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The Punishment Need Not Fit the Crime: *Harmelin v. Michigan* and the Eighth Amendment

I. INTRODUCTION

Ronald Harmelin was convicted of possession of 650 or more grams of cocaine and sentenced under Michigan law to mandatory life imprisonment without possibility of parole.¹ Ronald Harmelin had no prior felony convictions.² He was not convicted of dealing or transporting or having the intent to distribute or transport the drug.³ Nevertheless, Ronald Harmelin was sentenced to the harshest possible penalty available under Michigan law.⁴ No other jurisdiction punished his crime as severely.⁵ Despite these facts, the United States Supreme Court affirmed the conviction and held that a mandatory sentence of life imprisonment without possibility of parole for a first offense of drug possession was not a "cruel and unusual" punishment within the meaning of the Eighth Amendment.⁶

Thus, the "War on Drugs" rages on.⁷ Despite launching the most expensive crusade against illegal drugs in our history in 1988,⁸ America's addiction to narcotics has proven a difficult scourge to conquer.⁹ The

1. *People v. Harmelin*, 440 N.W.2d 75, 76 (Mich. Ct. App. 1989), *appeal denied*, 434 Mich. 863 (1990), 111 S. Ct. 2680 (1991). See MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West 1992).

2. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2718 (1991) (White, J., dissenting).

3. *Id.* (White, J., dissenting).

4. *Id.* (White, J., dissenting). Michigan does not have a death penalty. *Id.* (White, J., dissenting).

5. *Id.* (White, J., dissenting). Alabama punished first-time drug offenders with life imprisonment without possibility of parole only when the amount of the narcotic was ten kilograms or more. *Id.* (White, J., dissenting). See ALA. CODE § 13A-12-231(2)(d) (Supp. 1992).

6. *Harmelin*, 111 S. Ct. at 2701.

7. See *infra* note 338-49 and accompanying text.

8. The budget for federal anti-drug efforts in fiscal year 1992 was almost \$12 billion. Joseph B. Treaster, *THE 1992 CAMPAIGN: Candidates' Records; Four Years of Bush's Drug War: New Funds but an Old Strategy*, N.Y. TIMES, July 28, 1992, at A1. Almost two-thirds of this total will go to enforcement, with the balance used for education and treatment. *Id.*

9. *Id.* In 1985, federal surveys showed that 12.2 million Americans used cocaine

federal government has used the awesome weapons at its disposal to combat the growing drug tide by sealing our borders, destroying drug crops at home and abroad, and imprisoning drug offenders for ever-lengthening terms.¹⁰

No one suggests that illicit drugs do not have their cost.¹¹ The "War on Drugs," however, has costs of its own.¹² After *Harmelin v. Michigan*,¹³ it appears that the right to a punishment proportionate to the underlying crime¹⁴ has become another casualty of war.

In *Harmelin*, the Supreme Court held that a sentence of life in prison without possibility of parole for possession of 650 grams or more of cocaine¹⁵ did not constitute cruel and unusual punishment.¹⁶ In section V of Justice Scalia's opinion,¹⁷ the Court ruled that "severe, man-

at least occasionally. By 1990, that number had dropped to 6.2 million occasional users, while 662,000 Americans reported using cocaine weekly. However, the 1991 survey showed that 6.4 million Americans used cocaine occasionally and 654,000 used cocaine weekly. Taking into account the margin of error, the surveys suggest that progress in the "War on Drugs" is levelling off. *Id.*

Other data show that the drug war is far from over. For example, since 1988, the number of Americans reporting that they used crack occasionally has been steady at about one million people. *Id.* Additionally, emergency room incidents involving cocaine use actually rose 25% in the first three quarters of 1991. *Id.*

10. *Id.* For example, New York's Director of Criminal Justice and Commissioner of the Division of Criminal Justice Services, Richard H. Girgenti, estimates that about half of those incarcerated in New York state prisons are convicted drug offenders. Donna Greene, *Westchester Q&A: Richard H. Girgenti; Deciding Which Criminals Go to Prison*, N.Y. TIMES, Apr. 26, 1992, at 12WC3; see also *Hutto v. Davis*, 454 U.S. 370 (1982) (involving a sentence of 40 years and a fine of \$20,000 for possession and distribution of a small amount of marijuana); see generally Steven Wisotsky, *Crack-down: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

11. According to the Department of Health and Human Services, drug and alcohol addiction costs the United States an estimated \$140 billion dollars annually. Kimberly C. Moore, *Bi-Partisan Leadership Calls for New War on Drugs Strategy*, STATES NEWS SERV., June 4, 1992. Up to 40% of industrial deaths and 47% of industrial injuries can be linked to drug or alcohol abuse. Cristina Lee, *Recovery; Getting a Career Going Again; Ex-Drinkers, Drug Users Get Help*, L.A. TIMES, Oct. 25, 1992, at D1. Ten to twenty-three percent of all workers use drugs while at work. *Id.* Drug-abusing employees miss work three to five times more than other employees, and have three times their medical costs. *Id.*

12. See Wisotsky, *supra* note 10, at 900-06.

13. 111 S. Ct. 2680 (1991).

14. See *infra* notes 109-37 and accompanying text.

15. *People v. Harmelin*, 440 N.W.2d 75, 76 (Mich. Ct. App. 1989); see also MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West 1992).

16. *Harmelin*, 111 S. Ct. at 2701; see U.S. CONST. amend. VIII.

17. Section V was the only part of the opinion in which the majority joined. *Harmelin*, 111 S. Ct. at 2702. *Harmelin* produced five separate opinions, including three dissents.

datory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."¹⁸ As for the mitigating factors in *Harmelin*,¹⁹ the Court noted it had "drawn the line of required individualized sentencing at capital cases, and [saw] no basis for extending it further."²⁰

This Comment discusses the history of the proportionality guarantee in American jurisprudence in Part II. Part III describes the facts and procedural history of *Harmelin*. Part IV critiques the opinions, and attempts to show where proportionality stands after *Harmelin*. Part V examines *Harmelin's* effect on proportionality as a component of Eighth Amendment jurisprudence as well as *Harmelin's* impact on the growing "drug exception" to the Bill of Rights. Part VI concludes that after *Harmelin* the future of the proportionality principle is in question and, if it does apply to sentences of imprisonment, it will only apply in the most extreme cases.²¹

II. HISTORICAL BACKGROUND

The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."²² The framers of the United States Constitution borrowed the language of the Eighth Amendment directly from the Virginia Constitution of 1776, which derived its language from the English Bill of Rights of 1689.²³

18. *Id.* at 2701. See *infra* notes 165-67 and accompanying text.

19. For example, Ronald Harmelin was convicted for *possession* of cocaine; the State did not prove that he was dealing the drug or that he had possession with intent to distribute. *Harmelin*, 111 S. Ct. at 2717 (White, J., dissenting). Ronald Harmelin had no prior felony convictions. *Id.* at 2701. There was no evidence that he committed any acts of violence. *Id.* at 2716-17 (White, J., dissenting). *But see id.* at 2706 (Kennedy, J., concurring) (arguing that the very nature of Harmelin's crime entailed violence).

20. *Id.* at 2702. See *infra* notes 210-15 and accompanying text.

21. See *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980). A penalty of life imprisonment for a parking violation might constitute such a case. *Id.*

22. U.S. CONST. amend. VIII.

23. Nancy Keir, Note, *Solem v. Helm: Extending Judicial Review Under the Cruel and Unusual Punishments Clause to Require "Proportionality" of Prison Sentences*, 33 CATH. L. REV. 479, 481 (1984); see also Daryl P. Rush, *Constitutional Law—Safeguarding Eighth Amendment Rights with a Comparative Proportionality Review in the Imposition of the Death Penalty: Pulley v. Harris*, 28 How. L.J. 331 (1985). In adopting the Cruel and Unusual Punishments Clause, Patrick Henry argued

There is sparse legislative history available as to what the framers intended by the phrase "cruel and unusual." The Eighth Amendment was traditionally interpreted as prohibiting torture and other barbarous punishments,²⁴ such as occurred during the "Bloody Assize" in England in the late seventeenth century.²⁵ Many scholars contend that the English Bill of Rights of 1689, and specifically the Cruel and Unusual Punishments Clause, were created as a reaction to the barbarities of the "Bloody Assize."²⁶ However, historian Anthony Granucci disputes this view on several grounds.²⁷ Granucci suggests that the "Bloody Assize" did not trigger the Declaration of Rights; rather, the perjury trial of Titus Oates in 1685 prompted its creation.²⁸ Granucci contends that the

that it imposed a limitation on Congress' ability to legislate punishments. *Id.* at 334.

24. See Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 378 & n.6 (1980).

25. See *id.* at 378. In 1685, James II appointed a special commission to try the participants of the Duke of Monmouth's unsuccessful rebellion. *Id.* Lord Chief Justice Jeffreys of the King's Bench led the commission, which convicted hundreds of suspected rebels of treason. *Id.* One convicted man was executed by being hanged by the neck and cut down while still alive. *Id.* He was then disembowelled and had his bowels burned before him. *Id.* Then he was beheaded and quartered. *Id.* Female felons were simply burned alive. Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 CALIF. L. REV. 839, 856 (1969).

26. See Mark Alden James, *Eighth Amendment Proportionality Analysis: The Limits of Moral Inquiry*, 26 ARIZ. L. REV. 871, 871 n.4 (1984).

27. Granucci, *supra* note 25, at 855-56. First, the methods of punishment used in the "Bloody Assize" were used even after Parliament enacted the Bill of Rights. *Id.* at 855. Second, the chief prosecutor of the "Bloody Assize," Sir Henry Pollfexen, was a leading member of the committee that drafted the Bill of Rights. Granucci finds it "unlikely that he would have drafted a document condemning his own previous actions." *Id.* at 856. Third, since the "Bloody Assize" was mentioned only once during the House of Commons debate on the Bill of Rights, it would appear that the Bill was not in fact a reaction to its excesses. *Id.*

28. *Id.* at 856-57. In September of 1678, Oates, a minister in the Church of England, announced that he had uncovered a plot to kill King Charles. *Id.* Although Charles was a Protestant, his brother James and Queen Catherine were Catholics. *Id.* The alleged assassination attempt was to be carried out by two Jesuit priests, followed by an invasion of Catholic armies to install James on the throne. *Id.* This would subject England to Roman rule, one of the greatest fears of the age. *Id.* In the resulting hysteria, 15 Catholics were executed for treason. *Id.* at 857.

After the succession of James II to the throne, Oates was tried and convicted of perjury. "[He] was sentenced to (1) a fine of 2000 marks, (2) life imprisonment, (3) whippings, (4) pillorying four times a year, and (5) [defrocking]." *Id.* at 858. Oates petitioned for relief from the sentence after William of Orange became sovereign in 1689. *Id.* Though the House of Lords rejected the petition, the minority dissent provides insight into the contemporary meaning of the phrase "cruel and unusual." The particular methods of Oates' punishment were not disputed; rather, the dissenters based their objection on the sentence being contrary to the law and outside the court's jurisdiction. *Id.* at 859.

severity of Oates' sentence for his perjury conviction sparked objection based on the belief that punishments should in proportion to the crime.²⁹

English law had supported the principle of proportionality in punishments from early in its history, tracing the origins of proportional punishments to the *lex talionis*—the Biblical law of “an eye for an eye, a tooth for a tooth.”³⁰ When the American framers of the Bill of Rights borrowed from England the phrase “cruel and unusual punishments,” they quite possibly meant to adopt its history and interpretations. The Court in *Solem v. Helm*³¹ suggested that the Eighth Amendment's use of language similar to that of the English Bill of Rights is evidence of such an intent.³² Despite this argument, Granucci contends that the framers misinterpreted the phrase as prohibiting only torture and barbarous punishments.³³

What little evidence exists as to the intended meaning of the Eighth Amendment suggests that it was indeed aimed at preventing barbarous modes of punishment.³⁴ This is how the Amendment was interpreted

29. *Id.* at 860. Granucci's view is not uncontested. William of Orange may have released Oates simply because Oates indirectly helped him gain the throne. Also, disproportionate penalties continued long after the Bill of Rights was passed. Additionally, the proportionality principle was never mentioned during the debates in Parliament leading up to the ratification of the Bill of Rights. See Schwartz, *supra* note 24, at 380-81.

30. Granucci, *supra* note 25, at 844-47.

31. 463 U.S. 277 (1983).

32. *Id.* at 286.

33. Granucci, *supra* note 25 at 865. Whether or not the English meaning behind the phrase “cruel and unusual” should affect its meaning in American jurisprudence is subject to debate. See Schwartz, *supra* note 24, at 380.

34. The following discussion took place before the adoption of the Eighth Amendment:

“MR. SMITH, of South Carolina, objected to the words “nor cruel and unusual punishments;” the import of them being too indefinite.

MR. LIVERMORE [of New Hampshire]—the clause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have no meaning in it, I do not think it necessary No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?

The question was put on the clause, and it was agreed to by a considerable majority.”

