University of Baltimore Law Review

Volume 24
Issue 2 *Spring 1995*

Article 4

1994

Notes: The Eighth Amendment Proportionality Requirement: Maryland's Judicial Legislature "Repeals" an Open — Ended Common — Law Sentence. Thomas v. State, 333 Md. 84, 634 A.2d 1 (1993)

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THE EIGHTH AMENDMENT PROPORTIONALITY REQUIREMENT: MARYLAND'S JUDICIAL LEGISLATURE "REPEALS" AN OPEN-ENDED COMMON-LAW SENTENCE. *Thomas v. State*, 333 Md. 84, 634 A.2d 1 (1993).

I. INTRODUCTION

The Eighth Amendment to the United States Constitution is most commonly known for protecting the people of the United States from "cruel and unusual punishment."[1] It is unclear, however, what types of punishments are considered "cruel and unusual." Courts generally agree that certain methods of punishment, such as torture, disembowelment, and beheading, are clear violations of the cruel and unusual punishment clause.[2] Courts disagree, however, whether the

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1. The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment was held to apply to the states through the Fourteenth Amendment in Robinson v. California, 370 U.S. 660, 667, *reh'g denied*, 371 U.S. 905 (1962).

   Maryland has provided similar protection in Article 25 of the Maryland Declaration of Rights. MD. CONST. art. 25. Article 25 provides "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, by the Courts of Law." Although Maryland prohibits cruel *or* unusual punishment and the Eighth Amendment prohibits cruel *and* unusual punishment, the Court of Appeals of Maryland has recently held that "[b]ecause the prevailing view of the Supreme Court recognizes the existence of a proportionality component in the Eighth Amendment, we perceive no difference between the protection afforded by that amendment and by the 25th Article of our Declaration of Rights." Thomas v. State, 333 Md. 84, 103 n.5, 634 A.2d 1, 10 n.5 (1993).

   Article 16 of the Maryland Declaration of Rights also prohibits cruel and unusual punishment. MD. CONST. art. 16. It provides "[t]hat sanguinary Laws ought to be avoided as far as it is inconsistent with the safety of the States; and no Law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time, hereinafter." This section, however, appears to be targeted at the state legislature instead of the judiciary. Thomas, 333 Md. at 92, 634 A.2d at 5; Walker v. State, 53 Md. App. 171, 181, 452 A.2d 1234, 1239 (1982).

2. Weems v. United States, 217 U.S. 349 (1910) (holding punishment of hard labor, to be carried out in chains, to be cruel and unusual punishment); Wilkerson v. Utah, 99 U.S. 130 (1878) (holding that cruel and unusual punishment includes sentences calling for a prisoner to be disemboweled, beheaded, quartered and dragged, or burned alive); *see also* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 855-56 (1969) (describing various methods of torture used in England in the late seventeenth century).

length of a person's prison sentence can be so grossly disproportionate to the crime committed as to be deemed "cruel and unusual."[3]

The Court of Appeals of Maryland recently addressed the issue of proportionality in *Thomas v. State*.[4] The court held, for the first time in Maryland's history, that a twenty-year sentence for common-law battery was so grossly disproportionate to the crime committed that it violated the cruel and unusual punishment clause of both the Federal and the Maryland Constitutions.[5]

George Thomas (Mr. Thomas) lived with his wife, Shirlene Thomas (Mrs. Thomas), and her twelve-year old daughter, Martisha Stansbury, in Ridgely, Maryland.[6] In March of 1991, Mr. and Mrs. Thomas received a tax refund check made out in both of their names.[7] Mr. Thomas, however, insisted that the refund was his to cash, and a fight ensued.[8] A few days later, Mrs. Thomas learned that her husband had actually cashed the refund check and she confronted him about the money.[9] The fighting continued well into the evening, until Mrs. Thomas instructed her daughter to call the police department.[10] After the police left, however, the fight resumed, and in the early hours of April 2, 1991, Mr. Thomas slapped his wife across her face.[11]

After this incident, Mrs. Thomas obtained a two-day protective order and later obtained an order requiring Mr. Thomas to vacate the home for thirty days.[12] Mr. Thomas soon violated the order and returned home wherein the couple recommenced their earlier fight.[13] At the height of this argument, Mr. Thomas grabbed a steam iron and hit his wife once on the top of the head and twice on the back.[14]

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3. *See* Harmelin v. Michigan, 501 U.S. 957 (1991) (issuing five separate opinions, none of which hold a majority, on whether there is a proportionality requirement in the Eighth Amendment); Solem v. Helm, 463 U.S. 277 (1983) (holding that Eighth Amendment requires proportionality analysis in all cases); Rummel v. Estelle, 445 U.S. 263 (1980) (holding proportionality analysis unnecessary in non-capital cases); Weems v. United States, 217 U.S. 349 (1910) (holding that Eighth Amendment requires proportionality consideration).
4. 333 Md. 84, 634 A.2d 1 (1993).
5. *Id.* at 117, 634 A.2d at 15 (Chasanow, J., dissenting). For a discussion of the cruel and unusual clauses, see *supra* note 1.
6. *Thomas*, 333 Md. at 88, 634 A.2d at 3.
7. *Id.* The tax refund amounted to $254.00. *Id.*
8. *Id.*
9. *Id.* During this confrontation, the couple engaged in pushing and shoving, and each threatened to injure the other with a baseball bat. *Id.*
10. *Id.*
11. *Id.* at 89, 634 A.2d at 3. This slap left a temporary mark on Mrs. Thomas's cheek. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

Mrs. Thomas was rushed to a hospital where an eight centimeter laceration in her scalp was sutured.[15] She remained hospitalized for two days.[16] Mr. Thomas turned himself into the Denton Police Department immediately after the assault, admitting that he had beaten his wife with the iron and that he feared that he may have killed her.[17]

Mr. Thomas was convicted at a bench trial in the Circuit Court for Caroline County of two counts of common-law battery, reckless endangerment, violation of an order to vacate the family home, and the unlawful use of a telephone.[18] Mr. Thomas was sentenced to a total of fifty years and eight months in prison—twenty years for the initial slap on April 2nd,[19] thirty years for the battery with the steam iron,[20] sixty days for violating the order to vacate, and six months for the unlawful use of the telephone.[21] Mr. Thomas appealed to the Court of Special Appeals of Maryland, but before the matter could be considered, the court of appeals issued a writ of certiorari.[22]

Maryland's high court, adopting Justice Kennedy's concurring opinion in *Harmelin v. Michigan*,[23] held that Mr. Thomas's twenty-year sentence for common-law battery was disproportionate to his crime and constituted cruel and unusual punishment, in violation of the Eighth Amendment of the United States Constitution and of Article 25 of the Maryland Declaration of Rights.[24] This was the first time that a sentence for common-law battery was struck down as cruel and unusual punishment in Maryland.[25] The *Thomas* court,

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15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 88, 634 A.2d at 2-3. Mr. Thomas was accused and convicted of making approximately thirty telephone calls to his wife from jail, during which he threatened to kill her or her family. *Id.* at 103, 634 A.2d at 10.
19. *Id.* at 98, 634 A.2d at 7.
20. *Id.* at 101, 634 A.2d at 9.
21. *Id.* at 88, 634 A.2d at 2-3.
22. *Id.* at 88, 634 A.2d at 3. The court of appeals issued a writ of certiorari in order to resolve two questions: (1) Whether the "30- and 20-year sentences for common-law battery [were] illegal, disproportionate under the common law, or unconstitutional"; and (2) Whether the "evidence was sufficient to sustain defendant's conviction for telephone misuse[.]" *Id.* The first question is the focus of this Casenote. The *Thomas* court upheld the 30-year sentence but held that the 20-year sentence was unconstitutional. *Id.* at 98, 102, 634 A.2d at 7, 9. The court of appeals answered the second question in the affirmative and deemed the evidence sufficient to sustain Thomas's conviction for telephone misuse. *Id.* at 105, 634 A.2d at 11.
23. 501 U.S. 957, 996 (1991) (Kennedy, J., concurring). See *infra* notes 70-77 and accompanying text for a discussion of *Harmelin*.
24. *Thomas*, 333 Md. at 100-01, 634 A.2d at 9. See *supra* note 1 for a discussion of the cruel and unusual clauses.
25. *Id.* at 109, 634 A.2d at 14 (Chasanow, J., dissenting).

however, failed to provide comprehensible guidelines to help trial judges determine "proportional" sentences.

