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CONSTITUTIONAL CRIMINAL LAW—LIFE SENTENCE WITHOUT PAROLE IMPOSED ON RECIDIVIST GUILTY OF SEVEN NON-VIOLENT CRIMES CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT PROPORTIONALITY TEST— *Solem v. Helm*, 103 S.Ct. 3001 (1983).

A criminal defendant was convicted of uttering a bad check.[1] Prior to this charge the defendant had been convicted of six separate non-violent felonies.[2] The defendant was sentenced to life imprisonment without parole under the state recidivist statute.[3] The Supreme Court of South Dakota affirmed the trial court.[4] After two years of imprisonment the defendant filed a habeas corpus petition in federal district court where it was denied.[5] On appeal, the United States Court of Appeals for the Eighth Circuit reversed, finding the sentence grossly disproportionate to the nature of the offense.[6] The Supreme Court affirmed in a close decision, holding that the sentence was significantly disproportionate to the offense committed and therefore violated the eighth amendment.[7]

The eighth amendment concept of proportionality is an established principle that originates from the rights and privileges accorded English citizens at common law.[8] Fines were proportioned to the offense as early as the writing of the Magna Carta.[9] Later, the concept was expanded to include bails and punishments in the English Bill of Rights.[10] The language in the eighth amendment mirrors that found in the English Bill of Rights, evidencing the framers' intent that the same rights enjoyed by English citizens be granted to United States

1. Solem v. Helm, 103 S. Ct. 3001 (1983). S.D. CODIFIED LAWS ANN. § 22-41-1.2 (1979). Under normal circumstances the statute authorizes five years imprisonment and up to a $5,000 fine. S.D. CODIFIED LAWS ANN. § 22-6-1(7) (Supp. 1983).
2. *Solem*, 103 S. Ct. at 3004. He had been convicted three times for third degree burglary, once for obtaining money by false pretenses, once for grand larceny, and once for third offense driving while intoxicated.
3. *Id.* at 3005-06. "When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." *Id.* (citing S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended 1981) codified at S.D. CODIFIED LAWS ANN. § 22-7-8 (1983)). The sentence for a class one felony is life imprisonment. S.D. COMP. LAWS ANN. § 22-6-1 (1979 and Supp. 1980). Additionally, "a person sentenced to life imprisonment is not eligible for parole . . . ." S.D. CODIFIED LAWS ANN. § 24-15-4 (1983).
4. State v. Helm, 287 N.W.2d 497, 499 (S.D. 1980).
5. *Solem*, 103 S. Ct. at 3006.
6. Helm v. Solem, 684 F.2d 582, 587 (8th Cir. 1982), *aff'd*, Solem v. Helm, 103 S. Ct. 3001 (1983).
7. *Solem*, 103 S. Ct. at 3016 (five to four decision).
8. *Id.* at 3007 (citing 1 American Archives 700 (4th Series 1837) (Georgia Resolutions, Aug. 10, 1774)).
9. *Id.* at 3006; Magna Carta, 1215 *regnal year*, ch. 20-22.
10. *Solem*, 103 S. Ct. at 3007 (citing 1 W. & M., sess. 2, ch. 2 (1689)).

citizens.[11]

Despite its longstanding tradition, the constitutional requirement of proportionality has never been clearly defined by the courts. The underlying premise of the concept of proportionality is that crimes and their corresponding punishments are directly related to the changing standards of society.[12] Trial courts are generally accorded a presumption of correctness in sentencing procedures. Thus, appellate review has been limited to determining whether a clear abuse of discretion occurred using a subjective "shock the conscience" analysis.[13] If a sentence is found to "shock the conscience," courts generally[14] proceed to an analysis of the sentence under the more objective proportionality standard.[15]

The proportionality issue was raised in *O'Neil v. Vermont,*[16] an 1892 Supreme Court case involving the length of sentences. Although the case was dismissed for lack of jurisdiction,[17] the dissent considered whether the sentence constituted cruel and unusual punishment under the eighth amendment.[18] The dissent concluded that sentences that are excessively long or severe in comparison to the offense charged are unconstitutionally disproportionate and therefore prohibited by the eighth amendment.[19]

