ALLEN HARMELIN, PETITIONERv. MICHIGAN

[June 27, 1991]

Justice Scalia announced the judgment of the Court and delivered the opinion of the Court with respect to Part V, and an opinion with respect to Parts I, II, III, and IV, in which *The Chief Justice* joins.

Petitioner was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole. [n.1] The Michigan Court of Appeals initially reversed his conviction because evidence supporting it had been obtained in violation of the Michigan Constitution. 176 Mich. App. 524, 440 N. W. 2d 75 (1989). On petition for rehearing, the Court of Appeals vacated its prior decision and affirmed petitioner's sentence, rejecting his argument that the sentence was "cruel and unusual" within the mean- ing of the Eighth Amendment. Id., at 535, 440 N. W. 2d, at 80. The Michigan Supreme Court denied leave to appeal, 434 Mich. 863 (1990), and we granted certiorari. 495 U. S. --- (1990).

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 re- quired to impose it, without taking into account the particu- larized circumstances of the crime and of the criminal.

I

A The Eighth Amendment, which applies against the States by virtue of the Fourteenth Amendment, see Robinson v. California, 370 U.S. 660 (1962), provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In Rummel v. Estelle, 445 U.S. 263 (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 clas- sified and classifiable as felonies, that is, as punishable by sig- nificant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." Id., at 274. We specifically rejected the proposition asserted by the dissent, id., at 295 (Powell, J.), that unconstitutional disproportionality could be established by weighing three factors: (1) gravity of the of- fense compared to severity of the penalty, (2) penalties im- posed within the same jurisdiction for similar crimes, and (3) penalties imposed in other jurisdictions for the same offense. Id., at 281-282, and n. 27. A footnote in the opinion, how- ever, 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." Id., at 274, n. 11.

Two years later, in Hutto v. Davis, 454 U.S. 370 (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," 454 U. S., at 374-375. And we again explicitly rejected application of the three factors discussed in the Rummel dissent. [n.2] See 454 U. S., at 373-374, and n. 2. However, whereas in Rummel we had said that suc- cessful proportionality challenges outside the context of capi- tal punishment "have been exceedingly rare," 445 U. S., at 272 (discussing as the solitary example Weems v. United States, 217 U.S. 349 (1910), which we explained as involving punishment of a "unique nature," 445 U. S., at 274), in Davis we misdescribed Rummel as having said that " `successful challenges . . .' should be `exceedingly rare,' " 454 U. S., at 374 (emphasis added), and at that point inserted a reference to and description of the Rummel "overtime parking" foot- note, 454 U. S., at 374, n. 3. 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, 445 U. S., at 274, n. 11, became "not[ing] . . . that there could be situations in which the proportionality principle would come into play, such as" the fanciful parking example, Davis, supra, at 374, n. 3 (emphasis added). This combina- tion 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 incom- patible with the sharp per curiam reversal of the Fourth Cir- cuit'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, 463 U.S. 277 (1983), set aside under the Eighth Amendment, because it was disproportionate, a sentence of life imprisonment with- out 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, supra, at 274, but was the "leading case," Solem, 463 U. S., at 287, exemplifying the "general principle of pro- portionality," id., at 288, which was "deeply rooted and fre- quently repeated in common-law jurisprudence," id., at 284, had been embodied in the English Bill of Rights "in language that was later adopted in the Eighth Amendment," id., at 285, and had been "recognized explicitly in this Court for almost a century," id., at 286. The most recent of those "recognitions" were the "overtime parking" footnotes in Rummel and Davis, 463 U. S., at 288. As for the statement in Rummel that "one could argue without fear of contradic- tion 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, supra, at 274: according to Solem, the really important words in that passage were " `one could argue,' " 463 U. S., at 288, n. 14 (emphasis added by Solem). "The Court [in Rummel] . . . merely recognized that the ar- gument was possible. To the extent that the State . . . makes the argument here, we find it meritless." Id., at 289, n. 14. (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. 463 U. S., at 291-292. Those cases, the Court said, merely "in- dicated [that] no one factor will be dispositive in a given case," id., at 291, n. 17 -- though Davis had expressly, ap- provingly, and quite correctly, described Rummel as having "disapproved each of [the] objective factors," 454 U. S., at 373 (emphasis added). See Rummel, 445 U. S., at 281-282, and n. 27.

It should be apparent from the above discussion that our 5- to-4 decision eight years ago in Solem was scarcely the ex- pression 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 prece- dents, see Payne v. Tennessee, ante, at ---, (slip op., at 19); Smith v. Allwright, 321 U.S. 649, 665, and n. 10 (1944); Mitchell v. W. T. Grant Co., 416 U.S. 600, 627-628 (1974) (Powell, J., concurring); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting), 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 Amend- ment contains a proportionality guarantee -- with particular attention to the background of the Eighth Amendment (which Solem discussed in only two pages, see 463 U. S., at 284-286) 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 pro- portionality guarantee.

B 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 Amend- ment. There is no doubt that the Declaration of Rights is the antecedent of our constitutional text. (This document was promulgated in February 1689 and was enacted into law as the Bill of Rights, 1 Wm. & Mary, Sess. 2, ch. 2, in Decem- ber 1689. See Sources of Our Liberties 222-223 (R. Perry & J. Cooper eds. 1959); L. Schwoerer, Declaration of Rights, 1689 279, 295-298 (1981).) In 1791, five State Constitutions prohibited "cruel or unusual punishments," see Del. Decla ration of Rights, 16 (1776); Md. Declaration of Rights, XXII (1776); Mass. Declaration of Rights, Art. XXVI (1780); N. C. Declaration of Rights X (1776); N. H. Bill of Rights, XXXIII (1784), and two prohibited "cruel" punish- ments, Pa. Const., Art. IX, 13 (1790); S. C. Const., Art. IX, 4 (1790). The new Federal Bill of Rights, however, tracked Virginia's prohibition of "cruel and unusual punish- ments," see Va. Declaration of Rights 9 (1776), which most closely followed the English provision. In fact, the entire text of the Eighth Amendment is taken almost verbatim from the English Declaration of Rights, which provided "[t]hat ex- cessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."

