It appears the conservative wing wins big on this one!
Justice Scalia does his homework...again!

HARMELIN v. MICHIGAN

SUPREME COURT OF THE UNITED STATES
501 U.S. 957
June 27, 1991

OPINION: Justice Scalia...Petitioner was convicted of **possessing 672 grams of cocaine** and sentenced to a **mandatory term of life in prison without possibility of parole**...The Michigan Court of Appeals...affirmed..., rejecting his argument that the sentence was "cruel and unusual" within the meaning of the Eighth Amendment. The Michigan Supreme Court denied leave to appeal and we granted certiorari.

Petitioner claims that his sentence is unconstitutionally "cruel and unusual" for two reasons: first, because it is "significantly disproportionate" to the crime he committed; second, because the sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the criminal...

…In *Rummel v. Estelle* (1980), we held that it did not constitute "cruel and unusual punishment" to impose a life sentence under a recidivist statute upon a defendant who had been convicted, successively, of fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged check in the amount of $28.36, and obtaining $120.75 by false pretenses. We said that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly

classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." We specifically rejected the proposition asserted by the dissent, that unconstitutional disproportionality could be established by weighing three factors: (1) gravity of the offense compared to severity of the penalty, (2) penalties imposed within the same jurisdiction for similar crimes, and (3) penalties imposed in other jurisdictions for the same offense. A footnote in the opinion, however, said: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent,…if a legislature made overtime parking a felony punishable by life imprisonment."

Two years later, in *Hutto v. Davis* (1982), we similarly rejected an Eighth Amendment challenge to a prison term of 40 years and fine of $20,000 for possession and distribution of approximately nine ounces of marijuana. We thought that result so clear in light of *Rummel* that our per curiam opinion said the Fourth Circuit, in sustaining the constitutional challenge, "could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system," which could not be tolerated "unless we wish anarchy to prevail." And we again explicitly rejected application of the three factors discussed in the *Rummel* dissent. However, whereas in *Rummel* we had said that successful proportionality challenges outside the context of capital punishment "have been exceedingly rare" (discussing as the solitary example *Weems v. United States* (1910)[1], which we explained as involving punishment of a "unique nature"), in *Davis* we misdescribed *Rummel* as having said that "successful challenges…should be exceedingly rare" and at that point inserted a reference to and description of the *Rummel* "overtime parking" footnote. The content of that footnote was imperceptibly (but, in the event, ominously) expanded: *Rummel's* "not saying that a proportionality principle would not come into play" in the fanciful parking example became "noting…that there could be situations in which the proportionality principle would come into play, such as" the fanciful parking example. *Davis.* This combination of expanded text plus expanded footnote permitted the inference that gross disproportionality was an example of the "exceedingly rare" situations in which Eighth Amendment challenges "should be" successful. Indeed, one might say that it positively invited that inference, were that not incompatible with the sharp per curiam reversal of the Fourth Circuit's finding that 40 years for possession and distribution of nine ounces of marijuana was grossly disproportionate and therefore unconstitutional.

A year and a half after *Davis* we uttered what has been our last word on this subject to date. *Solem v. Helm* (1983)[2], set aside under the Eighth Amendment, because it was disproportionate, a sentence of life imprisonment without possibility of parole, imposed under a South Dakota recividist statute for successive offenses that included three convictions of third-degree burglary, one of obtaining money by false pretenses, one of grand larceny, one of third-offense driving while intoxicated, and one of writing a "no account" check with intent to defraud. In the *Solem* account, *Weems* no longer involved punishment of a "unique nature," *Rummel*, but was the "leading case" exemplifying the

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[1]Case 8A-CUP-3 on this website.

[2]Case 8A-CUP-16 on this website.

"general principle of proportionality" which was "deeply rooted and frequently repeated in common-law jurisprudence," had been embodied in the English Bill of Rights "in language that was later adopted in the Eighth Amendment" and had been "recognized explicitly in this Court for almost a century." The most recent of those "recognitions" were the "overtime parking" footnotes in *Rummel* and *Davis*. As for the statement in *Rummel* that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies...the length of the sentence actually imposed is purely a matter of legislative prerogative," *Rummel*: according to *Solem*, the really important words in that passage were "one could argue." "The Court in *Rummel*...merely recognized that the argument was possible. To the extent that the State…makes the argument here, we find it meritless." (Of course *Rummel* had not said merely "one could argue," but "one could argue without fear of contradiction by any decision of this Court.") Having decreed that a general principle of disproportionality exists, the Court used as the criterion for its application the three-factor test that had been explicitly rejected in both *Rummel* and *Davis*. Those cases, the Court said, merely "indicated that no one factor will be dispositive in a given case" — though *Davis* had expressly, approvingly, and quite correctly, described *Rummel* as having "disapproved each of the objective factors.