The Supreme Court later followed the reasoning of the *O'Neil* dissent by acknowledging the concept of proportionality.[20] In addition, the Court developed factors to measure sentences so as to prevent the imposition of a constitutionally disproportionate sentence.[21] The

11. *Id. Compare* U.S. CONST. amend. VIII *with* English Bill of Rights, 1 W. & M., sess. 2, ch. 2 (1689).
12. Trop v. Dulles, 356 U.S. 86 (1958) (the concept is one that must "draw its meaning from the evolving standards of decency that mark the progress of a mature society."); *see* Weems v. United States, 217 U.S. 349 (1910); *see generally* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment,* 24 STAN. L. REV. 838 (1972).
13. *See, e.g.,* Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965) (general prison regulatons on mail considered reasonable in a "shock the conscience" test); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (laying out an analysis of sentences, beginning with the subjective "shock the conscience" test, then proceeding to an objective proportionality test); State v. Cooper, 304 S.E.2d 851, 857 (W. Va. 1983) (criminal conviction reversed solely on "shock the conscience" test without the court finding it necessary to consider a more objective test).
14. *See* State v. Cooper, 304 S.E.2d 851 (W. Va. 1983).
15. *See supra* note 13 and accompanying text.
16. 144 U.S. 323 (1892).
17. *Id.* at 334-35.
18. *Id.* at 339 (Field, J., dissenting).
19. *Id.*
20. Weems v. United States, 217 U.S. 349 (1910).
21. *Id.* (considering punishment for same or similar crimes in other parts of United States); *see also* Solem v. Helm, 103 S. Ct. 3001 (1983) (considering gravity of offense and harshness of penalty, punishment in other jurisdictions and in the same jurisdiction); Enmund v. Florida, 458 U.S. 782 (1982) (considered punishment in other jurisdictions for same or similar crimes, the gravity of the offense and the harshness of the penalty). The Court, in O'Neil v. Vermont, 144 U.S. 323

Supreme Court first applied a proportionality test to determine the constitutionality of a sentence in 1910.[22] In *Weems v. United States,*[23] a government official was convicted of falsifying a public document. He was sentenced to *cadena temporal,* a penalty that carried a minimum twelve year imprisonment and also mandated, inter alia, that the defendant, upon release, would remain under the court's supervision for the rest of his life.[24] The *Weems* Court concluded that lifetime supervision was an attendant penalty which deprived the official of essential liberties.[25] Although *Weems* did not expressly set forth criteria against which to measure a sentence, the Court's analysis considered three major areas in invalidating the statute. Implicit in its decision is the consideration of the sentence through a "shock the conscience" perspective.[26] Specifically, the Court objectively compared the sentence both against those penalties imposed for the same or more severe offenses in other jurisdictions[27] and against similar penalties in the same jurisdiction.[28] In evaluating both of these factors, the Court found that *cadena temporal* constituted cruel and unusual punishment under the eighth amendment[29] because it was disproportionate to the offense charged.[30]

Between 1910 and 1958 the Supreme Court did not rule on the issue of proportionality.[31] In 1958, the Supreme Court considered a

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(1892), focused primarily on the severity of the punishment in its dissent. Perhaps in recognition of the potentially subjective nature of the abstract concept of severity, both state and federal courts have expanded the concept and based their proportionality analysis on a comparison between the specific crime and sentence at issue and other similar crimes and sentences. *See, e.g.,* MD. CODE ANN. art. 27, § 414(e)(4) (1978); Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1983).

22. Weems v. United States, 217 U.S. 349 (1910); *see* Wheeler, *supra* note 12, at 857-58.
23. 217 U.S. 349 (1910).
24. *Id.* at 366.

> Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council . . . forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to [authority] and without permission in writing.

Id.

