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Solem v. Helm: The Courts' Continued Struggle to Define Cruel and Unusual Punishment

INTRODUCTION

The most fundamental guarantee embodied in the eighth amendment to the United States Constitution is the prohibition against cruel and unusual punishment. The meaning, however, of the language is a confusing and undeveloped area of the law. Historically, neither courts nor scholars have been able to develop precise standards or guidelines delineating the scope or meaning of the terms "cruel and unusual." The constitutionality of punishment presents two major dilemmas which must be resolved before the eighth amendment may be utilized to its potential. First, there is the problem of judicial re-

1. U.S. Const. AMEND. VIII.

There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but of all our fundamental guarantees, the ban on "cruel and unusual punishments" is one of the most difficult to translate in judicially manageable terms. . . . The widely divergent views of the Amendment expressed in today's opinion reveal the haze that surrounds this constitutional command. Yet, it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.

Id.

3. Note, The Revival of the Eighth Amendment: Development of the Cruel and Unusual Punishment Doctrine by the Supreme Court, 16 STAN. L. REV. 966 (1964) [hereinafter cited as Note, The Cruel and Unusual Punishment Doctrine]. Attempts have been made to separate the terms cruel and unusual and define them individually. Some have attempted to ascertain the degree to which unusual defines the term cruel. For a complete discussion of this method, see Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 HARV. L. REV. 635 (1966) [hereinafter cited as Note, The Cruel and Unusual Punishment Clause].

4. Note, Constitutional Law—Eighth Amendment—Appellate Sentencing Review, 1976 WIs. L. REV. 655, 658 (1976) [hereinafter cited as Note, Constitutional Law]. One commentator has stated: "few constitutional guarantees of individual liberty have so often been relied upon, to so little avail, as has the eighth amendment." Note, The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment, 36 N.Y.U. L. REV. 846 (1961). Still another commentator notes: [I]n most actions arising under the eighth amendment, the briefs and opinions contain little more than detailed recitations of facts followed by conclusions that those facts are or are not "shocking." Judges recently have been shocked more often than before; but the truth remains that little will be done for the faceless thousands behind stone and concrete walls until courts develop a more carefully defined framework within which to examine the constitutionality of punishment.

Wheeler, supra note 2, at 838.

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view of an area traditionally deemed legislative: that is, the task of making the punishment fit the crime. Should a reviewing court invalidate a legislatively imposed penal sanction? That determination implicates the question of federalism: to what extent may a federal court review state legislation? The second major issue courts must resolve is substantive. Assuming that a court may engage in review of punishment can there be developed an analysis that will give an objective meaning to the cruel and unusual punishment clause.

Those questions were, at least partially, answered in Solem v. Helm. The United States Supreme Court held that the eighth amendment required a criminal punishment be proportionate to the criminal behavior. This Note will trace the development of eighth amendment analysis beginning with its origins in English jurisprudence. It will discuss application by American courts to inherently cruel modes of punishment, and application to capital punishment. Finally, it will discuss application of the clause by the court in Solem, to the punishment of imprisonment.

Throughout the analysis there exists extreme tension vis-a-vis the judicial role and the legislative role with respect to criminal sanc-

5. Richey, Appellate Review of Sentencing: Recommendation for a Hybrid Approach, 7 HOFSTRA L. REV. 71 (1978). Court's have generally been hesitant to become involved in sentences set by judges in the lower courts since sentencing has largely been viewed as an evaluation of the individual offender.

6. The courts have been more willing to intervene in the area of criminal procedure than in the area of substantive criminal law. Wading into the substantive area involves the courts in a morass of difficult philosophical questions with respect to the goals and justifications of the penal system. Dresser, Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endangered Doctrines, 34 Sw. L.J. 1098-1104 (1981) [hereinafter cited as Dresser, Endangered Doctrines]. The schism in policy between judicial restraint and active review is illustrated by the divergent views expressed in a leading eighth amendment case. The opinion of the Court stated:

While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Court recognized in that case that the words of the amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Trop v. Dulles, 356 U.S. 86, 100-01 (1958). The dissenting opinion stated the following: "The awesome power of the Court to invalidate such legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint." Trop, 356 U.S. at 128 (Frankfurter, J., dissenting).

8. This case appears to overrule Rummel v. Estelle, 445 U.S. 263 (1980) which held the eighth amendment not applicable to terms of imprisonment.

9. See infra notes 14-19 and accompanying text.
10. See infra notes 20-32 and accompanying text.
11. See infra notes 51-84 and accompanying text.
12. See infra notes 119-43 and accompanying text.
tions. Beyond the threshold questions of judicial interference, the courts appear to struggle with the substantive meaning of cruel and unusual punishment. Several analytical approaches are presented in the earlier cases. These threads are woven together in Solem and for the first time applied to a sentence involving only a term of years. This Note suggests that Solem represents a broadened scope for the eighth amendment and greater clarification of application. Finally, the Note will suggest an alternative analysis with respect to the necessary balance between the nature of the crime and punishment imposed.

I. HISTORIC ROOTS

A complete appreciation of the meaning and significance of Solem requires an understanding of the development and use of the eighth amendment. The phrase embodied in the United States Constitution was lifted directly from the English Declaration of Rights of 1688. Generally, it is thought that the English clause was drafted in response to the "Bloody Azzize" and the excesses of the Stuart era. However, there is authority to the effect that during earlier eras, the English meant to prohibit sentences which were excessive in the sense that the punishment did not fit the crime; that the English exhibited a desire to create some "equality between the offense and the punishment of the offender." The court's how-