Granucci, *supra* note 25, at 842 (quoting 1 ANNALS OF CONG. 782-83 (1789)).

throughout most of the nineteenth century.³⁵

It was not until *O'Neil v. Vermont*,³⁶ in 1892, that a proportionality component began to emerge in Eighth Amendment jurisprudence.³⁷ In *O'Neil*, the defendant was convicted of 307 separate counts of selling liquor without a license.³⁸ He was fined \$20 for each offense, totalling \$6,140. In addition, O'Neill was charged \$497.96 for prosecution costs and seventy-six cents for commitment costs until the fine was paid, bringing his total fine to \$6,638.72.³⁹ O'Neil argued that the Vermont law prohibiting sale of liquor to non-residents without a license contradicted the Commerce Clause of the Constitution. The Supreme Court ruled that because the petitioner failed to raise this point or any Eighth Amendment claim at trial, no federal question existed on appeal; thus the Court lacked jurisdiction.⁴⁰

However, Justice Field, in his dissenting opinion, objected to the sentence as "exceeding in severity, considering the offenses of which the defendant was convicted."⁴¹ Justice Field argued that O'Neil's punishment was greater than that which he could have received had he committed burglary, highway robbery, manslaughter, forgery, or perjury.⁴² Considering the punishment in relation to the crime, Justice Field found it "both cruel and unusual."⁴³ While admitting that the Eighth Amendment usually prohibited only barbarous punishments, he stated that it also prevented "all punishments which by their excessive length

35. See *infra* note 179 for early state court interpretations of the Eighth Amendment.

36. 144 U.S. 323 (1892).

37. Prior to *O'Neil*, in *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1867), the Supreme Court held that the Eighth Amendment did not apply to the states, and even if it did, it would not apply to a punishment of a \$54 fine and three months in jail because it was the "usual mode" the states used to deter the evils of intemperance. *Id.* at 480. In *Wilkerson v. Utah*, 99 U.S. 130 (1878), the Court ruled that the Eighth Amendment did not prohibit death by firing squad, because it was a common method of military execution and did not involve torture or unnecessary cruelty. *Id.* at 134-35. *In re Kemmler*, 136 U.S. 436 (1890), applied the *Wilkinson* rationale and upheld electrocution as consistent with the dictates of the Eighth Amendment. *Id.* at 447. Electrocution was not, of course, a common punishment throughout history. However, the Supreme Court ruled that the New York Legislature had a valid purpose in selecting it as a method of punishment. *Id.*

38. *O'Neil*, 144 U.S. at 327.

39. *Id.* at 330. O'Neil was to serve out the fine at three dollars a day, or 54 years, at hard labor. *Id.* at 331.

40. *Id.* at 335-37. The Court also stated that, in any event, the Eighth Amendment would not apply because it only applied to the federal government, not to the states. *Id.* at 331-32.

41. *Id.* at 338 (Field, J., dissenting).

42. *Id.* at 339 (Field, J., dissenting).

43. *Id.* (Field, J., dissenting).

or severity are greatly disproportioned to the offenses charged."⁴⁴ Justice Field pointed out that the penalty was not justified as a penalty for cumulative offenses because although "the State may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, . . . it would be an unheard of cruelty if it should count the drops in a single glass and make thereby a thousand offenses."⁴⁵ In a separate dissent, Justice Harlan concurred with Justice Field that the sentence violated the Eighth Amendment.⁴⁶

A. *United States v. Weems*

In 1910, the United States Supreme Court decided *United States v. Weems*.⁴⁷ *Weems* is regarded as the seminal case in recognizing a principle of proportionality in the Eighth Amendment.⁴⁸ However, *Weems* did not even involve an interpretation of the United States Constitution.⁴⁹ Instead, the Court was concerned with the Constitution of the Philippines, which incorporated language identical to the Eighth Amendment of the United States Constitution.⁵⁰

In *Weems*, the defendant was convicted of falsifying an official document and was sentenced to "cadena temporal."⁵¹ This punishment included imprisonment for twelve to twenty years, at hard and painful labor while chained by the wrists and ankles.⁵² In addition, various civ-

44. *Id.* at 339-40 (Field, J., dissenting). Shortly after *O'Neil* was decided, the defendants in *Howard v. North Carolina*, 191 U.S. 126 (1903), argued Justice Field's position. In *Howard*, two defendants were sentenced to ten years for conspiracy to defraud. A third defendant received a seven-year sentence. The Court held that the ten-year sentences did not violate the Eighth Amendment simply because the third defendant received a shorter sentence for the same crime. *Id.* at 135-36.

45. *O'Neil*, 144 U.S. at 340 (Field, J., dissenting).

46. *Id.* at 370 (Harlan, J., dissenting). Justice Harlan argued that the Court had jurisdiction to decide the Eighth Amendment claim even though it was not in the assignments of error. *Id.* (Harlan, J., dissenting). Justice Harlan reasoned that "[the] punishment . . . in view of the character of the offenses committed, must be deemed both cruel and unusual." *Id.* at 371 (Harlan, J., dissenting).

47. 217 U.S. 349 (1910).

48. See *Solem v. Helm*, 463 U.S. 277, 286-87 (1983). But see *Harmelin v. Michigan*, 111 S. Ct. 2680, 2682 (1991) ("[I]t is hard to view *Weems* as announcing a constitutional proportionality requirement given that it did not produce a decision implementing such a requirement . . . for six decades.").

49. *Weems*, 217 U.S. at 365.

50. *Id.* at 367.

51. *Id.* at 357.

52. *Id.* at 364.

il disabilities attached and remained throughout the offender's lifetime.⁵³ The Court held that the offense did not warrant the imposition of a disproportionately severe punishment, and observed that the Eighth Amendment proscribed legislative action in this area.⁵⁴ The Court applied a comparative test to determine that the sentence was out of proportion with the crime; it examined the nature of the crime, compared the penalty with penalties in other jurisdictions for the same offense, and considered penalties for more serious crimes within the same jurisdiction.⁵⁵

B. *Trop v. Dulles*

The decision in *Weems* failed, however, to immediately establish proportionality as a component of the Eighth Amendment, perhaps because of its unusual facts. The next significant Eighth Amendment case was decided almost fifty years later and also involved somewhat odd facts. In *Trop v. Dulles*,⁵⁶ the petitioner lost his United States citizenship after being court-martialed for wartime desertion.⁵⁷ Although there was no evidence presented that the petitioner declared his allegiance to a

53. *Id.* These "civil disabilities" included (1) civil interdiction by depriving the person of parental authority, guardianship of person or property, participation in family council, marital authority, and the right to dispose of personal property by inter vivos gift; (2) perpetual absolute disqualification by depriving the person of office, the right to vote, the right to be elected to office, acquisition of honors, and retirement pay; and (3) subjection to surveillance during life by imposing on the person the duty to fix his domicile and to request permission from the proper authorities to change it, to observe rules of inspection, and to adopt some trade, art, industry, or profession if he did not have some other means of supporting himself. *Id.* at 364-65.

54. *Id.* at 378-79.

55. *Id.* at 377-81. The Court compared *Weems'* crime of falsifying a single item of a public record to other serious crimes and found that many resulted in a less severe punishment. These crimes included robbery, larceny, incitement of rebellion, conspiracy to destroy the government by force, and forgery of bonds and other instruments for the purpose of defrauding the United States. *Id.* at 380. The Court also found that the law in the Philippines punished counterfeiting "the obligations or securities of the United States or of the Philippine Islands" less severely than *Weems'* crime. *Id.* at 380-81. The contrast forced the Court to conclude that the severity of the sentence imposed on *Weems* was cruel and unusual. *Id.* at 382.

Seventy-three years later, the Court in *Solem v. Helm*, 463 U.S. 277 (1983) took a similar approach and held that sentences reviewed under the Eighth Amendment should be guided by three objective factors. *Id.* at 290. First, the court conducting the review should compare the gravity of the offense to the severity of the punishment. Second, it should compare the sentence imposed to other sentences imposed for other crimes in that jurisdiction. Third, it should compare the sentence imposed to other sentences imposed for the same crime in other jurisdictions. *Id.* at 290-92.

56. 356 U.S. 86 (1958) (plurality opinion).

57. *Id.* at 87.

foreign power,⁵⁸ the Court concluded that denaturalization was not excessive when compared to the offense of wartime desertion, a capital crime.⁵⁹ However, the Court posited that "the existence of the death penalty [was] not a license to the Government to devise any punishment short of death within the limit of its imagination."⁶⁰ Though the meaning of the phrase "cruel and unusual" was far from certain, the Court stated that the Eighth Amendment must be interpreted in light of "the evolving standards of decency that mark the progress of a maturing society."⁶¹ Thus, the Court ruled that the destruction of the person as a political entity, coupled with the rarity of denaturalization, made the penalty "cruel and unusual."⁶²

C. *Robinson v. California*

Four years later, the Court expanded upon the proportionality principle first announced in *Weems*. In *Robinson v. California*,⁶³ the petitioner received a sentence of ninety days imprisonment under a California statute making drug addiction a misdemeanor.⁶⁴ Since the statute required neither criminal intent nor the commission of an overt act,⁶⁵ the

58. *Id.* at 92.

59. *Id.* at 99. By negative implication, the Court recognized that the Eighth Amendment prohibits disproportionate penalties. See Schwartz, *supra* note 24, at 387.

60. *Trop*, 356 U.S. at 99.

61. *Id.* at 100-01.

62. *Id.* at 100-02. The Court also noted that of 84 nations surveyed, only Turkey and the Philippines imposed denaturalization for desertion. *Id.* at 103.

63. 370 U.S. 660 (1962).

64. *Id.* at 663. See CAL. HEALTH & SAFETY CODE § 11721 (West 1962) (making it a crime to be "addicted to narcotics"). Justice Stewart noted that the statute prohibited a person from either using narcotics or being addicted to narcotics. *Robinson*, 370 U.S. at 662. He determined that the section making "use" of narcotics illegal was based upon the "act" of taking the drug, and that the section directed at being "addicted to the use of narcotics" was based upon a "condition or status." *Id.* The petitioner could have been convicted based upon either portion of the statute. *Id.* at 665.

65. *Robinson*, 370 U.S. at 666. Justice Stewart described the statute as

not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration . . . [the statute] makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the state, and whether or not he has been guilty of any antiso-

Court held that the sentence of imprisonment for such an "offense" was cruel and unusual punishment, much in the same manner that "one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."⁶⁶ In so doing, the Court for the first time extended the protection of the Eighth Amendment to the States via the Due Process Clause of the Fourteenth Amendment.⁶⁷ *Robinson* reinforced the idea that "the punishment must fit the crime" by emphasizing that the imposition of a penalty must be proportionate to the offender's moral culpability.⁶⁸

D. Death Penalty Cases

The proportionality principle of the Eighth Amendment has seen its most thorough development in capital punishment cases. In 1971, the Supreme Court held, in a brief *per curiam* opinion in *Furman v. Georgia*,⁶⁹ that capital punishment violated the Eighth and Fourteenth Amendments. However, the Court found no unifying rationale.⁷⁰ Nine separate opinions were filed, reflecting the unsettled nature of Eighth Amendment jurisprudence.⁷¹

cial behavior there.

Id.

66. *Id.* at 667. The Court held that as a matter of criminal law, a state cannot punish the "status" of narcotics addiction. *Id.*

67. *Id.* at 666.

68. *Id.* at 666-67. The Court likened criminalizing addiction to making it illegal to be afflicted with mental illness, leprosy, or a venereal disease. *Id.* at 666. Such an affliction can be acquired "innocently or involuntarily." *Id.* at 667. Thus, punishing a person suffering from addiction or illness, even though he has committed no overt criminal act, violates the Eighth and Fourteenth Amendments. *Id.* Justice Douglas noted in a concurring opinion that "[a] punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" *Id.* at 676 (Douglas, J., concurring) (citing *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892)). Justice Douglas stated that this same principle prohibited punishing a person for having an illness. *Id.* (Douglas, J., concurring). Justice White objected to this novel use of the Cruel and Unusual Punishments Clause, and argued that it was for the legislative branch to decide upon the best approach to deal with traffic in illegal drugs. *Id.* at 689 (White, J., dissenting). *Robinson* did not, however, forbid punishing any crime caused by illness. In *Powell v. Texas*, 392 U.S. 514 (1968), the Court upheld a conviction for public intoxication and distinguished it from chronic alcoholism. *Id.* at 532-33. See Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 654 (1966) (speculating that *Robinson* could create a revolution in criminal law).

69. 408 U.S. 238, 239-40 (1972) (*per curiam*).

70. *Id.* at 239-40.