25. *Id.* at 366-67.
26. *Id.* at 380-82. *Weems* is factually unique. The Court was considering a sentence which comported with traditional Philipino laws. The United States, however, was at the time in control of the nation and so applied United States constitutional law. The dissimilarities in the social values of each nation were obviously in conflict.
27. *Id.* at 380.
28. *Id.* at 380-81.
29. *Id.* at 381.
30. *Id.* at 382.
31. Although mentioned briefly in dictum in District of Columbia v. Clawans, 300 U.S. 617, 627 (1936), the proportionality issue lay dormant, perhaps because the Supreme Court believed that *Weems* should be limited to its facts. Packer, *Making*

case involving an army deserter who was denied a passport on the ground that his citizenship was revoked when he was court-martialed.[32] The Court stated that in the abstract, as the death penalty was available for desertion, a sentence imposing expatriation could not be considered excessive.[33] The plurality opinion nonetheless adopted the *Weems* analysis and found the sentence unconstitutionally disproportionate to the offense charged.[34] In analyzing the sentence, the Court found that eighty-two of eighty-four countries in the world did not punish a crime by denationalization.[35] In addition, expatriation is more destructive of the individual's psyche than torture or physical harm.[36] Thus, although the *Weems* proportionality test was not explicitly cited, the Court sanctioned the use of the objective two-prong analysis in reversing the defendant's sentence.[37]

Although prior to 1980 the *Weems* proportionality analysis was not used to evaluate the constitutionality of the length of a sentence, the analysis was refined and repeatedly applied in capital punishment cases.[38] The application of proportionality analysis to capital punishment cases has been justified on the ground that the death penalty is irrevocable, whereas a penalty of imprisonment can be reversed.[39] In 1982 the Supreme Court further clarified the proportionality analysis in *Enmund v. Florida*[40] by setting forth a spectrum of objective areas to consider in reviewing the death penalty.[41] In *Enmund,* the defendant was an accessory to an armed robbery which resulted in the victim's death.[42] The Court compared the penalties imposed for armed robbery in other jurisdictions and found that the death penalty was authorized for felony murder in only nine of the thirty-six states that authorized the use of the death penalty.[43] In addition, the Court considered the nature and gravity of the offense, finding that the majority of juries,

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the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1076 (1964). Additionally, proportionality was considered rarely applicable to penalties other than capital punishment. *See* Rummel v. Estelle, 445 U.S. 263, 272 (1982); Gregg v. Georgia, 428 U.S. 153, 187 (1976); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

32. Trop v. Dulles, 356 U.S. 86, 87-88 (1958).
33. *Id.* at 99.
34. *Id.* at 101.
35. *Id.* at 103.
36. *Id.* at 102-03.
37. *See* Furman v. Georgia, 408 U.S. 238, 327 (1971) (Marshall, J., concurring). *Contra* Gregg v. Georgia, 428 U.S. 153, 172 (1975).
38. *See* Coker v. Georgia, 433 U.S. 584, 597-600 (1977); Gregg v. Georgia, 428 U.S. 153, 187 (1976).
39. *See* Gregg v. Georgia, 428 U.S. 153, 187-88 (1976); Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).
40. 458 U.S. 782 (1982).
41. *Id.* at 788 ("historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made . . ."; paraphrasing the earlier plurality opinion of Coker v. Georgia, 433 U.S. 584 (1977)).
42. *Id.* at 784.
43. *Id.* at 791-92.

when faced with circumstances similar to those in *Enmund,* rejected the death penalty.[44] The *Enmund* Court next considered other sentences that had been imposed for felony murder within the same jurisdiction and found it significant that all felony murder convicts on death row in Florida, except the defendant, had actually committed the murder.[45] The Court emphasized that no valid state interest, such as deterrence of killing, was furthered by the imposition of capital punishment, because the killing was unintentional.[46] In sum, the Court held that the application of the death penalty to the defendant constituted an unconstitutionally disproportionate sentence because the defendant lacked the requisite intent to kill and had not actually committed the murder.[47]