II. BACKGROUND

A. The History of the Eighth Amendment

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[26] Courts, however, have disagreed as to whether the final clause of the Amendment refers only to barbaric methods of punishments such as drawing and quartering, beheading, and disemboweling,[27] or if it also prohibits sentences that are considered to be disproportionate to the crime committed.[28]

In *Harmelin v. Michigan*,[29] Justice Scalia thoroughly reviewed the history of the Eighth Amendment to the United States Constitution.[30] He observed, as have many legal scholars,[31] that the Eighth Amendment was derived, almost verbatim, from the English Declaration of Rights of 1689.[32] Therefore, in order to fully understand the Eighth Amendment, it is necessary to understand the history of the English Declaration of Rights.

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26. U.S. CONST. amend. VIII. For a discussion of both the United States and the Maryland cruel and unusual clauses, see *supra* note 1.
27. Granucci, *supra* note 2, at 855-56.
28. *See Harmelin*, 501 U.S. at 974 (explaining that the phrase "cruel and unusual" does not forbid disproportionate sentences); Granucci, *supra* note 2, at 865 (explaining that phrase "cruel and unusual" proscribes torturous methods of punishment only); *cf.* Solem v. Helm, 463 U.S. 277, 284 (1983) (explaining that the phrase "cruel and unusual" prohibits both barbaric methods of punishment and disproportionate sentences); *see* Karen D. Bayley, Note, *State v. Davis: A Proportionality Challenge to Maryland's Recidivist Statute*, 48 MD. L. REV. 520, 525 (1989) (explaining that the concept of proportionality has evolved from English common law).
29. 501 U.S. 957 (1991). See also *infra* notes 70-77 and accompanying text for a discussion of *Harmelin*.
30. *Harmelin*, 501 U.S. at 966-75.
31. *Id.* at 966; *see, e.g., Solem*, 463 U.S. at 285; Rummel v. Estelle, 445 U.S. 263, 287 (1980) (Powell, J., dissenting); Weems v. United States, 217 U.S. 349, 376 (1910); *see also* Bayley, *supra* note 28, at 525 n.39; Granucci, *supra* note 2, at 847.
32. *Harmelin*, 501 U.S. at 966. The English Declaration of Rights of 1689 provided "[t]hat excessive Baile [sic] ought not to be required nor excessive Fines imposed nor cruell [sic] and unusuall [sic] Punishments inflicted." 1 WM. & MARY, sess. 2, chap. 2 (1689).

Justice Powell reviewed the history of the Eighth Amendment in *Solem v. Helm*[33] and noted that the principle of proportionality, evident in three chapters of the Magna Carta of 1215,[34] was a widely accepted postulate at the time of the drafting of the English Declaration of Rights of 1689.[35] Powell reasoned that because the language of the Eighth Amendment is so similar to that of the English Declaration of Rights, the founding fathers must have intended to include the requirement of proportionality of sentencing as part of the Eighth Amendment.[36]

Justice Scalia, however, vehemently disagreed with this contention. He stated, in *Harmelin,* that "[d]espite this familiarity [between the Eighth Amendment's language and the language of the English Declaration of Rights], the drafters of the English Declaration of Rights did not explicitly prohibit 'disproportionate' or 'excessive' punishments. Instead they prohibited punishments that were 'cruell [sic] and unusuall [sic].' The [*Helm*] court simply assumed, with no analysis, that the one included the other."[37] According to Scalia, the goal of the cruel and unusual punishment clause of the English Declaration of Rights was not to ensure proportionality, but, instead, to prevent the abuses of the "Bloody Assizes,"[38] a court known for brutal punishments.[39] Based on this interpretation, Justice Scalia opined that the Eighth Amendment's incorporation of the language of the English Declaration of Rights did not result in the automatic adoption of a proportionality requirement.[40]

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33. 463 U.S. 277 (1983). See also *infra* notes 59-69 and accompanying text for a discussion of *Solem*.
34. Chapter 20 of the Magna Carta declared: "A free man shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." 1 S.D. CODIFIED LAWS p. 4 (1978) (translation of Magna Carta). Chapters 21 and 22 granted the same rights to the nobility and the clergy, respectively. *Id.*
35. *Solem*, 463 U.S. at 285-86. See *infra* notes 59-69 and accompanying text for a discussion of *Solem*.
36. *Solem*, 463 U.S. at 285-86.
37. *Harmelin*, 501 U.S. at 967.
38. Lord Chief Justice Jeffreys of the King's Bench presided over the "Bloody Assizes" during the Stuart reign of James II. *Harmelin*, 501 U.S. at 967-68. Following the "Duke of Monmouth's abortive rebellion in 1685, a special commission led by Lord Jeffreys tried, convicted, and executed hundreds of suspected insurgents." *Id.* at 968. "Some scholars have attributed the [English] Declaration of Rights provision to popular outrage against those proceedings." *Id.*; *see also* Richard L. Perry, SOURCES OF OUR LIBERTIES 236 n.103 (R. Perry & J. Cooper eds. 1959); Note, *What Is Cruel and Unusual Punishment.*, 24 HARV. L. REV. 54, 55 n.2 (1910); *cf.* Granucci, *supra* note 2, at 855-56 (finding no evidence to connect the cruel and unusual clause to the "Bloody Assizes").
39. *Harmelin*, 501 U.S. at 967-68.
40. *Id.* at 974-75. Furthermore, legal scholars have interpreted the debates and

B. The Eighth Amendment Proportionality Requirement Within the Supreme Court

The Supreme Court first addressed whether the Eighth Amendment contained a proportionality requirement in *Weems v. United States*.[41] Mr. Weems, a disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was found guilty of falsifying government payroll books.[42] On review, the Philippine Supreme Court affirmed a sentence of fifteen years "hard and painful labor" to be carried out in chains.[43] The United States Supreme Court granted certiorari[44] to determine whether this punishment was cruel and unusual, in violation of the Eighth Amendment.[45] In its analysis, the *Weems* Court noted that there were many crimes, such as homicide and treason, which were more extreme in character, but were not as severely punished.[46] Furthermore, the punishment of hard and painful labor, carried out in chains, was not a punishment prescribed by the American legislature.[47] Consequently, the Court held that Weems' penalty of *cadena temporal* was cruel and unusual.[48]

It is not clear, however, whether the *Weems* holding was based on the cruel methods of punishment imposed or whether the sentence was deemed disproportionate to the crime committed.[49] In the *Weems*

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correspondence of the founding fathers and have determined that the American colonists were solely concerned with prohibiting barbaric and torturous methods of punishments. *See Harmelin*, 501 U.S. at 979-80; Rummel v. Estelle, 445 U.S. 263, 287 (1980) (Powell, J., dissenting); Weems v. United States, 217 U.S. 349, 372 (1910); Granucci, *supra* note 2, at 841-42.

It has also been argued that the Eighth Amendment was not intended to prohibit proportionality because, "[d]uring the 19th century, several states ratified constitutions that prohibited 'cruel and unusual,' 'cruel or unusual,' or simply 'cruel' punishments and required all punishments to be proportioned to the offense." *Harmelin*, 501 U.S. at 982 (citations omitted); *see* GA. CONST. art. I, § 1, ¶ 17 (1983); IND. CONST. art. I, §§ 15, 16 (Michie 1990); ME. CONST. art. I, § 9 (West 1985); OHIO CONST. art. I, § 9 (1993); R.I. CONST. art. I, § 8 (1987); W. VA. CONST. art. III, § 5 (1982).