Perhaps the Americans of 1791 understood the Declara- tion's language precisely as the Englishmen of 1689 did -- though as we shall discuss later, that seems unlikely. Or perhaps the colonists meant to incorporate the content of that antecedent by reference, whatever the content might have been. Solem suggested something like this, arguing that since Americans claimed "all the rights of English subjects," "their use of the language of the English Bill of Rights is con- vincing proof that they intended to provide at least the same protection," 463 U. S., at 286. Thus, not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular "rights of English subjects" it was designed to vindicate.

As Solem observed, id., at 284-285, the principle of pro- portionality was familiar to English law at the time the Dec- laration of Rights was drafted. The Magna Carta provided that "[a] free man shall not be fined for a small offence, ex- cept 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 . . . ." Art. 20 (translated in Sources of our Liberties, supra, at 15). When imprison- ment supplemented fines as a method of punishment, courts apparently applied the proportionality principle while sen- tencing. Hodges v. Humkin, 2 Bulst. 139, 140,

80 Eng. Rep. 1015, 1016 (K. B. 1615) (Croke, J.) ("[I]mprisonment ought always to be according to the quality of the offence"). Despite this familiarity, the drafters of the Declaration of Rights did not explicitly prohibit "disproportionate" or "excessive" punishments. Instead, they prohibited punish- ments that were "cruell and unusuall." The Solem court simply assumed, with no analysis, that the one included the other. 463 U. S., at 285. 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 un- derstanding of the English guarantee.

Most historians agree that the "cruell and unusuall Punish- ments" 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. See, e. g., Schwoerer, supra, at 93; 4 W. Blackstone, Commentaries *372. They do not agree, how- ever, on which abuses. See Ingraham v. Wright, 430 U.S. 651, 664-665 (1977); Furman v. Georgia, 408 U.S. 238, 317-319 (1972) (*Marshall*, J. concurring). Jeffreys is best known for presiding over the "Bloody Assizes" following the Duke of Monmouth's abortive rebellion in 1685; a special Commission led by Jeffreys tried, convicted, and executed hundreds of suspected insurgents. Some have attributed the Declaration of Rights provision to popular outrage against those proceedings. E. g., Sources of Our Liberties, supra, at 236, n. 103; Note, What Is Cruel and Unusual Pun- ishment, 24 Harv. L. Rev. 54, 55, n. 2 (1910); see also 3 J. Story, Commentaries on the Constitution of the United States 1896 (1833). [n.3]

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. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 855-856 (1969); 4 Blackstone, supra, at *369-370. Thus, recently historians have argued, and the best historical evidence suggests, that it was not Jef- freys' management of the Bloody Assizes that led to the Dec- laration of Rights provision, but rather the arbitrary sentenc- ing power he had exercised in administering justice from the King's Bench, particularly when punishing a notorious per- jurer. See Granucci, supra, at 855-860; Schwoerer, supra, at 92-93. Accord, 1 J. Stephen, A History of the Criminal Law of England 490 (1883); 1 J. Chitty, Criminal Law 712 (5th Am. ed. 1847). Jeffreys was widely accused of "invent- ing" special penalties for the King's enemies, penalties that were not authorized by common-law precedent or statute. Letter to a Gentleman at Brussels, giving an account of the people's revolt (Windsor Dec. 2, 1688), cited in L. Schwoerer, The Declaration of Rights, 1689, p. 93 n. 207 (1981).

The preamble to the Declaration of Rights, a sort of indict- ment of James II that calls to mind the preface to our own Declaration of Independence, specifically referred to illegal sentences and King's Bench proceedings.

Whereas the late King James the Second, by the Assistance of diverse Evill Councellors Judges and Min- isters imployed by him did endeavour to subvert and ex- tirpate the Protestant Religion, and the Lawes and Lib- erties of this Kingdome.

"By Prosecutions in the Court of King's Bench for Matters and Causes cognizable onely in Parlyament and by diverse other Arbitrary and Illegall Courses.

"[E]xcessive Baile hath beene required of Persons committed in Criminall Cases to elude the Benefit of the Lawes made for the Liberty of the Subjects.

"And excessive Fines have been imposed.

"And illegall and cruell Punishments have been inflicted.

"All which are utterly and directly contrary to the knowne Lawes and Statutes and Freedome of this Realme." 1 Wm. & Mary, Sess. 2, ch. 2 (1689).

The only recorded contemporaneous interpretation of the "cruell and unusuall Punishments" clause confirms the focus upon Jeffreys' King's Bench activities, and upon the illegality rather than the disproportionality of his 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 an- other, 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. 4 Blackstone, supra, at *196. At sen- tencing, Jeffreys complained that death was no longer avail- able as a penalty and lamented that "a proportionable punish- ment of that crime can scarce by our law, as it now stands, be inflicted upon him." Second Trial of Titus Oates, 10 How. St. Tr. 1227, 1314 (K. B. 1685). The law would not stand in the way, however. The judges met, and, according to Jef- freys, were in unanimous agreement that "crimes of this na- ture are left to be punished according to the discretion of this court, so far as that the judgment extend not to life or mem- ber." Ibid. Another Justice taunted Oates that "we have taken special care of you," see id., at 1316. The court then decreed that he should pay a fine of "1000 marks upon each Indictment," that he should be "stript of [his] Canonical Hab- its," 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 New- gate," that he should be similarly whipped on May 22 "from Newgate to Tyburn," and that he should be imprisoned for life. Ibid.

"The judges, as they believed, sentenced Oates to be scourged to death." 2 T. Macaulay, History of England 204 (1899) (hereinafter Macaulay). Accord, D. Ogg, England In The Reigns of James II and William III 154-155 (1984). Oates would not die, however. Four years later, and sev- eral months after the Declaration of Rights, he petitioned the House of Lords to set aside his sentence as illegal. 6 T. Ma- caulay 138-141. "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 judg- ment. 6 id., at 140-141. A minority of the Lords dissented, however, and their statement sheds light on the meaning of the "cruell and unusuall Punishments" clause:

"1st, [T]he King's Bench, being a Temporal Court, made it a Part of the Judgment, That Titus Oates, being a Clerk, should, for his said Perjuries, be divested of his canonical and priestly Habit . . . ; which is a Matter wholly out of their Power, belonging to the Ecclesiastical Courts only.