Although lower courts have sanctioned the use of a proportionality analysis to non-capital sentences,[48] the Supreme Court severely restricted this approach in 1980.[49] In *Rummel v. Estelle,*[50] the defendant was sentenced to life imprisonment under a recidivist statute after incurring three felony convictions — once for fraudulently using a credit card, once for passing a forged check, and once for false pretenses.[51] The *Rummel* Court accorded great deference to the state's legislative authority to enact mandatory sentences.[52] The Court found that the state's liberal parole policy was an important variable to consider when evaluating the defendant's sentence.[53] In addition, the Court held that the state had a valid interest in increasing sentences of those who are demonstrably "incapable of conforming to the norms of society as established by its criminal law."[54] Moreover, the Court emphasized that only rarely would sentences be invalidated solely because of their

44. *Id.* at 794.
45. *Id.* at 795.
46. *Id.* at 797-99.
47. *Id.* at 801.
48. *See* Carmona v. Ward, 576 F.2d 405, 415 (2d Cir. 1978) (holding that imposition of maximum sentence for narcotics violations is not unconstitutionally disproportionate); Hart v. Coiner, 483 F.2d 136, 143 (4th Cir. 1973) (holding that sentence imposed on an habitual offender was unconstitutionally disproportionate under a four-prong test very similar to that later used in *Enmund*); Wanstreet v. Bordenkircher, 276 S.E.2d 205, 214 (W. Va. 1981) (enhanced penalty authorized under the state recidivist statute held disproportionate to the connected offenses). Apparently state courts have traditionally accorded their citizens broader protections than those extended under the eighth amendment. *Id.*
49. Rummel v. Estelle, 445 U.S. 263 (1980). Indicative of the lack of unanimity regarding the appropriate use of the proportionality analysis is the fact that the *Rummel* majority becomes the *Solem* dissent. The *Rummel* majority suggests that instances might arise where the test would apply, *id.* at 274 n.11, but only Justice Blackmun is convinced to join the dissenters in *Rummel* and find that the time is at hand, in *Solem,* to apply the test.
50. *Id.*
51. *Id.* at 265-66.
52. *Id.* at 274-75, 284.
53. *Id.* at 280-81.
54. *Id.* at 276, 280-81.

length.[55] The *Rummel* decision implied that the eighth amendment did not authorize courts to review sentences of imprisonment and that the determination of sentence lengths was entirely within the perogative of the legislature.[56]

Three years later the Supreme Court departed from its position that proportionality review was unavailable for sentence terms. In *Solem v. Helm*,[57] the Court held that a sentence of life imprisonment without parole, imposed on an habitual offender who was guilty of seven non-violent crimes, constituted cruel and unusual punishment under the eighth amendment.[58] In applying a proportionality analysis, the *Solem* Court adopted the criteria set forth in *Enmund*.[59] The Court initially evaluated the gravity of the offense and harshness of the penalty. It then compared the life sentence with sentences imposed for other crimes within the same jurisdiction and finally contrasted the sentence in *Solem* with sentences imposed for the same crime in other jurisdictions.[60]

In reviewing the gravity of the offense, the Court found that the most recent crime committed by the defendant was passive and did not involve violence.[61] Although it acknowledged the legitimacy of a state interest in imposing harsher sentences on habitual offenders, the Court emphasized the non-violent nature of each of the defendant's convictions.[62] In reviewing the severity of the penalty, the Court determined that the death penalty was not statutorily authorized at the time of the defendant's conviction; hence, life without parole was the most severe penalty that the state could impose.[63]

The *Solem* Court then reviewed the statutorily authorized sentences for felonies committed within the same state. Only a conviction for murder, repeated treason, second-degree manslaughter, first-degree arson or kidnapping warranted mandatory life sentences.[64] In addition, a life sentence could be imposed under the recidivist statute and for second or third convictions of attempted murder, placement of explosives on an airplane, or first-degree rape. The Court noted that the statutory penalty for several violent and serious crimes, such as aggravated assault, was a term of years with parole.[65] Thus, the Court concluded that the defendant's sentence was equal to or greater than the sentences imposed for more heinous crimes and therefore dispro-

