Supplementary Material

Chapter 10: The Reagan Era—Criminal Justice/Punishments

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**Harmelin v. Michigan, 501 U.S. 957** (1991)

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*Ronald Harmelin was found guilty by a state court in Michigan of possessing 672 grams of cocaine. Under Michigan law, the mandatory sentence for possessing more than 650 grams of a controlled substance was life in prison without parole. Harmelin appealed that sentence. He claimed that a life sentence without parole for a non-violent offense violated the cruel and unusual punishment clause of the Eighth Amendment as incorporated by the Fourteenth Amendment. The Michigan Court of Appeals rejected that claim and the Michigan Supreme Court refused to hear further appeals. Harmelin appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5–4 vote ruled that Harmelin had been constitutionally punished. Justice Scalia and Chief Justice Rehnquist insisted that the Constitution did not require that punishments be proportionate to the crime. Justice Kennedy, Justice Souter, and Justice O'Connor insisted that life in prison for possessing large amounts of cocaine was a reasonable punishment. How do the different opinions in this case interpret the Eighth Amendment? How do they interpret whether punishments "fit" the crime? Which opinion do you believe best expresses constitutional values? Does* Harmelin *suggest a "drug exception" to the Eighth Amendment or is the decision to impose life in prison without parole a reasonable effort to fight the war against drugs?*

JUSTICE SCALIA announced the judgment of the Court and an opinion with respect in which THE CHIEF JUSTICE joins in part.

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[T]the principle of proportionality was familiar to English law at the time the Declaration of Rights was drafted. The Magna Carta provided that "[a] free man shall not be fined for a small offence, except in proportion to the measure of the offense; and for a great offence he shall be fined in proportion to the magnitude of the offence, saving his freehold. . . ." When imprisonment supplemented fines as a method of punishment, courts apparently applied the proportionality principle while sentencing. Despite this familiarity, the drafters of the Declaration of Rights did not explicitly prohibit "disproportionate" or "excessive" punishments. Instead, they prohibited punishments that were "cruell and unusuall." The *Solem v. Helm* (1983) Court simply assumed, with no analysis, that the one included the other. As a textual matter, of course, it does not: a disproportionate punishment can perhaps always be considered "cruel," but it will not always be (as the text also requires) "unusual."

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[W]e think it most unlikely that the English Cruell and Unusuall Punishments Clause was meant to forbid "disproportionate" punishments. There is even less likelihood that proportionality of punishment was one of the traditional "rights and privileges of Englishmen" apart from the Declaration of Rights, which happened to be included in the Eighth Amendment. Indeed, even those scholars who believe the principle to have been included within the Declaration of Rights do not contend that such a prohibition was reflected in English practice—nor could they. . . .

Unless one accepts the notion of a blind incorporation, however, the ultimate question is not what "cruell and unusuall punishments" meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment. Even if one assumes that the Founders knew the precise meaning of that English antecedent, but see Granucci, *supra,* at 860–865, a direct transplant of the

English meaning to the soil of American constitutionalism would in any case have been impossible. There were no common-law punishments in the federal system, so that the provision must have been meant as a check not upon judges but upon the Legislature.

Wrenched out of its common-law context, and applied to the actions of a legislature, the word "unusual" could hardly mean "contrary to law." But it continued to mean (as it continues to mean today) "such as [does not] occu[r] in ordinary practice. . . . According to its terms, then, by forbidding "cruel *and unusual* punishments," the Clause disables the Legislature from authorizing particular forms or "modes" of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.

. . . [T]o use the phrase "cruel and unusual punishment" to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly. The notion of "proportionality" was not a novelty (though then as now there was little agreement over what it entailed). . . . Proportionality provisions had been included in several State Constitutions. There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them. Both the New Hampshire Constitution, adopted 8 years before ratification of the Eighth Amendment, and the Ohio Constitution, adopted 12 years after, contain, in separate provisions, a prohibition of "cruel and unusual punishments" ("cruel *or* unusual," in New Hampshire's case) *and* a requirement that all penalties ought to be proportioned to the nature of the offence."