13. See infra notes 20-50 and accompanying text.
15. Id. at 853-56. The "Bloody Azzize" refers to the treason trial conducted in England beginning in 1685 following an abortive rebellion against King James II. The punishment for treason at that time consisted of "drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disembowelled and his bowels burnt before him, and then beheaded and quartered." Id. at 854 (footnote omitted). This was publicized by Puritan writers and "history has recorded that the cruel and unusual punishment clause was in answer to the 'Bloody Azzize.'" Id.
16. Note, The Cruel and Unusual Punishment Clause, supra note 3, at 635-36. See also Granucci, supra note 14, at 854-65. Granucci maintains that the colonists' belief that the English Bill of Rights of 1689 and hence their understanding of the cruel and unusual punishment clause was actually based on the mistaken interpretation of historic events which led to the drafting of that clause. It is his view that the publications by Puritans regarding the "Bloody Azzize" gave birth to the colonists' belief that the phrase "cruel and unusual" referred to methods of punishment such as torture. Legal treatises available in America discussing at length the methods of punishment were misread by those influential in American legal development. Actually, Granucci has found through tracing English legal history from earlier times and the debates in the Houses of Parliament during the drafting of the provision, that it was meant to prohibit "illegal" sentences, "severe punishment unauthorized by statute and not within the jurisdiction of the court to impose." But see Mulligan, Cruel and Unusual Punishments: The Proportionality Rule, 47 FORDHAM L. REV. 639, 641 (1979) [hereinafter cited as Mulligan].
17. Granucci, supra note 14, at 844-47. The author points to provisions of the
ever, operated on the former theory. Very early cases made a historic analysis prohibiting only those punishments that were historically considered inherently cruel: torture, pilloring, etc.

II. INHERENTLY CRUEL PUNISHMENT

A. Weems v. United States

The first attempt at definition by the Supreme Court of eighth amendment jurisprudence occurred in 1910 in Weems v. United States. The defendant was found guilty of having falsified an official document. In delineating the meaning of the eighth amendment prohibition, the Court made clear that interpretation of the terms cruel and unusual included some flexibility—both in what the founding fathers intended and the effects of future experience and societal development. The opinion explicitly enunciates the necess-

Magna Carta and passages of the Laws of Edward the Confessor (1042-66) in support of this view.


19. This circumscribed view is illustrated by the Court in Wilkerson v. Utah, 99 U.S. 130 (1878), in its consideration of shooting as a method of inflicting the death penalty: Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." Id. at 135-36. The earlier mention of the clause by the Court is made in the dissenting opinion in O'Neill v. Vermont, 144 U.S. 323 (1892). The defendant in that case was found guilty of 307 offenses of selling liquor without authority. Punishment was inflicted for each distinct act—307 offenses fined $6,140.00 at $20.00 each. It was stipulated that failure to pay the fine within a fixed period would result in imprisonment at hard labor for 28,836 days. The majority opinion did not consider the question whether such excessive length may be cruel and unusual punishment since that question had not been raised by counsel and because the eighth amendment had not been made applicable to the states at that time. However, the dissenting opinion directly addresses the issue of excessive punishment:

The inhibition is directed not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or the fine imposed, or punishment inflicted. Fifty-four years confinement at hard labor, . . . is a punishment at the severity of which, considering the offences, it is hard to believe that any man of right feeling and heart can refrain from shuddering.


20. 217 U.S. 349 (1910). The offense called for the following minimum sentence: 1) Twelve years and one day of cadena temporal—imprisonment in chains at "hard and painful labor"; 2) certain accessory penalties: a) civil interdiction (loss of most marital and property rights during imprisonment), b) perpetual, absolute disqualification (permanent loss of the right to vote, to hold public office, to receive retirement pay, etc.), and c) subjection to official surveillance during life; and 3) a fine of $1,250. Id. at 366. The above punishments are generally referred to as cruel accompaniments.
sity for judicial review of legislative sentencing decisions. The *Weems* court reasoned that the power given to the legislature to fix punishment and substantive criminal law was so extensive, the framers of the amendment must have had in mind some limitation on that power.\(^2\)

While the amendment may have been drafted with certain very specific punishments in mind,\(^2\) the historic analysis does not have to preclude the view of the amendment as vital, capable of adaptation to changing circumstances. This amendment alone could not have been intended to preclude only those punishments which the founding fathers feared in their time.\(^2\) If the language were wedded to precisely those conditions current at the time it was written "general principles would have little value and be converted by precedent into impotent and lifeless formulas."\(^4\) Speaking specifically of Weem's sentence, the Court called it "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind."\(^5\)

The Court discussed, at length, the role of the judiciary with respect to review of a legislatively proscribed punishment. Alluding to the intention of the framers of the Constitution to place some limitation on the powers of the legislature, and at the same time acknowledging the primacy of the legislature to act in this area, the opinion declared the eighth amendment a limiting factor on the legislature. Constitutional prohibitions preclude an exclusive legislative arena. Those prohibitions also necessitate judicial review of legislatively mandated punishments.\(^6\)

The majority in *Weems* undertook a review of the sentence on a comparative basis\(^7\) such as is done later in the capital punishments cases and most recently by the *Solem* court. The opinion compared

\(^{21}\) *Id.* at 373-74.

\(^{22}\) *Id.* at 372. The opinion specifically mentions inflixions of bodily pain and mutilation.

\(^{23}\) *Id.* at 373. *See also* Mulligan, *supra* note 16, at 644.

\(^{24}\) *Weems*, 217 U.S. at 373. Clearly, this language anticipates later opinions enunciating the changing values of society as an indication of cruel and unusual punishment. It anticipates the concern that the Court must move as the Court did in *Solem* or the amendment would be an empty slogan. *See also*, Mulligan, *supra* note 16, at 645-49.

\(^{25}\) *Weems*, 217 U.S. at 373. It should be particularly noted that *Weems* referred to both excessive length of imprisonment and excessive accompaniments. Chief Justice Burger dissenting in *Solem* pointed to the fact that the *Weems* Court referred continually to the cruel accompaniments and therefore *Weems* could not support the holding that excessive length of sentence could violate the eighth amendment. *Solem v. Helm*, 103 S. Ct. 3001, 3018-19 (1983) (Burger, C.J., dissenting). He is correct that the decision probably had more to do with the accompaniments than length of sentence.

\(^{26}\) *Weems*, 217 U.S. at 378-79.

\(^{27}\) *Note, Constitutional Law, supra* note 4, at 584.
the punishments for other crimes in that jurisdiction and various punishments in the United States. As a result, the punishment was found excessive.