41. 217 U.S. 349 (1910) (seven member Court).
42. *Id.* at 358.
43. *Id.* at 364.
44. *Id.* at 382. Weems was able to appeal to the United States Supreme Court because the Philippine Islands was a protectorate of the United States, and the President of the United States had declared that American principles of law would apply to the Islands. *Id.* at 367-68.
45. *Id.* at 357.
46. *Id.* at 380.
47. *Id.* at 377.
48. *Id.* at 382.
49. Aubrey L. Brown, Jr., Comment, *Constitional Law—Harmelin v. Michigan: The Continuing Saga of Proportionality Review Under the Eighth Amendment*, 22 MEM. ST. U. L. REV. 373, 377 (1992); Christine D. Marton, *Recent Decisions*, 30 DUQ. L. REV. 387, 402-03 (1992).

opinion, the Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense."[50] Some courts have interpreted this statement to mean that the Eighth Amendment should be expanded to prohibit disproportionality.[51] Other courts have argued that the holding in *Weems* applies only to the specific and bizarre facts of the case and that, therefore, an extension should not be permitted.[52] In any event, the language of *Weems* has been used to support both contentions.[53]

Seventy years after the *Weems* decision, the Supreme Court again discussed whether the Eighth Amendment prohibited disproportionality in *Rummel v. Estelle*.[54] Mr. Rummel was convicted and sentenced to life in prison under the Texas recidivist statute after being convicted of felony theft—his second felony offense.[55] Rummel argued, on appeal to the Supreme Court, that *Weems* had created a proportionality requirement in the Eighth Amendment.[56] A majority of the Court, however, did "not believe that *Weems* [could] be applied without regard to its peculiar facts."[57] Thus, the Court

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50. *Weems*, 217 U.S. at 367.
51. *E.g.*, Solem v. Helm, 463 U.S. 277, 287 (1983).
52. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 958-59 (1991); Solem v. Helm, 463 U.S. 277, 306-07 (1983) (Burger, C.J., dissenting); Rummel v. Estelle, 445 U.S. 263, 273 (1980).
53. After *Weems*, the Supreme Court applied a proportionality analysis in capital punishment cases. Enmund v. Florida, 458 U.S. 782, 801 (1982) (imposing death penalty for felony murder, when defendant did not commit the murder but merely drove get-away car, is cruel and unusual punishment); Coker v. Georgia, 433 U.S. 584, 600 (1977) (plurality opinion) (imposing death penalty for rape violates Eighth Amendment); Gregg v. Georgia, 428 U.S. 153, 207 (1976) (imposing death penalty for armed robbery and murder does not violate Eighth Amendment). This analysis was not extended to non-capital cases until Solem v. Helm, 463 U.S. 277 (1983). See *infra* notes 59-69 and accompanying text for a discussion of *Solem*.
54. 445 U.S. 263 (1980).
55. *Id.* at 265-66. Rummel had been convicted of three crimes, two of which were felonies: (1) fraudulent use of a credit card to obtain $80.00; (2) passing a forged check for $28.36; and (3) obtaining $120.75 by false pretenses. *Id.* The first and last crimes were designated as felonies because they exceeded $50.00. *Id.*
56. *Id.* at 273. Justice Powell, dissenting in *Rummel*, proposed a proportionality test, to be applied in all Eighth Amendment challenges, that involved analyzing three factors: (1) "the nature of the offense;" (2) "the sentence imposed for commission of the same crime in other jurisdictions;" and (3) "the sentence imposed upon other criminals in the same jurisdiction." *Id.* at 295. This test, although rejected by the *Rummel* majority, was later approved by a majority of the Supreme Court in *Solem*. *See Solem*, 463 U.S. at 290-92. See *infra* notes 59-69 and accompanying text for a discussion of *Solem*.
57. *Rummel*, 445 U.S. at 274. The *Rummel* majority reasoned that the principle of proportionality did not apply to non-capital sentences because: (1) *Weems'* holding only applied to its own facts; (2) the length of a sentence was a

rejected an "objective" proportionality test in non-capital cases and, instead, held that Rummel's sentence of life in prison did not violate the cruel and unusual punishment clause of the Eighth Amendment.[58]

The issue of proportionality was revisited in 1983 by the Supreme Court in *Solem v. Helm*.[59] This time, however, the Court held that a life sentence without the possibility of parole for a seventh felony constituted cruel and unusual punishment.[60] Justice Powell, writing for the majority,[61] prefaced this finding with an expansive discussion of the history of the Eighth Amendment.[62] According to the Court, when the Eighth Amendment was adopted, the mere fact that its language was similar to that of the English Declaration of Rights indicated that the founding fathers also intended to adopt England's common-law principle of proportionality.[63] The Court then articulated three "objective criteria" to be used in the determination of proportionality: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[64]

Although the *Solem* Court distinguished the facts of its case from those in *Rummel*,[65] the Court declined to overrule its decision in *Rummel*.[66] Instead, the majority stated that Helm's "sentence [of life without the possibility of parole was] far more severe than the life sentence . . . considered in *Rummel v. Estelle*."[67] Chief Justice

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legislative prerogative; and (3) some states would always have harsher penalties than other states, therefore, an inter-jurisdictional comparison of sentences would clash with traditional notions of federalism. *Id.* at 272-85; *see also* Hutto v. Davis, 454 U.S. 370 (holding forty-year prison sentence for possession with intent to distribute marijuana not to be cruel and unusual punishment in light of *Rummel*), *reh'g denied*, 455 U.S. 1038 (1982).

58. *Rummel*, 445 U.S. at 285.
59. 463 U.S. 277 (1983).
60. *Id.* at 303.
61. Justice Powell, in *Solem*, elicited support from a majority of Justices for the same proportionality test that he had advocated in his dissenting opinion in *Rummel*. *Compare Rummel*, 445 U.S. at 295 (Powell, J., dissenting) (arguing in favor of three-step proportionality test) *with Solem*, 463 U.S. at 290-92 (adopting three-step proportionality test).
62. See *supra* Part II. *A.* for a discussion of the history of the Eighth Amendment.
63. *Solem*, 463 U.S. at 285-86; *see Rummel*, 445 U.S. at 295 (Powell, J., dissenting).
64. *Solem*, 463 U.S. at 292. The same objective test had previously been rejected in *Rummel*. *See also Rummel*, 445 U.S. at 295 (Powell, J., dissenting).
65. *Solem*, 463 U.S. at 297.
66. *Id.*
67. *Id.* The Court explained that Rummel was "likely to have been eligible for parole within 12 years of his initial confinement." *Id.* According to the *Solem* majority, this was an important factor in the Court's decision to uphold Rummel's sentence. *Id.* In fact, the Court noted that Rummel had actually been released within eight months of the *Rummel* decision. *Id.* at 297 n.25.