71. Justices Douglas, Brennan, Stewart, White, and Marshall filed separate concurring opinions. See *id.* at 240 (Douglas, J., concurring) (arguing that the irregular and selective application of the death penalty violates both the Eighth and Fourteenth

In *Furman*, the trial court convicted the petitioner of murder and sentenced him to death under Georgia law.⁷² In two companion cases,⁷³ the trial courts convicted the petitioners⁷⁴ of rape and imposed capital sentences under Georgia and Texas law respectively.⁷⁵

Justice Brennan's concurring opinion stated that a principle innate in the Cruel and Unusual Punishments Clause was "that a severe punishment must not be excessive."⁷⁶ He adopted as a guiding principle the belief that sentences must comport with basic human dignity, and that inflicting a punishment that was unnecessarily severe violated that precept.⁷⁷ Justice Brennan noted that death, like imprisonment, was a "traditional" punishment.⁷⁸ This did not serve, however, to make the death penalty immune to Eighth Amendment proscription.⁷⁹

Amendments); *id.* at 257-306 (Brennan, J., concurring) (stating that the Cruel and Unusual Punishments Clause operates as a constitutional check on the legislature, preventing it from arbitrarily inflicting severe punishments); *id.* at 306-10 (Stewart, J., concurring) (reaching the narrower conclusion that the Eighth Amendment prohibits "this unique penalty [from being] so wantonly and so freakishly imposed"); *id.* at 310-14 (White, J., concurring) (finding the death penalty is not *per se* unconstitutional, but is only forbidden when imposed by the jury's unguided discretion); *id.* at 314-74 (Marshall, J., concurring) (believing that capital punishment is an unconstitutionally excessive penalty and is morally unacceptable to the citizens of the United States).

Justices Burger, Blackmun, Powell and Rehnquist filed separate dissents. *See id.* at 375 (Burger, C.J., dissenting) (stating that the Eighth Amendment does not apply to the manner in which a particular punishment is imposed, but only forbids certain types of punishment); *id.* at 405-14 (Blackmun, J., dissenting) (arguing that it is beyond the power of the Supreme Court to strike down a legislatively mandated penalty); *id.* at 414-65 (Powell, J., dissenting) (arguing that according to the principles of judicial restraint, the abolition or imposition of capital punishment must be left to the discretion of the legislative branch); *id.* at 465-70 (Rehnquist, J., dissenting) (finding that judicial restraint is an implied condition of the Supreme Court's power of judicial review and that the Court violated that condition in striking down a penalty proscribed by the legislature).

72. *Id.* at 239.

73. The two companion cases were *Jackson v. Georgia* and *Branch v. Texas*. *Id.* at 238 n.1.

74. *Id.* at 239. All three petitioners were black males. *See generally* Fredric J. Bendremer et al., Comment, McClesky v. Kemp: *Constitutional Tolerance for Racially Disparate Capital Sentencing*, 41 U. MIAMI L. REV. 295 (1986) (arguing that the racially disparate impact of the death penalty on African-American males violates the Due Process Clause of the Fourteenth Amendment).

75. *Furman*, 408 U.S. at 239.

76. *Id.* at 279 (Brennan, J., concurring).

77. *Id.* at 280-81 (Brennan, J., concurring).

78. *Id.* at 282 (Brennan, J., concurring).

79. *Id.* at 282-84 (Brennan, J., concurring).

Justice Marshall also recognized the proportionality component of the Eighth Amendment in his concurring opinion.⁸⁰ He reasoned that a penalty might be cruel and unusual if it is excessive or unnecessary.⁸¹ He cited the dissent in *O'Neil* and the majority opinions in *Weems*, *Trop*, and *Robinson* as a line of authority prohibiting excessive punishments.⁸²

The *Furman* Court found that the unrestricted application of the death penalty constituted cruel and unusual punishment.⁸³ The Court essentially remanded the death penalty question to the states, requiring each state to re-enact its respective capital punishment statutes so as to be consistent with the *Furman* decision.⁸⁴ Many states soon enacted statutes to correct the prior defects.⁸⁵ This prompted a plurality of the Court in *Gregg v. Georgia*⁸⁶ to hold that the death penalty did not violate the Eighth Amendment under all circumstances.⁸⁷ In so doing, however, the plurality recognized that the "punishment must not be grossly out of proportion to the severity of the crime."⁸⁸ On that same day, the Court decided four other capital cases in *Woodson v. North Carolina*.⁸⁹ These cases established the principle that the standardless, mandatory imposition of the death penalty was unconstitutional.⁹⁰ Sys-

80. *Id.* at 331 (Marshall, J., concurring).

81. *Id.* (Marshall, J., concurring).

82. *Id.* at 331-32 (Marshall, J., concurring). See *supra* notes 36-68 and accompanying text.

83. See Albert W. Alschuler, *Burger's Failure: Trying Too Much to Lead*, NAT'L L.J., Feb. 18, 1980, at 27 n.4.

84. *Id.*

85. See *Gregg v. Georgia*, 428 U.S. 153 (1976). At the time *Gregg* was decided, 35 states had enacted new statutes imposing the death penalty that addressed the defects found in *Furman* by (1) providing guidelines to juries and trial courts regarding the imposition of capital punishment, or (2) making the death penalty mandatory for certain crimes. *Id.* at 179 & n.22-24 (Stewart, Powell, and Stevens, JJ., concurring).

86. 428 U.S. 153 (1976).

87. *Id.* at 187. The plurality in *Gregg* found that the death penalty was not always disproportionate to the crime of murder. *Id.* (Stewart, Powell, and Stevens, JJ., concurring).

88. *Id.* at 173 (Stewart, Powell, and Stevens, JJ., concurring).

89. 428 U.S. 280 (1976).

90. *Id.* at 302-03. The North Carolina statute imposing a mandatory death penalty for first degree murder was an inadequate response to *Furman* because the statute took from the jury *all* sentencing power instead of providing standards for imposing a capital sentence. *Id.*

The other cases decided were *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976). In *Roberts*, the Court found Louisiana's statute unconstitutional because it imposed a mandatory death penalty even though the first degree murder definition was narrower in scope than the statute at issue in *Woodson*. *Roberts*, 428 U.S. at 331-34. In *Proffitt*, the Court ruled that Florida's procedure requiring the trial judge to weigh aggravating and

tems that provided guidance for juries in imposing capital punishment along with various procedural protections for defendants were upheld.⁹¹

In 1977, the Court again discussed proportionality as an element of the Eighth Amendment in *Coker v. Georgia*.⁹² In *Coker*, the trial court convicted the defendant of armed robbery, kidnapping, and rape.⁹³ The jury considered the aggravating and mitigating circumstances according to the dictates of *Furman* and *Gregg*, and sentenced Coker to death by electrocution.⁹⁴ The Court held that the punishment was disproportionate to the crime of rape and, thus, prohibited by the Eighth Amendment.⁹⁵

In reaching this result, the Court compared the Georgia law to the laws of other states and found that only Georgia authorized the death penalty for the rape of an adult woman.⁹⁶ While recognizing the seriousness of the defendant's crime, the Court reasoned that the finality of a death sentence made it "an excessive penalty for the rapist who, as such, does not take a human life."⁹⁷

In *Enmund v. Florida*,⁹⁸ the Court extended this reasoning to the

mitigating factors in determining whether to impose the death penalty was a constitutionally acceptable response to *Furman*. *Proffitt*, 428 U.S. at 253. In *Jurek*, the Court approved a Texas statute requiring the jury to consider mitigating and aggravating factors before imposing the death penalty, thus eliminating the problems of arbitrary sentencing encountered in *Furman*. *Jurek*, 428 U.S. 271-73.

91. See Virginia Gayle Morrow, *Criminal Procedure—North Carolina's Capital Sentencing Procedure: The Struggle for an Acceptable Jury Instruction*, 62 N.C.L. REV. 833, 836 (1984) (noting that the North Carolina Legislature responded to *Woodson* by passing a statute that required the jury to balance aggravating and mitigating factors before imposing the death penalty). See also *Pulley v. Harris*, 465 U.S. 37 (1984). See generally *Rush*, *supra* note 23.

92. 433 U.S. 584 (1977).

93. *Id.* at 587.

94. *Id.* at 591.

95. *Id.* at 592. The plurality refused to consider Coker's prior crimes because he was sentenced to death on only the rape charge. *Id.* at 599.

96. *Id.* at 594-96. Two other jurisdictions authorized the death penalty for the rape of a child. *Id.* at 596. Justice White also surveyed the Georgia court system and found that Georgia imposed the death penalty in only 6 of the 63 rape cases reviewed by the Georgia Supreme Court. *Id.* at 596-97.

97. *Id.* at 597-98. Justice White considered existing community standards in determining that capital punishment was a disproportionate penalty for the crime of rape. Georgia was the sole jurisdiction that made rape a capital offense, and Georgia juries had shown reluctance in imposing the death penalty for rape. *Id.* at 596-98.

98. 458 U.S. 782 (1982).

crime of felony-murder. The petitioner in *Enmund* had participated in a robbery in which one of his accomplices had killed two people.⁹⁹ The State did not prove that Enmund was present at the killings, nor that he had intent to kill.¹⁰⁰ Under Florida's felony-murder rule, however, the jury convicted him of first degree murder and sentenced him to death.¹⁰¹ The Court noted that only eight of the thirty-six jurisdictions authorizing the death penalty considered felony-murder a crime punishable by death.¹⁰² In this case, as in *Coker* before it, the Court rejected capital punishment as an appropriate penalty for a crime less than murder.¹⁰³ In relation to Enmund's culpability, the Court found the death penalty "unconstitutionally excessive."¹⁰⁴

E. Application of the Proportionality Principle Developed in Death Penalty Cases to Sentences of Imprisonment

The proportionality principle set forth in the Court's death penalty cases did not necessarily extend to cases involving terms of imprisonment. Certain courts continued to hold that a term of years within statutory limits did not constitute cruel and unusual punishment.¹⁰⁵ Other

99. *Id.* at 784.

100. *Id.* at 785.

101. *Id.*

102. *Id.* at 792. Justice White found that while current legislative judgment was not "wholly unanimous" among states with regard to imposing the death penalty for crimes less than murder, it "weigh[ed] on the side of rejecting capital punishment for this crime at issue." *Coker v. Georgia*, 433 U.S. 584, 596-99 (1977).

103. *Enmund*, 458 U.S. at 797. See Douglas W. Schwartz, Note, *Imposing the Death Sentence for Felony-Murder on a Non-Triggerman*, 37 STAN. L. REV. 857 (1985) (proposing that, at a minimum, *Enmund* requires a finding of knowledge on the part of a nontriggerman before a capital sentence may be imposed).

104. *Enmund*, 458 U.S. at 800. Justice White found that the death penalty, "unique in its severity and irrevocability," was an excessive penalty for a robber who did not take a human life. *Id.* at 797 (citing *Gregg v. Georgia*, 428 U.S. 153, 187).

105. See *Marcella v. United States*, 344 F.2d 876, 882 (9th Cir. 1965) (stating that a 40-year sentence for five counts of narcotics violations is not cruel and unusual punishment), *cert. denied*, 382 U.S. 1016 (1966); *Anthony v. United States*, 331 F.2d 687, 693 (9th Cir. 1964) (holding that 40 years' days imprisonment for two sales of marijuana is a customary punishment and cannot be characterized as "cruel" or "unusual"); *Lindsey v. United States*, 332 F.2d 688, 693 (9th Cir. 1964) (declaring that a sentence of five years each on six counts of fraud by wire was within statutory limits); *State v. McNally*, 211 A.2d 162, 164 (Conn.) (holding that consecutive life sentences for two counts of second degree murder are not cruel and unusual if imposed within established statutory limits), *cert. denied*, 382 U.S. 948 (1965); *Chavigny v. State*, 112 So.2d 910, 915 (Fla. Dist. Ct. App.) (holding that the Eighth Amendment prohibition refers to the statute authorizing the sentence and not the sentence fixed within the statute's limits, and that therefore consecutive life sentences for two counts of second degree murder are not cruel and unusual punishment), *cert. denied*, 114 So. 2d 6 (Fla. 1959), and *cert. denied*, 362 U.S. 922 (1960).

courts begrudgingly acknowledged a narrow proportionality principle, but only under "extraordinary and special circumstances."¹⁰⁶

Still other courts, however, applied the reasoning of *Coker* and *Gregg* to sentences of imprisonment.¹⁰⁷ For example, one court found that a sentence of thirty to sixty years for possession of a small amount of marijuana violated the Eighth Amendment due to the punishment's severity in relation to the crime.¹⁰⁸ Successful challenges to terms of imprisonment on proportionality grounds, however, remained rare.

F. *The Tension Between Rummel v. Estelle and Solem v. Helm: Who Decides What Is "Proportionate?"*

1. *Rummel v. Estelle*

In the 1980 decision of *Rummel v. Estelle*,¹⁰⁹ the Supreme Court retreated from its past decisions that incorporated a proportionality guarantee in the Eighth Amendment. The Court felt that it was the duty of the legislature, not the judiciary, to set criminal penalties.¹¹⁰ Only in the most extreme cases, the Court reasoned, should federal courts intercede on a defendant's behalf to reduce the sentence received.¹¹¹

106. *Davis v. Davis*, 585 F.2d 1226, 1232 (4th Cir. 1978) (quoting *United States v. Wooten*, 503 F.2d 65, 67 (4th Cir. 1974) (holding that consecutive 20-year terms and a \$20,000 fine for possession with intent to distribute, and distribution of, marijuana is cruel and unusual punishment)); see also *Carmona v. Ward*, 576 F.2d 405, 409 (2d Cir. 1978) (holding that a severe sentence imposed for a minor offense could violate the Eighth Amendment's dictate against cruel and unusual punishment solely on account of its length), *cert. denied*, 439 U.S. 1091 (1979); *Boerngen v. United States*, 326 F.2d 326, 329 (5th Cir. 1964) (holding that consecutive ten-year terms for two counts of transporting forged documents were not so disproportionate as to constitute cruel and unusual punishment).