The ramifications and exact meaning of *Weems* is unclear. Some commentators claim that this case expanded the dissent in *O'Neil*; that the court clearly recognized excessive length of the sentence as violative of the eighth amendment.\(^{28}\) "The *Weems* decision has generally been accepted by both federal and state courts as establishing the rule that excessiveness, as well as mode of punishment may be unconstitutionally cruel."\(^{29}\) However, a harsh sentence alone has seldom been found unconstitutional. This can be attributed to deference to the legislative prerogative in this area.\(^{30}\) *Weems* actually had very little impact since it involved not only length of the sentence, but that sentence accompanied by hard labor and various other civil deprivations that compelled the result. Considering these latter aspects of the case, it is closer to the traditional approach:\(^{31}\)

In view of its rather special facts, *Weems* was hardly the occasion for a general pronouncement on the authority of courts to upset a legislatively determined proportion of punishment to crime. . . . The thrust of that comparison was the notion that punishment imposed on *Weems* was aberrational when viewed in the context of the American legal system . . . It does not contain, nor will it support, an analysis in terms of the rationality of a legislatively determined proportion of punishment to crime.\(^{32}\)

Arguably, *Weems* represents disdain for the accompaniments rather than any notion that the sentence does not serve the goals of punishment. It does not question the penological purposes of a sanction nor does it suggest that those purposes might better be served by some other means.

Application of *Weems* is further limited by the fact that the federal courts were reviewing a federally mandated sentence. Therefore, while it is of some assistance in setting the parameters of

\(^{28}\) Gardner, *supra* note 19, at 1006.


\(^{30}\) *Id.* The courts traditionally had some difficulty in assessing the parameters of cruel and unusual punishment. Perhaps more than others it can lend itself to the subjective judgments of the justices. It is necessary to determine whether the legislature has abused its discretion without overlaying the personal proclivities of the individual justices. Note, *Recidivist Statutes—Application of Proportionality and Overbreadth Doctrines to Repeat Offenders—Wansstreet v. Bordenkircher, 57 WASH. L. REV. 573, 577 (1982)* [hereinafter cited as Note, *Proportionality*]; see also Furman v. Georgia, 408 U.S. 238, 375-76 (1971) (per curiam) (Burger, C.J., dissenting).


\(^{32}\) *Id.* at 1076.
legislative activity and judicial intervention it does not suggest a solution to the problem of a federal court invalidating state legislation.

B. Trop v. Dulles

In 1958, the Court in *Trop v. Dulles* overthrew a federal statute authorizing expatriation for the crime of wartime desertion. The opinion draws on the *Weems* analysis in three areas: 1) the validity of judicial review; 2) the construction of the eighth amendment as a flexible instrument; and 3) the use of an interjurisdictional analysis.

Acknowledging that the State has the power and authority to fix crime and punishment, the Court established the eighth amendment as a curb on that power. This is clearly a reiteration of the policy expressed in *Weems* condemning judicial reticence. However, a schism in policy is still evident in this case. Justice Frankfurter, in a dissenting opinion, condemned what he termed the Court's foray into the legislative arena. His hesitation is grounded in two areas which recur throughout eighth amendment jurisprudence. His first objection is a classic dilemma: to what extent is the judiciary actually legislating, usurping legislative authority, when declaring a punishment invalid? A legislatively imposed sanction implies societal judgment both in condemnation of the act and goals accomplished by a given punishment. The second objection deals with the subjectivity of the decision. Since there had not been developed objective standards to determine the meaning of cruel and unusual, any analysis would inevitably be based on the personal predilections of individual justices.

The majority opinion construes the precept underlying the eighth amendment to be "nothing less than the dignity of man." This test is "the evolving standards of human decency." The analysis therefore moves away, as did *Weems*, from a strictly historic analysis. Interpretation therefore should not be wedded to what evils it may have been meant to prohibit at the time it was established. In that sense, the case gives future courts room to expand the concepts. *Weems* and *Trop* read together clearly establish that the amendment should be interpreted in a flexible manner.

How might a court determine the evolving standards of decency? Such a test seems vulnerable to Justice Frankfurter's fear that the

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34. Id. at 100.
35. See supra note 6.
36. See infra notes 53-59 and accompanying text.
38. Id. at 120.
39. Id. at 100.
40. Id. at 100-01.
courts would have to engage in moral and policy judgments. In an attempt to remove some of the inherent subjectivity, the Court utilized an interjurisdictional analysis similar to that of Weems. After canvassing the international community to determine the penalties in other jurisdictions for the crime of desertion, the Court found "virtual unanimity" for the condemnation of denationalization as a punishment. Such a result indicates at least that the punishment was unusual and probably excessive in relation to the crime.

What then may be gleened from Trop that may be utilized in future analysis? First, it lends validity to judicial review and tends to establish the eighth amendment as a limitation of the prerogative of the legislature in this area. However, as with Weems, the Court was evaluating a federal statute thus somewhat limiting its application to state legislation. Second, cruel and unusual punishment does not apply only to torture. Rather, it is that which is offensive to humanity and is tested by evolving standards. Unfortunately, beyond the scope it gives courts to expand application of the clause, Trop offers little objective guidance for application. The standard creates its own definitional problems. How might a court attempt to measure an affront to human dignity? Some indication was given by the Court: "imprisonment and even execution may be imposed depending on the enormity of the crime... any technique outside the bounds of these traditional penalties is constitutionally suspect." Therefore, the eighth amendment prohibits more than torture, etc. and certain inherently cruel punishments, but is not applicable to commonly practiced and accepted punishments. Thus limited, it seems of little use in reviewing a sentence of imprisonment.

