." Baker & Baldwin, *supra* note 26, at 61.

³⁴⁷ See *Harmelin*, 501 U.S. at 1021 (White, J., dissenting).

³⁴⁸ *Id.* at 1026 (White, J., dissenting). Those two crimes are first degree murder and manufacture, distribution, or possession with intent to manufacture or distribute 650 grams or more of narcotics. *Id.* (White, J., dissenting).

Justice White found it disturbing that Michigan chose not to prosecute Harmelin under the more serious crime of possession with intent to distribute, because it knew it could obtain the same sentence without having to prove the additional element of intent. To Justice White, this meant that the state essentially obtained for Harmelin the sentence warranted for the more serious crime, while having to prove only the less serious one. *Id.* at 1025 (White, J., dissenting).

³⁴⁹ *Id.* (White, J., dissenting). To Justice White this demonstrated that Harmelin had

according to Justice White, that Michigan is the only state in which a defendant could receive life without parole for possessing the amount of drugs Harmelin had.³⁵⁰ While this is certainly permissible under our federalist system, the fact that Michigan treats Harmelin differently than would any other state informs an assessment of proportionality and even more obviously objectifies the assessment measurably.³⁵¹

In the wake of the holding by the Supreme Court in *Harmelin*, following the decisions in *Rummel*, *Davis*, and *Solem*, a great deal of confusion exists respecting the application of a proportionality principle to non-capital sentences.³⁵² Much of that confusion stems from the

been treated at least as harshly, if not more so, than those in Michigan guilty of having committed more serious crimes. *Id.* (White, J., dissenting).

³⁵⁰ Specifically, Justice White noted that only one other state, Alabama, punishes a first-time drug possessor with life imprisonment without possibility of parole, and even there such punishment results only from possession of an amount considerably greater than that possessed by Harmelin. Additionally, according to Justice White, Harmelin would have received approximately ten years in prison under the Federal Sentencing Guidelines. *Id.* at 1026-27 (White, J., dissenting).

³⁵¹ In determining the acceptability under the Eighth Amendment of Georgia's capital sentencing provision for offenders convicted of the rape of an adult woman, the Court in *Coker* examined at some length the capital sentencing provisions in other states. *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977) (plurality opinion). It concluded: "The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures but it *obviously weighs very heavily* on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." *Id.* at 596 (emphasis added). The Court in *Coker* also alluded to the fact that one year earlier, when it had approved other aspects of Georgia's capital sentencing provisions in *Gregg*, it was heavily influenced by similar policies in other states. *Id.* at 592 ("[A]ttention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted."); see also *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion) (discussing how international opinion regarding the acceptability of a punishment (denationalization) played a role in the Court's opinion), cited in *Coker*, 433 U.S. at 596 n.10.

³⁵² A number of lower courts refer to this confusion directly. See *United States v. Sarbello*, 985 F.2d 716, 722 (3d Cir. 1993) (observing that "[t]he Supreme Court has not provided clear guidance regarding the propriety or nature of proportionality review in non-capital cases," and also noting the "lack of clear directive from the Supreme Court" regarding Eighth Amendment proportionality claims); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509 (10th Cir. 1993), cert. denied, 114 S. Ct. 1563 (1994) (noting that the Supreme Court failed to reach a consensus on the existence, or lack thereof, of proportionality review in *Harmelin*, and stating that "*Harmelin* provides no guidance in articulating the proper approach for an Eighth Amendment review."); *Neal v. Grammer*, 975 F.2d 463, 465 (8th Cir. 1992) ("The future of the proportionality test is uncertain."); *People v. Gaskins*, 825 P.2d 30, 34 n.10 (Colo. 1992) ("*Harmelin* leaves the future of

inability of the Justices to agree upon and articulate clearly an Eighth Amendment proportionality principle, and from the mixed signals they have given with respect to application of such a principle. These problems derive in large part from the Court's failure to develop a convincing philosophical basis on which to premise a meaningful ban on grossly disproportionate punishments.