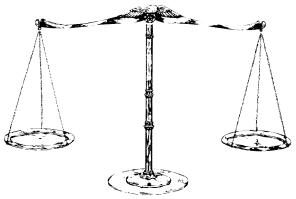
It should be apparent from the above discussion that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law. We have long recognized, of course, that the doctrine of stare decisis is less rigid in its application to constitutional precedents (*Payne v. Tennessee*) and we think that to be especially true of a constitutional precedent that is both recent and in apparent tension with other decisions. Accordingly, we have addressed anew, and in greater detail, the question whether the Eighth Amendment contains a proportionality guarantee — with particular attention to the background of the Eighth Amendment (which *Solem* discussed in only two pages) and to the understanding of the Eighth Amendment before the end of the 19th century (which *Solem* discussed not at all). **We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.**

Solem based its conclusion principally upon the proposition that a right to be free from disproportionate punishments was embodied within the "cruell and unusuall Punishments" provision of the English Declaration of Rights of 1689, and was incorporated, with that language, in the Eighth Amendment. There is no doubt that the [English] Declaration of Rights [of 1689] is the antecedent of our constitutional text...[T]he 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..." 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* 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." The error of *Solem's* assumption is confirmed by the historical context and contemporaneous understanding of the English guarantee.

Most historians agree that the "cruell and unusuall Punishments" provision of the English Declaration of Rights was prompted by the abuses attributed to the infamous Lord Chief Justice Jeffreys of the King's Bench during the Stuart reign of James II. **They do not agree, however, on which abuses.** Jeffreys is best known for presiding over the "Bloody Assizes" following the Duke of Monmouth's abortive rebellion in 1685...[and some] have attributed the Declaration of Rights provision to popular outrage against those proceedings.

But the vicious punishments for treason decreed in the Bloody Assizes (drawing and quartering, burning of women felons, beheading, disembowling, etc.) were common in that period -- indeed, they were **specifically authorized by law** and remained so for many years afterwards. Thus, recently historians have argued, and the best historical evidence suggests, that it was not Jeffreys' **management** of the Bloody Assizes that led to the Declaration of Rights provision, but rather the **arbitrary sentencing power** he had exercised in administering justice..., particularly when punishing a notorious perjurer. **Jeffreys was widely accused of "inventing" special penalties for the King's enemies, penalties that were not authorized by common-law precedent or statute**...

The only recorded contemporaneous interpretation of the "cruell and unusuall Punishments" clause confirms the focus upon...the illegality, rather than the disproportionality, of [Jeffreys'] sentences. In 1685 Titus Oates, a Protestant cleric whose false accusations had caused the execution of 15 prominent Catholics for allegedly organizing a "Popish Plot" to overthrow King Charles II in 1679, was tried and convicted before the King's Bench for perjury. Oates' crime, "bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed," had, at one time, been treated as a species of murder, and punished with death. At sentencing, Jeffreys complained that death was no longer available as a penalty and lamented that "a proportionable punishment of that crime can scarce by our law, as it now stands, be inflicted upon him." The law would not stand in the way, however. The judges met, and, according to Jeffreys, were in unanimous agreement that "crimes of this nature are left to be punished according to the discretion of this court, so far as that the judgment extend not to life or member."...The court then decreed that he should pay a fine of "1000 marks upon each Indictment," that he should be "stript of his Canonical Habits," that he should stand in the pillory annually at certain specified times and places, that on May 20 he should be whipped by "the common hangman" "from Aldgate to Newgate," that he should be similarly whipped on May 22 "from Newgate to Tyburn," and that he should be imprisoned for life.



The judges, as they believed, sentenced Oates to be scourged to death. Oates would not die, however. Four years later, and several months after the Declaration of Rights, he petitioned the House of Lords to set aside his sentence as illegal. "Not a single peer ventured to affirm that the judgment was legal: but much was said about the odious character of the appellant," and the Lords affirmed the judgment. A minority of the Lords dissented, however, and **their statement sheds light on the meaning of the "cruell and unusuall Punishments" clause:**

"1st, The King's Bench...made it a Part of the Judgment That Titus Oates... should ...be divested of his canonical and priestly Habit...which is a Matter **wholly out of their Power**, belonging to the Ecclesiastical Courts only.