"2dly, [S]aid 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, [T]his will be an Encouragement and Allow- ance for giving the like cruel, barbarous and illegal Judg- ments hereafter, unless this Judgment be reversed.

"5thly, . . . [T]hat 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 on the Twelfth of February last . . . that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual Punishments aflicted." 1 Journals of the House of Lords 367 (May 31, 1689), quoted in Second Trial of Titus Oates, supra, at 1325.

Oates' cause then aroused support in the House of Com- mons, whose members proceeded to pass a bill to annul the sentence. A "free conference" was ultimately convened in which representatives of the House of Commons attempted to persuade the Lords to reverse their position. See 6 Ma- caulay 143-145. Though this attempt was not successful, the Commons' report of the conference confirms that the "cruell and unusuall Punishments" clause was directed at the Oates case (among others) in particular, and at illegality rather than disproportionality of punishment in general.

"[T]he Commons had hoped, That, after the Declara- tion [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 Pun- ishments; 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 as cruel and illegal within the Meaning of those Declarations.

"That the Commons had a particular Regard to these Judgments, amongst others, when that Declaration was first made; and must insist upon it, That they are erro- neous, cruel, illegal, and of ill Example to future Ages . . . .

"That it seemed no less plain, That the Judgments were cruel, and of ill Example to future Ages.

"That it was surely of ill Example for a Temporal Court to give Judgment, `That a Clerk be divested of his Canonical Habits; and continue so divested during his Life.'

"That it was of ill example, and illegal, That a Judg- ment of perpetual Imprisonment should be given in a Case, where there is no express Law to warrant it.

"It was of ill Example, and unusual, That an English- man should be exposed upon a Pillory, so many times a Year, during his Life.

"That it was illegal, cruel, and of dangerous Example, That a Freeman should be whipped in such a barbarous manner, as, in Probability, would determine in Death.

"That this was avowed, when these Judgments were given by the then Lord Chief Justice of the King's Bench; who declared; `That all the Judges had met; and unanimously agreed, That where the Subject was prose- cuted at Common Law for a Misdemeanor, it was in the Discretion of the Court, to inflict what Punishment they pleased, not extending to Life, or Member.'

"That as soon as they had set up this Pretence to a dis- cretionary 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 . . . ." 10 Journal of the House of Commons 247 (Aug. 2, 1689) (emphasis added).

In all these contemporaneous discussions, as in the pro- logue of the Declaration, a punishment is not considered objectionable because it is disproportionate, [n.4] but because it is "out of [the Judges'] Power," "contrary to Law and ancient practice," without "Precedents" or "express Law to war- rant," "unusual," "illegal," or imposed by "Pretence to a dis- cretionary Power." Accord, 2 Macaulay 204 (observing that Oates' punishment, while deserved, was unjustified by law). Moreover, the phrase "cruell and unusuall" is treated as in- terchangeable with "cruel and illegal." In other words, the "illegall and cruell Punishments" of the Declaration's pro- logue, see supra, at 9, are the same thing as the "cruell and unusuall Punishments" of its body. (*Justice Marshall*'s concurrence in Furman v. Georgia, 408 U. S., at 318, ob- serves that an earlier draft of the body prohibited "illegal" punishments, and that the change "appears to be inadver- tent." See also 1 J. Chitty, Criminal Law 712 (5th Am. ed. 1847) (describing Declaration of Rights as prohibiting "cruel and illegal" punishments).) In the legal world of the time, and in the context of restricting punishment determined by the Crown (or the Crown's judges), "illegall" and "unusuall" were identical for practical purposes. Not all punishments were specified by statute; many were determined by the common law. Departures from the common law were lawful only if authorized by statute. See J. Stephen, A History of the Criminal Law of England 489-490 (1883); 1 J. Chitty, Criminal Law 710 (5th Am. ed. 1847). A requirement that punishment not be "unusuall" -- that is, not contrary to "usage" (Lat. "usus") or "precedent" -- was primarily a re- quirement that judges pronouncing sentence remain within the bounds of common-law tradition. 1 id., at 710-712; Ingraham v. Wright, 430 U. S., at 665 (English provision aimed at "judges acting beyond their lawful authority"); Granucci, 57 Calif. L. Rev., at 859; Cf. 4 W. Blackstone, Commentaries, *371-*373.

In sum, we think it most unlikely that the English Cruel and Unusual Punishments Clause was meant to forbid "dis- proportionate" punishments. There is even less likelihood that proportionality of punishment was one of the traditional "rights and privileges of Englishmen" apart from the Dec- laration of Rights, which happened to be included in the Eighth Amendment. Indeed, even those scholars who be- lieve the principle to have been included within the Declara- tion of Rights do not contend that such a prohibition was re- flected in English practice -- nor could they. See Granucci, supra, at 847. [n.5] For, as we observed in Woodson v. North Carolina, 428 U.S. 280, 289 (1976), in 1791, England pun- ished over 200 crimes with death. See also 1 Stephen, supra, at 458, 471-472 (until 1826, all felonies, except may- hem and petty larceny, were punishable by death). By 1830 the class of offenses punishable by death was narrowed to in- clude "only" murder, attempts to murder by poisoning, stab- bing, shooting etc.; administering poison to procure abortion, sodomy, rape, statutory rape, and certain classes of forgery. See 1 Stephen, supra, at 473-474. It is notable that, during his discussion of English capital punishment reform, Stephen does not once

mention the Cruell and Unusuall Punishments Clause, though he was certainly aware of it. See 1 Stephen, supra, at 489-490. Likewise, in his discussion of the suit- ability of punishments, Blackstone does not mention the Dec- laration. See 4 Blackstone, supra, at *9-*19.