V. PHILOSOPHICAL DEFENSE OF PROPORTIONALITY

Any attempt by the Court to resolve issues surrounding the concept of proportionality should be informed by both long-held and modern ideas related to theories of punishment. Theories of punishment are traditionally divided into two somewhat competing justifications: retribution and utilitarianism.³⁵³ Retribution, or just deserts, seeks to

Solem somewhat clouded." (citation omitted)); *Bult v. Leapley*, 507 N.W.2d 325, 328 n.2 (S.D. 1993), *appeal after remand*, *State v. Bult*, 529 N.W.2d 197 (S.D. 1995) (deciding the case on other than proportionality grounds, the court stated, "Whether the Eighth Amendment even encompasses a proportionality principle in non-capital cases has been called into question . . ." and citing *Harmelin* as the source of the confusion.); *State v. Borrell*, 482 N.W.2d 883, 893 (Wis. 1992) ("[A] recent decision of the Supreme Court casts serious doubt on the viability of proportionality analysis in non-death penalty cases.").

Others demonstrate this confusion by holding that *Solem* was overruled by *Harmelin*. See *People v. Knott*, 586 N.E.2d 479, 497 (Ill. App. Ct. 1991), *vacated due to death of defendant*, 621 N.E.2d 611 (1993) ("*Solem* was expressly overruled in *Harmelin*" and "the term 'cruel and unusual' under the Eighth Amendment has no connection to the particular offense."); *State v. Tyler*, 840 P.2d 413, 434 (Kan. 1992) (viewing *Harmelin* as overruling *Solem*); *State v. Combs*, 504 N.W.2d 248, 251 (Minn. Ct. App. 1993) (holding that *Harmelin* did away with proportionality review); *State v. Stoer*, 862 S.W.2d 348, 354 (Mo. Ct. App. 1993) (holding that *Solem* was "expressly overruled" by *Harmelin* and that the Eighth Amendment does not contain a proportionality requirement). These courts saw no proportionality requirement after *Harmelin*, notwithstanding the stance seven Justices took in support of some kind of proportionality principle. See *supra* note 288 and accompanying text.

Even among those courts that saw a proportionality principle surviving *Harmelin*, there is disagreement on how to apply it. Compare cases cited, *supra* note 325 (requiring use of the inter- and intrajurisdictional comparative criteria only after an initial determination of gross disproportionality is made), with those courts that continue to require application of the three criteria in all cases. See, e.g., *United States v. Lemons*, 941 F.2d 309, 319-20 (5th Cir. 1991); *People v. Gaskins*, 825 P.2d 30, 34 n.10 (Colo. 1992) ("In absence of more definitive guidance from the United States Supreme Court, we shall adhere to our prior understanding of the requirements of *Solem*"); *Johnson v. State Hearing Examiner's Office*, 838 P.2d 158, 177-78 (Wyo. 1992).

³⁵³ MURPHY, *supra* note 317, at 151; PACKER, *supra* note 200, at 10-11; LEON RADZINOWICZ, *IDEOLOGY AND CRIME* 115 (1966).

punish an offender for the act committed³⁵⁴ commensurate with the harm inflicted and the moral wrongfulness of the act.³⁵⁵ Retribution is retrospective in that it punishes for what was done without any regard to possible future benefits arising out of the punishment.³⁵⁶

Utilitarianism, on the other hand, is prospective in that its goal is to impose a punishment that will be beneficial to society in the future.³⁵⁷ That intended benefit usually takes the form of deterrence, incapacitation, rehabilitation or some combination thereof.³⁵⁸ Utilitarians believe that it is without effect, and therefore cruel, to impose punishment on an offender merely because a moral wrong was committed.³⁵⁹ Jeremy Bentham, perhaps the leading early proponent of utilitarianism, believed that "punishment is a technique of social control which is justified so long as it prevents more mischief than it produces."³⁶⁰

As did Bentham, modern utilitarians have particularly championed the principle of general deterrence to justify the imposition of punish-

³⁵⁴ See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 147-48 (1971), arguing that as a matter of principle, the law has dominion over an offender only as to the criminal act committed. As a matter of policy, were the law to sentence "the whole person," then irrelevant and improper considerations such as wealth, influence and power would inevitably play a role in sentencing, according to the authors. *Id.*

³⁵⁵ VON HIRSCH, *supra* note 172, at 31, 64. von Hirsch defines harm as "the injury done or risked by the criminal act." In assessing wrongfulness or culpability, he looks to "the factors of intent, motive and circumstance." *Id.* at 64. See also Baker & Baldwin, *supra* note 26, at 69 (including the following among factors of blameworthiness: the harm to persons and property; whether the misconduct was intentional or negligent; whether the harm actually occurred or was merely threatened; what the risk was; and how much violence or theft occurred); Gilchrist, *supra* note 334, at 1125.