Nevertheless, the interjurisdictional analysis becomes an important tool in later court analysis. It gives an objective means to ascertain an otherwise subjective standard. However, since the case involves an unusual punishment, it cannot be said conclusively that the decision was based on amount of punishment or that it was

41. Id. at 102.
42. Id. at 110-11. The concurring opinion of Justice Brennan is somewhat prophetic in its questioning of the legislative authority where that authority has been used to sanction a punishment that is not rationally related to the criminal behavior in question. He would invalidate a statutory scheme that does not achieve rational ends. There is a lengthy discussion of the popular sentiment of rehabilitation as an objective of punishment, deterrence, incapacitation and protection of society from the criminal and the relationship of this particular punishment to those goals. Since denationalization serves none of these goals it should not be sanctioned.
43. Wheeler, supra note 2, at 842.
44. Trop, 356 U.S. at 100.
46. Gardner, supra note 19, at 1114.
based on a proportionality principle.47

C. Robinson v. California

Another facet of the analysis was added by the Court in Robinson v. California.48 The Court held that a statute making addiction to narcotics a crime constituted cruel and unusual punishment. The case is significant for two reasons. While not specifically employing a proportionality analysis, it is an expansion of one aspect of that test. That is, the punishment cannot be viewed in the abstract but must be viewed in relation to the act being punished. The Court stated: “To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold.”49

Robinson also emphasized the culpability or blameworthiness of the act and distinguished between involuntary versus voluntary acts. An examination of the crime in terms of the punishment imposed is used in later cases to determine whether the punishment, in fact, fits the crime.

III. CAPITAL PUNISHMENT

The most extensive analysis of the cruel and unusual punishment clause was precipitated by challenges to the death penalty. Even with this most extreme of penalties there is very little consensus.50 The problems of judicial review and questions of federalism are still debated throughout the major cases. There is vehement disagreement throughout regarding the role of the judiciary and vehement disagreement regarding whether objective criteria can be determined so as to arrive at some workable test of cruel and unusual. The last is the most vexing problem confronted by the Court.

47. Id.
48. 370 U.S. 660 (1962). This case held that the eighth amendment was applicable to the states by operation of the fourteenth amendment.
49. Id. at 667.
50. Wheeler, Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia, 25 STAN. L. REV. 62 (1972) [hereinafter cited as Wheeler, Punishment II]. This case encompasses six tests: 1) public abhorrence; 2) inherently excessive pain and suffering; 3) degradation of human dignity; 4) excessiveness in relation to purpose: unnecessary punishment; 5) unusualness; and 6) arbitrariness. “Each Justice wrote a separate opinion and no more than three of the five whose votes saved the lives of the petitioners agreed upon either the nature of the questions before the Court or the type of tests appropriately employed in eighth amendment litigation.” Id. at 62.
A. Furman v. Georgia

Furman v. Georgia\(^{51}\) is the most exhaustive examination and the most illustrative of the various definitions given the language and the struggle to find some objective means of evaluating a sentence. Furman considered the imposition of the death penalty in two cases of rape and one case of murder. The Court held the punishment of death for the crime of rape unconstitutional. Two justices held the death penalty unconstitutional in all instances. Three justices held the death penalty unconstitutional for the crime of rape.\(^{52}\)

As in the earlier cases, the Court debated the threshold question of judicial intervention. Again, there was wide disagreement between the plurality and minority opinions. In the view of Justice Brennan, it was the very purpose of the amendment to check "the exercise of legislative authority."\(^{53}\) Justice White directly addressed the question of judicial review. Justice White, like the Weems Court, viewed the eighth amendment as a limiting factor on the legislature.\(^{54}\)

The dissenting justices strenuously opposed use of the eighth amendment by courts to impose judicial views of policy and morality.\(^{55}\) Justice Blackmun expressed distaste for the use of capital punishment, but found abolition of the punishment a legislative decision.\(^{56}\) Although he acknowledged that the eighth amendment

\(^{51}\) 408 U.S. 238 (1971) (per curiam).

\(^{52}\) Id. at 264.

\(^{53}\) He further stated that legislative authorization was not dispositive of the acceptance of a given punishment by society. Rather, it was use of that punishment. Id. at 277-80 (Brennan, J., concurring).

\(^{54}\) Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the amendment would bar whether legislatively approved or not. Inevitably, then, there will be occasions when, we will differ with Congress or state legislatures with respect to the validity of punishment. There will also be cases in which we shall strongly disagree among ourselves. Unfortunately, this is one of them. Id. at 313-14 (White, J., concurring).

\(^{55}\) The dissenting justices were: Burger, C.J., Blackmun, J., Rehnquist, J., and Powell, J. Id. at 467 (Rehnquist, J., dissenting).

\(^{56}\) To reverse the judgments in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts—perhaps rationalizations—that is the compassionate decision for a maturing society; that this is the moral, the "right" thing to do; that thereby we convince ourselves that we are moving down the road toward human decency; that we value life even though that life has taken another or others or has grievously scarred another or others and their families; and that we are less barbaric than we were. . . . This, for me, is a good argument, and it makes some sense. But it is good argument and makes sense only in a legislative and executive way and not as a judicial expedient. . . . I do not sit on
may be defined by evolving standards, those standards must be determined by the legislatures. Judicial determination involves courts in policy decisions that courts cannot and should not make. Chief Justice Burger condemned the judgment of the plurality as essentially moral. Justice Powell condemned the attempt by the plurality to examine the utility of the punishment as nothing less than "shattering" with respect to "principles of stare decisis, federalism, judicial restraint and—most importantly—separation of powers." Justice Powell further stated:

[N]othing in the history of the Cruel and Unusual Punishments Clause indicates that it may properly be utilized by the judiciary to strike down punishments—authorized by legislatures and imposed by juries—in any but the extraordinary case. This Court is not empowered to sit as a court of sentencing review, implementing the personal views of its members on the proper role of penology. To do so is to usurp a function committed to the Legislative Branch and beyond the power and competency of this Court.

While the plurality easily resolved the threshold issue, at least with respect to the death penalty, there was little or no agreement on the appropriate test. The plurality offers several guidelines to determine the meaning of cruel and unusual punishment. All seem to join earlier general principles from previous cases to an examination of the purpose or justification for the punishment and its effectiveness. This necessarily results in an examination and judgment of the legislative purpose in enacting the sanction.