107. See, e.g., *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (holding that unreasonable punishments that are grossly disproportionate to the offense charged constitute cruel and unusual punishment), *aff'd*, 445 U.S. 263 (1980); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Ca.) (per curiam) (adopting proposition that an excessive prison sentence could constitute cruel and unusual punishment if grossly out of proportion to the crime), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

108. *Downey v. Perini*, 518 F.2d 1288 (6th Cir.), *vacated on other grounds*, 423 U.S. 993.

109. 445 U.S. 263 (1980).

110. *Id.* at 274.

111. *Id.* at 274 n.11 (citing the dissent's example of life imprisonment for overtime parking). The Court gave no indication of how to determine when the proportionality principle should apply. *Id.* at 307 n.25 (Powell, J., dissenting).

In *Rummel*, the petitioner was convicted and sentenced under a Texas repeat offender statute that imposed life imprisonment upon an individual convicted of a third felony.¹¹² Under the Texas system of "good time" credits, however, Rummel could be eligible for parole in as few as ten years.¹¹³ Rummel's prior convictions were for fraudulent use of a credit card¹¹⁴ and for passing a forged check for \$28.36.¹¹⁵ His most recent offense involved obtaining \$120.75 by false pretenses.¹¹⁶ The Court ruled that a life sentence for theft of approximately \$230 was not cruel and unusual punishment under the Eighth Amendment.¹¹⁷ The Court reasoned that the proportionality test used in death penalty cases was of "limited assistance" in Rummel's case because the nature of a death sentence is "qualitatively different" from a sentence of life imprisonment.¹¹⁸ The Court also distinguished *Weems*' peculiar facts,¹¹⁹ and argued that "the length of the sentence actually imposed is purely a matter of legislative prerogative."¹²⁰

112. *Id.* at 266. Recidivist statutes were found constitutional by the United States Supreme Court in *Spencer v. Texas*, 385 U.S. 554 (1967). In *Rummel*, the petitioner only attacked the application of the statute to the facts of his case. *Rummel*, 445 U.S. at 268.

113. *Rummel*, 445 U.S. at 293 (Powell, J., dissenting).

114. *Id.* at 265. Rummel was convicted of using the credit card to obtain \$80 worth of goods or services. Since the amount exceeded \$50, he was charged with a felony punishable by two to ten years in prison. *Id.*

115. *Id.*

116. *Id.* at 266.

117. *Id.* at 285. See generally Patricia E. Rant, Note, *Criminal Law—Cruel and Unusual Punishment—Mandatory Life Imprisonment Under Texas Recidivist Statute Not Violative of Eighth Amendment When Applied to One Convicted of Three Non-Violent Property-Related Felonies—Rummel v. Estelle*, 12 ST. MARY'S L.J. 525 (1980) (viewing *Rummel* as a retreat from the "evolving standards of decency" enunciated in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), and a limit on future Eighth Amendment challenges to punishments differing in kind, rather than degree, from traditional sentences). If *Rummel* is used as a yardstick, Harmelin's sentence of life without possibility of parole for possession of cocaine does not seem as severe in comparison. See *infra* notes 150-56.

118. *Rummel*, 445 U.S. at 272. Justice Powell objected to the majority's use of the distinction between capital and noncapital sentences in limiting an Eighth Amendment proportionality analysis. *Id.* at 306 (Powell, J., dissenting). He quoted Justice Frankfurter in stating, "[T]he fact that a line has to be drawn somewhere does not justify its being drawn anywhere." *Id.* (Powell, J., dissenting) (quoting *Pearce v. Commissioner*, 315 U.S. 543, 558 (1942) (Frankfurter, J., dissenting)). In Justice Powell's view, the majority chose "the easiest line rather than the best." *Id.* at 307 (Powell, J., dissenting.).

119. *Id.* at 273-74. See *supra* notes 47-55 and accompanying text. See also Pressly Millen, Note, *Interpretation of the Eighth Amendment—Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 DUKE L.J. 789 (arguing that the rationale applied in *Weems*, rather than that of either *Rummel* or *Solem*, best preserves the intent of the framers in Eighth Amendment jurisprudence).

120. *Rummel*, 445 U.S. at 274. But see Thomas F. Cavalier, Note, *Salvaging Propor-*

2. *Hutto v. Davis*

The Supreme Court followed the reasoning set forth in *Rummel* in its 1982 memorandum opinion for *Hutto v. Davis*.¹²¹ In *Hutto*, the petitioner was convicted of possession and distribution of small amounts of marijuana and sentenced to forty years in prison and \$20,000 in fines.¹²² The Court rejected the application of the proportionality principle in this case, maintaining that *Rummel* prevented its application to cases involving "excessive" imprisonment.¹²³

3. *Solem v. Helm*

The following year the Court granted certiorari on a case with facts very similar to those presented in *Rummel*. The petitioner in *Solem v. Helm*¹²⁴ was sentenced to life in prison under a South Dakota recidivist statute.¹²⁵ Unlike the petitioner in *Rummel*, however, the petitioner here did not retain the possibility of parole.¹²⁶ The felony offense at issue in *Solem* was the issuance of a "no account" check for \$100.¹²⁷ Because Helm had six previous felony convictions, the trial court sentenced him under South Dakota's repeat offender statute.¹²⁸ The Court, while noting that it had never applied proportionality principles to a term of imprisonment, expressly expanded the proportionality analysis by holding that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been con-

tionate Prison Sentencing: A Reply to Rummel v. Estelle, 15 U. MICH. J.L. REF. 285 (1982) (rejecting *Rummel's* assertion that there is no precedent for a proportionality review of prison sentences and proposing that state courts adopt a proportionality analysis under their state constitutions).

121. 454 U.S. 370 (1982).

122. *Id.* at 371.

123. *Id.* at 373. See generally Anita Eve, Note, *Constitutional Law—A 40-Year Sentence of Imprisonment Within the Limits of a Statute Does Not Amount to Cruel and Unusual Punishment: Hutto v. Davis*, 26 How. L.J. 305 (1983) (asserting that allowing legislatures to define proportionality abdicates judicial responsibility and is contrary to the admonishment in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), to interpret the Eighth Amendment in light of "evolving standards of decency").

124. 463 U.S. 277 (1983).

125. *Id.* at 281.

126. *Id.* See *Rummel v. Estelle*, 445 U.S. 263, 293 (1980).

127. *Solem*, 463 U.S. at 281.

128. *Id.* at 279-81. Helm's prior convictions included burglary, third offense drunk driving, grand larceny, and obtaining money by false pretenses. *Id.*

victed."¹²⁹

Solem did not expressly overrule *Rummel*; in fact, it strained to distinguish the two cases factually.¹³⁰ The *Solem* Court focused on the possibility that *Rummel* would be eligible for parole in as few as ten years, whereas Helm could never qualify for parole.¹³¹ The Court stressed that *Solem* did not pave the way for appellate review of all sentences; indeed, it envisioned that such appeals would be "exceedingly rare."¹³²

The *Solem* Court set out three objective factors that courts should apply in an Eighth Amendment analysis. First, courts should examine the underlying offense and the severity of the penalty.¹³³ Second, courts should compare the sentence received to those imposed for more serious crimes in the same jurisdiction.¹³⁴ Third, courts should compare the sentence received to that imposed for the same crime in other jurisdictions.¹³⁵ In applying these factors to the case at hand, the Court noted that Helm received the harshest penalty possible under South Dakota law,¹³⁶ while his underlying offenses were relatively minor and nonviolent.¹³⁷

129. *Id.* at 290. See generally Barton C. Legum, Note, "Down the Road Toward Human Decency:" Eighth Amendment Proportionality Analysis and *Solem v. Helm*, 18 GA. L. REV. 109 (1983) (finding that *Solem* was more consistent with the history of the Eighth Amendment than *Rummel* in rejecting the proposition that prison sentences are purely a matter of legislative prerogative); Maja Campbell-Eaton, Note, *Solem v. Helm: Extension of Eighth Amendment Proportionality Review to Noncapital Punishment*, 69 IOWA L. REV. 775 (1984) (arguing that *Solem* was a natural extension of prior precedents). The Court noted that although prison sentences will seldom be overturned because they are disproportionately severe, that does not obviate the need for an Eighth Amendment analysis in noncapital cases. *Solem*, 463 U.S. at 289. Though courts should defer to the broad discretion of legislatures in setting criminal penalties, "no penalty is *per se* constitutional." *Id.* at 290.

130. *Solem*, 463 U.S. at 297, 300-03. See Keir, *supra* note 23, at 509-10; see also Johnathan C. Aked, Note, *Solem v. Helm: The Supreme Court Extends the Proportionality Requirement to Sentences of Imprisonment*, 1984 WIS. L. REV. 1401, 1423 & nn.145-47 (emphasizing the lack of possibility for parole as the distinguishing factor in *Solem*); Campbell-Eaton, *supra* note 129, at 793 (citing the mandatory nature of Helm's sentence as the key factor distinguishing *Solem* from *Rummel*).

131. *Solem*, 463 U.S. at 297. Helm would, however, still be eligible for legislative or executive clemency. *Id.* at 283.

132. *Id.* at 289-90 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

133. *Id.* at 290-91.

134. *Id.* at 291.

135. *Id.*

136. *Id.* at 297. There is no death penalty in South Dakota. *Id.* The Court also noted that "Helm was treated more severely than he would have been in any other state." *Id.* at 300.

137. *Id.* at 297.

III. *HARME LIN V. MICHIGAN*

Ronald Harmelin relied on *Solem* for the proposition that sentences of imprisonment must be proportionate to the crime charged.¹³⁸ Harmelin argued that, although serious, his crime did not involve death or violence; therefore, it was cruel and unusual punishment to inflict the same sentence on him as on a convicted murderer. Unfortunately for Harmelin, the United States Supreme Court refused to find the distinction significant under the Eighth Amendment.

A. *Facts*

At approximately 2:45 A.M. on May 12, 1986, Officers Rix and Blakeney of the Oak Park, Michigan Police Department drove into the parking lot of the Embassy Motel.¹³⁹ At this time and twice later that morning, the officers observed Harmelin's car entering and leaving the lot.¹⁴⁰ Other than these early morning comings and goings, nothing about Harmelin's activities attracted the officers' attention.¹⁴¹

Shortly after observing the petitioner's car exit the lot a third time, the officers again encountered his car. This time they watched the petitioner run a red light while making a U-turn at an intersection. The officers stopped Harmelin, who remained seated in his car and cooperated with the officers when asked for his license and registration. Harmelin eventually stepped out of his car.¹⁴²

He immediately told the officers that he was carrying a gun in his ankle holster.¹⁴³ Not wishing to alarm the officers, he explained that he had a permit to carry the concealed weapon. He handed the permits for the .38-caliber, five-chamber revolver to Officer Rix, who then con-

138. Brief of Petitioner, *Harmelin v. Michigan* 111 S. Ct. 2680 (1991) (No. 89-7272), available in LEXIS, Genfed library, Briefs File.

139. *People v. Harmelin*, 440 N.W.2d 75, 77 (Mich. Ct. App. 1989), *appeal denied*, 434 Mich. 863 (1990), *aff'd*, 111 S. Ct. 2860 (1991). In the past, the motel lot had proved a popular spot for dumping stolen vehicles. *Id.*

140. *Id.*

141. *Id.* At no time did the officers observe anything unusual or illegal about the petitioner's car or the manner in which he drove. *Id.*

142. *Id.* There was some dispute as to whether the officers ordered Harmelin out of the car or whether he got out on his own. *Id.*

143. *Id.*

fiscated the gun.¹⁴⁴ Because the petitioner appeared nervous, and one of Harmelin's coat pockets had a bulge, the officer decided to conduct a pat-down search. The search yielded marijuana, and the petitioner was placed under arrest.¹⁴⁵

A more thorough search pursuant to the arrest revealed additional contraband.¹⁴⁶ Harmelin's car was impounded and an inventory search was conducted.¹⁴⁷ A shaving bag in the trunk contained \$2900 in cash and two bags of white powder. Later tests revealed that the white powder was 672.5 grams of cocaine.¹⁴⁸ Additionally, the petitioner's fingerprints were found on books inside the shaving bag and next to the packets of cocaine.¹⁴⁹

B. Procedural Background

At trial, Ronald Harmelin was convicted of possession of 672.5 grams of cocaine and sentenced under Michigan law to life in prison without possibility of parole.¹⁵⁰ On appeal, the court ruled that the search was illegal and reversed Harmelin's conviction.¹⁵¹ The dissenting judge argued that the record was unclear as to whether the petitioner was ordered out of the car or got out voluntarily.¹⁵² Two months later, the court vacated this judgment on its own motion and reconsidered the case.¹⁵³ Upon further review, the court concluded that its initial ruling was in error and reinstated the conviction.¹⁵⁴ The Michigan Supreme

144. *Id.*

145. *Id.*

146. The search revealed "assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia and a telephone beeper." *Id.*

147. *Id.* at 77-78.