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Perhaps the most persuasive evidence of what "cruel and unusual" meant, however, is found in early judicial constructions of the Eighth Amendment and its state counterparts. An early (perhaps the earliest) judicial construction of the federal provision is illustrative. In *Barker v. People,* (N.Y.Sup.Ct.1823), the defendant, upon conviction of challenging another to a duel, had been disenfranchised. Chief Justice Spencer assumed that the Eighth Amendment applied to the States, and in finding that it had not been violated considered the proportionality of the punishment irrelevant. "The disenfranchisement of a citizen," he said, "is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences."

. . .

We think it enough that those who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences that some State Constitutions contained. It is worth noting, however, that there was good reason for that choice—a reason that reinforces the necessity of overruling *Solem v. Helm* (1983). While there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are "cruel and unusual," *proportionality* does not lend itself to such analysis. Neither Congress nor any state legislature has ever set out with the objective of crafting a penalty that is "disproportionate"; yet as some of the examples mentioned above indicate, many enacted dispositions seem to be so—because they were made for other times or other places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of penology. This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are certain never to occur. The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

This becomes clear, we think, from a consideration of the three factors that *Solem* found relevant to the proportionality determination: (1) the inherent gravity of the offense, (2) the sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions. As to the first factor: Of course some offenses, involving violent harm to human beings, will always and everywhere be regarded as serious, but that is only half the equation. The issue is *what else* should be regarded to be *as serious* as these offenses, or even to be *more serious* than some of them. On that

point, judging by the statutes that Americans have enacted, there is enormous variation—even within a given age, not to mention across the many generations ruled by the Bill of Rights. . . .

. . . The second factor suggested in *Solem* fails for the same reason. One cannot compare the sentences imposed by the jurisdiction for "similarly grave" offenses if there is no objective standard of gravity. Judges will be comparing what *they* consider comparable. Or, to put the same point differently: When it happens that two offenses judicially determined to be "similarly grave" receive significantly *dis*similar penalties, what follows is not that the harsher penalty is unconstitutional, but merely that the legislature does not share the judges' view that the offenses are similarly grave. . . .

As for the third factor mentioned by *Solem*—the character of the sentences imposed by other States for the same crime—it must be acknowledged that that can be applied with clarity and ease. The only difficulty is that it has no conceivable relevance to the Eighth Amendment. That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows *a fortiori* from the undoubted fact that a State may criminalize an act that other States do not criminalize *at all*. . . .

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Our 20th-century jurisprudence has not remained entirely in accord with the proposition that there is no proportionality requirement in the Eighth Amendment, but neither has it departed to the extent that *Solem* suggests. In *Weems v. United States* (1910), a government disbursing officer convicted of making false entries of small sums in his account book was sentenced by Philippine courts to 15 years of *cadena temporal*. That punishment, based upon the Spanish Penal Code, called for incarceration at "'hard and painful labor'" with chains fastened to the wrists and ankles at all times. . . . Justice McKenna, writing for himself and three others, held that the imposition of *cadena temporal* was "Cruel and Unusual Punishment." That holding, and some of the reasoning upon which it was based, was not at all out of accord with the traditional understanding of the provision we have described above. The punishment was both (1) severe *and* (2) unknown to Anglo-American tradition.

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Since it contains language that will support either theory, our later opinions have used *Weems,* as the occasion required, to represent either the principle that "the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed," *Coker v. Georgia* (1977), or the principle that only a "unique . . . punishmen[t]," a form of imprisonment different from the "more traditional forms . . . imposed under the Anglo-Saxon system," can violate the Eighth Amendment, *Rummel.* If the proof of the pudding is in the eating, however, it is hard to view *Weems* as announcing a constitutional requirement of proportionality, given that it did not produce a decision implementing such a requirement, either here or in the lower federal courts, for six decades.

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The first holding of this Court unqualifiedly applying a requirement of proportionality to criminal penalties was issued 185 years after the Eighth Amendment was adopted. In *Coker v. Georgia* (1977), the Court held that, because of the disproportionality, it was a violation of the Cruel and Unusual Punishments Clause to impose capital punishment for rape of an adult woman. . . . Proportionality review is one of several respects in which we have held that "death is different," and have imposed protections that the Constitution nowhere else provides. We would leave it there, but will not extend it further.