C 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 anteced- ent, but see Granucci, supra, at 860-865, a direct transplant of the English meaning to the soil of American constitutional-ism would in any case have been impossible. There were no common-law punishments in the federal system, see United States v. Hudson and Goodwin, 7 Cranch 32 (1812), so that the provision must have been meant as a check not upon judges but upon the Legislature. See, e. g., In re Kemmler, 136 U.S. 436, 446-447 (1890).

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 con- tinues to mean today) "such as [does not] occu[r] in ordinary practice," Webster's 1828 edition, "[s]uch as is [not] in com- mon use," Webster's 2d International. According to its terms, then, by forbidding "cruel and unusual punish- ments," see Stanford v. Kentucky, 492 U.S. 361, 378 (1989) (plurality opinion); In re Kemmler, supra, at 446-447, the Clause disables the Legislature from authorizing particular forms or "modes" of punishment -- specifically, cruel methods of punishment that are not regularly or customarily em- ployed. E. g., Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion); In re Kemmler, supra, at 446-447. See also United States v. Collins, 25 F. Cas. (No. 14,836) 545 (CC R. I. 1854) (Curtis, J.).

The language bears the construction, however -- and here we come to the point crucial to resolution of the present case -- 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. [n.6] The ar-guments against it, however, seem to us conclusive.

First of all, to use the phrase "cruel and unusual punish- ment" 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 di- rectly. 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. See 4 W. Blackstone, Commentaries 18 (H. Tucker ed. 1803) (discuss- ing efforts at reform); 1 Writings of Thomas Jefferson 218-239 (A. Lipscomb 1903). Proportionality provisions had been included in several state constitutions. See, e. g., Pa. Const., 38 (1776) (punishments should be "in general more proportionate to the crimes"); S. C. Const., Art. XL (1778) (same); N. H. Bill of Rights, Art. I, XVIII (1784) ("all pen- alties 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, [n.7] yet chose not to replicate them. Both the New Hampshire Con-stitution, 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 Hamp- shire's case) and a requirement that "all penalties ought to be proportioned to the nature of the offence." N. H. Bill of Rights, XVIII, XXXIII (1784). Ohio Const., Art. VIII, 13, 14 (1802). [n.8]

Secondly, it would seem quite peculiar to refer to cruelty and unusualness for the offense in question, in a provision having application only to a new government that had never before defined offenses, and that would be defining new and peculiarly national ones. Finally and most conclusively, as we proceed to discuss, the fact that what was "cruel and un- usual" under the Eighth Amendment was to be determined without reference to the particular offense is confirmed by all available evidence of contemporary understanding. [n.9]

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 "confirm[s] the view that the cruel and unusual punishments clause was directed at prohibiting certain methods of punish- ment." Granucci, 57 Calif. L. Rev., at 842 (emphasis added). See Schwartz, Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummell, 71 J. Crim. L. & Criminology 378, 378-382 (1980); Welling & Hipfner, Cruel and Unusual?: Capital Punishment in Canada, 26 U. Toronto L. J. 55, 61 (1976).

In the January 1788 Massachusetts Convention, for exam- ple, 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." 2 J. Elliot, Debates on the Federal Constitution 111 (2d ed. 1854) (emphasis added).

In the Virginia Convention, Patrick Henry decried the ab- sence of a bill of rights, stating:

"What says our [Virginia] Bill of Rights? -- `that exces- sive bail ought not be required, nor excessive fines im- posed, nor cruel and unusual punishments inflicted.' . . .

"In this business of legislation, your members of Con- gress 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 an- cestors? -- That they would not admit of tortures, or cruel and barbarous punishment." 3 id., at 447.

The actions of the First Congress, which are of course per- suasive evidence of what the Constitution means, Marsh v. Chambers, 463 U.S. 783, 788-790 (1983); Carroll v. United States, 267 U.S. 132, 150-152 (1925); cf. McCulloch v. Mary- land, 4 Wheat. 316, 401-402 (1819), belie any doctrine of pro- portionality. Shortly after this Congress proposed the Bill of Rights, it promulgated the Nation's first Penal Code. See 1 Stat. 112-119 (1790). As the then-extant New Hampshire Constitution's proportionality provision didactically ob- served, "[n]o wise legislature" -- that is, no legislature at- tuned 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," N. H. Const., Art. I, XVIII (1784). 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 "run[ning] away with any sea-vessel or goods laden on board thereof" by treble dam- ages to the victim and five years at hard labor. See 1 Writ- ings of Thomas Jefferson 220-222, 229-231 (A. Lipscomb ed. 1903) (footnote omitted). Shortly after proposing the Bill of Rights, the First Congress ignored these teachings. It pun- ished forgery of United States securities, "run[ning] 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. 1 Stat. 114. The law books of the time are devoid of indication that anyone considered these newly enacted penalties unconstitutional by virtue of their disproportionality. Cf. United States v. Tully, 28 F. Cas. (No. 16, 545) 226 (CC Mass. 1812) (Story and Davis, JJ.) (Force or threat thereof not an element of "run[n]ing away with [a] ship or vessel").

The early commentary on the Clause contains no reference to disproportionate or excessive sentences, and again indi- cates that it was designed to outlaw particular modes of pun- ishment. One commentator wrote:

"The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion." J. Bayard, A Brief Exposition of the Constitution of the United States 154 (2d ed. 1840).

Another commentator, after explaining (in somewhat convo- luted fashion) that the "spirit" of the Excessive Bail and Excessive Fines Clauses forbade excessive imprisonments, went on to add:

"Under the [Eighth] amendment the infliction of cruel and unusual punishments, is also prohibited. The vari- ous barbarous and cruel punishments inflicted under the laws of some other countries, and which profess not to be behind the most enlightened nations on earth in civiliza- tion and refinement, furnish sufficient reasons for this express prohibition. Breaking on the wheel, flaying alive, rending assunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death, are wholly alien to the spirit of our humane general constitution." B. Oli- ver, The Rights of An American Citizen 186 (1832).