"2dly, Said Judgments are barbarous, inhuman, and unchristian; and **there is no Precedent** to warrant the Punishments of whipping and committing to Prison for Life, for the Crime of Perjury; which yet were but Part of the Punishments inflicted upon him...

"4thly, This will be an Encouragement and Allowance for giving the like cruel, barbarous and **illegal** Judgments hereafter, unless this Judgment be reversed.

"5thly,...That the said Judgments were **contrary to Law** and ancient Practice, **and therefore erroneous**, and ought to be reversed.

"6thly, Because it is contrary to the Declaration...**that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual Punishments afflicted**."

Oates' cause then aroused support in the House of Commons, whose...**report...confirms that the "cruell and unusuall Punishments" clause was directed at...illegality, rather than disproportionality of punishment in general.**

"The Commons had hoped, That, after the Declaration [of Rights] presented to their Majesties upon their accepting the Crown (wherein their Lordships had joined with the Commons in complaining of the **cruel and illegal Punishments of the last Reign**; and in asserting it to be the ancient Right of the People of England that they should not be subjected to **cruel and unusual Punishments**; and that no Judgments to the Prejudice of the People in that kind ought in any wise to be drawn into Consequence, or Example); and after this Declaration had been so lately renewed in that Part of the Bill of Rights which the Lords have agreed to; they should not have seen Judgments of this Nature affirmed, and been put under a Necessity of sending up a Bill for reversing them; since those Declarations will not only be useless, but of pernicious Consequence to the People, if, so soon after, such Judgments as these stand affirmed, and be not taken to be **cruel and illegal within the Meaning of those Declarations.**

"That the Commons...[insist that these Judgments] are **erroneous, cruel, illegal**, and of ill Example to future Ages...

"That it was of ill Example, and illegal, That a Judgment of perpetual Imprisonment should be given in a Case, where there is **no express Law to warrant it**...

"That as soon as they had set up this Pretence to a **discretionary** Power, it was observable how they put it in Practice, not only in this, but in other Cases, and for

other Offences, by inflicting such cruel and ignominious Punishments, as will be agreed to be far worse than Death itself to any Man who has a sense of Honour or Shame..."

In all these contemporaneous discussions, as in the prologue of the Declaration, a punishment is not considered objectionable because it is disproportionate, but because it is "out of [the Judges'] Power," "contrary to Law and ancient practice," without "Precedents" or "express Law to warrant," "unusual," "illegal," or imposed by "Pretence to a discretionary Power."...Moreover, **the phrase "cruell and unusuall" is treated as interchangeable with "cruel and illegal."** In other words, the "illegall and cruell Punishments" of the Declaration's prologue are the same thing as the "cruell and unusuall Punishments" of its body...A requirement that punishment not be "unusuall " -- that is, not contrary to "usage" or "precedent" -- was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition...

In sum, we think it <u>most unlikely</u> that the English Cruell and Unusuall Punishments Clause was meant to forbid "disproportionate" punishments...

[T]he 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,...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 <u>the provision must have been meant as a check not upon judges but upon the Legislature</u>.

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 occur in ordinary practice," Webster's American Dictionary (1828), "such as is not in common use," Webster's Second International Dictionary 2807 (1954). 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, <u>cruel methods of punishment that are not regularly or customarily employed</u>.

The language bears the construction, however..., that "cruelty and unusualness" are to be determined not solely with reference to the punishment at issue ("Is life imprisonment a cruel and unusual punishment?") but with reference to the crime for which it is imposed as well ("Is life imprisonment cruel and unusual punishment for possession of unlawful drugs?"). The latter interpretation would make the provision a form of proportionality guarantee. The arguments against it, however, seem to us conclusive.

First of all, to 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). In 1778, for example, the Virginia Legislature narrowly rejected a comprehensive "Bill for Proportioning Punishments"

introduced by Thomas Jefferson. Proportionality provisions had been included in several State Constitutions. See [Pennsylvania and South Carolina] (1776) (punishments should be "in general more proportionate to the crimes");...[New Hampshire] (1784) ("All penalties ought to be proportioned to the nature of the offence"). 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"... *and* a requirement that "all penalties ought to be proportioned to the nature of the offence."**

...The Eighth Amendment received little attention during the proposal and adoption of the Federal Bill of Rights. However, what evidence exists from debates at the state ratifying conventions that prompted the Bill of Rights as well as the floor debates in the First Congress which proposed it "confirms the view that the cruel and unusual punishments clause was directed at prohibiting certain ***methods*** of punishment."