148. *Id.* at 78. Michigan classifies cocaine as a controlled substance. MICH. COMP. LAW ANN. § 333.7214(a)(iv) (West 1992). According to Justice Kennedy, this amount of pure cocaine can potentially produce between 32,500 and 65,000 doses. Harmelin v. Michigan, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., concurring) (citing A. WASHTON, COCAINE ADDICTION: TREATMENT, RECOVERY, AND RELAPSE PREVENTION 18 (1989)). Authorities estimated the street value to be \$100,000. David G. Savage, *Justices Uphold Victims' Rights, 'Cruel' Punishments*, L.A. TIMES, June 28, 1991, at A1.

149. Harmelin, 440 N.W.2d at 78. At trial, defense counsel called no witnesses. Instead, Harmelin's attorney attacked the admissibility of the offered evidence. *Id.*

150. *Id.* at 76-77. See MICH. COMP. LAWS ANN. § 333.7403 (2)(a)(i) (West 1992).

151. Harmelin, 440 N.W.2d at 76. The court interpreted the search-and-seizure provision under the Michigan Constitution as more protective than the Fourth Amendment to the United States Constitution. Cf. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam) (holding that it is constitutional for a police officer to order an individual out of his or her car during a routine traffic stop).

152. Harmelin, 440 N.W.2d at 76.

153. *Id.*

154. *Id.* at 80. The court ruled that the Michigan Constitution provided greater protection than the federal constitution only within the curtilage of a dwelling house. See

Court denied appeal.¹⁵⁵ In 1990, the United States Supreme Court granted the petitioner's writ of certiorari.¹⁵⁶

IV. ANALYSIS OF *HARME LIN V. MICHIGAN*

Reflecting the unsettled nature of the Cruel and Unusual Punishments Clause, especially regarding the proportionality component, the Court in *Harmelin v. Michigan*¹⁵⁷ fragmented into five opinions. This Comment focuses on the three main opinions. First, the Comment examines Justice Scalia's opinion, followed by Justice Kennedy's concurrence, and, lastly, Justice White's dissenting opinion.¹⁵⁸

A. *Justice Scalia's Opinion*

Justice Scalia's opinion consisted of five parts. The majority only joined Part V.¹⁵⁹ In Parts I-IV of his opinion, Justice Scalia was joined only by the Chief Justice.

1. Rejection of *Solem v. Helm* and Its Interpretation of the Original Intent of the Phrase "Cruel and Unusual Punishments"

MICH. CONST. art. 1, § 11. Since the officers stopped Harmelin on a public road, he was entitled only to minimum constitutional protection. *Harmelin*, 440 N.W.2d at 78. Thus, the police had the authority to order the petitioner out of his car and to conduct a pat-down search. In so ruling, the court rejected Harmelin's contention that his mandatory sentence to life in prison without possibility of parole violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.*

155. *People v. Harmelin*, 434 Mich. 863, *cert. granted*, 495 U.S. 956 (1990), *aff'd*, 111 S. Ct. 2680 (1991).

156. *Harmelin v. Michigan*, 495 U.S. 956 (1990), *aff'd*, 111 S. Ct. 2680 (1991). The Supreme Court affirmed Harmelin's sentence. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991). Eventually, Harmelin appealed to the Michigan Supreme Court on the ground that his sentence violated the Michigan State Constitution. *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992). The Michigan Supreme Court held that a mandatory sentence of life in prison without possibility of parole for possession of 650 or more grams of cocaine constituted cruel or unusual punishment under the state constitution. *Id.* at 877. See *infra* note 350 and accompanying text.

157. 111 S. Ct. 2680 (1991).

158. The dissenting opinions of Justices Marshall and Stevens are addressed briefly at *infra* notes 260-64 and accompanying text.

159. Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Souter joined Justice Scalia in holding that Harmelin's sentence did not violate the Eighth Amendment despite the state court's refusal to consider the individual, mitigating circumstances. *Harmelin*, 111 S. Ct. at 2701-02.

Justice Scalia began his analysis with the proposition that *Solem v. Helm*¹⁶⁰ wrongly concludes that the Eighth Amendment contained a proportionality component.¹⁶¹ The Court in *Solem* recognized that the meaning of the phrase “cruel and unusual” was uncertain, but stated that “it at least incorporated ‘the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.’”¹⁶² According to *Solem*, when the framers incorporated the language of the English Bill of Rights¹⁶³ into the Eighth Amendment, they meant to guarantee American citizens all of the rights enjoyed by British subjects.¹⁶⁴ Therefore, the British interpretation of the phrase “cruel and unusual” becomes pertinent to American Eighth Amendment jurisprudence.

Under Justice Scalia’s analysis, however, the English Bill of Rights prohibited “illegal,” not “disproportionate,” penalties.¹⁶⁵ Justice Scalia contended that if the English framers had meant to prohibit “disproportionate” or “excessive” punishments, they would have said so.¹⁶⁶ Under Justice Scalia’s reasoning, an excessive penalty can be considered “cruel” but not necessarily “unusual,” thereby circumventing the prohibition.¹⁶⁷ In arriving at this conclusion, Justice Scalia agreed with Granucci and other modern historians who allege that the Cruel and Unusual Punishments Clause was not a response to the “Bloody Assizes,” but to the perjury trial of Titus Oates.¹⁶⁸ Thus, the clause prohibits arbitrary penalties that are not authorized by either the common law or statute.¹⁶⁹ Only in these circumstances would Justice Scalia find an imposed sentence “cruel and unusual”: not that it is excessive, but that it is beyond the judge’s authority under the law.¹⁷⁰ Justice Scalia further supported his theory by proposing that the word “illegal” was used interchangeably with the word “unusual” at that time.¹⁷¹

160. 463 U.S. 277 (1983).

161. *Harmelin*, 111 S. Ct. at 2686.

162. *Solem*, 463 U.S. at 285 (quoting RICHARD L. PERRY, *THE SOURCES OF OUR LIBERTIES* 236 (1959)).

163. The English Bill of Rights provides that “excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.” 1 W. & M., sess. 2, ch. 2 (1689) (Eng.). See *supra* notes 23-33 and accompanying text.

164. *Solem*, 463 U.S. at 286.

165. *Harmelin*, 111 S. Ct. at 2690.

166. *Id.* at 2687.

167. *Id.*

168. See *supra* note 27-29 and accompanying text.

169. *Harmelin*, 111 S. Ct. at 2688.

170. *Id.* at 2690-91.

171. *Id.* Justice Scalia left open the question of whether a punishment could be outside the lawful authority of the judge (i.e. “illegal” or “unusual”) and at the same

Despite Justice Scalia's analysis of English jurisprudence, he argued that the "ultimate question" is what the framers of the American Bill of Rights intended by the phrase "cruel and unusual."¹⁷² However, the sparse legislative history that accompanied the adoption of the Eighth Amendment makes this task difficult.¹⁷³

Justice Scalia began his analysis in the same way he began his analysis of the English Bill of Rights: If the Eighth Amendment was meant to prohibit disproportionate penalties, it would do so explicitly.¹⁷⁴ After all, he reasoned that "proportionality provisions had been [explicitly] included in several state constitutions."¹⁷⁵ He rejected the contention that the framers thought that the term "cruel and unusual" implicitly guaranteed proportional punishments.¹⁷⁶ From the little legislative history that does exist and according to many commentators,¹⁷⁷ the Eighth Amendment was interpreted as prohibiting only certain modes of punishment.¹⁷⁸ Early state court interpretations of the Eighth Amendment bear out this construction.¹⁷⁹

time fail to be "cruel." Granucci pointed out that the framers of the English Bill of Rights explicitly prohibited "disproportionate" punishments by using the phrase "cruel and unusual." Granucci, *supra* note 25, at 865. However, Justice Scalia relied on the modern usage of the word "cruel" in his analysis as meaning "merciless, pitiless, [or] hard-hearted." See 2 OXFORD ENGLISH DICTIONARY 1216 (1970). Absent a penalty that fits within this definition of "cruel," Justice Scalia may find no violation of the Eighth Amendment. In the late 17th century, however, the word "cruel" was synonymous with "severe." Thus, the Cruel and Unusual Punishments Clause may indeed contain a prohibition against severe or excessive penalties within the meaning of the words themselves. Granucci, *supra* note 25, at 860.

172. *Harmelin*, 111 S. Ct. at 2691.

173. See *supra* note 34 and accompanying text.

174. *Harmelin*, 111 S. Ct. at 2692.

175. *Id.* For example, the Constitutions of Pennsylvania, South Carolina, and New Hampshire enacted in 1776, 1778 and 1784 respectively, all guaranteed that punishments shall be proportionate to the crime. *Id.* (citing PA. CONST. § 38; S.C. CONST. art. XL; N.H. BILL OF RIGHTS pt. 1, art. XVIII).

176. See *supra* notes 160-64 and accompanying text.

177. See Granucci, *supra* note 25, at 839-43.

178. See notes 34-35 *supra* and accompanying text.

179. *Harmelin*, 111 S. Ct. at 2695-96 (citing *Territory v. Ketchum*, 65 P. 169, 171 (N.M. 1901) (stating that a sentence so disproportionate as to shock the conscience would be "cruel and unusual" punishment); *State v. Hogan*, 58 N.E. 572, 575 (Ohio 1900) (finding that punishment may be severe, but it is the legislature's duty to determine appropriate sentences); *Hobbs v. State*, 32 N.E. 1019, 1020-21 (Ind. 1893) (same); *State v. Becker*, 51 N.W. 1018, 1022 (S.D. 1892) (invoking the power of the courts under the South Dakota Constitution to intervene where the punishment is so disproportionate so as to shock the public conscience); *People v. Morris*, 45 N.W.

2. Critical Analysis of the Factors Set Forth in *Solem v. Helm*

In Justice Scalia's view, prohibiting certain methods of punishment rather than "disproportionate" penalties makes good judicial sense.¹⁸⁰ It is relatively easy for judges to determine whether or not a particular mode of punishment is "torturous or barbaric."¹⁸¹ Proportionality, on the other hand, is a more subjective analysis that is best left to the legislature.¹⁸²

As proof of this proposition, Justice Scalia analyzed the three factors set forth in *Solem v. Helm*: (1) the gravity of the offense as compared to the harshness of the penalty, (2) the sentences imposed on similarly offensive crimes in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.¹⁸³

591, 592 (Mich. 1890) (finding that the Cruel and Unusual Punishments Clause refers to the kind of punishment and not the degree); *State v. White*, 25 P. 33, 34-35 (Kan. 1890) (reasoning that imprisonment at hard labor is not a cruel and unusual punishment because it was a common penalty throughout the state's existence); *State v. Williams*, 77 Mo. 310, 312-13 (Mo. 1883) (finding that the Cruel and Unusual Punishment Clause forbids torture or barbarous penalties, but does not apply to the proportionality of prison sentences); *Cummins v. People*, 3 N.W. 305, 305 (Mich. 1879) (holding that a sentence imposed within the statutory limits is not cruel and unusual punishment); *Whitten v. Georgia*, 47 Ga. 297, 301 (1872) (stating that the Constitution limits infliction of torturous or barbarous punishments, but a punishment's severity is otherwise at the discretion of the legislature); *Garcia v. Territory*, 1 N.M. 415, 417-19 (1869) (reasoning that whipping is not a cruel and unusual punishment because it has long been a common punishment and it does not amount to torture); *Commonwealth v. Hitchings*, 71 Mass. (1 Gray) 482, 486 (1855) (stating that the legislature determines the severity of punishments); *Aldridge v. Commonwealth*, 4 Va. (1 Va. Cas.) 447 (1824) (holding that the Eighth Amendment applies only to certain modes of punishment); *Barker v. People*, 20 Johns. 457, 458 (N.Y. Sup. Ct. 1823) (holding that disenfranchising a citizen for a dueling conviction is a proper punishment, made at the discretion of the legislature), *aff'd*, 3 Cow. 686 (N.Y. 1824)).

180. *Id.* at 2696.

181. *Id.* Justice Scalia suggested that there are "clear historical guidelines and accepted practices" that allow courts to determine whether or not a particular mode of punishment is "cruel and unusual." *Id.* This sounds much like the "evolving standards of decency" set forth in *Trop*. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Justice Scalia, however, determined that this is an objective analysis, whereas a proportionality analysis relies on the subjective determinations of judges. But even Justice Scalia admitted that there are some absolutes: "one can imagine extreme examples that no rational person . . . could accept." *Harmelin*, 111 S. Ct. at 2696. But, he argued that such examples, for the very reason that they are so horrible, are "certain never to occur." *Id.* at 2696-97. Justice White felt that Justice Scalia's reassurances offered "cold comfort indeed, for absent a proportionality guarantee, there would be no basis for deciding such cases should they arise." *Id.* at 2714 (White, J., dissenting).

182. *Harmelin*, 111 S. Ct. at 2696-97.

183. *Id.* at 2697 (citing *Solem v. Helm*, 463 U.S. 277, 290-91 (1983)).