Burger, who ardently dissented in *Solem*, wrote that "the Court blithely discard[ed] any concept of *stare decisis,* trespasse[d] gravely on the authority of the states, and distort[ed] the concept of proportionality of punishment by tearing it from its moorings in capital cases."[68] Nevertheless, the majority applied the newly adopted proportionality test and determined that Helm's sentence of life in prison without the possibility of parole constituted cruel and unusual punishment.[69]

In 1991, the Supreme Court, in *Harmelin v. Michigan,*[70] granted certiorari in order to address the proportionality issue "anew, and in greater detail,"[71] and to clarify its position after *Solem.*[72] Unfortunately, the Court's attempt at clarification has only made the law of proportionality more ambiguous. The *Harmelin* Court, offering no majority opinion,[73] can be divided into three main groups. The first group, comprised of Justice Scalia and Chief Justice Rehnquist, found, after an extensive historical analysis, that the Eighth Amendment does not contain a proportionality requirement and that the *Solem* holding was "simply wrong."[74] Four Justices, White, Marshall, Blackmun, and Stevens, asserted that because the Eighth Amendment included a strict proportionality requirement, much like the one prescribed in *Solem*, Harmelin's sentence was cruel and unusual.[75] The last group, consisting of Justice Kennedy, Justice O'Connor and Justice Souter, offered a middle ground and argued that the Eighth Amendment required a narrow proportionality principle.[76] Because of the three competing views, the convoluted nature of the opinions

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68. *Id.* at 304 (Burger, C.J., dissenting).
69. *Id.* at 296-300.
70. 501 U.S. 957 (1991).
71. *Id.* at 965.
72. *Id.* According to Justice Scalia, the "5-4 decision eight years ago in [*Solem*] was scarcely the expression of clear and well accepted constitutional law." *Id.*
73. *Id.* at 957. Justice Scalia announced the judgment of the Court only in part IV. *Id.* at 994-96 (The parts were originally numbered I, III, IV, V, therefore part V in *Harmelin*, 111 S. Ct. 2680, 2701, has been changed to part IV in 501 U.S. at 957-94.). Chief Justice Rehnquist joined Justice Scalia on parts I through IV. *Id.* Justices Kennedy, O'Connor and Souter concurred in part and concurred in the judgment. *Id.* at 996-1009. Justices White, Blackmun and Stevens dissented. *Id.* at 1009-27. Both Justice Marshall, *id.* at 1027-28, and Justice Stevens, *id.* at 1028-29, wrote separate, dissenting opinions.
74. *Id.* at 965.
75. *Id.* at 1010, 1027-28.
76. *Id.* at 1005. According to Justice Kennedy, "one factor may be sufficient to determine the constitutionality of a particular sentence," making it unnecessary to consider the second and third factors unless "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* at 1004-05. If the threshold analysis suggests gross disproportionality, the reviewing court should conduct an intra- and inter-jurisdictional comparison. *Id.* at 1005.

and the lack of a clear majority, it now remains unclear whether the Eighth Amendment prohibits disproportionate punishments in non-capital cases.[77]

C. *The Eighth Amendment Proportionality Requirement in Maryland*

The inconsistency in the decisions of the Supreme Court has, in effect, left the door open for states to construe the Eighth Amendment requirements individually. The Maryland court of appeals first addressed this issue in *Mitchell v. State*.[78] In *Mitchell*, the defendant was convicted of attempted rape and was sentenced to fifteen years in prison.[79] The court of appeals justified its holding—that the sentence was neither cruel nor unusual—on the grounds that "it was not their purpose to dispense with punishments of great severity."[80] The court noted in dicta, however, that "[i]f the punishment is grossly and inordinately disproportionate to the offence so that the sentence is evidently dictated not by a sense of public duty, but by passion, prejudice, ill-will or any other unworthy motive, the judgment ought to be reversed."[81] While the court apparently accepted

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77. Travis A. Pearson, *Constitutional Law: The Eighth Amendment Principle of Proportionality in Noncapital Criminal Sentences*, 31 WASHBURN L.J. 394, 403-04 (1992).

    Federal courts are aware that *Harmelin* has called *Solem's* continuing vitality into question. United States v. R.R. #1, Box 224, 14 F.3d 864, 875 (3rd Cir. 1994); Toulson v. Beyer, 827 F. Supp. 307, 310 (D.N.J. 1993). A majority of the federal circuit courts, however, have determined that at least a majority of the Justices in *Harmelin* indicated that some level of proportionality was required and have, therefore, applied a narrow proportionality test similar to the one prescribed in Justice Kennedy's concurring opinion in *Harmelin*. *See* United States v. R.R. #1, Box 224, 14 F.3d 864, 875 (3rd Cir. 1994); McCullough v. Singletary, 967 F.2d 530, 534-35 (11th Cir. 1992); United States v. Abrue, 962 F.2d 1425, 1428-29 (10th Cir. 1992); United States v. Pavlico, 961 F.2d 440, 447-48 (4th Cir. 1992); United States v. Garrett, 959 F.2d 1005, 1009 (D.C. Cir. 1992); Bradford v. Whitley, 953 F.2d 1008, 1012 (5th Cir. 1992); United States v. Johnson, 944 F.2d 396, 408-09 (8th Cir. 1991); United States v. Hopper, 941 F.2d 419, 422 (6th Cir. 1991); United States v. Torres, 941 F.2d 124, 127-28 (2nd Cir. 1991); United States v. Contreras, 937 F.2d 1191, 1195 n.3 (7th Cir. 1991); *cf.* United States v. Frazier, 981 F.2d 92, 95-96 (3rd Cir. 1992) (applying *Solem* proportionality analysis); Tart v. Massachusetts, 949 F.2d 490, 503 n.16 (1st Cir. 1991) (explaining that *Solem* remains controlling precedent).

78. 82 Md. 527, 34 A. 246 (1896).

79. *Id.* at 530, 34 A. at 246.

80. *Id.* at 533, 34 A. at 247. The court also stated that it was "impossible in the abstract to mark the boundaries which separate cruelty from just severity." *Id.* at 534, 34 A. at 247.

81. *Id.* at 534, 34 A. at 247-48.

the view that a disproportionate sentence could be unconstitutional, it stressed that great deference was to be given to the opinion of the trial judge.[82]

Mitchell continued to be the law of Maryland well into the middle of the twentieth century,[83] until the United States Supreme Court's *Rummel-Solem* controversy swelled across the country.[84] The Maryland intermediate appellate court responded in *Bryan v. State*.[85] In *Bryan,* Harry Paul Bryan was convicted of burglary and theft and was sentenced, under Maryland's recidivist statute,[86] to twenty-five years in prison without the possibility of parole.[87] Bryan argued, on appeal, that this mandatory sentencing requirement for a third crime of violence constituted cruel and unusual punishment because it did not permit individualized sentencing.[88] In its analysis, the Court of Special Appeals of Maryland looked to the recent Supreme Court decisions for guidance.[89] The intermediate appellate court, acknowledging the inconsistency between *Rummel* and *Solem*, determined that the Supreme Court case most analogous to *Bryan* would control.[90] After reviewing the facts of each case, the court of special

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82. *Id.*

83. Brooks v. Warden, Md. Penitentiary, 1 Md. App. 1, 3, 226 A.2d 354, 386 (1967).

84. See *supra* text accompanying notes 54-69 for a discussion of the *Rummel-Solem* controversy.

85. 63 Md. App. 210, 492 A.2d 644, *cert. denied*, 304 Md. 296, 498 A.2d 1183 (1985).

86. Maryland's recidivist statute provides, in pertinent part:

> (c) *Third conviction of crime of violence.*—Any person who (1) has been convicted on two separate occasions of a crime of violence where the convictions do not arise from a single incident, and (2) has served at least one term of confinement in a correctional institution as a result of a conviction of a crime of violence, shall be sentenced, on being convicted a third time of a crime of violence, to imprisonment for the term allowed by law, but, in any event, not less than 25 years
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> . . . .

MD. ANN. CODE art. 27, § 643B(c) (Supp. 1994). In 1976, Bryan was convicted of robbery with a deadly weapon for which he received a two-year suspended sentence. *Bryan*, 63 Md. App. at 212, 492 A.2d at 645. In 1977, he pled guilty to robbery and received a seven-year sentence. *Id.* Eight years later, he was convicted of burglary and theft. *Id.*

87. *Bryan*, 63 Md. App. at 212, 492 A.2d at 645.

88. *See id.* at 212-13, 492 A.2d at 645.

89. *See id.* at 214-17, 492 A.2d at 645-47.