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. . . Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century. There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is "mandatory."

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Our cases creating and clarifying the "individualized capital sentencing doctrine" have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties. . . .

It is true that petitioner's sentence is unique in that it is the second most severe known to the law; but life imprisonment *with* possibility of parole is also unique in that it is the third most severe. . . . We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, concurring in part and concurring in the judgment.

. . . Regardless of whether Justice SCALIA or Justice WHITE has the best of the historical argument, *stare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years. Although our proportionality decisions have not been clear or consistent in all respects, they can be reconciled, and they require us to uphold petitioner's sentence.

Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle. We first interpreted the Eighth Amendment to prohibit "'greatly disproportioned'" sentences in *Weems v. United States* (1910). Since *Weems,* we have applied the principle in different Eighth Amendment contexts. Its most extensive application has been in death penalty cases. . . .

The Eighth Amendment proportionality principle also applies to noncapital sentences. In *Rummel v. Estelle* (1980), we acknowledged the existence of the proportionality rule for both capital and noncapital cases, but we refused to strike down a sentence of life imprisonment, with possibility of parole, for recidivism based on three underlying felonies. . . . Our most recent decision discussing the subject is *Solem v. Helm* (1983). There we held that a sentence of life imprisonment without possibility of parole violated the Eighth Amendment because it was "grossly disproportionate" to the crime of recidivism based on seven underlying nonviolent felonies.

. . . [C]lose analysis of our decisions yields some common principles that give content to the uses and limits of proportionality review.

The first of these principles is that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts." . . . The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature. Thus, "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."

The second principle is that the Eighth Amendment does not mandate adoption of any one penological theory. . . . The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.

Third, marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. And even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes. Thus, the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate.

The fourth principle at work in our cases is that proportionality review by federal courts should be informed by "'objective factors to the maximum possible extent.'" . . .

All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality

between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

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Petitioner's life sentence without parole is the second most severe penalty permitted by law. It is the same sentence received by the petitioner in *Solem.* Petitioner's crime, however, was far more grave than the crime at issue in *Solem.*

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Petitioner was convicted of possession of more than 650 grams (over 1.5 pounds) of cocaine. This amount of pure cocaine has a potential yield of between 32,500 and 65,000 doses. From any standpoint, this crime falls in a different category from the relatively minor, nonviolent crime at issue in *Solem.* Possession, use, and distribution of illegal drugs represent "one of the greatest problems affecting the health and welfare of our population." *Treasury Employees v. Von Raab,* (1989). Petitioner's suggestion that his crime was nonviolent and victimless is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.

Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. . . .

. . . [T]the pernicious effects of the drug epidemic in this country do not establish that Michigan's penalty scheme is correct or the most just in any abstract sense. But they do demonstrate that the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole. . . .

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The proper role for comparative analysis of sentences is to validate an initial judgment that a sentence is grossly disproportionate to a crime. This conclusion neither "eviscerate[s]" *Solem,* nor "abandon[s]" its second and third factors. . . . In light of the gravity of petitioner's offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed.

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A penalty as severe and unforgiving as the one imposed here would make this a most difficult and troubling case for any judicial officer. Reasonable minds may differ about the efficacy of Michigan's sentencing scheme, and it is far from certain that Michigan's bold experiment will succeed. The accounts of pickpockets at Tyburn hangings are a reminder of the limits of the law's deterrent force, but we cannot say the law before us has no chance of success and is on that account so disproportionate as to be cruel and unusual punishment. The dangers flowing from drug offenses and the circumstances of the crime committed here demonstrate that the Michigan penalty scheme does not surpass constitutional bounds. Michigan may use its criminal law to address the issue of drug possession in wholesale amounts in the manner that it has in this sentencing scheme. For the foregoing reasons, I conclude that petitioner's sentence of life imprisonment without parole for his crime of possession of more than 650 grams of cocaine does not violate the Eighth Amendment.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

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The language of the Amendment does not refer to proportionality in so many words, but it does forbid "excessive" fines, a restraint that suggests that a determination of excessiveness should be based at least in part on whether the fine imposed is disproportionate to the crime committed. Nor would it be unreasonable to conclude that it would be both cruel and unusual to punish overtime parking by life imprisonment or, more generally, to impose any punishment that is grossly disproportionate to the offense for which the defendant has been convicted. . . .