³⁵⁶ MURPHY, *supra* note 317, at 229; PACKER, *supra* note 200, at 11; RADZINOWICZ, *supra* note 353, at 115; VON HIRSCH, *supra* note 172, at 31; Radin, *supra* note 64, at 1049.

³⁵⁷ PACKER, *supra* note 200, at 11, 14; RADZINOWICZ, *supra* note 353, at 115; Radin, *supra* note 64, at 1049.

³⁵⁸ C.L. TEN, CRIME, GUILT AND PUNISHMENT 7-8 (1987).

³⁵⁹ Utilitarians believe "suffering is always an evil and there is no justification for making people suffer unless some secular good can be shown to flow from doing so." PACKER, *supra* note 200, at 11. To utilitarians, sentencing based on retributionist notions of public indignation or condemnation is counterproductive, in part because it makes the judge less likely to consider the effects of the sentence on the community at large. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 170-71 (1968). Understandably, therefore, utilitarian goals are described as "collectivist," whereas retributive goals are classified as "individualist." Radin, *supra* note 64, at 1049.

³⁶⁰ Stanley I. Benn & Richard S. Peters, *The Utilitarian Case for Punishment*, in CONTEMPORARY PUNISHMENT 96, 96 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

ment.³⁶¹ Stated simply, proponents of general deterrence advocate sentencing an offender just severely enough to create a significant disincentive for other similarly situated potential offenders to avoid engaging in criminal activity.³⁶² The concept of general deterrence presupposes that crime is a rational act and that the potential offender will weigh rationally the cost (likelihood of conviction and punishment imposed) against the possible benefits to be achieved from the criminal act.³⁶³ Further, it assumes communication, in some form, of sentences actually imposed to potential future offenders.³⁶⁴

Although they share the view that crime is the product of a rational act,³⁶⁵ strict retributionists recoil from the supposed pragmatism of

³⁶¹ See generally PACKER, *supra* note 200; Andenaes, *supra* note 200, at 949; Bem & Peters, *supra* note 360, at 97-98. General deterrence should be distinguished from the separate, but related, punishment justification known as special or specific deterrence. Special deterrence proponents advocate punishing the individual to the extent necessary to prevent or reduce the likelihood that she will commit another crime in the future. While similar to general deterrence in that it is based on the rational, hedonistic model of criminal behavior, special deterrence aims at deterring the particular offender rather than other similarly situated potential offenders. See PACKER, *supra* note 200, at 45-46.

³⁶² PACKER, *supra* note 200, at 140; RADZINOWICZ, *supra* note 353, at 10-11; VON HIRSCH, *supra* note 172, at 32.

³⁶³ PACKER, *supra* note 200, at 11, 40-41.

Hart describes how proponents of general deterrence seek to work "through the mind" of those who are to be deterred:

These thinkers conceived the law's threats of punishment as something which would enter into the reasoning and deliberation of the potential criminal at the moment when he considered whether or not to commit the crime: the threats were to constitute, for the person tempted to commit the crime, reasons against committing it, and the hope was that the reasons would appear conclusive and lead to a decision to conform. In this rationalistic picture of what one might call "criminal deliberations", the threat of punishment was intended to constitute a *guide* to deliberation on the assumption that he would be tempted to commit the crime and he would deliberate.

HART, *supra* note 359, at 133.

³⁶⁴ Andenaes, *supra* note 200, at 970.

³⁶⁵ Professor Jeffrie Murphy describes the retributionist's approach to the criminal as a rational actor as follows: "If he chooses not to sacrifice by exercising self-restraint and obedience, this is tantamount to his choosing to sacrifice in another way — namely by paying the prescribed penalty." JEFFRIE G. MURPHY, *RETRIBUTION RECONSIDERED* 47 (1992) (quoting JEFFRIE G. MURPHY, *KANT: THE PHILOSOPHY OF RIGHT* 142-43 (1970)).

The criminal, therefore, deserves the punishment he receives because he is morally responsible for his actions. To the retributionist, moral responsibility justifies infliction of punishment. TEN, *supra* note 358, at 46-48.