Justice Scalia's difficulty with the first factor was in defining "grave" offense.¹⁸⁴ Assessing "gravity" depends on "how odious and socially threatening" one perceives the crime to be.¹⁸⁵ Justice Scalia illustrated this difficulty with examples of various crimes and their punishments,¹⁸⁶ noting that there seems to be little logic in apportioning penalties.¹⁸⁷ He believed that "the Michigan Legislature, and not [the Court], knows the situation on the streets of Detroit."¹⁸⁸

Likewise, Justice Scalia had difficulties with *Solem's* second test: comparing the sentence imposed to the sentences imposed for other crimes in that jurisdiction.¹⁸⁹ He pointed out that "similarly grave" offenses could receive disparate penalties for a variety of reasons.¹⁹⁰ For example, one crime that is equally as "grave" as another might receive a harsher sentence because it occurs more frequently.¹⁹¹ In *Solem*, Helm received a life sentence without possibility of parole for passing a "no account" check and because he was a habitual offender.¹⁹² The same sentence was authorized for crimes such as murder, treason, arson, and kidnapping.¹⁹³ The *Solem* Court also found that Helm's sentence was harsher than those received by defendants who had committed more serious offenses.¹⁹⁴ Justice Scalia objected to the holding in *Solem* be-

184. *Id.* at 2698. In Justice Scalia's view, an assessment of the gravity of the punishment depends on the crime's severity and the threat it poses to society. Justice Scalia reasoned that the legislature, and not the judiciary, is best equipped to make such an assessment. *Id.*

185. *Id.* Justice Scalia asked rhetorically whether life imprisonment without possibility of parole might be an appropriate penalty for possession of, or possession with intent to distribute, a quantity of heavy weaponry. *Id.*

186. *Id.* One such example is that both assault and the unauthorized reproduction of the character or name "Smokey [the] Bear" are punished by up to six months imprisonment. See 18 U.S.C. § 113(d) (1988); 18 U.S.C. § 711 (1988).

187. *Harmelin*, 111 S. Ct. at 2697-98. However, the Court in *Solem* emphasized that instead of determining that an offense was "grave" on its face, the offense should be compared to the penalty imposed. *Solem*, 463 U.S. at 295-97. While courts may not be in the best position to make judgments about the logic of a particular sentencing hierarchy, surely judges possess the ability to recognize when an excessively harsh penalty has been inflicted for a certain crime.

188. *Harmelin*, 111 S. Ct. at 2698.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Solem v. Helm*, 463 U.S. 277, 297 (1983). See *supra* notes 127-28 and accompanying text.

193. *Solem*, 463 U.S. at 298-99.

194. *Id.* at 299.

cause he reasoned that there is no objective basis for comparing the gravity of two different crimes.¹⁹⁵

As for the third *Solem* test, Justice Scalia admitted that one can easily and objectively compare sentences for the same crime among different jurisdictions.¹⁹⁶ He questioned the worth of such a test, however, since states are entitled to punish, or not punish, different crimes in different ways.¹⁹⁷ Justice Scalia noted that such diversity is the result of federalism.¹⁹⁸ Our federal structure allows the states to pursue divergent paths in their sentencing schemes, thus allowing each state to best respond to its particular social conditions.¹⁹⁹

3. Proportionality Principle Cases Distinguished

Justice Scalia next analyzed the cases that established a proportionality component in the Eighth Amendment.²⁰⁰ He found that *Weems v. United States*²⁰¹ contained language supporting two different interpretations of the Eighth Amendment: first, that the Eighth Amendment forbids torturous punishments,²⁰² and second, that it forbids disproportional

195. *Harmelin*, 111 S. Ct. at 2698. In the close cases that Justice Scalia envisioned, such comparisons would be quite difficult. *Id.* For example, Justice Scalia found it difficult to draw a distinction between the severity of possessing illegal narcotics and the severity of possessing illegal weaponry. *Id.*

However, because some comparisons may be difficult to make does not vitiate the worth of a comparative test in its entirety. There is, for example, an identifiable difference between uttering a "no account" check and murder. A similar difference exists between murder and possession of a controlled substance: the former is a violent crime, while the latter is not. *But see id.* at 2706 (Kennedy, J., concurring) (rejecting the characterization of *Harmelin's* offense as "nonviolent").

196. *Id.* at 2698-99.

197. *Id.* at 2698. There is, of course, no requirement that the states punish crimes uniformly. *Id.* at 2698-99. The aim of *Solem* was not to prohibit different states from punishing the same crime differently. Rather, the third test was developed to provide objective evidence of current social thought among the people of the different states. For cases that apply a similar analysis, see *Solem v. Helm*, 463 U.S. 291-92 (1983); see also *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 (1977). If one state punishes a crime far more severely than all others, that state may be out of step with the rest of the country's assessment of the danger that the crime poses. However, such a finding is far from conclusive evidence and must be considered along with the other *Solem* factors. See *Solem*, 463 U.S. at 290-92.

198. *Harmelin*, 111 S. Ct. at 2699.

199. *Id.*

200. *Id.* at 2699-701.

201. 217 U.S. 349 (1910).

202. *Harmelin*, 111 S. Ct. at 2699. For example, the Court said in *Weems*:

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

tionate penalties.²⁰³ In Justice Scalia's view, the fact that in sixty years no court used *Weems* to ban disproportionate penalties was sufficient proof that *Weems* stood against only the barbarities of that particular petitioner's sentence.²⁰⁴

Eventually, the Court did use *Weems* and other cases for the proposition that proportionality was indeed a component of the Eighth Amendment.²⁰⁵ However, Justice Scalia asserted that proportionality applies only to capital cases and has no application to sentences of imprisonment.²⁰⁶ In fact, the Court in *Rummel* noted that "outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."²⁰⁷ However, at the

have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain.

Weems, 217 U.S. at 366-67.

203. *Harmelin*, 111 S. Ct. at 2699. For example, "[s]uch penalties for such offenses [as those committed by *Weems*] amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Id.* (quoting *Weems*, 217 U.S. at 366-67).

204. *Id.* at 2700 (citing *Hart v. Coiner*, 483 F.2d 136, 140 (4th Cir. 1973) (holding that a sentence of imprisonment may violate the Eighth Amendment solely because it is disproportionate to the underlying offense)).

205. See *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (holding that capital punishment for a felony-murder conviction violates the Eighth Amendment prohibition against disproportionate penalties); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (finding the death penalty disproportionate to the crime of rape).

206. *Harmelin*, 111 S. Ct. at 2701. Justice Scalia cited three cases in support of this proposition: *Turner v. Murray*, 476 U.S. 28 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Beck v. Alabama*, 447 U.S. 625 (1980). However, these three cases do not refer to the proposition that proportionality should only apply in capital cases. Rather, they propose that courts must take special care in the sentencing phase of a death penalty case because of the irrevocability of the sentence. See *Turner*, 476 U.S. at 35-36 (stating that prospective jurors in a capital case must be questioned as to possible racial prejudice in light of the finality of the death sentence); *Eddings*, 455 U.S. at 110-17 (finding that evidence of violent family history and emotional disturbance were improperly excluded from consideration during sentencing); *id.* at 117-18 (O'Connor, J., concurring) (asserting that on account of the irrevocability of the death sentence, the Court goes to great lengths to ensure that it is not "imposed out of whim, passion, prejudice, or mistake."); *Beck*, 447 U.S. at 637 (requiring that the jury be permitted to consider lesser included offenses in a death penalty case because the defendant's life is at stake).

207. *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). See Karl N. Metzner, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 1991 DUKE L.J. 160, 160 (noting that *Harmelin* reaffirmed the proposition that the death penalty is fundamentally different than a prison sentence).

same time, *Rummel* expressly recognized that the proportionality component applies to prison sentences.²⁰⁸ There is no compelling authority as to why the proportionality component should apply to capital cases and not to sentences of imprisonment. Certainly the Eighth Amendment prohibition against “cruel and unusual punishments” does not contain such a distinction.²⁰⁹

4. Failing to Consider Individual Mitigating Factors Does Not Make a Mandatory Prison Sentence Cruel and Unusual

Justice Scalia again applied the capital/noncapital distinction in rejecting Harmelin’s second claim that his sentence violated the Eighth Amendment because the trial court did not consider his individual circumstances in the sentencing phase.²¹⁰ As to this claim, precedent provided a more solid foundation for Justice Scalia’s analysis.²¹¹ Central to Justice Scalia’s argument is the fact that death is irrevocable, while the legislature or the executive may reduce a sentence of imprisonment, even a life sentence without possibility of parole.²¹² Also, Justice Scalia found that the difference between a life sentence without possibility of parole and other sentences of imprisonment will often be slight.²¹³ But, even when an obvious difference exists, Justice Scalia reasoned that “it cannot be compared with death.”²¹⁴ Therefore, the Court held that indi-

208. *Rummel*, 445 U.S. at 274 n.11.

209. *Harmelin*, 111 S. Ct. at 2680, 2712 (White, J., dissenting). As Justice White pointed out, the Eighth Amendment’s proportionality principle should either apply to both capital and noncapital cases or to neither, since the text of the amendment does not distinguish between the two. *Id.* (White, J., dissenting). See also Martin R. Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103, 1129 (noting that the Eighth Amendment proscribes cruel and unusual “punishments” and not merely cruel and unusual “executions”).

210. *Harmelin*, 111 S. Ct. at 2701-02.

211. Because of the qualitative difference between the death penalty and sentences of imprisonment, the former requires consideration of individual mitigation factors. See *supra* note 90 and accompanying text. See also *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (holding that in order to survive a constitutional challenge, the death penalty must be imposed with due regard to the individual characteristics of both the crime and the offender).

212. *Harmelin*, 111 S. Ct. at 2702.

213. For example, a life sentence with eligibility for parole after 20 years inflicted on a 65-year-old man, is basically equivalent to a life sentence without the possibility for parole. *Id.*

214. *Id.* Justice Scalia’s own examples, however, fail to demonstrate a great distinction between a death sentence and mandatory life imprisonment without possibility of parole. The latter is, in effect, a form of a death sentence because the offender is sentenced to die in prison.

vidualized sentencing is only required in capital cases.²¹⁵

B. Justice Kennedy's Concurring Opinion

Justice Kennedy wrote a separate opinion, in which Justices O'Connor and Souter joined, concurring in part and concurring in Part V of Justice Scalia's opinion, which held that individualized sentencing is not required in noncapital cases.²¹⁶ Justice Kennedy's thesis differed from that offered by Justice Scalia in that Justice Kennedy believed that the Eighth Amendment does contain a proportionality component.²¹⁷ However, he construed this principle narrowly, thereby voting to uphold Harmelin's sentence.²¹⁸

1. Recognition of a Narrow Proportionality Principle

Although Justice Kennedy relied in part on *Weems v. United States*²¹⁹ to find a narrow proportionality component in the Eighth Amendment,²²⁰ he found that the Court's death penalty cases more conclusively established this principle.²²¹ In doing so, Justice Kennedy rejected Justice Scalia's suggestion that the proportionality principle applies only to death penalty cases.²²² Justice Kennedy then cited several recent cases that had recognized a proportionality principle in both capital and noncapital cases.²²³

215. *Id.*

216. *Id.* at 2702, 2707-08 (Kennedy, J., concurring).

217. *Id.* at 2703 (Kennedy, J., concurring).

218. *Id.* at 2707-08 (Kennedy, J., concurring).

219. 217 U.S. 349 (1910).

220. *Harmelin*, 111 S. Ct. at 2707-08 (Kennedy, J., concurring).

221. *Id.* at 2703 (Kennedy, J., concurring) (citing *Enmund v. Florida*, 458 U.S. 782, 800-01 (1982) (finding a capital sentence inappropriate for the crime of felony murder where the defendant neither intended to kill nor in fact killed); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (holding that the death penalty is disproportionate to the crime of raping an adult woman)).

222. *Id.* (Kennedy, J., concurring).

223. *Id.* (Kennedy, J., concurring) (citing *Solem v. Helm*, 463 U.S. 277, 297 (1983) (finding that life imprisonment without possibility of parole is disproportionate to a conviction as a repeat offender for seven underlying nonviolent felonies); *Hutto v. Davis*, 454 U.S. 370, 374 & n.3 (1982) (holding that a 40-year sentence for possession with intent to distribute nine ounces of marijuana is not a disproportionate penalty); *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (holding that the Eighth Amendment prohibits grossly disproportionate penalties); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (stating that the Eighth Amendment prohibits punishments that are grossly disproportional)).

2. Application of the Proportionality Component

After establishing the existence of a proportionality element in the Eighth Amendment, Justice Kennedy attempted to determine how to apply this concept in the future. He announced four guiding principles gleaned from past decisions: (1) it is the proper duty of the legislature, and not the courts, to determine the length of prison terms, (2) the Eighth Amendment does not require the adoption of one particular theory of criminal sentencing, (3) variations in the length of sentences among jurisdictions are the natural result of our federal structure, and (4) courts should employ objective factors in reviewing sentences whenever possible.²²⁴

Justice Kennedy's first principle was that the legislature is in the best position to set the length of prison sentences. In Justice Kennedy's view, decisions regarding the proper punishment for criminals have a broad impact on societal interests.²²⁵ Furthermore, it is for the legislature to determine and implement questions of policy.²²⁶ Therefore, in reviewing a sentence set within legislatively proscribed maximums, courts should give broad deference to legislative intent.²²⁷ Justice Kennedy did not, however, discuss what limits, if any, should be placed on legislative choices in this area.