55. *Id.* at 272.
56. *Id.* at 274.
57. 103 S. Ct. 3001 (1983).
58. *Id.* at 3016.
59. *Id.* at 3011.
60. *Id.*
61. *Id.* at 3012-13.
62. *Id.*
63. *Id.* at 3013.
64. *Id.*
65. *Id.* at 3014.

portionate to his offense.[66]

In applying the third criterion, the *Solem* Court found that the sentence was disproportionate to those sentences imposed on recidivists in other jurisdictions because only one other state permitted the imposition of life without parole for habitual offenders.[67] Based on its finding that the sentence failed to satisfy each prong of the trifurcated test, the Court affirmed the Eighth Circuit's decision and granted the defendant habeas corpus relief, provided the state did not resentence him.[68]

In a departure from the traditional view that courts should defer to legislative determinations of sentence lengths,[69] *Solem* indicates that the Supreme Court will subject egregious sentences to proportionality review. The dissent criticized the majority for departing from precedent, citing *Rummel* for the proposition that prescribing sentences is within the prerogative of the legislature and therefore unreviewable in most instances.[70] The majority, however, did not attempt to limit the legislature's control over the regulation of sentences and penalties. Instead, the majority expanded the *Rummel* proposition by ruling that legislative control does not preclude constitutional review.[71] As indicated by *Rummel* and *Solem,* all sentences are potentially reviewable under a "shock the conscience" test.[72] *Solem,* however, suggests that only certain sentences will be reviewed under the proportionality analysis. Whereas the *Rummel* sentence was reviewed but held to be out of the Court's purview, the exclusion of parole in *Solem* crossed the threshold "shock the conscience" test, thus rendering the sentence subject to Supreme Court proportionality review.[73]

The *Solem* decision highlights the absence of a clear approach in applying proportionality to the review of sentence lengths. The dissent validly objected to the majority's failure to establish guidelines for sentence review.[74] Indeed, although the decision ends speculation in the scenario presented in *Solem,* there are many questions left open for further contemplation by the Court.[75] Yet the decision will not result

66. *Id.*
67. *Id.*
68. *Id.* at 3006.
69. *See* Rummel v. Estelle, 445 U.S. 263 (1980); Carmona v. Ward, 576 F.2d 405, 406-10 (2d Cir. 1978).
70. Solem v. Helm, 103 S. Ct. 3001, 3018 (1983) (Burger, C. J., dissenting).
71. *Id.* at 3009-10.
72. *See supra* note 13.
73. *Compare Rummel,* 445 U.S. at 263 (Court considered the constitutional challenge to the recidivist statute but affirmed the state verdict) *with Solem,* 103 S. Ct. at 3001 (Court considered the constitutional challenge to the applied sentence and reversed it as going beyond appropriate constitutional boundaries).
74. Solem v. Helm, 103 S. Ct. 3001, 3002 (1983) (Burger, C.J., dissenting).
75. For example, the Court does not address the issue of sentences for a set term of years which appear unconscionably long when compared with the severity of the crime. In addition, it is conceivable that any sentence that is mechanically im-

in a substantial increase of litigation as the dissenters predicted.[76] It is clear that after *Solem* the sentence must still "shock the conscience" to reach the Supreme Court. In addition, the recent decision of *Pulley v. Harris*[77] indicates that a sentence will be reviewed for proportionality only when its imposition is deemed arbitrary and capricious.[78] Thus, although sentences such as the death penalty and life without parole in extreme circumstances will be reviewed, *Rummel* and *Pulley* emphasize that the Court will be disinclined to overturn statutorily authorized sentences.