Chancellor Kent, in a paragraph of his Commentaries arguing that capital punishment "ought to be confined to the few cases of the most atrocious character," does not suggest that the "cruel and unusual punishments" Clauses of State or Fed- eral Constitutions require such proportionality -- even though the very paragraph in question begins with the statement that "cruel and unusual punishments are universally con- demned." 2 J. Kent, Commentaries on American Law 10-11 (1827). And Justice Story had this to say:

"The provision [the Eighth Amendment] would seem wholly unecessary in a free government, since it is scarcely possible, that any department of such a govern- ment should authorize, or justify such atrocious conduct. It was, however, adopted as an admonition to all depart- ments 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." 3 J. Story, Commentaries on the Constitution of the United States 1896 (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 propor- tioned to the offense. Ohio Const., Art. VIII, 13, 14 (1802); Ind. Const., Art. I, 15-16 (1816); Me. Const., Art. I, 9 (1819); R. I. Const., Art. I, 8 (1842); W. Va. Const., Art. II, 2 (1861); Ga. Const., Art. I, 16, 21 (1868).

Perhaps the most persuasive evidence of what "cruel and unusual" meant, however, is found in early judicial construc- tions 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, 20 Johns. *457 (N. Y. Sup. Ct. 1823), aff'd, 3 Cow. 686 (N. Y. 1824) 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 dis- enfranchisement of a citizen," he said, "is not an unusual pun- ishment; 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." Barker v. People, supra, at *459.

Throughout the 19th century, state courts interpreting state constitutional provisions with identical or more expan- sive wording (i. e., "cruel or unusual") concluded that these provisions did not proscribe disproportionality but only cer- tain modes of punishment. For example, in Aldridge v. Commonwealth, 4 Va. 447 (1824), the General Court of Vir- ginia had occasion to interpret the cruel and unusual punish- ments clause that was the direct ancestor of our federal pro- vision, see supra, at 6. In rejecting the defendant's claim that a sentence of so many as 39 stripes violated the Virginia Constitution, the court said:

"As to the ninth section of the Bill of Rights, denounc- ing cruel and unusual punishments, we have no notion that it has any bearing on this case. That provision was never designed to control the Legislative right to deter- mine ad libitum upon the adequacy of punishment, but is merely applicable to the modes of punishment. . . . [T]he best heads and hearts of the land of our ancestors, had long and loudly declaimed against the wanton cru- elty of many of the punishments practised in other coun- tries; and this section in the Bill of Rights was framed effectually to exclude these, so that no future Legisla- ture, in a moment perhaps of great and general excite- ment, should be tempted to disgrace our Code by the in- troduction of any of those odious modes of punishment." 4 Va., at 449-450 (emphasis in original).

Accord Commonwealth v. Hitshings, 71 Mass. 482, 486 (1855); Garcia v. Territory, 1 N. M. 415, 417-419 (1869); Whitten v. Georgia, 47 Ga. 297, 301 (1872); Cummins v. Peo- ple, 42 Mich. 142, 143-144, 3 N. W. 305 (1879); State v. Wil- liams, 77 Mo. 310, 312-313 (1883); State v. White, 44 Kan. 514, 520-521, 25 P. 33, 34-35 (1890); People v. Morris, 80 Mich. 634, 638, 45 N. W. 591, 592 (1890); Hobbs v. State, 133 Ind. 404, 408-410, 32 N. E. 1019, 1020-1021 (1893); State v. Hogan, 63 Ohio St. 202, 218, 58 N. E. 572, 575 (1900); see also, In re Bayard, 32 N. Y. 546, 549-550 (1881). In the 19th century, judicial agreement that a "cruel and unusual" (or "cruel or unusual") provision did not constitute a propor- tionality requirement appears to have been universal. [n.10] 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, 3 S. D. 29, 41, 51 N. W. 1018, 1022 (1892). That case, however, involved a constitutional provision proscribing all punishments that were merely "cruel," S. D. Const., Art. VI, 23 (1889). A few decisions early in the present century cited it (again in dictum) for the proposition that a sentence "so out of propor- tion to the offense . . . as to

`shock public sentiment and vio- late the judgment of reasonable people' " would be "cruel and unusual." Jackson v. United States, 102 F. 473, 488 (CA9 1900); Territory v. Ketchum, 10 N. M. 718, 723, 65 P. 169, 171 (1901).

III 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 sen- tences 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. While there are relatively clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are "cruel and unusual," proportional- ity 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 dispo- sitions seem to be so -- because they were made for other times or other places, with different social attitudes, differ- ent 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. [n.11] 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 im- position 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. 463 U. S., at 290-291. 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 men- tion across the many generations ruled by the Bill of Rights. The State of Massachusetts punishes sodomy more severely than assault and battery, compare Mass. Gen. Laws 272:34 (1988) ("not more than twenty years" in prison for sodomy) with 265:13A ("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 as- saults another with a dangerous weapon faces the same maxi- mum prison term as one who removes a shopping basket "from the parking area or grounds of any store . . . without authorization." La. Rev. Stat. Ann. 14:37; 14:68.1 (West 1986). A battery that results in "protracted and obvious dis- figurement" merits imprisonment "for not more than five years," 14:34.1, one half the maximum penalty for theft of livestock or an oilfield seismograph, 14:67.1, 14:67.8. We may think that the First Congress punished with clear dis proportionality when it provided up to seven years in prison and up to $1,000 in fine for "cut[ting] off the ear or ears, . . . cut[ting] out or disabl[ing] the tongue, . . . put[ting] out an eye, . . . cut[ting] off . . . any limb or member of any person with intention . . . to maim or disfigure," but provided the death penalty for "run[ning] away with [a] ship or vessel, or any goods or merchandise to the value of fifty dollars." Act of Apr. 30, 1790, ch. 9, 8, 13, 1 Stat. 113-115. But then perhaps the citizens of 1791 would think that today's Con- gress punishes with clear disproportionality when it sanc- tions "assault by . . . wounding" with up to six months in prison, 18 U.S.C. 113(d), unauthorized reproduction of the "Smokey Bear" character or name with the same