There are four purposes for which a punishment may be justified. They are retribution, rehabilitation, deterrence and incapacita-
The opinions employ several tests using at times different terms drawing different meanings. The plurality uses this examination to determine specific criteria for evaluating the standards of earlier cases. *Weems* and *Trop*, it will be recalled, tended to establish flexibility of interpretation. *Trop* established that changing values of society maybe used to interpret the language. The plurality used popular sentiment as an index. Popular sentiment was determined by fairly objective criteria such as the jurisdictional analysis made in *Weems* and *Trop*.

Preservation of the human dignity of the individual appears as a limiting factor on the range of permissible punishments. The exact meaning of that standard is still somewhat clouded. One commentator has suggested that it is a factor limiting the power of the legislature. This same commentator has suggested that it be interpreted as a rejection of the utilitarian purposes of punishment.

The most extensive questioning of legislative purposes can be found in the determination of the term excessive. Several justices define excessive as "not necessary" to achieve the purpose of the punishment. Justice Stewart defined cruel as "excessive" and unusual as an arbitrary imposition. Excessive is defined as that which does not serve a legitimate purpose.

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62. Deterrence is basically a threat to curtail future criminal behavior. It curtails that behavior by threatening the individual behavior (specific deterrence) and by holding out the threat of punishment and example of punishment to society as a whole (general deterrence). *Id.* at 391-92.

63. Incapacitation literally removes the offender from society or neutralizes the criminal for the protection of society. *Id.* at 387. The latter three are collectively referred to as utilitarian theories of punishment and arguably are more concerned, and punish the criminal, not for individual acts, but for the collective good of society. See Andenas, *The Morality of Deterrence*, 37 U. CH. L. REV. 649, 656 (1970). "In a system of this kind it is a fair generalization that the offender is used as a means for the public good." *Id.*

64. Justice Douglas, for example, uses the term arbitrary in an equal protection, enforced with discrimination sense. *Furman*, 408 U.S. at 240 (Douglas, J., concurring). Justice Stewart uses it to indicate random selection: "in the sense that being struck by lightening is cruel and unusual." *Id.* at 309 (Stewart, J., concurring). Justice White uses it in the sense that the punishment serves no rational purpose. *Id.* at 310 (White, J., concurring).

65. See *supra* note 40 and accompanying text. Societal values were also indicated by the number of states which enacted the death penalty statutes.

66. Changing values of society were measured by such things as: 1) increasing disuses of the death penalty; 2) decreasing numbers of executions; 3) decreasing numbers of death sentences rendered; and 4) rejection by the public of the penalty. *Furman*, 408 U.S. at 434-46.


68. *Id.* at 67.

69. *Id.* at 69.

70. *Id.* at 67.

71. *Furman*, 408 U.S. at 331.

72. *Id.* at 309 (Stewart, J., concurring).
trary encompassed an examination of the purpose of the punishment. However, he appeared not to question the legitimacy of the goal, rather he questioned the effectiveness of that penalty to achieve that goal. 73

The plurality also seems to question the purposes for which society may punish. The death penalty, as Justice Marshall viewed it, completely rejects rehabilitation and emphasizes retribution. Justice Marshall suggested that retribution for its own sake is improper. 74 Further, if the purpose is better served or equally well served with another punishment, the chosen punishment is excessive. 75

In sum, this case draws from Weems and Trop the following: 1) the validity of judicial review, 2) that the amendment is a limiting factor on the power of the legislature, and 3) some general definition of the standards of measurement. It added a more detailed jurisdictional analysis and more specific guidelines to elucidate the general definitions of cruel and unusual punishment.

B. Gregg v. Georgia

While the Court previously proceeded very slowly in this area, there now seemed more rapid movement. In 1976, the Court in Gregg v. Georgia, 76 upheld the death penalty for the crime of murder. The Court articulated the standard which should be employed to review the penalty. Those considerations are "first, society's attitude towards a challenged sanction—determined by objective criteria such as the history and traditional use of the punishment; second, current legislative trends regarding its use; and third, frequency of imposition by juries." 77 The Court also draws a distinction between the death penalty and all other types of punishment which justifies the more serious review by the courts. 78

C. Coker v. Georgia

A year later, in Coker v. Georgia, 79 the Court struck down as

73. Id. at 312 (White, J., concurring).
74. Id. at 342.
75. Id.
76. 428 U.S. 153 (1976). The defendant had been convicted of two counts of murder and two counts of armed robbery. The jury returned after a bifurcated procedure, the penalty of death since it found as an aggravating circumstances that the murders were committed during the commission of two other capital felonies.
77. Gardner, supra note 19, at 1116.
78. Gregg, 428 U.S. at 188. This distinction becomes most relevant in future eighth amendment challenges based on length of sentences.
79. 433 U.S. 584 (1977). The defendant was convicted of, among other, things Rape and armed robbery. He was sentenced to death for the rape conviction.
excessive, the death penalty for the crime of rape.\textsuperscript{80} The opinion held that two factors should be considered when deciding the question of excessive punishments. A punishment is excessive if it “1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or 2) is grossly out of proportion to the severity of the crime.”\textsuperscript{81} The determination is made by considering “public attitudes” and the sentences imposed by juries for crimes which are similar in nature.\textsuperscript{82} The result of this analysis is the “requirement of proportionality” as a tool to inhibit society's imposition of certain goals of punishment.\textsuperscript{83} The eighth amendment becomes then, at least in terms of the death penalty, a “limitation of the extent to which a state may impose severe sanctions in individual offenders to further broad societal goals.”\textsuperscript{84}

IV. Punishments of Imprisonment

Logically, the analysis employed in earlier cases, should be applicable to sentences of imprisonment as well.\textsuperscript{85} If the amendment is flexibly viewed to prohibit punishments other than those historically thought of as inherently cruel, the analysis should be applicable to terms of imprisonment. If courts can examine the nature of the crime against the punishment imposed in capital cases, there seems to be no logical reason to preclude the analysis to capital cases alone. Further, there seems to be no basis for finding the jurisdictional analysis, which served as an objective barometer of changing societal value, not sufficiently objective when considering a sentence of imprisonment.