Contrary to the dissent's claim that the *Solem* decision violates principles of federalism by permitting indirect federal intervention in state sentencing procedures,[79] the majority decision furthers the intent of the framers of the Constitution to protect individual rights. The decision accomplishes this by expanding the scope of judicial review of sentencing, while preserving the state's authority to regulate sentencing as long as legislative safeguards exist. One important factor in determining whether the Court will intervene and conduct a proportionality review is the degree to which an extreme sentence is mechanically imposed without any consideration of mitigating or aggravating circumstances. The statutory provision involved in *Solem* contained no legislative safeguards and consequently the decision was subject to judicial review.[80] South Dakota's sentencing scheme mandated an automatic life sentence without parole for all habitual offenders. Unlike *Solem,* the California capital sentencing provisions upheld in *Pulley*[81] require the existence of special aggravating circumstances before the penalty may be imposed.[82] The Maryland repeat offender statute[83] does not violate the eighth amendment proscription against cruel and unusual punishment under the *Solem* proportionality analysis. Similar

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posed for a term of years, regardless of any extraneous circumstances, might also fall within the analysis framed by *Solem.*

76. *Solem,* 103 S. Ct. at 3022 (Burger, C. J., dissenting).
77. 104 S. Ct. 871 (1984).
78. *Id.* at 879-81. One factor that appeared to influence the Court's decision in *Solem* that the statutorily authorized sentence exceeded constitutional limits was that penal objectives of rehabilitation, attained by means of a parole system, would be disserved. *Solem,* 103 S. Ct. at 3015; *see also* Williams v. New York, 337 U.S. 241, 248 (1949) (stating that one of the primary goals of the criminal justice system is rehabilitation). The Court found untenable the suggestion that even though rehabilitated, the only remedy open to the defendant in *Solem* was commutation of the sentence by the governor. *Solem,* 103 S. Ct. at 3015-16. South Dakota's commutation policy is very stringent. Where granted, it only allows a prisoner to be eligible for parole. Moreover, the governor enjoys unfettered discretion over the decision; there can be no definite expectation of commutation. Indeed, "the best indication [the Court had] for Helm's chance for commutation is the fact that his request already [had] been denied." *Id.* at 3016 n.29.
79. Solem v. Helm, 103 S. Ct. 3001, 3019 (1983) (Burger, C. J., dissenting).
80. *See supra* note 3.
81. Pulley v. Harris, 104 S. Ct. 871, 881 (1984).
82. *Id.* at 881.
83. MD. CODE ANN. art. 27, § 643B (1982 & Supp. 1983).

to the South Dakota provision involved in *Solem,* the Maryland statute provides that any habitual offender who has been convicted of three separate crimes, and has served time for each, will automatically be sentenced to life without parole on the conviction of a fourth violent crime.[84] Unlike the South Dakota statute, however, the Maryland statute requires the additional consideration of the aggravating factor of violence.[85]

The Court, in *Solem,* broadened the applicability of the three-prong proportionality test used for review of death penalties by extending it to a sentence of life without parole. The second and third prongs of this test, which compare the sentence against penalties imposed in the same and other jurisdictions, provide an objective evaluation of the constitutionality of a sentence. The dissent criticized the subjectivity of the proportionality analysis,[86] perhaps because the first criterion, evaluation of the gravity of the offense and the harshness of the penalty, is not specifically delineated. The clear standard provided in the second and third criteria, however, provides a balance to the overall test.

As a result of *Solem,* state legislatures and courts will be well-advised to consider the proportionality of the sentence imposed to the offense charged, not only when imposing the death penalty, but also when imposing a sentence for an extreme term of years, such as life without parole. The Supreme Court will continue to apply the proportionality test in cases that "shock the conscience." Although legislative sentencing enactments will remain presumptively valid, the *Solem* decision has eroded the almost unfettered deference these laws previously have been accorded.

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84. *Id.* § 643B(b) (1982 & Supp. 1983).
85. *Id. Compare* MD. CODE ANN. art. 27, § 643B(b) (1982 & Supp. 1983), *with* statutes cited *supra* note 3.
86. *Solem,* 103 S. Ct. at 3017, 3023-24 (Burger, C. J., dissenting).