penalty, 18 U.S.C. 711 offering to barter a migratory bird with up to two years in prison, 16 U.S.C. 707(b), and purloining a "key suited to any lock adopted by the Post-Office Department" with a prison term of up to 10 years, 18 U.S.C. 1704. 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 exces- sive" for possession of cocaine with intent to distribute, see Hutto v. Davis, 454 U.S. 370 (1982). 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 pos- sibility of theft by others who might distribute -- depends en- tirely 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 objec- tive 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 de- termined to be "similarly grave" receive significantly dissimi- lar 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 identi- fied, the penalties for them would not necessarily be com- parable, since there are many other justifications for a differ- ence. 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, de- pends, of course, upon the weight the society accords to de- terrence and rehabilitation, rather than retribution, as the objective of criminal punishment (which is an eminently legis- lative judgment). In fact, it becomes difficult even to speak intelligently of "proportionality," once deterrence and re- habilitation are given significant weight. Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law. Cf. Bill For Proportioning Punishments, 1 Writings of Thomas Jefferson 218, 228-229 (A. Lipscomb 1903) ("[W]hoever . . . 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 a fortiori 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 re- ward -- 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 no- tions of federalism, some State will always bear the distinc- tion of treating particular offenders more

severely than any other State." Rummel, 445 U. S., at 282. Diversity not only in policy, but in the means of implementing policy, is the very raison d'Âetre 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 rela- tively minor offense, see Wyo. Stat. 35-7-1031(c) (1988) (6 months); W. Va. Code 60A-4-401(c) (1989) (6 months), nothing in the Constitution requires Michigan to follow suit. The Eighth Amendment is not a ratchet, whereby a tempo- rary consensus on leniency for a particular crime fixes a per- manent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed so- cial conditions.

IV 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 de- parted to the extent that Solem suggests. In Weems v. United States, 217 U.S. 349 (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. Several "accessor[ies]" were superadded, in- cluding permanent disqualification from holding any position of public trust, subjection to "[government] surveillance" for life, and "civil interdiction," which consisted of deprivation of " `the rights of parental authority, guardianship of person or property, participation in the family council [, etc.]' " Weems, supra, at 364.

Justice McKenna, writing for himself and three others, held that the imposition of cadena temporal was "Cruel and Unusual Punishment." (Justice White, joined by Justice Holmes, dissented.) That holding, and some of the reason- ing upon which it was based, was not at all out of accord with the traditional understanding of the provision we have de- scribed 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." Id., at 366-367.

As to the latter:

It has no fellow in American legislation. Let us remem- ber that it has come to us from a government of a differ- ent 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." Id., at 377.

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." Id., at 366-367.

"[T]he 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.' " Id., at 371, quoting O'Neil v. Vermont, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting).

Since it contains language that will support either theory, our later opinions have used Weems, as the occasion re- quired, to represent either the principle that "the Eighth Amendment bars not only those punishments that are `bar- baric' but also those that are `excessive' in relation to the crime committed," Coker v. Georgia, 433 U.S. 584, 592 (1977), or the principle that only a "unique . . . punish- men[t]," a form of imprisonment different from the "more traditional forms . . . imposed under the Anglo-Saxon sys- tem," can violate the Eighth Amendment, Rummel, 445 U. S., at 274-275. If the proof of the pudding is in the eat- ing, however, it is hard to view Weems as announcing a con- stitutional 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, 224 U.S. 616 (1912), for in- stance, we evaluated (and rejected) a claim that life im prisonment for a third offense of horse theft was "cruel and unusual." We made no mention of Weems, although the pe- titioner had relied upon that case. [n.12] See also Badders v. United States, 240 U.S. 391 (1916).

Opinions in the federal courts of appeals were equally de- void of evidence that this Court had announced a general pro- portionality principle. Some evaluated "cruel and unusual punishment" claims without reference to Weems. See, e. g., Bailey v. United States, 284 F. 126 (CA7 1922); Tincher v. United States, 11 F. 2d 18, 21 (CA4 1926). Others continued to echo (in dictum) variants of the dictum in State v. Becker, 3 S. D. 29, 51 N. W. 1018 (1892), to the effect that courts will not interfere with punishment unless it is "manifestly cruel and unusual," and cited Weems for the propostion that sen- tences imposed within the limits of a statute "ordinarily will not be regarded as cruel and unusual." See, e. g., Sansone v. Zerbst, 73 F. 2d 670, 672 (CA10 1934); Bailey v. United States, 74 F. 2d 451, 453 (CA10 1934). [n.13] Not until more than half a century after Weems did the Circuit Courts begin per- forming proportionality analysis. E. g., Hart v. Coiner, 483 F. 2d 136 (CA4 1973). Even then, some continued to state that "[a] sentence within the statutory limits is not cruel and unusual punishment." Page v. United States, 462 U.S. 932, 935 (CA3 1972). Accord, Rener v. Beto, 447 F. 2d 20, 23 (CA5 1971); Anthony v. United States, 331 F. 2d 687, 693 (CA9 1964).

The first holding of this Court unqualifiedly applying a re- quirement of proportionality to criminal penalties was issued 185 years after the Eighth Amendment was adopted. [n.14] In Coker v. Georgia, supra, the Court held that, because of the disproportionality, it was a violation of the Cruel and Un- usual Punishments Clause to impose capital punishment for rape of an adult woman. Four years later, in Enmund v. Florida, 458 U.S. 782 (1982), 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, supra, treated this line of authority as an as- pect of our death penalty jurisprudence, rather than a gen- eralizable aspect of Eighth Amendment law. We think that is an accurate explanation, and we reassert it. Proportional- ity 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. See, e. g., Turner v. Murray, 476 U.S. 28, 36-37 (1986); Eddings v. Okla- homa, 455 U.S. 104 (1982); id., at 117 (*O'Connor, J.,* con- curring); Beck v. Alabama, 447 U.S. 625 (1980). We would leave it there, but will not extend it further.

V Petitioner claims that his sentence violates the Eighth Amendment for a reason in addition to its alleged disproportionality. He 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 the most severe of a range of available penalties that the sentencer may im- pose after hearing evidence in mitigation and aggravation.