However, the Court held in 1980, in \textit{Rummel v. Estelle},\textsuperscript{86} that the eighth amendment was not applicable to a sentence of life imprisonment and that the proportionality analysis applicable to capital cases was not applicable to sentences of imprisonment alone.\textsuperscript{87} The defendant in this case was sentenced under a Texas recidivist statute which imposed life imprisonment upon conviction of three felonies. The felonies were: 1) fraudulent use of a credit card to charge in the amount of $80.00; 2) passing a forged check in the amount of $28.36; and 3) obtaining by false pretenses $120.75.\textsuperscript{88} A panel of

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\textsuperscript{80} Id. at 592.
\textsuperscript{81} Id.
\textsuperscript{82} Id. Public attitudes may be ascertained by considering the punishments for similar crimes in other areas because presumably legislatures reflect public sentiment.
\textsuperscript{83} Gardner, \textit{supra} note 19, at 1122.
\textsuperscript{84} Id.
\textsuperscript{85} Gardner, \textit{supra} note 19, at 1118-19.
\textsuperscript{86} 445 U.S. 263 (1980).
\textsuperscript{87} Id.
\textsuperscript{88} 445 U.S. at 265-66.
Rummel attempted to invoke the Court’s previous decisions outlined above. However, the Court rejected that analysis with respect to a sentence of imprisonment stating: “because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.”91 The Court specifically rejected the construction of earlier cases as supporting a conclusion that a sentence may be excessive merely because of length.92 According to the Rummel majority, the issue was “purely a matter of legislative prerogative.”93

The analysis proposed by the defendant included: 1) inquiry into the nature of the crime; 2) an interjurisdictional analysis; and 3) an intrajurisdictional analysis.94 Although the Court rejected this proposed analysis, the opinion discusses each facet. The defendant had characterized his offenses as “petty” and not involving violence.95 The Court rejected the presence or absence of violence as indicative of the nature of the crime or a meaningful measure of the appropriateness of the punishment. Whether violence exists in the commission of a crime does not necessarily measure society’s interest in punishing or society’s interest in deterring crime.96 The result is theoretically sound if it rests on a utilitarian theory of punishment. It falters if the Court were to consider the retributive theory. If the actor is punished in proportion to culpability and risk of harm—less harm, less punishment97—presence or absence of violence is relevant to the calculus of harm and hence to the calculus of punishment.98

89. Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978).
90. Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978).
92. Id. at 273. While there may be some disagreement as to whether the accompaniments in Weems were dispositive, it seems rather a simplified interpretation to say that the length of sentence was not considered or that because Weems was concerned with accompaniments, the Court could not today take the underlying thesis that the amendment is a flexible instrument employed to guard against legislative excesses.
93. Id. at 274. This notion of a judicially untouchable legislative arena is somewhat curious in light of earlier language expressing the duty of the judiciary to act as a check on legislative excesses.
94. Id. at 275-83.
95. Id. at 263.
96. Id.
98. Dressler, Endangered Doctrines, supra note 6, at 1113.
The second analytical difficulty is the characterization of the crime as recidivism. That characterization changes the nature of the crime. It gives the theoretical base of utilitarianism greater justification. There is much debate regarding the degree to which past criminal behavior increases the culpability of the actor. However, there is a clearer justification under a utilitarian theory for infliction of enhanced sentences on the habitual offender. There is greater interest in longer incapacitation of the habitual offender yielding greater protection for society.

The Court also rejected the jurisdictional analysis finding it overly complex and subjective. For example, the Court found the only distinction made between various states is the number of felonies which would trigger the habitual offender statute. The Court stated:

> [O]nce the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving “violence” violates the cruel and unusual punishment clause of the Eighth Amendment.

Another complicating factor cited by the Court is the possibility of parole. To what extent should the length of sentence be measured by the full statutory possibility? Or should the analysis be made with a view to the earliest possible parole date? The Court did not reach that question but cited the parole question as illustrative of the difficulties inherent in the analysis.

The question of judicial intervention is debated throughout the Rummel decision with the majority opinion in Rummel sounding like the minority opinion in Furman. The majority in Rummel took the position that an exclusively legislative prerogative does exist in this area characterizing the penal statute as a “societal decision.” Principles of federalism demand that the Court not interfere in

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101. Habitual offender has been defined as “one who possesses criminal qualities inherent or latent in his mental constitution (but who is not insane or mentally deficient); who has manifested a settled practice in crime and who presents a danger to the society in which he lives (but is not merely a prostitute, vagrant, habitual drunkard or habitual petty delinquent).” Morris, *Introduction*, 13 McGill L.J. 534, 537 (1967).
102. *Rummel*, 445 U.S. at 279. A number of states impose a mandatory life sentence upon conviction of four felonies rather than three. Clearly this is a more complex analysis than simply whether or not capital punishment is imposed but does not seem impossible. See also Dressler, *Endangered Doctrines*, supra note 6, at 1071.
103. *Rummel*, 445 U.S. at 283 n.27.
104. Id. at 278, 280-81.
105. Id. at 278.
questions of penal policy. If a state finds that acceptable goals of punishment are served by imposition of a given punishment, the Court should not disturb that judgment.\textsuperscript{106} However, the Court does acknowledge in a footnote, that were the legislature to make overtime parking a felony punishable by life imprisonment, a proportionality analysis could be considered.\textsuperscript{107}

The majority opinion may be read as prohibiting a proportionality analysis as subjective, rejecting the substitution of judicial judgment for the legislative judgment. Further, it may be read as rejecting the notion that the eighth amendment is a limitation on sanctions society may impose, except those historically condemned and, in certain instances, the death penalty.\textsuperscript{108}

In dissent, Justice Powell cites all the precedents of the Court to come to the finding that a sentence of imprisonment alone, may by reason of its length, be cruel and unusual punishment.\textsuperscript{109} \textit{Weems} stands for the proposition that an acceptable measure of cruel is the relationship between punishment and the crime.\textsuperscript{110} \textit{Robinson} stands for the proposition that punishment may be measured by the nature of the crime.\textsuperscript{111} \textit{Furman} represents the notion that the eighth amendment prohibits "grossly excessive punishment"—that standards of measurement may evolve.\textsuperscript{112} \textit{Coker} measured the excessiveness in terms of contribution to acceptable goals of punishment to crime.\textsuperscript{113} "The scope of the Cruel and Unusual Punishments clause extends . . . to punishments that are grossly disproportionate. Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender."\textsuperscript{114}

The dissent found the analysis compatible with "principles of judicial restraint and federalism."\textsuperscript{115} The compatibility is attributable to the delineation of three objective factors which may be applied to the analysis and which substantially reduce the possibility of judicial subjectivity. They are: 1) the nature of the offense; 2) the sentence imposed for commission of the same crime in other jurisdictions; and 3) the sentence imposed upon other criminals in the same jurisdiction.\textsuperscript{116} The most difficult, analytically, is the first.