In the January 1788 Massachusetts Convention, for example, the objection was raised that Congress was "nowhere restrained from inventing the most *cruel and unheard-of* punishments, and annexing them to crimes; and there is no constitutional check on it, but that *racks* and *gibbets* may be amongst the most mild instruments of its discipline." Debates on the Federal Constitution.

In the Virginia Convention, Patrick Henry decried the absence of a bill of rights, stating:

> "What says our Virginia Bill of Rights? -- 'that excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'...
>
> "In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? -- That they would not admit of tortures, or cruel and barbarous punishment."

The actions of the First Congress, which are of course persuasive evidence of what the Constitution means (*Marsh v. Chambers*), belie any doctrine of proportionality. Shortly after this Congress proposed the Bill of Rights, it promulgated the Nation's first Penal Code. As the then-extant New Hampshire Constitution's proportionality provision didactically observed, "no wise legislature" -- that is, no legislature attuned to the principle of proportionality -- "will afix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason." Jefferson's Bill For Proportioning Crimes and Punishments punished murder and treason by death; counterfeiting of public securities by forfeiture of property plus six years at hard labor, and "running away with any sea-vessel or goods laden on board thereof" by treble damages to the victim and five years at hard labor. Shortly after proposing the Bill of Rights, the First Congress ignored these teachings. It punished forgery of United States securities, "running away with a ship or vessel, or any goods or merchandise to the value of fifty dollars," treason, and murder on the high seas with

the same penalty: death by hanging. **The law books of the time are devoid of indication that anyone considered these newly enacted penalties unconstitutional by virtue of their disproportionality**.

The early commentary on the Clause contains no reference to disproportionate or excessive sentences, and again indicates that it was designed to outlaw particular *modes* of punishment... Justice Story had this to say:

> "The provision would seem wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct. It was, however, adopted as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts." Story (1833).

Many other Americans apparently agreed that the clause only outlawed certain modes of punishment: during 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. (Ohio; Indiana; Maine; Rhode Island; West Virginia; Georgia.)

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 fo other offences."

Throughout the 19th century, state courts interpreting state constitutional provisions with identical or more expansive wording (*i.e.*, "cruel *or* unusual") concluded that these provisions did not proscribe disproportionality but only certain modes of punishment. For example, in *Aldridge v. Commonwealth (1824),* the General Court of Virginia had occasion to interpret the cruel and unusual punishments clause that was the direct ancestor of our federal provision. In rejecting the defendant's claim that a sentence of so many as 39 stripes violated the Virginia Constitution, the court said:

> "...**That provision was never designed to control the Legislative right to determine...upon the *adequacy* of punishment, but is merely applicable to the modes of punishment**..."

...In the 19th century, judicial agreement that a "cruel and unusual" (or "cruel or unusual") provision did not constitute a proportionality requirement appears to have been universal. One case, late in the century, suggested in dictum, not a full-fledged proportionality principle, but at least the power of

the courts to intervene "in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people." *State v. Becker* (1892). That case, however, involved a constitutional provision proscribing all punishments that were merely "cruel." A few decisions early in the present century cited it (again in dictum) for the proposition that a sentence "so out of proportion to the offense...as to 'shock pubic sentiment and violate the judgment of reasonable people' would be cruel and unusual."

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...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.**

In other words, to search for and find "proportionality" is what legislators do.

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 State of Massachusetts punishes sodomy more severely than assault and battery...(1988) ("not more than twenty years" in prison for sodomy)...("not more than two and one half years" in prison for assault and battery); whereas in several States, sodomy is not unlawful *at all*. In Louisiana, one who assaults another with a dangerous weapon faces the same maximum prison term as one who removes a shopping basket "from the parking area or grounds of any store... without authorization." A battery that results in "protracted and obvious disfigurement" merits imprisonment "for not more than five years," one half the maximum penalty for theft of livestock or an oilfield seismograph. We may think that the First Congress punished with clear dispropor-

tionality when it provided up to seven years in prison and up to $1,000 in fine for "cutting off the ear or ears,...cutting out or disabling the tongue,...putting out an eye,...cutting off...any limb or member of any person with intention...to maim or disfigure," but provided the death penalty for "running away with a ship or vessel, or any goods or merchandise to the value of fifty dollars." But then perhaps the citizens of 1791 would think that today's Congress punishes with clear disproportionality when it sanctions "assault by...wounding" with up to six months in prison, unauthorized reproduction of the "Smokey Bear" character or name with the same penalty, offering to barter a migratory bird with up to two years in prison, and purloining a "key suited to any lock adopted by the Post Office Department" with a prison term of up to 10 years. Perhaps both we and they would be right, but the point is that there are no textual or historical standards for saying so.