90. *Id.* at 216-17, 492 A.2d at 647. As justification for this compromise, the court of special appeals quoted the *Solem* majority, in which Justice Powell stated that *Rummel* should be "controlling only in a similar factual situation." *Id.* (quoting Solem v. Helm, 463 U.S. 277, 304 n.32 (1983)). As a result, the Maryland court of special appeals, in effect, categorized all criminal sentences into two separate categories: "[O]ne involving no proportionality analysis [following *Rummel*] and the other involving a particular form of extended

appeals held that *Rummel* was "apposite" and would control its decision because Maryland's recidivist statute was not as harsh as the South Dakota recidivist statute involved in *Solem*.[91] Consequently, the court held that a proportionality review was not warranted and that Bryan's sentence was constitutional.[92]

In the late 1980s, two cases reached the Court of Appeals of Maryland, *State v. Davis*[93] and *Minor v. State*,[94] that again demonstrated the confusion created by the *Rummel-Solem* controversy.[95] In *Davis*, the defendant was convicted of daytime housebreaking.[96] It was his fourth conviction for a violent crime.[97] He was sentenced to life in prison without parole under Maryland's recidivist statute.[98] Maryland's high court acknowledged the apparent inconsistency between the *Rummel* and *Solem* decisions and chose *Rummel* to be factually controlling,[99] as the court of special appeals had done in *Bryan*.[100] This time, however, the court reasoned that, unlike the relatively minor burglary at issue in *Solem*, Davis's daytime housebreaking was a serious crime.[101] Although the court of appeals concluded that a proportionality analysis was not required in *Rummel* and, therefore, that such an analysis was not required in *Davis*, the court conducted a *Solem*-like review "in the alternative."[102] The court of appeals ultimately found Davis's life sentence to be constitutional under both approaches.[103]

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proportionality analysis utilizing three, and only three, criteria [following *Solem*]." Minor v. State, 313 Md. 573, 587, 546 A.2d 1028, 1035 (1988) (Eldridge, J., concurring). See *infra* notes 104-07 and accompanying text for a discussion of *Minor*.

91. *See Bryan*, 63 Md. App. at 217-19, 492 A.2d at 647-48.
92. *Id.* at 219-20, 492 A.2d at 647.
93. 310 Md. 611, 530 A.2d 1223 (1987).
94. 313 Md. 573, 546 A.2d 1028 (1988).
95. See *supra* text accompanying notes 54-69 for a discussion of the *Rummel-Solem* controversy.
96. *Davis*, 310 Md. at 613, 530 A.2d at 1224.
97. *Id.*
98. *Id.* Davis was sentenced under Article 27, section 643B of the Annotated Code of Maryland, the same recidivist statute discussed in *Bryan*. *Id.* Davis, however, was sentenced under subsection (b) which provided:

> (b) *Mandatory life sentence.*—Any person who has served three separate terms of confinement in a correctional institution as a result of three separate convictions of any crime of violence shall be sentenced, on being convicted a fourth time of a crime of violence to life imprisonment without the possibility of parole. Regardless of any other law to the contrary, the provisions of this section are mandatory.

MD. ANN. CODE art. 27, § 643B(b) (1986).

99. *Davis*, 310 Md. at 628, 530 A.2d at 1232.
100. See *supra* text accompanying notes 85-92 for a discussion of *Bryan*.
101. *Id.*
102. Minor v. State, 313 Md. 573, 580, 546 A.2d 1028, 1031 (1988).
103. *See Davis*, 310 Md. at 639, 530 A.2d at 1237.

Similarly, in *Minor v. State*,[104] the defendant was convicted of his fourth daytime housebreaking and was sentenced to twenty-five years in prison without the possibility of parole.[105] The *Minor* court reaffirmed the position it had taken in *Davis*—that *Rummel* was controlling—and thus found that Minor's sentence was constitutional.[106] The court, however, was concerned that its solution to the *Rummel-Solem* controversy could be overturned by a later Supreme Court decision, and, therefore, determined that "even if a proportionality analysis is required, we believe that the sentence is valid."[107]

The *Rummel-Solem* controversy, although troubling in these statutory sentencing cases, did not complicate Eighth Amendment challenges to sentences administered under Maryland's common law. In *Walker v. State*,[108] the court of special appeals addressed the legitimacy of an "open-ended common law sentence."[109] Ricky Arvin Walker was convicted of four crimes, one of which was common-law assault.[110] The judge sentenced Walker to twenty years in prison for the assault.[111] On appeal, Walker argued that the twenty-year sentence for common-law assault was disproportionate to the crime and that it violated the cruel and unusual clauses of the Federal and the Maryland Constitutions.[112]

The *Walker* court reviewed the history of the Eighth Amendment by citing Maryland case law, which concluded that the cruel and unusual clauses "went essentially to the means or quality of punish-

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104. 313 Md. 573, 546 A.2d 1028 (1988).
105. *Id.* at 574-75, 546 A.2d at 1028. Although Minor, like Davis, was convicted of his fourth crime of violence, he was sentenced under § 643B(c) of Maryland's recidivist statute because he had served only one term of confinement. *Id.* at 575, 546 A.2d at 1028-29. Subsection (b), used in *Davis*, is applicable only if three separate terms of confinement are served. *Id.* at 575, 546 A.2d at 1029.
106. *See id.* at 583-84, 546 A.2d at 1033.
107. *Id.* at 584, 546 A.2d at 1033.
108. 53 Md. App. 171, 452 A.2d 1234 (1982).
109. *Id.* at 173, 452 A.2d at 1236.
110. *Id.* at 173-74, 452 A.2d at 1236. Walker was convicted of (1) attempted first degree rape, (2) burglary, (3) common-law assault, and (4) openly carrying a dangerous and deadly weapon. *Id.* at 174, 452 A.2d at 1236. The facts indicated that the victim, Norva Lee Borroughs, was awakened in her bedroom one evening by a stranger wearing a ski mask and wielding a knife. *Id.* at 175, 452 A.2d at 1236. The stranger, later identified as Walker, ordered her to undress. *Id.* While in the act of undressing, Borroughs grabbed for the knife. *Id.* at 175, 452 A.2d at 1237. During the struggle she was beaten, kicked, cut with the knife, and knocked to the floor. *Id.* This resistance, however, was successful, and Walker ultimately fled. *Id.*
111. *Id.* at 174, 452 A.2d at 1236. Walker also received life imprisonment for the attempted rape conviction, 20 years for the burglary conviction, and three years for the deadly weapon conviction. *Id.*
112. *See id.* at 192-93, 452 A.2d at 1245-46.

ment and not to its quantity."[113] The court, however, acknowledged that some level of proportionality was required under recent Supreme Court decisions.[114] Accordingly, the court of special appeals administered a "two-pronged inquiry."[115] First, the court considered the mode of punishment and determined that there was "nothing barbarous" about the twenty-year prison sentence.[116] Second, the court conducted a proportionality analysis and noted that such a review must be administered on a case-by-case basis.[117] In its analysis, the court compared the sentence both with Walker's behavior and with the consequences of his act. The court stressed that "no term of years for common law assault [was] *per se* and universally unconstitutional" and further noted that Maryland had upheld similar sentences in the past.[118] After reviewing the violent nature of the crime, the court upheld the twenty-year sentence.[119]

In *Matthews v. State*,[120] the court of special appeals again addressed an Eighth Amendment challenge to a common-law sentence for assault. Matthews was convicted of assault and was sentenced to fifteen years in prison.[121] The intermediate appellate court rejected Matthews's contention that the sentence was unconstitutional.[122] In support of its holding, the court stressed: "[A]ssault is a common-law crime for which the Legislature has not prescribed a penalty and for which no limitation exist[s] at common law."[123] Moreover, the court reasoned that "[t]he single restriction on the discretion of the trial judge in sentencing a defendant for assault [was] found in the constitutional prohibition against cruel and unusual punishment,"