The "liberal" or "classical" approach to crime, whose most renowned proponent was Cesare Beccaria, had aspects of both retribution and deterrence. As Beccaria believed that

general deterrence, often sharing the view of Immanuel Kant, that "one man ought never to be dealt with as a means subservient to the purpose of another" ³⁶⁶ To Kant and his many followers, the purpose of punishment is to act as an appropriate, morally justified, societal response to a moral or legal wrong. ³⁶⁷ When considering the extent of punishment, the focus is on the act more than the actor, and certainly not on any potential offender. ³⁶⁸ If fortuitously society derives certain benefits from the sentence such as deterring potential criminals or furthering the rehabilitation of the defendant, that is all well and good. ³⁶⁹ The goal of punishment to the retributionist, however, must be some form of righting the wrong, and not "the serpent-wings of utilitarianism." ³⁷⁰

Most Western penal systems combine in varying degrees retributionist and utilitarian theories of punishment. ³⁷¹ In crafting its approach to proportionality within the "evolving standard" of the Eighth Amendment, the Supreme Court should take note of both justifications for punishment

crime was the product of a rational act, both deterrence and retribution were appropriate punishment justifications. RADZINOWICZ, *supra* note 353, at 12-13. By contrast, those with a "behavioral" view of crime see free will as an illusion and ascribe criminal conduct to a variety of anatomical, psychological, economic, or environmental factors. PACKER, *supra* note 200, at 11-13.

³⁶⁶ Immanuel Kant, *The Philosophy of Law, Part II* (W. Hastie trans., 1887), 194-98, reprinted in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 103, 104 (Gertrude Ezorzky ed., 1972). When a person is so treated, according to C.S. Lewis, he or she loses his or her autonomy and becomes a "case." C.S. Lewis, *The Humanitarian Theory of Punishment*, in CONTEMPORARY PUNISHMENT, *supra* note 360, at 195.

³⁶⁷ See generally HART, *supra* note 359, at 236; PACKER, *supra* note 200, at 9-10; J.D. Mabbott, *Punishment*, 48 MIND 152 (1939).

³⁶⁸ Helen Silving, *A New Philosophy of Criminal Justice*, in CONTEMPORARY PUNISHMENT, *supra* note 360, at 254.

³⁶⁹ PACKER, *supra* note 200, at 10.

³⁷⁰ WALKER, *supra* note 172, at 7.

³⁷¹ RADZINOWICZ, *supra* note 353, at 115. See also Jerome Hall, *The Inclusive Theory of Punishment*, in CONTEMPORARY PUNISHMENT, *supra* note 360, at 235-36. In our country, the Sentencing Reform Act of 1984 provided for the development of sentencing guidelines for the federal courts that would "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment and rehabilitation." UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL 1 (1994). The guidelines were to aim at achieving all of these goals, although the basic objective of the Act was "to combat crime through an effective, fair sentencing system." *Id.* at 2. The Senate Judiciary Committee reported that the guidelines were "designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release and make criminal sentences fairer and more certain." S. Rep. No. 223, 98th Cong., 1st Sess. 62 (1983). The call for "fair" and "certain" sentencing through a guidelines approach suggests that the actual primary goal of the Act is retribution through proportioning the sentence to the crime.

and, particularly, the way in which each addresses the issue of proportioning the sentence to the crime.

It is hardly surprising that retributionists have an overriding concern with proportioning the severity of a sentence to the crime committed, given that theories of desert and proportionality are based on the same underpinnings.³⁷² To the retributionist, a person should receive the punishment he or she *deserves* based on the wrongfulness of the act committed and the extent of the harm inflicted.³⁷³ While different retributionists define wrongfulness in different ways, they share the view that a firm relationship between crime and punishment, based on desert, is essential to insure justice in any sentencing system.³⁷⁴ As justice, and not any utilitarian benefit, is the ultimate goal of the retributionist,³⁷⁵ it follows that the punishment must be proportionate to the crime.

Somewhat less self-evident is the view among all but the most extreme utilitarians that principles of proportionality play an important role in punishment theory.³⁷⁶ To some utilitarians, a ban on punishments that are grossly disproportionate to the crimes committed serves as

³⁷² See, e.g., C.S. Lewis, who argues that "the concept of desert is the only connecting link between punishment and justice." Lewis, *supra* note 366, at 195.