The difficulty of assessing gravity is demonstrated in the very context of the present case: Petitioner acknowledges that a mandatory life sentence might not be "grossly excessive" for possession of cocaine **with intent to distribute**. But surely whether it is a "grave" offense merely to possess a significant quantity of drugs -- thereby facilitating distribution, subjecting the holder to the temptation of distribution, and raising the possibility of theft by others who might distribute -- **depends entirely upon how odious and socially threatening one believes drug use to be**. Would it be "grossly excessive" to provide life imprisonment for "mere possession" of a certain quantity of heavy weaponry? If not, then the only issue is whether the possible dissemination of drugs can be as "grave" as the possible dissemination of heavy weapons. **Who are we to say no? The members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.**

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. Moreover, even if "similarly grave" crimes could be identified, the penalties for them would not necessarily be comparable, since there are many other justifications for a difference. For example, since deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties. Grave crimes of the sort that will not be deterred by penalty may warrant substantially lower penalties, as may grave crimes of the sort that are normally committed once in a lifetime by otherwise law-abiding citizens who will not profit from rehabilitation. Whether these differences will occur, and to what extent, depends, of course, upon the weight the society accords to deterrence and rehabilitation, rather than retribution, as the objective of criminal punishment (**which is an eminently legislative judgment**). In fact, it becomes difficult even to speak intelligently of "proportionality," once deterrence and rehabilitation are given significant weight. **Proportionality is inherently a retributive concept**, and perfect proportionality is the **talionic** law. Bill For Propor-tioning Punishments, 1 Writings of Thomas Jefferson ("Whoever...shall maim another, or shall disfigure him...shall be maimed or disfigured in like sort").

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...from the undoubted fact that **a State may criminalize an act that other States do not criminalize *at all*.** Indeed, **a State may criminalize an act that other States choose to *reward*** -- punishing, for example, the killing of endangered wild animals for which other States are offering a bounty. What greater disproportion could there be than that? "**Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." Diversity not only in policy, but in the means of implementing policy, is the very *raison d'etre* of our federal system. Though the different needs and concerns of other States may induce them to treat simple possession of 672 grams of cocaine as a relatively minor offense (Wyoming and Virginia — 6 months), nothing in the Constitution requires Michigan to follow suit. The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.**

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. [The sentence in] *Weems v. United States*...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. As to the former, Justice McKenna wrote:

> "No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain."

As to the latter:

> "It has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character."

Other portions of the opinion, however, suggest that mere disproportionality, by itself, might make a punishment cruel and unusual:

> "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 offense."

> "The inhibition of the Cruel and Unusual Punishments Clause was directed, not only against punishments which inflict torture, 'but against all punishments which by their excessive length or severity **are greatly disproportioned** to the offenses charged.'"

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)*[3], or the principle that only a "unique...punishment," a form of imprisonment different from the "more traditional forms...imposed under the Anglo-Saxon system," can violate the Eighth Amendment. 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. In *Graham v. West Virginia (1912),* for instance, we evaluated (and rejected) a claim that life imprisonment for a third offense of horse theft was "cruel and unusual." We made no mention of *Weems*, although the petitioner had relied upon that case...[Several opinions in the federal courts of appeal] continued to echo (in dictum) variants of the dictum in *State v. Becker* to the effect that courts will not interfere with punishment unless it is "manifestly cruel and unusual," and cited *Weems* for the proposition that sentences imposed within the limits of a statute "ordinarily will not be regarded as cruel and unusual." "Not until more than half a century after *Weems* did the Circuit Courts begin performing proportionality analysis. Even then, some continued to state that "a sentence within the statutory limits is not cruel and unusual punishment."

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*, 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. Four years later, in *Enmund v. Florida*[4], we held that it violates the Eighth Amendment, **because of disproportionality**, to impose the death penalty upon a participant in a felony that results in murder, without any inquiry into the participant's intent to kill. *Rummel (1980)* treated this line of authority as an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law. We think that is an accurate explanation, and we reassert it. 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.

Petitioner...[also] argues that it is "cruel and unusual" to impose a mandatory sentence of such severity, without any consideration of so-called **mitigating factors** such as, in his case, the fact that he had **no prior felony convictions**. He apparently contends that the Eighth Amendment requires Michigan to create a sentencing scheme whereby life in prison without possibility of parole is simply

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[3]Case 8A-CUP-13 on this website.