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113. *Id.* at 182, 452 A.2d at 1240 (citing Delnegro v. State, 198 Md. 80, 81 A.2d 241 (1951)).
114. *See id.* at 183, 452 A.2d at 1240-41 (citing Gregg v. Georgia, 428 U.S. 153 (1976)). In *Gregg*, the defendant was convicted of murder and was sentenced to death. *Gregg*, 428 U.S. at 169. The Supreme Court held that the punishment of death did not violate the Constitution. *Id.*
115. *Walker*, 53 Md. App. at 184, 452 A.2d at 1241.
116. *Id.*
117. *Id.* at 184-85, 452 A.2d at 1241.
118. *Id.* at 199, 452 A.2d at 1249. Furthermore, the court quoted Apple v. State, 190 Md. 661, 59 A.2d 509 (1948), which stated: "[T]he offense [of common-law assault] is one prescribed by the common law, and there is no limit imposed on the court . . . ." *Id.* at 668, 59 A.2d at 512. See *infra* note 147 for a list of Maryland cases upholding 20-year sentences for common-law assault.
119. *Walker*, 53 Md. App. at 195, 452 A.2d at 1247.
120. 68 Md. App. 282, 511 A.2d 548, *cert. denied*, 308 Md. 238, 517 A.2d 1121 (1986).
121. *Id.* at 287, 511 A.2d at 550. Matthews was also convicted of the use of a handgun in the commission of a crime of violence and was sentenced to a concurrent sentence of 20 years. *Id.*
122. *Id.* at 303, 511 A.2d at 558.
123. *Id.* (citing Raley v. State, 32 Md. App. 515, 363 A.2d 261, *cert. denied*, 278 Md. 731 (1976), *cert. denied*, 431 U.S. 965 (1977)).

and that Maryland had consistently upheld twenty-year sentences for common-law assault.[124] In sum, although the *Rummel-Solem* controversy slowly altered the proportionality analysis required in cases involving statutorily mandated sentences, it seemed to have little or no effect upon Maryland cases involving common-law sentencing.

III. THE INSTANT CASE

As previously discussed,[125] the Supreme Court held, in *Rummel*, that the Eighth Amendment did not require a proportionality analysis. In contrast, the Court, in *Solem*,[126] determined that the cruel and unusual punishment clause of the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[127] Finally, in *Harmelin*,[128] the discord within the Supreme Court came to the forefront when the Court issued five separate opinions regarding the proportionality requirement of the Eighth Amendment.[129]

Thomas v. State[130] was the first Eighth Amendment challenge to be heard by the Court of Appeals of Maryland following the Supreme Court's ruling in *Harmelin v. Michigan*.[131] Maryland's high court addressed the inconsistencies that existed among *Rummel*, *Solem* and *Harmelin* in order to find an adequate solution for the case *sub judice*. For the first time in Maryland's history,[132] the court of appeals

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124. *Id.* at 304, 511 A.2d at 558. Similarly, in Levitt v. Maryland Deposit Insurance Fund, 66 Md. App. 524, 505 A.2d 140 (1986), the court of appeals stated:

> It is not the function of an appellate court to substitute its judgment for that of the trial judge. That this Court might have imposed a greater or lesser sentence matters not a whit. Ordinarily, we do not address the matter of the severity of the sentence. Indeed, we may not unless the sentence falls in the category of cruel and unusual, is *dehors* the statutorily prescribed limits, or is "grossly and inordinately disproportionate to the offense."

Id. at 548, 505 A.2d at 152 (quoting, in part, Lowery v. State, 202 Md. 314, 321, 96 A.2d 20, 23 (1953)).

125. See *supra* text accompanying notes 54-58 for a discussion of *Rummel*.
126. See *supra* text accompanying notes 59-69 for a discussion of *Solem*.
127. Solem v. Helm, 463 U.S. 277, 284 (1983).
128. See *supra* text accompanying notes 70-77 for a discussion of *Harmelin*.
129. Harmelin v. Michigan, 501 U.S. 957 (1991). The only opinion of the Court appears in Part IV of Justice Scalia's opinion. *Id.* at 961, 994 (Part "IV" is incorrectly numbered as Part V in *Harmelin*, 111 S. Ct. 2680, 2701.). The Court, in Part IV, held that it was not cruel and unusual punishment to impose a mandatory sentence of life in prison without the possibility of parole. *Id.* at 994-96.
130. 333 Md. 84, 634 A.2d 1 (1993).
131. 501 U.S. 957 (1991); *see supra* text accompanying notes 70-77.
132. *Thomas*, 333 Md. at 111, 634 A.2d at 15 (Chasanow, J., dissenting in part).

held that a twenty-year sentence for common-law assault, although within the permissible range of punishment,[133] was disproportionate to the crime and, thus, that it violated the cruel and unusual clauses of the Federal and Maryland Constitutions.[134]

In its analysis, the Court of Appeals of Maryland reasoned that although the *Harmelin* decision may have "clouded somewhat the waters of the Eighth Amendment proportionality jurisprudence,"[135] a majority of the justices agreed that it at least forbade "extreme sentences that are 'grossly disproportionate' to the crime."[136] After concluding that proportionality was a requirement of the Eighth Amendment, the court of appeals adopted Justice Kennedy's proportionality analysis discussed in a concurring opinion in *Harmelin*.[137] This test requires a reviewing court to first determine whether the imposed sentence "appears" to be grossly disproportionate to the crime.[138] This is accomplished by performing a threshold comparison of the seriousness of the conduct, the seriousness of any past conduct, any articulated purpose supporting the sentence and the importance of deferring to the legislature and sentencing court.[139] If, after the threshold comparison, these considerations do not lead to the suggestion of gross disproportionality, the review is at an end and the sentence will be upheld.[140] If, however, the sentence appears to be grossly disproportionate to the crime, a reviewing court should engage in an intra- and inter-jurisdictional analysis, similar to the one proposed in *Solem*.[141] Maryland's high court stated: "[O]nly rarely will an extensive review be required."[142] In fact, "in a vast majority

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133. *Id.*
134. *Id.* at 100-01, 634 A.2d at 9. See *supra* note 1 for a discussion of the cruel and unusual clauses.
135. *Thomas*, 333 Md. at 93, 634 A.2d at 5.
136. *Id.* at 94, 634 A.2d at 5. (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) and also quoting, in part, Solem v. Helm, 463 U.S. 277, 303 (1983)).
137. *Thomas*, 333 Md. at 94, 634 A.2d at 6. For a discussion of Justice Kennedy's concurrence, see *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring). "The approach outlined by Justice Kennedy's opinion in *Harmelin* is consistent with the approach we earlier approved in [*Davis*]." *Thomas*, 333 Md. at 94, 634 A.2d at 6.
138. *Id.* at 95, 634 A.2d at 6.
139. *Id.*
140. *Id.*
141. *Id.* at 95-96, 634 A.2d at 6. The court of appeals emphasized that when conducting the inter-jurisdictional comparison, the principles of federalism allow one state to impose more severe punishment than another state for the same crime. *Id.* at 96, 634 A.2d at 6. Only punishments that are grossly disproportionate will be considered unconstitutional. *Id.*
142. *Id.* at 95, 634 A.2d at 6.

of cases, an appellate court, faced with an Eighth Amendment contention, can quickly reach the conclusion that the sentence is not constitutionally disproportionate to the crime."[143]

The *Thomas* court first applied the newly-adopted "threshold test" to the twenty-year sentence Mr. Thomas received for slapping his wife.[144] According to the court, the twenty-year sentence imposed "for a battery that was literally no more than a slap" appeared to be grossly disproportionate.[145] Since the threshold comparison indicated gross disproportionality, the court proceeded with an intra-jurisdictional proportionality analysis.[146] Although both the court of appeals and the court of special appeals had sustained twenty-year sentences for common-law assault and battery in the past,[147] the *Thomas* court distinguished those cases on the basis that the conduct involved was "far more violent and aggravated than those presented in [*Thomas*]."[148] Furthermore, the court cited other Maryland cases involving facts "more aggravated" than a mere slap in which the defendant was sentenced to less than twenty years in prison.[149]

The court buttressed its intra-jurisdictional analysis with a comparison of legislatively-imposed sentences for certain aggravated assaults.[150] At the time *Thomas* was decided, an assault with intent to maim had a statutory maximum of ten years in prison.[151] The court