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Justice SCALIA argues that all of the available evidence of the day indicated that those who drafted and approved the Amendment "chose . . . not to include within it the guarantee against disproportionate sentences that some State Constitutions contained." Even if one were to accept the argument that the First Congress did not have in mind the proportionality issue, the evidence would hardly be strong enough to come close to proving an affirmative decision against the proportionality component. Had there been an intention to exclude it from the reach of the words that otherwise could reasonably be construed to include it, perhaps as plain-speaking Americans, the Members of the First Congress would have said so. And who can say with confidence what the members of the state ratifying conventions had in mind when they voted in favor of the Amendment? Surely, subsequent state-court decisions do not answer that question.

In any event, the Amendment as ratified contained the words "cruel and unusual," and there can be no doubt that prior decisions of this Court have construed these words to include a proportionality principle. In 1910, in the course of holding unconstitutional a sentence imposed by the Philippine courts, the Court stated: "Such penalties for such offenses amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense. *Weems v. United States* (1910).

That the punishment imposed in *Weems* was also unknown to Anglo-American tradition—"It has no fellow in American legislation," was just another reason to set aside the sentence and did not in the least detract from the holding with respect to proportionality. . . .

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. . . Justice SCALIA . . . appears to accept that the Amendment does indeed insist on proportional punishments in a particular class of cases, those that involve sentences of death. . . . This position . . . ignores the generality of the Court's several pronouncements about the Eighth Amendment's proportionality component. And it fails to explain why the words "cruel and unusual" include a proportionality requirement in some cases but not in others. Surely, it is no explanation to say only that such a requirement in death penalty cases is part of our capital punishment jurisprudence. That is true, but the decisions requiring proportionality do so because of the Eighth Amendment's prohibition against cruel and unusual punishments. The Court's capital punishment cases requiring proportionality reject Justice SCALIA's notion that the Amendment bars only cruel and unusual modes or methods of punishment. Under that view, capital punishment—a mode of punishment—would either be completely barred or left to the discretion of the legislature. Yet neither is true. The death penalty is appropriate in some cases and not in others. The same should be true of punishment by imprisonment.

What is more, the Court's jurisprudence concerning the scope of the prohibition against cruel and unusual punishments has long understood the limitations of a purely historical analysis. Thus, "this Court has 'not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'"

The Court therefore has recognized that a punishment may violate the Eighth Amendment if it is contrary to the "evolving standards of decency that mark the progress of a maturing society." In evaluating a punishment under this test, "we have looked not to our own conceptions of decency, but to those of modern American society as a whole" in determining what standards have "evolved," and thus have focused not on "the subjective views of individual Justices," but on "objective factors to the maximum possible extent."

. . . Courts appear to have had little difficulty applying the analysis to a given sentence, and application of the test by numerous state and federal appellate courts has resulted in a mere handful of sentences being declared unconstitutional. Thus, it is clear that reviewing courts have not baldly substituted their own subjective moral values for those of the legislature. Instead, courts have demonstrated that they are "capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy."

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While Justice SCALIA seeks to deliver a swift death sentence to *Solem,* Justice KENNEDY prefers to eviscerate it, leaving only an empty shell. The analysis Justice KENNEDY proffers is contradicted by the language of *Solem v. Helm* (1983) itself and by our other cases interpreting the Eighth Amendment.

In *Solem,* the Court identified three major factors to consider in assessing whether a punishment violates the Eighth Amendment: "the gravity of the offense and the harshness of the penalty," "the sentences imposed on other criminals in the same jurisdiction," and "the sentences imposed for commission of the same crime in other jurisdictions." Justice KENNEDY, however, maintains that "one factor may be sufficient to determine the constitutionality of a particular sentence," and that there is no need 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." . . .