[4]Case 8A-CUP-15 on this website.

the **most severe of a range** of available penalties that the sentencer may impose after hearing evidence in mitigation and aggravation...

This claim has no support in the text and history of the Eighth Amendment. 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."**

Petitioner's "required mitigation" claim, like his proportionality claim, **does** find support in our **death penalty jurisprudence**. We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is "appropriate" whether or not the sentence is "grossly disproportionate." *Woodson*. Petitioner asks us to extend this so-called "individualized capital sentencing doctrine" to an "individualized mandatory life in prison without parole sentencing doctrine." We refuse to do so...

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. The judgment of the Michigan Court of Appeals is *Affirmed*.

CONCURRENCE (IN PART): Justice Kennedy/O'Connor/Souter...I concur in...the Court's... judgment. I write this separate opinion because my approach to the Eighth Amendment proportionality analysis differs from Justice Scalia's. Regardless of whether [he] 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.

> In other words, even if the historical argument favors departure from relatively recent case law, *stare decisis* counsels us to stick with the current trend; i.e., "we've done it wrong for such a long time, citizens have come to rely so much on our mistakes that we should continue doing it wrong."

Though our decisions recognize a proportionality principle, its precise contours are unclear...[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."...And the responsibility for making these fundamental choices and implementing them lies with the legislature...Thus, "reviewing 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 principles which have guided criminal sentencing...have varied with the times."...

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..."Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise...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..."Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."

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...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. *Solem; Weems; Coker; Rummel*.

...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*...

Petitioner was convicted of possession of...over 1.5 pounds of cocaine [with a]...potential yield of 32,500 [to] 65,000 doses [which]...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." Petitioner's suggestion that his crime was nonviolent and victimless...is false to the point of absurdity...

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. Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence. To mention but a few examples, 57 percent of a national sample of males

arrested in 1989 for homicide tested positive for illegal drugs. The comparable statistics for assault, robbery, and weapons arrests were 55, 73, and 63 percent, respectively. In Detroit, Michigan, in 1988, 68 percent of a sample of male arrestees and 81 percent of a sample of female arrestees tested positive for illegal drugs. Fifty-one percent of males and seventy-one percent of females tested positive for cocaine. And last year an estimated 60 percent of the homicides in Detroit were drug related, primarily cocaine related.

The % of positive drug tests in the criminal population doesn't mean much without a comparison to at least the estimate of % drug use in the rest of the population, does it? I am sure it would be greater. Nevertheless, I would like to have a comparison.

These...reports...demonstrate that the Michigan Legislature could with reason conclude that the threat posed...by possession of this large an amount of cocaine...is momentous enough to warrant the deterrence and retribution of a life sentence without parole...

The severity of petitioner's crime brings his sentence within the constitutional boundaries established by our prior decisions. In *Hutto v. Davis (1982),* we upheld against proportionality attack a sentence of 40 years' imprisonment for possession with intent to distribute nine ounces of marijuana. Here, Michigan could with good reason conclude that petitioner's crime is more serious than the crime in *Davis*. Similarly, a rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which "no sentence of imprisonment would be disproportionate."...

Given the serious nature of petitioner's crime, no [intrastate or interstate] comparative analysis is necessary...*Solem* is best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review. The Court stated that "it ***may*** be helpful to compare sentences imposed on other criminals in the same jurisdiction," and that "courts ***may*** find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." **It did not mandate such inquiries**.

A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the **rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality...**

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.

Petitioner also attacks his sentence because of its mandatory nature. Petitioner would have us hold that any severe penalty scheme requires **individualized sentencing** so that a judicial official may consider **mitigating circumstances**. Our precedents do not support this proposition, and petitioner presents no convincing reason to fashion an exception or adopt a new rule in the case

before us. The Court demonstrates that our Eighth Amendment capital decisions reject any requirement of individualized sentencing in **noncapital** cases...

It is beyond question that the legislature "has the power to define criminal punishments without giving the courts any sentencing discretion," ***Chapman v. United States (1991).*** Since the beginning of the Republic, Congress and the States have enacted mandatory sentencing schemes. **To set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist, as in *Solem*, but rather the collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry. We have never invalidated a penalty mandated by a legislature based only on the length of sentence**, and, especially with a crime as severe as this one, we should do so only in the most extreme circumstance.