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143. *Id.*
144. *Id.* at 97-101, 634 A.2d at 7-9.
145. *Id.* at 98, 634 A.2d at 7. The court explained that the slap was not "legally 'serious'" because it did not result in any lasting physical injury. *Id.*
146. *Id.*
147. *See* Adair v. State, 231 Md. 255, 256, 189 A.2d 618, 619-20 (1963) (defendant broke into victim's home, slapped her, grabbed her from behind and assaulted her with a knife, allegedly attempting to rape her); Walker v. State, 53 Md. App. 171, 195, 452 A.2d 1234, 1246-47 (1982) (defendant committed burglary and attempted rape); Brown v. State, 38 Md. App. 192, 196, 379 A.2d 1231, 1234 (1977) (defendant allegedly raped a 15-year old, mentally retarded girl), *cert. denied*, 282 Md. 730 (1978); Raley v. State, 32 Md. App. 515, 526-27, 363 A.2d 261, 268-69 (defendant killed the male friend of his estranged wife and then shot his wife in the throat), *cert. denied*, 278 Md. 731 (1976), *cert denied*, 431 U.S. 965 (1977); Wilkins v. State, 5 Md. App. 8, 22, 245 A.2d 80, 88 (1967) (defendant robbed victims at gunpoint and severely "pistol-whipped" and beat them).
148. *Thomas*, 333 Md. at 98, 634 A.2d at 7-8.
149. *Id.* at 99 n.4, 634 A.2d at 8 n.4; *see* Austin v. Director, 237 Md. 314, 317, 206 A.2d 145 (1965) (sentencing defendant to 10 years in prison for assault with attempt to rape); Gleaton v. State, 235 Md. 271, 277-78, 201 A.2d 353 (1964) (sentencing defendant to 10 years in prison for shooting and wounding three men); Duff v. State, 229 Md. 126, 127, 182 A.2d 349, 350 (sentencing defendant to 10 years in prison for assaulting and shooting an unarmed victim), *cert. denied*, 371 U.S. 898 (1962).
150. *Thomas*, 333 Md. at 99-100, 634 A.2d at 8.
151. MD. ANN. CODE art. 27, § 386 (1957); *see also Thomas*, 333 Md. at 99, 634 A.2d at 8.

contended, and the State conceded, that the slap involved in the instant case was significantly less serious than an assault with intent to maim, disfigure, or disable.[152] The court acknowledged that although the ten-year maximum penalty for a greater crime was not controlling in the case *sub judice*,[153] it gave "heavy weight" to the ten-year deviation between the two seemingly unequal offenses.[154]

Finally, the court conducted an extensive inter-jurisdictional comparison.[155] According to the court, the slap that Mr. Thomas inflicted on his wife would be categorized, in other states, as a "misdemeanor-type simple assault."[156] The punishment Mr. Thomas would have received elsewhere for the same crime would only have ranged from one month to two and one-half years in jail.[157] Thus, the court concluded that the inter-jurisdictional analysis demonstrated that the twenty-year sentence for a slap was, in fact, grossly disproportionate.[158]

In contrast to Mr. Thomas's twenty-year sentence for the slap, the court held that his thirty-year sentence for battery using a steam iron was constitutionally proportionate, although severe.[159] The court again considered the threshold question of whether the sentence appeared, on its face, to be grossly disproportionate to the crime committed.[160] Unlike the slap, the court viewed the assault with the iron as a "serious" offense.[161] Because there was no indication of

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152. *Thomas*, 333 Md. at 99-100, 634 A.2d at 8.

153. In Simms v. State, 288 Md. 712, 421 A.2d 957 (1980), the court of appeals held that

> when a defendant is charged with a greater offense and a lesser included offense based on the same conduct . . . and when the defendant is convicted only of the lesser included charge, he may not receive a sentence for that conviction which exceeds the maximum sentence which could have been imposed had he been convicted of the greater charge.

Id. at 724, 421 A.2d at 964. The *Thomas* court refused to extend its holding in *Simms* to the present case and held, instead, that *Simms* did not apply in the instant case because Thomas was never charged with aggravated assault. *Thomas*, 333 Md. at 100, 634 A.2d at 8.

154. *Thomas*, 333 Md. at 100, 634 A.2d at 8-9.

155. *Id.* at 100, 634 A.2d at 9.

156. *Id.* A list of maximum penalties for simple assaults and batteries was appended to the opinion. *Id.* at 106-08, 634 A.2d at 11-13. However, as Judge Chasanow pointed out in his dissenting opinion, the majority failed to analyze sentences imposed in other jurisdictions for common-law assault and battery. *Id.* at 117, 634 A.2d at 18 (Chasanow, J., dissenting).

157. *Id.* at 100, 634 A.2d at 9.

158. *Id.* at 101, 634 A.2d at 9.

159. *Id.* at 102, 634 A.2d at 10.

160. *Id.*

161. *Id.* at 101, 634 A.2d at 9.

gross disproportionality, further analysis was unwarranted.[162]

IV. ALTERNATIVE APPROACHES

In *Thomas v. State*, the Court of Appeals of Maryland improperly determined that Mr. Thomas's twenty-year sentence for common-law assault constituted cruel and unusual punishment. Although the Supreme Court has indicated that proportionality is a requirement of the Eighth Amendment,[163] the Court has not yet addressed the validity of open-ended, common-law sentences. Maryland, on the other hand, has specifically addressed this issue. In *Mitchell v. State*,[164] a case that upheld a fifteen-year sentence for common-law rape, the court of appeals emphasized the importance of showing respect for the discretion of the sentencing judge.[165] The court stated: "When the discretion which the law confers is exercised with a sedate and conscientious judgment under the influence of a love of public justice, and a desire to promote it, the Judge is acting in the legitimate discharge of his duty and his sentence is not subject to reversal."[166] Moreover, Maryland's highest court later commented that "[i]t is not the function of an appellate court to substitute its judgment for that of the trial judge. That this Court might have imposed a greater or lesser sentence matters not a whit."[167] Finally, the Supreme Court has emphasized that "the appellate court decides only whether the sentence under review is within constitutional limits."[168] The *Thomas* court, however, blatantly disregarded these words of wisdom.

Although the Court of Appeals of Maryland, in *Thomas*, conceded that it had upheld the constitutionality of twenty-year sentences for common-law assault in at least five previous Maryland deci-

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162. *Id.* at 102, 634 A.2d at 10.

163. Harmelin v. Michigan, 501 U.S. 957, 961 (1991) (plurality opinion) (holding that there is no proportionality requirement in the Eighth Amendment); *Id.* at 996 (Kennedy, J., concurring) (holding that proportionality is required in non-capital cases); *Id.* at 1009 (White, J., dissenting) (holding that proportionality is required under the Eighth Amendment in all cases); Solem v. Helm, 463 U.S. 277, 284 (1983) (holding that proportionality is required in all cases); Rummel v. Estelle, 445 U.S. 263, 272 (1980) (holding that no proportionality is required in non-capital cases).

164. 82 Md. 527, 34 A. 246 (1896); *see supra* text accompanying notes 78-82.

165. *Mitchell*, 82 Md. at 534, 34 A. at 248.

166. *Id.*

167. Levitt v. Maryland Deposit Ins. Fund, 66 Md. App. 524, 548, 505 A.2d 140, 152 (1985).

168. *Solem*, 463 U.S. at 290 n.16. The Court went on to explain: "Reviewing courts, of course, should grant substantial deference to the broad authority that . . . trial courts possess in sentencing convicted criminals." *Id.* at 290.

sions,[169] it, nonetheless, held that Mr. Thomas's twenty-year sentence for common-law assault was unconstitutional.[170] This obvious discrepancy occurred because the court of appeals apparently "made its own findings of fact instead of taking the testimony and reasonable inferences in the light most favorable to the trial judge's decision."[171] Instead of respecting the decision of the trial judge, who apparently felt that Mr. Thomas deserved the maximum sentence,[172] the court of appeals unexpectedly declared the sentence unconstitutional.[173] The court, however, gave no guidance to the trial judge for resentencing.