\textsuperscript{106} \textit{Id.}\textsuperscript{107} \textit{Id.} at 274 n.11.\textsuperscript{108} \textit{Id.}\textsuperscript{109} \textit{Id.} at 290 (Powell, J., dissenting).\textsuperscript{110} \textit{Id.}\textsuperscript{111} \textit{Id.} at 291.\textsuperscript{112} \textit{Id.} at 291-92.\textsuperscript{113} \textit{Id.} at 292.\textsuperscript{114} \textit{Id.} at 288.\textsuperscript{115} \textit{Id.} at 287.\textsuperscript{116} \textit{Id.} at 295.
Powell's analysis is as follows: Rummel's offenses were nonviolent, involved no threat of violence or use of weapons. At that time, only twelve states had enacted habitual offender statutes imposing a life sentence for "the commission of two or three violent felonies." Some of those that did experiment with them had at that time decided such a scheme excessive. In Texas, a criminal could commit far more serious crimes and receive lesser sentences.117

The opinion of the Court and the dissent present two diametrically opposed concepts. The majority stands for the proposition that the eighth amendment does not apply to terms of imprisonment; the dissent finding that it does. Implicit in these two views is the relationship of the judiciary and the legislature in setting criminal sanctions. The majority would draw a distinction between the death penalty and all other punishments. The dissent illustrates "the fact that [even though] a line has to be drawn does not justify it being drawn anywhere."118 The dissenting premise is clearly the premise of Solem.

V. SOLEM v. HELM

Jerry Helm was convicted, after a plea of guilty, for the offense of uttering a No Account Check in the amount of $100.00. Under South Dakota law at that time, the maximum penalty which he could receive on conviction for that offense was five years imprisonment and/or a $5,000.00 fine.119 Helm also pleaded guilty to the charge of having been previously convicted of six prior felonies: three third degree burglaries; one Obtaining Money Under False Pretenses; one Grand Larceny; and one Third Offense Driving While Intoxicated.120 Under South Dakota law, a person convicted of at least three prior felonies, in addition to the principal felony, is subject to an enhanced sentence equal to that of a Class 1 felony. Therefore, Helm was sentenced to life imprisonment.121 Further, the South Dakota law does not provide parole for persons sentenced to life imprisonment,122 although there is provided the possibility of pardon.123

Helm filed a petition in district court for a Writ of Habeas

117. Id. at 295-301.
118. Id. at 306 (quoting Pearce v. Commissioner, 315 U.S. 543, 558 (1942)) (Powell, J., dissenting).
123. Id. § 24-14-1.
Corpus alleging the sentence imposed violated the eighth and fourteenth amendments to the Constitution. The district court denied the petition. An appeal was taken to the Court of Appeals for the Eighth Circuit. That court applied a proportionality analysis analogous to that outlined by the dissent in *Rummel*. As a result, the sentence was held to violate the eighth amendment. However, that court emphasized the fact that South Dakota did not allow for parole. Therefore, Helm's punishment differed in kind from Rummel's sentence. Since the punishment differed in kind, *Rummel* was not dispositive of this case.

The issue framed by the majority opinion in *Solem* is: "whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony." Justice Powell wrote the opinion of the Court holding that as a matter of principle, crime and punishment must be proportionate. With the exception of the fact that Rummel's sentence included the possibility of parole and Helm's sentence included only the possibility of pardon, the issues and facts of consequence are remarkably similar. The results, however, are entirely opposed. The *Solem* holding rests on an entirely different premise and involves different philosophical judgments. *Solem* does not technically overrule *Rummel*. However, in theory it must overrule *Rummel* and its practical consequences are inimical.

The *Solem* Court employed two methods to circumvent the *Rummel* decision. The first implies that *Rummel* incorrectly interpreted the prior holdings in this area. *Solem* initially embraces an interpretation of the historic basis of the amendment consistent with a flexible interpretation rather than the more narrow "inherently cruel modes" of punishment theory embraced by the *Rummel* Court. Thereafter, the Court gave the broadest possible interpretation to precedent. *Weems* established proportionality as a constitutional doctrine; *Trop* represents continued recognition of the proportionality principle; *Robinson* establishes that a prison sentence alone may violate the eighth amendment. The death penalty cases clearly represent findings of disproportionality.

The dissenting opinion emphasized a narrow reading of precedent: "The lesson the *Rummel* Court drew from *Weems* and from

124. *Helm v. Solem*, 684 F.2d 582 (8th Cir. 1982).
125. *Id.* at 587.
126. *Id.* at 584.
128. *Id.* at 3009.
129. *Id.* at 3008-09 n.13.
130. *Id.* at 3007-08.
131. *Id.* at 3008-09.
capital punishment cases was that the eighth amendment did not authorize courts to review sentences of imprisonment to determine whether they were 'proportional' to the crime." However, even if there can be argument as to which was the more dispositive in Weems—length of imprisonment or the peculiar accompaniments—the Weems Court envisioned a more flexible reading of the eighth amendment than either the Rummel Court or the Solem dissent will acknowledge. Nor is there any basis in prior decisions to believe that the courts have no power of review in this area.