In asserting the constitutionality of this mandatory sentence, I offer no judgment on its wisdom. Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse and acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum. On the other hand, broad and unreviewed discretion...leads to the perception that...the rule of law is imperiled by sentences imposed for no discernible reason other than the subjective reactions of the sentencing judge. The debate illustrates that...**Arguments for and Against Particular Sentencing Schemes Are for Legislatures to Resolve.** [Capital letters courtesy of *ℰℒℒ.*]

...The Michigan scheme does possess mechanisms for consideration of individual circumstances. Prosecutorial discretion before sentence and executive or legislative clemency afterwards provide means for the State to avert or correct unjust sentences. Here the prosecutor may have chosen to seek the maximum penalty because petitioner possessed 672.5 grams of undiluted cocaine and several other trappings of a drug trafficker, including marijuana cigarettes, four brass cocaine straws, a cocaine spoon, 12 Percodan tablets, 25 tablets of Phendimetrazine Tartrate, a Motorola beeper, plastic bags containing cocaine, a coded address book, and $3,500 in cash.

...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..., 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...

DISSENT: Justice White/Blackmun/Stevens...Justice Scalia concludes that "the Eighth Amendment contains no proportionality guarantee." Accordingly, he says *Solem v. Helm (1983),* "was simply wrong" in holding otherwise, as would be the Court's other cases interpreting the Amendment to contain a proportionality principle. Justice Kennedy, on the other hand, asserts that the Eighth Amendment's proportionality principle is so "narrow" that *Solem*'s analysis should be reduced from three factors to one. With all due respect, I dissent.

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...

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?...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...*Weems; Robinson; Coker; Enmund; Solem.*

[Per Justice Scalia]..., [w]ith the exception of capital cases, the severity of the sentence for any crime is a matter that the Amendment leaves to the discretion of legislators. Any prison sentence, however severe, for any crime, however petty, will be beyond review under the Eighth Amendment.

However severe? That isn't true if the "mode" of punishment is "cruell and unusual."

This position restricts the reach of the Eighth Amendment far more than did *Rummel*. It also 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...

It is my distinct impression that Scalia goes along with the "death-is-different" proportionality rules, not because he believes them to be correctly imposed, but because he knows he cannot muster enough votes to overcome them.

The Court...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." It is this type of objective factor which forms the basis for the tripartite proportionality analysis set forth in *Solem*.

That may sound nice, but is it a fair summary of reality?

Contrary to Justice Scalia's suggestion, the *Solem* analysis has worked well in practice...[C]ourts 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." *Solem* is wholly consistent with this approach, and when properly applied, its analysis affords "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals" and will only rarely result in a sentence failing constitutional muster. The fact that this is one of those rare instances is no reason to abandon the analysis.

Nor does the fact that this case involves judicial review of a legislatively mandated sentence, rather than a sentence imposed in the exercise of judicial discretion, warrant abandonment of *Solem*... [C]ontrary to Justice Scalia's **suggestion**, the fact that a punishment has been legislatively mandated does not automatically render it "legal" or "usual" in the constitutional sense. Indeed, as noted above, if this were the case, then the prohibition against cruel and unusual punishments would be devoid of any meaning. He asserts that when "wrenched out of its common-law context, and applied to the actions of a legislature, the word 'unusual' could hardly mean 'contrary to law,'" because "there were no common-law punishments in the federal system." But if this is so, then neither could the term "unusual" mean "contrary to custom," for until Congress passed the first penal law, there were no "customary" federal punishments either. Moreover, the suggestion that a legislatively mandated punishment is necessarily "legal" is the antithesis of the principles established in *Marbury v. Madison (1803),* for "it is emphatically the province and duty of the judicial department to say what the law is" and to determine whether a legislative enactment is consistent with the Constitution... That [scrutiny of legislation] requires sensitivity to federalism concerns and involves analysis that may at times be difficult affords no justification for this Court's abrogation of its responsibility to uphold constitutional principles.

Two dangers lurk in Justice Scalia's analysis. First, **he provides no mechanism for addressing a situation...in which a legislature makes overtime parking a felony punishable by life imprisonment.** He...attempts to offer reassurance by claiming that "for the same reason these examples are easy to decide, they are certain never to occur." This is cold comfort indeed, for absent a proportionality guarantee, there would be no basis for deciding such cases should they arise.

At a minimum, Justice Kennedy would adopt a "gross proportionality" guarantee.

Second,...[i]f the concept of proportionality is downgraded in the Eighth Amendment calculus, much of this Court's capital penalty jurisprudence will rest on quicksand.