³⁷³ See *supra* note 355 and accompanying text. Hart attributes to all strict retributionists the view that punishing someone, appropriate to the wickedness of the offense, is a mandatory component of any just system. HART, *supra* note 359, at 231.

³⁷⁴ See, e.g., K.G. Armstrong, *The Right to Punish*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 136, 136 (Gertrude Ezorsky ed., 1972); MURPHY, *supra* note 365, at 60; VON HIRSCH, *supra* note 172, at 38; Lewis, *supra* note 366, at 195.

³⁷⁵ Herbert Morris suggests that the wrongfulness of basing punishment on achieving utilitarian ends can be demonstrated by considering a situation in which a person innocent of any crime receives a criminal sentence. Even if deterrence or some other utilitarian end can be achieved through such a sentence, it is still patently unjust. Sentences that are excessive and disproportionate to the crime committed to achieve utilitarian ends, Morris argues, constitute similar scapegoating. Herbert Morris, *Persons and Punishment*, in PHILOSOPHICAL PERSPECTIVES, *supra* note 374, at 121. See generally NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 75 (1972); MURPHY, *supra* note 317, at 234.

³⁷⁶ HART, *supra* note 359, at 76; PACKER, *supra* note 200, at 16; Andenaes, *supra* note 200, at 957, 970.

To extreme utilitarians, especially those characterized as behavioralists, see PACKER, *supra* note 200, at 11-13, widely indeterminate and therefore disproportional sentences are acceptable. Such sentences leave open the amount of imprisonment an offender must serve until it is determined whether she is sufficiently "rehabilitated" to be released. *Id.* at 14. Proponents of such sentences often are positivists who view crime as less the product of a free will than as the manifestation of a sickness. For a discussion of the concept of crime as a sickness, see KARL MENNINGER, THE CRIME OF PUNISHMENT (1966). For criticism of the extreme indeterminate sentencing system employed by California in the 1960s, see MITFORD, *supra* note 284, at 87-103.

a necessary limit so that sentences will not be overly severe.³⁷⁷ To others, using the language of utilitarianism, sentences that are excessive are not useful. H.L.A. Hart, for instance, maintained that like cases be treated alike and different cases differently (an important aspect of proportionality), but not, as a retributionist would argue, so that society can express a level of moral indignation appropriate to the crime.³⁷⁸ Instead, Hart saw the need to establish "a prima facie principle of fairness between offenders."³⁷⁹ Achieving this fairness was not an end in itself (as it might be for a retributionist),³⁸⁰ but rather a means of furthering some forward-looking aim such as deterrence or rehabilitation. At least one utilitarian explains this connection between fairness and utilitarianism in the following way: when a penalty for a certain crime is too severe, the public is less likely to inform the police, prosecutors are not as likely to prosecute fully and the jury is less inclined to convict.³⁸¹ Given this diminution in enforcement of the law, no meaningful utilitarian benefit, such as general deterrence, can occur.

Bentham's approach to proportionality is summed up in his belief that punishing someone more than is necessary, even to achieve desirable goals, is "evil without justification."³⁸² Although this focus on utilitarian necessity is not the same thing as proportionality between punishment and crime, it is a recognition of the importance of punishment limitation.³⁸³ Further, along with classical punishment theorist Cesare Beccaria, Bentham realized that if crimes of unequal gravity were punished equally, the public would lose the important ability to distinguish serious wrongs from more trivial ones.³⁸⁴

³⁷⁷ Andenaes, *supra* note 200, in CONTEMPORARY PUNISHMENT 112 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

³⁷⁸ HART, *supra* note 359, at 170-72.

³⁷⁹ *Id.* at 172-73.

³⁸⁰ HART, *supra* note 359, at 233-37; MURPHY, *supra* note 317, at 235.

³⁸¹ Andenaes, *supra* note 200, at 970.

³⁸² WALKER, *supra* note 172, at 103. *See also* MURPHY, *supra* note 317, at 226; Radin, *supra* note 64, at 1045 (defining a cruel act as one that "gratuitously inflicts suffering or inflicts suffering without good reason.").