As our earlier discussion should make clear, 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 cen- tury. See Woodson v. North Carolina, 428 U. S., at 289-290. There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is "mandatory." See Chapman v. United States, 500 U. S. ---, --- - --- (1991) (slip op., at 12-13).

Petitioner's "required mitigation" claim, like his propor- tionality claim, does find support in our death-penalty juris- prudence. We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed with- out an individualized determination that that punishment is "appropriate" -- whether or not the sentence is "grossly dis- proportionate." See Woodson v. North Carolina, supra; Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, supra; Hitchcock v. Dugger, 481 U.S. 393 (1987). Peti- tioner asks us to extend this so-called "individualized capital- sentencing doctrine," Sumner v. Shuman, 483 U.S. 66, 73 (1987), to an "individualized mandatory life in prison without parole sentencing doctrine." We refuse to do so.

Our cases creating and clarifying the "individualized capital sentencing doctrine" have repeatedly suggested that there is no comparable requirement outside the capital context, be- cause of the qualitative difference between death and all other penalties. See Eddings v. Oklahoma, supra, at 110-112; id., at 117-118 (*O'Connor, J.* concurring); Lockett v. Ohio, supra, at 602-605; Woodson v. North Carolina, supra, at 303-305; Rummel v. Estelle, 445 U. S., at 272.

"The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its re- jection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its ab solute renunciation of all that is embodied in our concept of humanity." Furman v. Georgia, 408 U. S., at 306 (Stewart, J., concurring).

It is true that petitioner's sentence is unique in that it is the second most severe known to the law; but life imprison- ment with possibility of parole is also unique in that it is the third most severe. And if petitioner's sentence forecloses some "flexible techniques" for later reducing his sentence, see Lockett, supra, at 605 (Burger, C. J.) (plurality opinion), it does not foreclose all of them, since there remain the pos- sibilities of retroactive legislative reduction and executive clemency. In some cases, moreover, there will be negligible difference between life without parole and other sentences of imprisonment -- for example, a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65-year-old man. But even where the difference is the greatest, it cannot be compared with death. 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.

Notes

1 Mich. Comp. Laws Ann. 333.7403(2)(a)(i) (Supp. 1990-1991) pro- vides a mandatory sentence of life in prison for possession of 650 grams or more of "any mixture containing [a schedule 2] controlled substance"; 333.7214(a)(iv) defines cocaine as a schedule 2 controlled substance. Sec- tion 791.234(4) provides eligibility for parole after 10 years in prison, except for those convicted of either first-degree murder or "a major con- trolled substance offense"; 791.233b[1](b) defines "major controlled sub- stance offense" as, inter alia, a violation of 333.7403.

2 Specifically, we rejected, in some detail, the four-factor test promul- gated by the Fourth Circuit in Hart v. Coiner, 483 F. 2d 136 (CA4 1973). This test included the three factors relied upon by the Rummel dissent. See Hart, supra, at 140-143.

3 Solem v. Helm, 463 U.S. 277 (1983), apparently adopted this inter- pretation, quoting, as it did, from one of these sources. See id., at 285 (quoting Sources of our Liberties 236).

4 Indeed, it is not clear that, by the standards of the age, Oates' sen- tence was disproportionate, given that his perjuries resulted in the deaths of 15 innocents. Granucci suggests that it was not. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 859, and n. 97 (1969). And Macaulay observed that Oates' "sufferings, great as they might seem, had been trifling when compared with his crimes." 6 Macaulay, 137. See also, 2 id., at 203-204.

5 Contrary to *Justice White*'s suggestion, post, at 3, n. 1, Granucci provides little (if any) direct evidence that the Declaration of Rights embodied a proportionality principle. He simply reasons that, because English law was concerned with proportionality, the Declaration of Rights must have embodied such a principle. Granucci, supra, at 844-847.

6 *Justice White* apparently agrees that the clause outlaws particular "modes" of punishment. He goes on to suggest, however, that because the Founders did not specifically exclude a proportionality component from words that "could reasonably be construed to include it," the Eighth Amendment must prohibit disproportionate punishments as well. Post, at 3. Surely this is an extraordinary method for determining what re strictions upon democratic self-government the Constitution contains. It seems to us that our task is not merely to identify various meanings that the text "could reasonably" bear, and then impose the one that from a pol- icy standpoint pleases us best. Rather, we are to strive as best we can to select from among the various "reasonable" possibilities the most plausible meaning. We do not bear the burden of "proving an affirmative decision against the proportionality component," ibid.; rather, *Justice White* bears the burden of proving an affirmative decision in its favor. For if the Constitution does not affirmatively contain such a restriction, the matter of proportionality is left to state constitutions or to the democratic process.

7 Printed collections of State Constitutions were available to the Founders, see The Federalist No. 24, p. 159, n. (C. Rossiter ed. 1961) (A. Hamilton); see also id., No. 47, p. 304-307 (J. Madison) (comparing con- stitutions of all 13 States).

8 The New Hampshire proportionality provision, by far the most de- tailed of the genre, read: "All penalties ought to be proportioned to the na- ture of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences; the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of san- guinary laws is both impolitic and unjust. The true design of all punish- ments being to reform, not to exterminate, mankind." N. H. Const., Art. I, 18 (1784).

The Ohio provision copied that of New Hampshire.

9 *Justice White* suggests that because the Framers prohibited "exces- sive fines" (which he asserts, and we will assume for the sake of argument, means "disproportionate fines"), they must have meant to prohibit "exces- sive" punishments as well. Post, at 1-2. This argument apparently did not impress state courts in the 19th century, and with good reason. The logic of the matter is quite the opposite. If "cruel and unusual punish- ments" included disproportionate punishments, the separate prohibition of disproportionate fines (which are certainly punishments) would have been entirely superfluous. When two parts of a provision (the Eighth Amend- ment) use different language to address the same or similar subject matter, a difference in meaning is assumed. See Walton v. Arizona, 497 U. S. ---, --- (1990) (opinion concurring in part and concurring in judgment).