Not if a "death-is-different" jurisprudence is followed.

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* itself and by our other cases interpreting the Eighth Amendment...

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...

Justices White, Blackmun and Stevens "shun" subjective views?

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.

Really. Who are you to make that call, Justice White?
Hmmm?!?
Knock, knock...subjectivity calling!!!
If Michigan had a mandatory fine of $5,000 for speeding, do you think <u>anyone</u> would speed in Michigan (other than criminals fleeing the scenes of crimes)? Assume Indiana has a maximum fine of $100 for speeding. Do you think an Indiana resident driving to Michigan for Thanksgiving is likely to slow up when crossing the state line? I am betting the drug lords know the laws of the 50 states and I am betting they "operate" in the states friendliest to their profession. If "*We, the People of Michigan*" have a drug problem more severe than "*We, the People of Indiana,*" why on earth can't Michigan deter the drug industry **<u>on its terms</u>**? Well, at least just this side of Justice Kennedy's "gross disproportionality."

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, something which this Court held in *Robinson,* cannot be made a crime.

To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt. *Enmund v. Florida.* 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...[such as alcohol.] The "absolute magnitude" of petitioner's crime is not exceptionally serious.

There you go again, "shunning" subjectivity. Apparently, the legislature of Michigan disagrees with you, Justice White. Who are you to proclaim for them and their citizens and, indeed, the entire Country whether the collateral consequences of drugs are "not unlike" those of alcohol? Whether or not that is true, is it your call to make?

Because possession is necessarily a lesser included offense of possession with intent to distribute, **it is odd** to punish the former as severely as the latter. Nor is the requisite intent for the crime sufficient to render it particularly grave. To convict someone under the possession statute, it is only necessary to prove that the defendant knowingly possessed a mixture containing narcotics which weighs at least 650 grams. There is no *mens rea* requirement of intent to distribute the drugs, as there is in the parallel statute. Indeed, the presence of a separate statute which reaches manufacture, delivery, or possession with intent to do either undermines the State's position that the purpose of the *possession* statute was to reach drug dealers. Although "intent to deliver can be inferred from the amount of a controlled substance possessed by the accused," the inference is one to be drawn by the jury. In addition, while there is usually a pecuniary motive when someone possesses a drug with intent to deliver it, such a motive need not exist in the case of mere possession. **Finally, this statute applies equally to first-time offenders, such as petitioner, and recidivists.** Consequently, the particular concerns reflected in recidivist statutes such as those in *Rummel* and *Solem* are not at issue here.

There is an additional concern present here. The State has conceded that it chose not to prosecute Harmelin...[for] possession with intent to deliver, because it was "not necessary and not prudent to make it more difficult for us to win a prosecution."...**Because the statutory punishment for the two crimes is the same, the State succeeded in punishing Harmelin as if he had been convicted of the more serious crime without being put to the test of proving his guilt on those charges**.

This argument holds some merit!
Yet, I still fail to see any **constitutional** implications.

The second prong of the *Solem* analysis is an examination of "the sentences imposed on other criminals in the same jurisdiction."...[L]ife without parole...is the harshest penalty available in Michigan. 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."

State legislators may well conclude that 650 grams of cocaine will eventually kill far more than one murderer's victim. Personally, I get exceedingly tired of "some" Justices who declare omnipotence. In my estimation, this is a legislative function...period.

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. Of the remaining 49 States, only Alabama provides for a mandatory sentence of life imprisonment without possibility of parole for a first-time drug offender, and then only when a defendant possesses *10 kilograms* or more of cocaine. Possession of the amount of cocaine at issue here would subject an Alabama defendant to a mandatory minimum sentence of only five years in prison...Thus, "it appears that [petitioner] was treated more severely than he would have been in any other State." *Solem*. Indeed, the fact that no other jurisdiction provides such a severe, mandatory penalty for possession of this quantity of drugs is enough to establish "the degree of **national consensus** this Court has previously thought sufficient to label a particular punishment cruel and unusual."

What happened to the concept of "states"? Michiganites apparently consider drugs to be a far greater problem than do Alabamians and would likely leave the dangers of housing pet alligators off its wish list of crimes. I imagine the evils of cocaine have a different meaning (in degree) to the citizens of New York City than they do to the citizens of Greenville, Illinois, than they do to the citizens of Des Moines, Iowa, etc. Where does the Constitution say we need a "**national consensus**" for resolution of "**local concerns**"?

...[T]he Michigan statute...fails constitutional muster...I would reverse...