[T]he use of an intrajurisdictional and interjurisdictional comparison of punishments and crimes has long been an integral part of our Eighth Amendment jurisprudence. Numerous cases have recognized that a proper proportionality analysis must include the consideration of such objective factors as "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made."

Justice KENNEDY's abandonment of the second and third factors set forth in *Solem* makes any attempt at an objective proportionality analysis futile. The first prong of *Solem* requires a court to consider two discrete factors—the gravity of the offense and the severity of the punishment. A court is not expected to consider the interaction of these two elements and determine whether "the sentence imposed was grossly excessive punishment for the crime committed." Were a court to attempt such an assessment, it would have no basis for its determination that a sentence was—or was not—disproportionate, other than the "subjective views of individual [judges]," which is the very sort of analysis our Eighth Amendment jurisprudence has shunned. . . . [O]nly when a comparison is made with penalties for other crimes and in other jurisdictions can a court begin to make an objective assessment about a given sentence's constitutional proportionality, giving due deference to "public attitudes concerning a particular sentence."

. . .

The first *Solem* factor requires a reviewing court to assess the gravity of the offense and the harshness of the penalty. The mandatory sentence of life imprisonment without possibility of parole "is the most severe punishment that the State could have imposed on any criminal for any crime," for Michigan has no death penalty.

. . . Drugs are without doubt a serious societal problem. To justify such a harsh mandatory penalty as that imposed here, however, the offense should be one which will *always* warrant that punishment. Mere possession of drugs—even in such a large quantity—is not so serious an offense that it will always warrant, much less mandate, life imprisonment without possibility of parole. Unlike crimes directed against the persons and property of others, possession of drugs affects the criminal who uses the drugs most directly. The ripple effect on society caused by possession of drugs, through related crimes, lost productivity, health problems, and the like, is often not the direct consequence of possession, but of the resulting addiction. . . .

To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt. Justice KENNEDY attempts to justify the harsh mandatory sentence imposed on petitioner by focusing on the subsidiary effects of drug use, and thereby ignores this aspect of our Eighth Amendment jurisprudence. While the collateral consequences of drugs such as cocaine are indisputably severe, they are not unlike those which flow from the misuse of other, legal substances. . . . Indeed, it is inconceivable that a State could rationally choose to penalize one who possesses large quantities of alcohol in a manner similar to that in which Michigan has chosen to punish petitioner for cocaine possession, because of the tangential effects which might ultimately be traced to the alcohol at issue. . . .

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The second prong of the *Solem* analysis is an examination of "the sentences imposed on other criminals in the same jurisdiction." As noted above, there is no death penalty in Michigan; consequently, life without parole, the punishment mandated here, is the harshest penalty available. It is reserved for

three crimes: first-degree murder, manufacture, distribution, or possession with intent to manufacture or distribute 650 grams or more of narcotics; and possession of 650 grams or more of narcotics. Crimes directed against the persons and property of others—such as second-degree murder, rape, and armed robbery, do not carry such a harsh mandatory sentence, although they do provide for the possibility of a life sentence in the exercise of judicial discretion. It is clear that petitioner "has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes."

The third factor set forth in *Solem* examines "the sentences imposed for commission of the same crime in other jurisdictions." No other jurisdiction imposes a punishment nearly as severe as Michigan's for possession of the amount of drugs at issue here. . . . Even under the Federal Sentencing Guidelines, with all relevant enhancements, petitioner's sentence would barely exceed 10 years. . . .

Application of *Solem*'s proportionality analysis leaves no doubt that the Michigan statute at issue fails constitutional muster. The statutorily mandated penalty of life without possibility of parole for possession of narcotics is unconstitutionally disproportionate in that it violates the Eighth Amendment's prohibition against cruel and unusual punishment. Consequently, I would reverse the decision of the Michigan Court of Appeals.

JUSTICE MARSHALL, dissenting.

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JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

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. . . [A] mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished "criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator." Serious as this defendant's crime was, I believe it is irrational to conclude that every similar offender is wholly incorrigible.

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