But, it might be argued, why would any rational person be careful to for- bid the disproportionality of fines but provide no protection against the disproportionality of more severe punishments? Does not the one suggest the existence of the other? Not at all. There is good reason to be con- cerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Impris- onment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the con- text of other constitutional provisions, it makes sense to scrutinize govern- mental action more closely when the State stands to benefit. See United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 25-26 (1977); Perry v. United States, 294 U. S. 330, 350-351 (1935). (We relied upon precisely the lack of this incentive for abuse in holding that "punitive dam- ages" were not "fines" within the meaning of the Eighth Amendment. Browning Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271-276 (1989)). Thus, some early State Constitutions prohib- ited excessive fines without placing any restrictions on other modes of pun- ishment. E. g., Conn. Declaration of Rights Art. I, 13 (1818) (prohibit- ing excessive fines only); Ga. Const., Art. LIX (1777) (same).

10 Neither State v. Driver, 78 N. C. 423 (1878), nor State ex rel. Garvey v. Whitaker, 48 La. 527, 19 So. 457 (1896) is to the contrary. They are examples of applying, not a proportionality principle, but rather the princi- ple (curiously in accord with the original meaning of the phrase in the Eng- lish Declaration of Rights, discussed above) that a punishment is "cruel and unusual" if it is illegal because not sanctioned by common law or statute. In Driver, the court had imposed a sentence of five years in county jail for the common-law offense of assault and

battery, for which no statutory pen- alty had been established. The North Carolina Supreme Court held the sentence to violate the State's "cruel or unusual punishment" provision be- cause a county jail is "a close prison, where life is soon in jeopardy," and no prisoner had ever "been imprisoned for five years in a County jail for any crime however aggravated." 78 N. C., at 425, 426-427. A subsequent North Carolina case makes it clear that when the legislature has prescribed a penalty of a traditional mode, the penalty's severity for the offense in question cannot violate the State's "cruel or unusual punishment" clause. State v. Blake, 157 N. C. 608, 611, 72 S. E. 1080, 1081-1082 (1911).

In Garvey, the defendants were sentenced to nearly six years in jail for trespassing on public property. The sentence prescribed by the relevant city ordinance was 30 days, but the defendants' one-hour forty-minute occupation had been made the subject of 72 separate counts, "each offence embracing only one and one-half minutes and one offence following after the other immediately and consecutively," 48 La., at 533, 19 So., at 459. The Louisiana Supreme Court found the sentence to have been cruel and unusual "considering the offence to have been a continuing one," ibid. We think it a fair reading of the case that the sentence was cruel and unusual because it was illegal.

11 *Justice White* argues that the Eighth Amendment must contain a proportionality principle because otherwise legislatures could "mak[e] overtime parking a felony punishable by life imprisonment." Post, at 10. We do not in principle oppose the "parade of horribles" form of argumenta- tion, see Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 590-593 (1989-1990); but its strength is in direct proportion to (1) the certitude that the provision in question was meant to exclude the very evil represented by the imagined parade, and (2) the probability that the parade will in fact materialize. Here, for the reasons we have discussed, there is no cause to believe that the provision was meant to exclude the evil of a disproportionate punishment. *Justice White*'s argument has force only for those who believe that the Constitu- tion prohibited everything that is intensely undesirable -- which is an obvi- ous fallacy, see Art. I, 9 (implicitly permitting slavery); Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353 (1981). Nor is it likely that the horrible example imagined would ever in fact occur, unless, of course, overtime parking should one day become an arguably major threat to the common good, and the need to deter it arguably critical -- at which time the members of this Court would probably disagree as to whether the punish- ment really is "disproportionate," even as they disagree regarding the pun- ishment for possession of cocaine today. As Justice Frankfurter reminded us, "[t]he process of Constitutional adjudication does not thrive on conjur- ing up horrible possibilities that never happen in the real world and devis- ing doctrines sufficiently comprehensive in detail to cover the remotest contingency." New York v. United States, 326 U.S. 572, 583 (1946). It seems to us no more reasonable to hold that the Eighth Amendment for- bids "disproportionate punishment" because otherwise the State could im- pose life imprisonment for a parking offense, than it would be to hold that the Takings Clause forbids "disproportionate taxation" because otherwise the State could tax away all income above the subsistence level.

12 At the time we decided Graham, it was not clear that the Eighth Amendment was applicable to the States, but our opinion obviously as- sumed that it was. See Rummel v. Estelle, 445 U.S. 263, 277, n. 13 (1980).

13 State Supreme Courts reacted to Weems in various ways. The Vir- ginia Supreme Court suggested that, since only four Justices had joined the majority opinion, the proportionality question "may be fairly said to be still an open question in so far as the authority of the

Supreme Court is concerned." Hart v. Commonwealth, 131 Va. 726, 745, 109 S. E. 582, 588 (1921). Cf. North Georgia Fishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 616-619 (1975) (*Blackmun, J.,* dissenting). The Supreme Court of Indi- ana apparently thought Weems to be in accord with the traditional view expressed in Hobbs v. State, 133 Ind. 404, 32 N. E. 1019 (1893). See Kistler v. State, 190 Ind. 149, 158 (1921). The North Carolina Supreme Court, after stating that Weems contained "an interesting historical re- view" went on to hold that, under North Carolina's "similar provision," punishment fixed by the legislature "cannot be excessive." State v. Blake, 157 N. C. 608, 611, 72 S. E. 1080, 1081-1082 (1911).

14 In Robinson v. California, 370 U.S. 660 (1962), the Court invalidated a 90-day prison sentence for the crime of being "addicted to the use of nar- cotics." The opinion does not cite Weems and rests upon the proposition that "[e]ven one day in prison would be a cruel and unusual punishment for the `crime' of having a common cold," 370 U. S., at 667. Despite the Court's statement to the contrary in Solem v. Helm, 463 U.S. 277, 287 (1983), there is no reason to believe that the decision was an application of the principle of proportionality. See Ingraham v. Wright, 430 U.S. 651, 667 (1977).