Judge Chasanow argued, in dissent, that, in addition to ignoring precedent, the court of appeals erred in two further respects.[174] First, there were important facts which were not mentioned in the majority opinion:

> (1) Mr. Thomas had two prior convictions for assault . . . ; (2) the April 2nd assault was committed immediately after Mr. Thomas was warned by the police; (3) Mr. Thomas subsequently committed another much more violent assault on Ms. Thomas in spite of a protective order; and (4) even after being incarcerated for those offenses, he repeatedly threatened to kill Ms. Thomas.[175]

According to Judge Chasanow, it was reasonable to assume, based on these facts, that the trial judge believed that a twenty-year sentence was necessary in order to protect Mrs. Thomas and the public at large.[176] Instead, the majority classified the April 2 slap as "not legally serious," and, based on its own limited interpretation of the facts, overturned the trial judge's decision.[177]

Second, Judge Chasanow pointed out that Maryland's state legislature set up a procedure for the review of criminal sentences.[178] According to Article 27, sections 645JA through 645JG of the

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169. Thomas v. State, 333 Md. 84, 99 n.3, 634 A.2d 1, 8 n.3 (1993).
170. *Thomas*, 333 Md. at 100-01, 634 A.2d at 9.
171. *Id.* at 114, 634 A.2d at 16 (Chasanow, J., dissenting in part).
172. *Id.*
173. *Id.*
174. *Id.* at 113, 634 A.2d at 16.
175. *Id.* Judge Chasanow viewed the instant case as falling under an extension of the law developed in *Simms*. *See id.*, 333 Md. at 109-11, 634 A.2d at 14-15. Judge Chasanow felt that the *Thomas* holding would have been justified if the court had held that the "punishment for the common law assault [was] . . . limited by the punishment for the greater statutory offense whether the defendant [was] acquitted of the greater offense or never charged with it." *Id.* at 109, 634 A.2d at 14 (Chasanow, J., dissenting in part).
176. *Thomas*, 333 Md. at 109, 634 A.2d at 14.
177. 333 Md. at 114, 634 A.2d at 16. As a result, the court of appeals apparently developed a new category of "not legally serious" common law assaults but failed to indicate what that phrase actually meant. *Id.*
178. *Id.* at 113, 634 A.2d at 16 (Chasanow, J., dissenting in part).

Annotated Code of Maryland,[179] a review of criminal sentences is conducted by a hearing panel of three circuit court judges.[180] Mr. Thomas had already sought a review of his sentences pursuant to this procedure, and the panel unanimously decided that both Mr. Thomas's twenty and thirty-year sentences for common-law assault should remain.[181] Judge Chasanow commented "[t]hat [the] decision by three experienced trial judges provide[d] some indication that the twenty-year sentence [was] not unreasonable and should not be considered cruel and unusual punishment."[182] The court of appeals should have given more deference to the trial judge and the legislature.[183] Furthermore, Judge Chasanow challenged the soundness of the majority's opinion by pointing out that the majority "[did] not analogize to, rely on, or even cite any case from any jurisdiction which reverse[d] any sentence as being cruel and unusual punishment."[184]

The "threshold test," enunciated in *Thomas,* continues to be applied in Maryland.[185] On the same day that *Thomas* was decided, the court of appeals similarly held, in *Epps v. State,*[186] that a twenty-year sentence for common-law assault was cruel and unusual punishment.[187] Judge Chasanow, writing for the dissent in *Epps,* as he had in *Thomas,*[188] aptly warned the majority that it may be sliding down

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179. MD. ANN. CODE art. 27, §§ 645JA - 645JG (1992).
180. *Id.*
181. *Thomas*, 333 Md. at 113, 634 A.2d at 16.
182. *Id.* at 114, 634 A.2d at 16.
183. *Id.* at 113-14, 634 A.2d at 16-17.
184. *Id.* at 117, 634 A.2d at 18.
185. Ayers v. State, 335 Md. 602, 645 A.2d 22, *cert. denied,* 115 S. Ct. 942 (1994) (holding 60-year sentence for hate crime valid under threshold test); Epps v. State, 333 Md. 121, 634 A.2d 20 (1993) (applying threshold test and holding that 20-year sentence for assault violates cruel and unusual clauses); Thomas v. State, 98 Md. App. 580, 634 A.2d 966 (1993) (holding 10-year sentence for common-law assault and battery valid under threshold test).
186. 333 Md. 121, 634 A.2d 20 (1993).
187. *Id.* at 130, 634 A.2d at 24. Leroy Epps was sentenced to 20 years imprisonment for projecting a colorless, odorless liquid onto the person and clothing of a correctional officer. *Id.* at 123, 634 A.2d at 21. The Court of Appeals of Maryland applied the newly-adopted "threshold test" and determined that Epps's sentence was unconstitutional. *Id.* at 126-30, 634 A.2d at 22-24. According to the majority, Epps was a dangerous felon and difficult prisoner. *Id.* at 128, 634 A.2d at 23. This characterization, however, was not enough to warrant a 20-year sentence. *Id.* The court stated that "[t]he aggravating circumstances [were] more than sufficient to support a sentence at the high end of the spectrum of sentences allowed for the particular conduct involved. That spectrum [was] not, however, as wide as the spectrum of sentences permitted for all batteries, including egregious aggravated assaults." *Id.* at 128, 634 A.2d at 23.
188. See *supra* text accompanying notes 174-84 for an analysis of Judge Chasanow's dissent in *Thomas.*

the "proverbial slippery slope."[189] Although the *Thomas* majority emphasized that the Eighth Amendment proportionality analysis should be applied only in "rare cases,"[190] the court overturned two non-capital sentences in one day—something that had never been done in Maryland's history.

V. CONCLUSION

The Court of Appeals of Maryland incorrectly applied the Eighth Amendment "threshold" proportionality analysis to Mr. Thomas's twenty-year sentence for common-law assault. Despite germane precedent upholding twenty-year sentences for common-law assaults,[191] the court needlessly overturned Mr. Thomas's valid and constitutional sentence.[192] Although the Supreme Court has indicated that the Eighth Amendment has at least a narrow proportionality requirement,[193] the Court's line of cases has primarily been applied to situations involving mandatory statutory sentences.[194] Never has the Supreme Court indicated that an open-ended, common-law sentence should be overturned because a reviewing court does not view the crime committed as "legally serious." In fact, the Court has recently emphasized that a "[r]eviewing court . . . should grant substantial deference to the broad authority that . . . trial courts possess in sentencing convicted criminals."[195] Not only has the court of appeals ignored the Supreme Court's reasoning, but Maryland's high court has shattered the sentencing autonomy of trial court judges while simultaneously sending out an invitation for groundless appeals, *sub silentio*.

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189. *Thomas*, 333 Md. at 132, 634 A.2d at 26 (Chasanow, J., dissenting).
190. *Id.* at 97, 634 A.2d at 7. The court stated: "Only rarely should a reviewing court interfere in the sentencing decision at all, especially because the sentencing court is virtually always better informed of the particular circumstances. Thus, we emphasize that challenges based on proportionality will be seriously entertained only where the punishment is truly egregious." *Id.*
191. For a list of Maryland precedents upholding 20-year sentences for common-law assault, see *supra* note 147.
192. *Thomas*, 333 Md. at 100-01, 634 A.2d at 9.
193. *See supra* text accompanying notes 70-77.
194. Harmelin v. Michigan, 501 U.S. 957, 959 (1991) (mandatory sentence imposed under Michigan drug possession statute); Solem v. Helm, 463 U.S. 277, 281 (1983) (sentenced under South Dakota's recidivist statute); Rummel v. Estelle, 445 U.S. 263, 266 (1980) (sentenced under Texas's recidivist statute).
195. *Solem*, 463 U.S. at 290.