³⁸³ Packer claims that a modern day Benthamite would allow just enough punishment to accomplish the goal of deterrence. PACKER, *supra* note 200, at 140. Hart argues that treating trivial offenses with severity inflicts greater suffering than it is likely to prevent, and therefore violates utilitarian principles. HART, *supra* note 359, at 173 n.20.

³⁸⁴ WALKER, *supra* note 172, at 103-04. Although Hart rejects the view of strict retributionists that each crime has a different moral price tag attached to it, he does hold that:

[M]aintenance of proportion of this kind may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges

VI. LIMITING RETRIBUTIVISM

There is therefore a recognition by both schools of punishment theory that some sort of ban on grossly disproportionate sentences is necessary. Although each school comes to this conclusion by different means, consistent with its particular views on why punishment is justified, such a consensus should inform the Supreme Court's approach to proportionality. Specifically, the Court should adopt an approach of "limiting retributivism" in its decisions assessing proportionality under the Eighth Amendment.³⁸⁵ This approach would allow both legislatures and trial judges to use whatever retributive and utilitarian goals they thought justified when setting punishments. It would, however, place a limit on the severity of the sentences consistent with the notion that no sentence can be grossly disproportional to the crime which it seeks to punish.³⁸⁶

sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt.

HART, *supra* note 359, at 25.

When the public has contempt for the law, achievement of utilitarian ends, such as deterrence, is virtually impossible.

³⁸⁵ Norval Morris describes limiting retributivism in this way:

Desert is not a defining principle; it is a limiting principle. The concept of "just desert" sets the maximum and minimum of the sentence that may be imposed for any offense and helps to define the punishment relationships between offenses; it does not give any more fine-tuning to the appropriate sentence than that. The fine-tuning is to be done on utilitarian principles.

NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 199 (1982).

Nigel Walker, after describing limiting retributivism in similar terms, observes that most British penal statutes are based on the principle of "retribution not as duty but merely as a rule that sets upper limits to the severity of punishment." WALKER, *supra* note 172, at 127. Packer argues that while prevention or deterrence is the chief purpose of the criminal law, blameworthiness must act as a limiting principle. PACKER, *supra* note 200, at 66. *See also* Armstrong, *supra* note 374, at 136.

These commentators are describing limiting retributivism as the foundation for a sentencing system, not specifically as a standard or guide for application of the Cruel and Unusual Punishments Clause. To turn limiting retributivism into a workable and principled constitutional standard, this author would advocate imposing a desert-based maximum, yet allowing states to use whatever combination of utilitarian or retributionist punishment goals they choose in framing sentences.

³⁸⁶ As Professor Murphy observed: "Considerations of justice function as checks on social utility, weighing against promoting happiness if in so doing some people must be treated unfairly in the process." MURPHY, *supra* note 317, at 150.

Naturally, once a maximum is set, there is no need to sentence every defendant to that maximum. Nigel Walker, *Varieties of Retributivism*, in *CONTEMPORARY PUNISHMENT*, *supra* note 360, at 89. At this point both utilitarian and desert principles can help inform what constitutes the proper sentence. Norval Morris, for example, advocates use of the

Limiting retributivism recognizes "the tendency of all conduct codes . . . to proportion to some extent the severity of the group's reaction to a violator, *i.e.* the punishment, to the severity of injury done to its moral values."³⁸⁷ Additionally, it realizes that utilitarian goals such as deterrence, incapacitation or rehabilitation can be worthwhile sentencing considerations. It is, however, most difficult to assess whether a particular criminal justice system is effective at achieving any of these utilitarian goals.³⁸⁸ Given this uncertainty, creating a sentencing system based entirely on achieving these goals without desert limitations risks causing severe injustice without the certainty of tangible benefits.³⁸⁹

Perhaps most importantly, limiting retributivism, as an Eighth Amendment approach, although using desert as an outside limit, allows legislatures and sentencing judges the latitude to use primarily utilitarian considerations, primarily retributionist considerations, or some combina-

concept of parsimony, whereby the sentence could be "[t]he least restrictive — least punitive — sanction necessary to achieve defined social purposes." MORRIS, *supra* note 375, at 60-61. By condemning punishment that "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering," the lead opinion in *Coker* appears to take cognizance of the parsimony principle. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion of White, J.). For a detailed discussion of this aspect of the opinion in *Coker*, see Radin, *supra* note 64, at 1052-54.