The Solem Court also used the acknowledgment by the Rummel Court that they might, in some extreme case, invalidate a term of imprisonment, thus characterizing the Rummel holding as not entirely precluding the possibility of a proportionality analysis in this instance.

The proportionality analysis undertaken by the Court was expressly rejected by the Rummel Court:

In sum, a Court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

While the Rummel Court found difficulty in examining the first of the criteria, Solem establishes factors which may be considered in making an assessment of the culpability of the actor. The first factor is the harm caused by the actor’s conduct. Presence or absence of violence is also considered and the absolute magnitude of the crime. This is closer to a retributive theory than a utilitarian theory. It emphasizes the individual's criminal behavior rather than vindicating society's interest in deterrence or incapacitation.

Applied to the instant case, Helm's punishment indicates a

132. Id. at 3018 (Burger, C.J., dissenting).
133. See supra notes 20-32 and accompanying text.
134. Solem, 103 S. Ct. at 3019. “However, the Rummel court emphasized that line drawing between different sentences of imprisonment would thrust the Court inevitably ‘into the basic line-drawing process that is pre-eminently the province of the legislature’ and produce judgments that were no more than the visceral reactions of individual Justices.”
135. Solem, 103 S. Ct. at 3009 n.14.
136. Id. at 3010-11.
137. Id. at 3018. “The test in Rummel which we rejected would have required us to determine on an abstract moral scale whether Rummel had received his ‘just deserts’ for his crimes.”
138. Id. at 3011. “Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance.”
139. Id.
greater culpability than the nature of his offense would indicate. "Helm's crime was 'one of the most passive felonies a person could commit.' . . . It involved neither violence nor threat of violence to any person. The $100.00 face value of Helm's no account check was not trivial, but neither was it a large amount." 140

It should also be noted that while the Court acknowledges that a recidivist may be punished more severely than a first offender, the analysis rests most heavily on the triggering offense. Theoretically, there is greater justification for punishment in terms of the triggering offense. As the Court points out, the habitual offender is being punished repeatedly for behavior he has already been punished for. 141

A jurisdictional comparison revealed that Helm could have been sentenced to life imprisonment for the following offenses: murder, treason, first degree manslaughter, first degree arson, and kidnapping. 142 A comparable sentence could have been imposed in only one other jurisdiction.

The Solem decision broadens the scope of the eighth amendment and resolves many of the definitional problems that have plagued courts. The clarity of definition and criteria enhances the ability of courts to apply the protection provided by the amendment.

The threshold question of judicial review of a legislatively imposed sanction is apparently resolved by this case. However, the question remains: when can the courts engage in such a review? Certainly, when the punishment involves an inherently cruel mode of punishment. Furman and later cases involving the death penalty, establish the validity of judicial review and that the eighth amendment prohibits, in certain instances, imposition of the death penalty. Solem extends that prohibition to sentences of imprisonment.

The extent of the review in cases of imprisonment is somewhat unclear. Narrowly read, Solem may only prohibit imposition of life imprisonment without possibility of parole. However, such a reading ignores the words of the court: terms of imprisonment must be

140. Id. at 3012-13 (citation omitted).

141. Id. at 3013 n.21. The triggering offense is the principal felony which brings into operation the recidivist statute. For example, if the statute imposes a higher sentence for commission of three felonies, the triggering offense is the third felony. The Solem Court's reasoning for concentrating the analysis on the triggering offense is the belief that the criminal has already been punished for the previous offenses. A view which involves only the triggering offense as the major consideration lessens the weight of the retributive factor in the balancing process. Von HirsCH, Doing Justice 46-7 (1976). It is also probably the more humane view and most logical in terms of utilitarian principles since recidivist statutes fall most heavily on the petty offender. Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99, 119 (1971).

142. Solem, 103 S. Ct. at 3013-15.
proportionate to the crime. The language suggests that it applies to noncapital cases generally.

If *Solem* has resolved the question of judicial review, the next question necessarily involves the implications of the analysis. What are the criteria that may be applied in the future? The jurisdictional analysis measures, as in the previous cases, the changing values of society. Those indices are fairly simple and objective.

However, the analysis of the nature of the crime appears more clouded. The *Solem* Court suggests certain fairly objective factors to begin the analysis: 1) presence or absence of violence, or the threat of violence; 2) the absolute magnitude of the crime; 3) crimes against persons rather than property.143 Beyond these obvious guidelines, others are implicit. First, the criteria used to analyze the nature of the crimes suggests that the Court is embracing a retributive theory of punishment. The Court's use of these criteria would suggest that the state is limited in its ability to exercise the utilitarian goals only to the extent of the actor's blameworthiness. For example, the state's ability to deter crime by imposing a given sanction on the individual actor is limited to the seriousness of the individual's offense. The state cannot impose a greater sentence on a lesser offender merely to deter others.

The Court explicitly condemns the complete rejection of rehabilitation:

Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.144

The Court's statement above suggests that it is questioning the effectiveness of the punishment in achieving the goals of punishment and the extent to which the state may pursue those goals.

This author suggests that the analysis could be strengthened in future cases by relying entirely on the retributive theory. A deterrence purpose allows the individual to be punished not for his own behavior but, as a lesson for society in general.145 The incapacitation purpose allows the offender to be incarcerated, in the case of recidivism, based on future behavior.146 Rehabilitation purposes

143. *Id.* 3011.
144. *Id.* at 3013 n.22.
146. *Id.* at 399.
often allow incarceration at the discretion of prison authorities.\textsuperscript{147} These are to a large degree subjective. How many years should be added to a sentence to sufficiently deter others? How can we accurately predict criminal behavior to the extent needed to justify incarceration to protect against future criminal acts? This author believes that the \textit{Solem} Court's criteria are the more objective and just basis for imposing punishment.

CONCLUSION

In sum, the importance of this case is its affirmative answer to the question of judicial involvement in review of legislatively determined penal sanctions. It has broadened the scope of the eighth amendment and extended constitutional protection to persons sentenced to terms of imprisonment. Perhaps most critical, it has given courts workable principles with which to define and apply the terms cruel and unusual punishment.

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\textsuperscript{147} \textit{Id.} at 403.