The second principle Justice Kennedy discussed was that the Constitution does not command adherence to any particular theory of criminal sentencing.²²⁸ The theories of retribution, deterrence, incapacitation, and rehabilitation have exerted more or less influence over this country's sentencing policies depending on which was more in tune with current thought.²²⁹ Over the years, courts have similarly debated

tionate to the underlying offense); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (stating that the Eighth Amendment proscribes disproportionate penalties).

224. *Id.* at 2703-05 (Kennedy, J., concurring).

225. *Id.* at 2703 (Kennedy, J., concurring) ("Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and social order.") See generally DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 1 (1990).

226. *Harmelin*, 111 S. Ct. at 2703-05 (Kennedy, J., concurring) (citing *Gore v. United States*, 357 U.S. 386, 393 (1958) (holding that the legislature should decide questions of sentencing)).

227. *Id.* at 2703-04 (Kennedy, J., concurring).

228. *Id.* at 2704 (Kennedy, J., concurring).

229. See *id.* (Kennedy, J., concurring). For a greater exploration of penological theories as applied to Eighth Amendment jurisprudence, see Harvey D. Ellis, Jr., *Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for Its Justification*, 34 OKLA. L. REV. 567 (1981) (analyzing various justifications for the death penalty and arguing that

the question of whether sentencing should be mandatory or discretionary.²³⁰ Apparently, Justice Kennedy's view is that the Constitution's silence on the matter gives the legislature wide latitude in determining which theory or theories to emphasize in devising a sentencing scheme.

Justice Kennedy's third principle was that the states' varying sentencing hierarchies result from our federal system of government.²³¹ Depending on the local conditions and the particular theories of sentencing embraced, different states may and do have widely varying methods of punishing the same offense.²³² Thus, comparisons among the different states may be of little or no help in a proportionality review.²³³

Lastly, Justice Kennedy asserted that courts should rely on objective factors in determining whether a particular sentence is proportional to a given crime.²³⁴ "The easiest comparison is between capital . . . and noncapital punishment."²³⁵ However, no objective factors exist to compare punishments varying in terms of years; the reasons that one

none yet offered stand up to close constitutional scrutiny); Mark A. James, *Eighth Amendment Proportionality Analysis: The Limits of Moral Inquiry*, 26 ARIZ. L. REV. 871 (1984) (reconciling the proportionality decisions of *Helm* and *Coker* while developing an extended Eighth Amendment analysis); David S. Mackey, *Rationality Versus Proportionality: Reconsidering the Constitutional Limits on Criminal Sanctions*, 51 TENN. L. REV. 623 (1984) (proposing a rational basis test for criminal sentencing that would give a criminal defendant the right to the least restrictive sentence).

230. *Harmelin*, 111 S. Ct. at 2704. (Kennedy, J., concurring) (citing *United States v. Grayson*, 438 U.S. 41, 45-47 (1978) (examining reform movement away from fixed criminal penalties that gave sentencing judges broad discretion in determining criminal punishments)).

Compare *Mistretta v. United States*, 448 U.S. 361, 412 (1989) (holding that the Sentencing Reform Act of 1984, which reduced the discretion of federal judges in imposing criminal sentences, was a constitutional method of eliminating or reducing variations in criminal sentences) with *Williams v. New York*, 337 U.S. 241, 251 (1949) (holding that a criminal statute permitting a sentencing judge to exercise wide discretion in determining criminal punishments was constitutional).

231. *Harmelin*, 111 S. Ct. at 2704 (Kennedy, J., concurring).

232. *Id.* (Kennedy, J., concurring).

233. *Id.* (Kennedy, J., concurring). Thus, Justice Kennedy agrees with Justice Scalia's analysis of the third factor in the *Solem* test: comparing sentences for the same crime among different jurisdictions may be a futile exercise, since there is no requirement for uniformity of punishments among the states. *See supra* note 197 and accompanying text.

234. *Harmelin*, 111 S. Ct. at 2704 (Kennedy, J., concurring) (citing *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)).

235. *Id.* at 2705. (Kennedy, J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 294 (1983)).

crime should be punished with a sentence of seven years and another with a sentence of ten years are hard to discern.²³⁶ It is this lack of objective standards that has made “successful challenges to the proportionality of particular sentences exceedingly rare.”²³⁷

All of these principles guided Justice Kennedy toward the conclusion that the Eighth Amendment’s proportionality principle is a narrow one. He concluded that the Cruel and Unusual Punishments Clause prohibits only sentences grossly out of proportion to the underlying offense.²³⁸

3. Analysis of Petitioner’s Sentence Under the Narrow Proportionality Principle

Justice Kennedy then turned his analysis toward applying this narrow proportionality principle to Harmelin’s sentence. As he pointed out, Harmelin’s sentence is exactly the same as that received by the petitioner in *Solem v. Helm*:²³⁹ life without possibility of parole.²⁴⁰ However, Justice Kennedy distinguished the underlying offenses committed by Harmelin and Helm.²⁴¹ Helm’s crime of uttering a no account check, as well as his other felony convictions, were passive and nonviolent.²⁴² Harmelin’s crime, possession of narcotics, is perhaps one of the most serious crimes facing society today.²⁴³ In Justice Kennedy’s eyes, it was this difference that justified Harmelin’s sentence but not Helm’s.²⁴⁴ Harmelin claimed that, like the crime at issue in *Solem*, his crime was nonviolent and victimless. Justice Kennedy disputed that notion on three grounds: (1) physiological changes caused by drug use can make the user more predisposed to commit crime, (2) drug users may steal or commit other crimes to get money to feed their addiction, and (3) drug-related offenses are often accompanied by violent crime.²⁴⁵ In applying

236. *Id.* (Kennedy, J., concurring).

237. *Id.* (Kennedy, J., concurring) (quoting *Rummel*, 445 U.S. at 272)).

238. *Id.* (Kennedy, J., concurring) (citing *Weems v. United States*, 217 U.S. 349, 371 (1910) (“Eighth Amendment prohibits ‘greatly disproportioned’ punishments.”); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“Eighth Amendment prohibits ‘grossly disproportionate’ sentences.”); *Rummel*, 445 U.S. at 271 (same); *Solem*, 463 U.S. at 288 (same)).

239. 463 U.S. 277 (1983).

240. *Harmelin*, 111 S. Ct. at 2705 (Kennedy, J., concurring).

241. *Id.* (Kennedy, J., concurring). Justice Kennedy contrasted Helm’s minor, property-related offenses with Harmelin’s crime of drug possession. *Id.* at 2705-06 (Kennedy, J., concurring). Justice Kennedy asserted that Harmelin’s crime was neither “nonviolent [nor] victimless, [rather it] threatened to cause grave harm to society.” *Id.* at 2706 (Kennedy, J., concurring).

242. *Id.* (Kennedy, J., concurring). See *supra* notes 127-28 and accompanying text.

243. *Harmelin*, 111 S. Ct. at 2705 (Kennedy, J., concurring).

244. *Id.* at 2706 (Kennedy, J., concurring).

245. *Id.* (Kennedy, J., concurring) (citing NAT’L INST. OF JUSTICE, 1989 DRUG USE

what amounted to a rational basis test, Justice Kennedy concluded that these facts support Michigan's determination that possession of 650 or more grams of cocaine warrants a sentence of life in prison without possibility of parole.²⁴⁶

Furthermore, because of the "gravity" of Harmelin's offense, Justice Kennedy reasoned that he need go no further in his *Solem* analysis.²⁴⁷ Justice Kennedy relied on language in *Solem* for the proposition that a comparative analysis of the offender's sentence is required only if the initial determination infers that the sentence is grossly disproportionate to the crime.²⁴⁸ Justice Kennedy, however, did not provide guidelines as to when a sentence may be grossly disproportionate to the underlying offense,²⁴⁹ nor did he establish how disproportionate that sentence must be to continue with the comparative factors set forth in *Solem*.²⁵⁰ Contrary to Justice Kennedy's assertion, the Court has used this type of comparative analysis in the past for the initial determination of whether a penalty is disproportionate to the crime.²⁵¹

FORECASTING ANNUAL REPORT 9 (1990); UNITED STATES DEP'T OF HEALTH AND HUMAN SERVS., EPIDEMIOLOGICAL TRENDS IN DRUG ABUSE 107 (1990)).

246. *Id.* (Kennedy, J., concurring). These factors seem to apply, however, more to the addict at one extreme and the dealer at the other. The narcotics addict will steal and rob to get money to buy drugs, while the dealer surrounds himself with illegal firearms in conducting his illegal enterprise. And while the sheer volume of drugs found in Harmelin's car supports an inference that he was one or the other or both, the prosecution failed to prove either in court. *Id.* at 2717-18 (White, J., dissenting). Harmelin was convicted of possession, not possession with intent to distribute. *Id.* at 2718 (White, J., dissenting). Although he was armed when stopped by the police, he had a legal permit for the weapon. Also, he had never been previously convicted of a felony. While these mitigating factors certainly do not make Harmelin an innocent man, neither do they support the assertion that the nature of his crime demands that he spend the rest of his life in prison. *See id.* at 2719 (White, J., dissenting).

247. *Id.* at 2707 (Kennedy, J., concurring).

248. *See Solem v. Helm*, 463 U.S. 277, 290 & n.16 (1983) (finding that an extended analysis of proportionality in sentencing is required only in rare cases and that courts may conduct a comparative analysis of the offender's sentence).

249. *Harmelin*, 111 S. Ct. at 2706-07 (Kennedy, J., concurring).

250. *Id.* at 2707 (Kennedy, J., concurring).

251. *See Rummel v. Estelle*, 445 U.S. 263, 269-70 & nn.9-10 (1980) (comparing petitioner's sentence to those received for similar crimes in other jurisdictions); *Coker v. Georgia*, 433 U.S. 584, 592-96 & nn.4-10 (1977) (using a comparative analysis to determine that Georgia was the lone jurisdiction to inflict capital punishment for the rape of an adult woman); *Weems v. United States*, 217 U.S. 349, 380-81 (1910) (comparing petitioner's sentence to those received for more serious crimes committed in the United States).

4. Review of the Mandatory Nature of Harmelin's Sentence

Justice Kennedy began his analysis of the petitioner's second Eighth Amendment attack by agreeing with Justice Scalia's distinction between capital and noncapital sentences.²⁵² Justice Kennedy found additional support in past noncapital cases.²⁵³ Unlike *Solem*, the trial judge in *Harmelin* did not use his discretion to choose a sentence near the top of the range; Harmelin's sentence was mandatory.²⁵⁴ Therefore, Justice Kennedy reasoned that the courts should be more hesitant in overturning the will of the legislature than in reversing the decision of a single judge.²⁵⁵

Although he found mandatory sentencing constitutional, Justice Kennedy was reluctant to wholeheartedly endorse it. He noted that it may be unwise to restrict individual sentencing where mitigating factors weigh strongly against imposing the maximum sentence.²⁵⁶ He opined, however, that it may be more fair to put offenders on notice of their sentence before they commit the crime, rather than allow the occasionally unpredictable discretion of judges in sentencing hearings.²⁵⁷ Additionally, Justice Kennedy observed that consideration of individual circumstances does occur through pre-sentence prosecutorial discretion or post-sentence legislative or executive clemency.²⁵⁸

252. *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring).

253. *Id.* (Kennedy, J., concurring) (citing *Chapman v. United States*, 111 S. Ct. 1919, 1928 (1991) (stating that the legislative branch may deny sentencing courts discretion in determining the appropriate penalty)).

254. *People v. Harmelin*, 440 N.W.2d 75, 76 (Mich. Ct. App. 1989), *appeal denied*, 434 Mich. 863 (1990), *aff'd*, 111 S. Ct. 2860 (1991). *Solem v. Helm*, 463 U.S. 277, 281-82 & n.6 (1983). Mandatory sentencing has long been held constitutional. *See Mistretta v. United States*, 488 U.S. 361, 363-66 (1988) (holding that mandatory sentences are a proper method of moderating the disparate sentencing practices of judges); *United States v. Grayson*, 438 U.S. 41, 45-46 (1978) (approving statutes that fix a "range" of possible sentences); *Ex Parte United States*, 242 U.S. 27, 42 (1916) (reasoning that the legislature has the authority to fix and define criminal penalties).

255. *Harmelin*, 111 S. Ct. at 2708 (Kennedy, J., concurring).

256. *Id.* (Kennedy, J., concurring).

257. *Id.* (Kennedy, J., concurring).

258. *Id.* at 2708-09 (Kennedy, J., concurring). The wisdom of relying on the prosecutor for restraint is not compelling, however, especially in light of the competitive nature of the adversarial system. Although the prosecutor is charged with upholding the interests of justice, she certainly is not in the best position to assess the individual circumstances of the defendant. Furthermore, executive or legislative clemency is so seldom used that it provides little comfort to the offender punished by a disproportionate sentence. *See* Brief of Petitioner, *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (No. 89-7272), *available in* LEXIS, Genfed library, Briefs file.