³⁸⁷ Sellin, *The Law and Some Aspects of Criminal Conduct*, in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 121 (1957), *quoted in* Jerome Hall, *Just vs. Unjust Law*, in CONTEMPORARY PUNISHMENT, *supra* note 360, at 53 n.19. *See also* EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 73 (George E. Catlin ed. & Sarah A. Solovay & John H. Mueller trans., 1938), *quoted in* Jerome Hall, *Just vs. Unjust Law*, in CONTEMPORARY PUNISHMENT, *supra* note 360, at 235-36; Hall, *supra* note 371, at 235-36.

³⁸⁸ RADZINOWICZ, *supra* note 353, at 120-21; VON HIRSCH, *supra* note 172, at 95; WALKER, *supra* note 172, at 67; Silving, *supra* note 368, at 254 ("[S]ince we do not know how either deterrence or rehabilitation works, these cannot be assumed as primary goals . . .").

³⁸⁹ WALKER, *supra* note 172, at 67. C.S. Lewis fears that the claims of experts regarding the benefits of unlimited utilitarian approaches to sentencing will have the following effect:

Only the expert "penologist" . . . in the light of previous experiment, can tell us what is likely to deter: only the psychotherapist can tell us what is likely to cure. It will be in vain for the rest of us, speaking simply as men, to say, "but this punishment is hideously unjust, hideously disproportionate to the criminal's deserts." The experts with perfect logic will reply, "but nobody was talking about deserts." No one was talking about *punishment* in your archaic vindictive sense of the word. Here are the statistics proving this treatment deters. Here are the statistics proving that this other treatment cures. What is your trouble?

Lewis, *supra* note 366, at 196.

tion of the two.³⁹⁰ It does not turn the Eighth Amendment into a document compelling the use of any particular sentencing theory and is sensitive to concerns of federalism. Accordingly, even future-oriented utilitarians who see crime prevention as the central element of any system of punishment, such as Hart³⁹¹ or Packer,³⁹² accept the need for a desert-based maximum. Similarly, scholars more commonly associated with a desert-based approach to punishment, such as Andrew von Hirsch,³⁹³ are willing to permit the use of utilitarian considerations as long as some sort of proportionality limitation exists.³⁹⁴

While an Eighth Amendment standard based on limiting retributivism might on rare occasions serve to overturn a short prison sentence,³⁹⁵ its primary impact would be to restrict longer sentences whose disproportionality stems from attempts to achieve utilitarian ends.³⁹⁶

³⁹⁰ See, e.g., MURPHY, *supra* note 365, at 21-22.

³⁹¹ HART, *supra* note 359, at 172-73.

³⁹² PACKER, *supra* note 200, at 66.

³⁹³ VON HIRSCH, *supra* note 172, at 43-46. But note von Hirsch's distinction between ordinal magnitudes, for which he sees desert principles as determining the sentence, and cardinal magnitudes, for which he sees such principles as only limiting the sentence. von Hirsch defines ordinal magnitudes as those factors dealing with "how crimes should be punished related to each other," and cardinal magnitudes as those concerned with determining "what absolute levels of severity should be chosen to anchor the penalty scale." *Id.* at 39.

³⁹⁴ Hart observes that, "many self-styled retributionists treat appropriateness to the crime as setting a *maximum* within which penalties, judged most likely to prevent the repetition of the crime by the offender or others, are to be chosen." HART, *supra* note 359, at 237. See also WALKER, *supra* note 172, at 127; Gilchrist, *supra* note 334, at 1123.

³⁹⁵ See, e.g., *Robinson v. California*, 370 U.S. 660, 675 (1962) (ninety days in jail excessive for "crime" of being a drug addict); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962) (placing prisoner in restrictive custody apart from general population for two years for racist preaching constitutes unreasonable punishment).

³⁹⁶ RADZINOWICZ, *supra* note 353, at 127.

See Gilchrist, *supra* note 334, at 1126 n.32 (expressing the fear that absent some desert-based limitation, a person, because of his or her unpopularity could receive a long jail sentence for a relatively minor crime) (citing, for example, *Johnson v. State*, 447 S.W.2d 927 (Tex. Crim. App. 1969) (challenging unsuccessfully a thirty-year sentence for unlawful sale of marijuana under the Cruel and Unusual Punishments Clause)). The forty-year jail term imposed on the defendant in *Davis* may have been based in part on his unpopularity. See *supra* note 80. See also *United States v. Gracia*, 755 F.2d 984, 990 (2d Cir. 1985) (finding excessive a nine year criminal contempt sentence for a terrorist).

Professor Packer sees a danger of excessive jail sentences justified by the need to incapacitate, when no desert-based maximum exists. Using incapacitation as a justification, those who commit minor offenses conceivably could be kept in prison for long

In a case such as *Harmelin*, the state of Michigan should have the option of sentencing the defendant harshly if it views as paramount the need to deter others from possessing large amounts of cocaine. Under an approach to the Eighth Amendment encompassing limiting retributivism, a state would be able to impose a sentence based largely on its perceived deterrent needs.³⁹⁷ If the sentence greatly exceeded what the defendant deserved to receive for the crime,³⁹⁸ however, the sentence would be invalidated, notwithstanding any claimed utilitarian benefits.

Unlike the opinion of Justice Scalia, Justice Kennedy's opinion in *Harmelin* recognizes some limitation in the Eighth Amendment to grossly disproportionate sentences.³⁹⁹ Kennedy's opinion, and the many cases since *Harmelin* utilizing Kennedy's approach,⁴⁰⁰ however, suffer from the lack of any firm, articulated basis for a principle of proportionality. Justice Kennedy's defense of a limited proportionality principle relies primarily on previous Supreme Court opinions, which themselves are questionable in their interpretation or result. Understandably, cases subsequent to *Harmelin* reflect a broad confusion as to what proportionality means under the Eighth Amendment, why we need it, and how we should apply such a principle.⁴⁰¹ Limiting retributivism offers at least a philosophical basis, consistent with the Eighth Amendment,⁴⁰² for adopting and implementing a meaningful requirement of proportionality.

periods until they are no longer deemed dangerous by some psychologist or corrections board. PACKER, *supra* note 200, at 51. This is what happened in *In re Lynch*, 503 P.2d 921 (Cal. 1972), *see supra* note 284, and *In re Rodriguez*, 537 P.2d 384, 384 (Cal. 1975) (defendant served 22 years of life sentence for minor sex offense, until released by court).

See also Francis A. Allen, *The Rehabilitative Ideal*, in CONTEMPORARY PUNISHMENT, *supra* note 360, at 214-15 (making the same observation regarding the use of a need to rehabilitate rationale to justify excessive sentences).

³⁹⁷ *See supra* notes 390-94 and accompanying text.

³⁹⁸ Absent other objectifying methods of determining what the defendant deserved (or more precisely whether her sentence is grossly disproportionate to the crime committed), the criteria adopted by the Court in *Solem*, *see supra* notes 159-83 and accompanying text, and utilized by Justice White in his dissent in *Harmelin*, *see supra* notes 334-51 and accompanying text, would serve this end best.

³⁹⁹ *Harmelin v. Michigan*, 501 U.S. 957, 997-98, 1001 (1991) (plurality opinion as to Parts I-IV; majority opinion as to Part V) (Kennedy, J., concurring).

⁴⁰⁰ *See cases cited supra* note 325.

⁴⁰¹ *See cases cited supra* note 352.

⁴⁰² In the language of moral theory, the Bill of Rights is an "attempt to formulate reasonable deontological restrictions of principle on the pursuit of social utility." MURPHY, *supra* note 317, at 223.

CONCLUSION

Due to a series of flawed opinions by the Supreme Court regarding a proportionality principle in non-capital cases, there is considerable uncertainty and confusion over the existence, extent, and application of such a principle. With a majority of the Court having recognized that the Eighth Amendment bans sentences grossly disproportionate to the offense committed, it is incumbent upon the Court to develop an analytical framework for application of this constitutional standard.

The Court should adopt an approach based on the concept of limiting retributivism. Application of this approach would require consideration of the seriousness of the crime, the harshness of the sentence, and how other comparable offenders are treated in the subject jurisdiction and in other jurisdictions. Such an approach, borrowing from accepted philosophical justifications of punishment, would be sensitive to important constitutional considerations, such as legislative primacy and federalism, yet preserve the crucial role of the judiciary in protecting individual rights.