C. The Dissenting Opinions of Justices Marshall, Stevens and White

Justice White delivered a dissenting opinion in which Justices Stevens and Blackmun joined.²⁵⁹ Justice Marshall delivered a brief dissenting opinion of his own,²⁶⁰ agreeing with Justice White's dissent with the exception that Justice Marshall reasserted his view that the death penalty violates the Eighth Amendment in all instances.²⁶¹

Justice Stevens filed a separate dissent in which Justice Blackmun joined.²⁶² Justice Stevens agreed with Justice White's opinion, but stressed that where the sentence has no rehabilitative function, as in *Harmelin*, the underlying offense must be so serious that "society's interest in deterrence and retribution wholly outweighs considerations of reform or rehabilitation of the perpetrator."²⁶³ In Justice Stevens' view, Ronald Harmelin's crime of possessing a controlled substance did not meet that burden.²⁶⁴

1. Justice White's Dissent and Criticism of Justice Scalia's Interpretation of the Eighth Amendment

Justice White strongly disagreed with Justice Scalia's conclusion that the Eighth Amendment does not include a guarantee against disproportionate sentencing.²⁶⁵ His reasons were threefold. First, Justice White disputed Justice Scalia's contention that if the Eighth Amendment were meant to prohibit disproportionate penalties, it would say so explicitly.²⁶⁶ Justice White quoted Benjamin Oliver's statement: "[S]hall it be supposed that the power to fine is restrained, but the power to imprison is wholly unrestricted by [the Eighth Amendment]?"²⁶⁷ Moreover, Justice White noted that like the Fifth Amendment's Due Process Clause²⁶⁸ and the Fourth Amendment's guarantee against "unreason-

259. *Harmelin*, 111 S. Ct. at 2709 (White, J., dissenting).

260. *Id.* at 2719 (Marshall, J., dissenting).

261. *Id.* (Marshall, J., dissenting).

262. *Id.* (Stevens, J., dissenting).

263. *Id.* (Stevens, J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (Stewart, J., concurring)).

264. *Id.* at 2720 (Stevens, J., dissenting).

265. *Id.* at 2709 (White, J., dissenting).

266. *Id.* at 2709-10 (White, J., dissenting).

267. *Id.* at 2710 (White, J., dissenting) (quoting BENJAMIN OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 185-86 (1832)).

268. U.S. CONST. amend. V.

able searches and seizures,²⁶⁹ the phrase “cruel and unusual” does not have a set definition and is subject to widely-varying interpretations.²⁷⁰

Second, Justice White addressed Justice Scalia’s rejection of the notion that the Eighth Amendment prohibits punishments that are “cruel and unusual” in relation to the crime itself.²⁷¹ Justice Scalia questioned the validity of this interpretation, noting that at the instant the Eighth Amendment was adopted, every criminal punishment imposed by the newly-formed federal government would necessarily be “unusual.”²⁷² In response, Justice White conceded that there were no benchmarks under the new federal law for determining whether a criminal penalty was “unusual.”²⁷³ However, the states had existing criminal sentencing schemes that could be used in determining whether or not a particular sentence was “unusual.”²⁷⁴ Justice White further concluded that Justice Scalia’s interpretation would deprive the word “unusual” in the Eighth Amendment of all meaning.²⁷⁵

Third, addressing Justice Scalia’s argument that the framers chose not to include a proportionality guarantee in the Eighth Amendment, Justice White observed that existing legislative history does not support such a contention.²⁷⁶ Justice Scalia failed to provide any evidence to establish that the framers considered and then discarded a proportionality component.²⁷⁷ Moreover, Justice White extended this logic by positing that if the framers meant to exclude proportionality from the Eighth Amendment, they would have said so explicitly.²⁷⁸

2. Prior Supreme Court Decisions Have Included the Proportionality Guarantee in the Eighth Amendment

Justice White cited *Weems v. United States*²⁷⁹ as the first case to hold that “punishment for crime should be graduated and proportioned to [the] offense.”²⁸⁰ As Justice White noted, subsequent courts have followed *Weems* as authority for the prohibition of disproportionate

269. U.S. CONST. amend. IV.

270. *Harmelin*, 111 S. Ct. at 2710 (White, J., dissenting).

271. *Id.* at 2710 (White, J., dissenting). *See id.* at 2693.

272. *Id.*

273. *Id.* at 2710 (White, J., dissenting).

274. *Id.* (White, J., dissenting).

275. *Id.* (White, J., dissenting).

276. *Id.* (White, J., dissenting). *See supra* notes 161-79 and accompanying text for Scalia’s criticism.

277. *Harmelin*, 111 S. Ct. at 2710 (White, J., dissenting).

278. *Id.* (White, J., dissenting).

279. 217 U.S. 349 (1910).

280. *Harmelin*, 111 S. Ct. at 2711 (White, J., dissenting) (quoting *Weems*, 217 U.S. at 367).

penalties.²⁸¹ Indeed, *Rummel v. Estelle*,²⁸² a case on which Justice Scalia relied in his analysis, expressly recognized that the proportionality principle developed in *Gregg v. Georgia*,²⁸³ *Coker v. Georgia*,²⁸⁴ and *Enmund v. Florida*,²⁸⁵ also applies to sentences of imprisonment.²⁸⁶

Further, Justice White pointed out a logical flaw in Justice Scalia's analysis. If, as Justice Scalia asserts, there is a proportionality component in death penalty cases, it is unclear why such a component should not also apply in noncapital cases.²⁸⁷ Rather, the fact that death penalty cases have involved a proportionality guarantee at all refutes Justice Scalia's argument that the Cruel and Unusual Punishments Clause does not include a prohibition against disproportionate penalties.²⁸⁸ According to Justice White, Justice Scalia's construction would mean either that the Eighth Amendment completely forbids the death penalty or that the legislature may impose capital punishment without restriction.²⁸⁹ Since neither case holds true, proportionality must exist as an element of the Cruel and Unusual Punishments Clause.²⁹⁰

Justice White also rejected Justice Scalia's purely historical analysis as a proper technique in Eighth Amendment jurisprudence.²⁹¹ Prior cases advise courts to interpret the Eighth Amendment in light of "evolving standards of decency that mark the progress of a maturing society."²⁹² Otherwise, changes in society might make the prohibitions of the Eighth Amendment meaningless. Justice White quoted Justice

281. See *Solem v. Helm*, 463 U.S. 277, 290 (1983) (holding that sentences must be proportionate to the underlying offense); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (noting that the Eighth Amendment proscribes disproportionate penalties); *Trop v. Dulles*, 356 U.S. 86, 100-02 (1958) (finding that the Eighth Amendment prohibits disproportionately severe punishments).

282. 445 U.S. 263 (1980).

283. 428 U.S. 153, 173 (1976) (concluding that the Eighth Amendment prohibits disproportionate penalties).

284. 433 U.S. 584, 592 (1977) (holding that the death penalty is disproportionate to the crime of rape, and therefore, unconstitutional).

285. 458 U.S. 782, 797 (1982) (holding that capital punishment is disproportionate to the petitioner's felony-murder conviction, and thus, in violation of the Eighth Amendment).

286. *Rummel*, 445 U.S. at 263, 274 n.11.

287. See *supra* notes 205-09 and accompanying text.

288. See *supra* note 205-09 and accompanying text.

289. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2712 (1991) (White, J., dissenting).

290. *Id.* (White, J., dissenting).

291. *Id.* (White, J., dissenting). See *supra* notes 161-79 and accompanying text.

292. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

McKenna's exhortation that, for an amendment to remain "vital [it] must be capable of wider application than the mischief which gave it birth."²⁹³ Justice White reasoned that this was the purpose of the tests set forth in *Solem v. Helm*.²⁹⁴ to objectively determine society's standards for imposing criminal sentences.²⁹⁵ He observed that courts have had no trouble applying the *Solem* test.²⁹⁶ The parties in *Harmelin* cited only four state cases that had to be reversed under *Solem*.²⁹⁷ Likewise, the *Solem* review has not burdened federal courts either.²⁹⁸ Further, Justice White asserted that under *Marbury v. Madison*,²⁹⁹ deferring to the judgment of the legislature on the reasonableness of criminal penalties is an abdication of judicial responsibility.³⁰⁰

Justice White also disputed Justice Kennedy's assertion that an analysis under only the first *Solem* factor is sufficient for a proportionality review.³⁰¹ He argued that because of the difficulty of conducting a pro-

293. *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

294. 463 U.S. 277, 290-92 (1983).

295. *Harmelin*, 111 S. Ct. at 2712 (White, J., dissenting). *See also* *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (stating that courts should rely on objective factors for determining societal standards).

296. *Harmelin*, 111 S. Ct. at 2712-13 (White, J., dissenting).

297. *Id.* at 2713 n.2. *See* *Ashley v. State*, 538 So.2d 1181, 1185 (Miss. 1989) (proclaiming that a life sentence without possibility of parole is unconstitutionally severe for petty theft and burglary involving only a few dollars); *Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (holding that a penalty of life imprisonment without possibility of parole is unconstitutionally severe when imposed on a 13-year-old offender); *Clowers v. State*, 522 So.2d 762, 763-65 (Miss. 1988) (holding that it is within the trial court's power to reduce a mandatory 15-year sentence for a repeat offender where the underlying offense was uttering a forged check); *State v. Gilham*, 549 N.E.2d 555, 558 (Ohio Ct. App. 1988) (holding that a felony conviction for possession of criminal tools during commission of misdemeanor solicitation is grossly disproportionate and violative of the Eighth Amendment).

298. *See Harmelin*, 111 S. Ct. at 2713 n.3 (White, J., dissenting) (citing *United States v. Sullivan*, 895 F.2d 1030, 1031-32 (5th Cir.), *cert. denied*, 111 S. Ct. 207 (1990) ("In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not unconstitutionally disproportionate.") (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983)); *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989) (holding that reviewing courts have limited power to change imposed sentences in light of the substantial deference accorded to congressional intent); *United States v. Savage*, 888 F.2d 528, 530 (7th Cir. 1989), *cert. denied*, 495 U.S. 959 (1990) ("[F]ine tuning the duration of imprisonment is not a function of the Constitution.")).

299. 5 U.S. (1 Cranch) 137 (1803).

300. *Harmelin*, 111 S. Ct. at 2713 (White, J., dissenting) (citing *Marbury*, 5 U.S. (1 Cranch) at 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")). Thus, penalties are not "legal" simply because Congress has passed them. It is the Court's responsibility to review laws and make sure that they conform to the dictates of the Constitution. *Id.* (White, J., dissenting).

301. *Id.* at 2714 (White, J., dissenting). *See supra* notes 247-48 and accompanying

portionality review, the Court in *Solem* required a combination of several factors for a proper analysis.³⁰² The *Solem* Court reasoned that a sentence could conceivably satisfy one factor and yet grossly violate the other two, and thus fail the proportionality test.³⁰³ These factors together provide a "relative scale" that makes an objective proportionality analysis possible.³⁰⁴ Without comparing the sentence imposed to either the sentences imposed for similar crimes in the same jurisdiction or the sentence imposed for the same crime in other jurisdictions, the Court is left with only a relatively subjective determination of the gravity of the crime compared to the severity of the penalty.³⁰⁵ The Court has consistently rejected relying on the subjective determination of judges in criminal sentencing.³⁰⁶

Justice White proceeded to apply the *Solem* factors to Harmelin's sentence.³⁰⁷ In addition to noting that Harmelin's sentence was the most severe possible under Michigan law,³⁰⁸ Justice White observed that the sentence for Harmelin's crime was mandatory, gave no hope of parole, and applied regardless of whether the state proved intent to distribute.³⁰⁹ Justice White agreed with the rest of the Court that illegal drug use is a grave problem in this country, but parted with the majority in its assessment that mere possession mandates such a severe penalty in every case.³¹⁰ After all, he noted, the Supreme Court held in *Rob-*

text.

302. *Harmelin*, 111 S. Ct. at 2714 (White, J., dissenting) (quoting *Solem v. Helm*, 463 U.S. 274, 291 n.17 (1983)).

303. *Id.* (White, J., dissenting). See *Solem*, 463 U.S. at 291, n.17.

304. See *Solem*, 463 U.S. at 292.

305. *Harmelin*, 111 S.Ct. at 2715 (White, J., dissenting).

306. See *Thompson v. Oklahoma*, 487 U.S. 815, 817 (1988) (stating that rather than relying on its own subjective judgment, the Court should rely on the state legislature's expression as objective evidence of societal consensus); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (indicating that the Court also relies on jury decisions as objective evidence of societal values); *Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (stating that sentences "should neither be nor appear to be merely the subjective views of individual Justices"); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (stating that the Court should rely on history and precedent, legislative attitudes, and jury sentencing decisions as objective factors in Eighth Amendment judgments); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (explaining that an assessment of contemporary values must rely on objective indicia for an Eighth Amendment analysis).

307. *Harmelin*, 111 S. Ct. at 2716 (White, J., dissenting).

308. *Id.* (White, J., dissenting). Michigan does not have the death penalty.

309. *Id.* (White, J., dissenting).

310. *Id.* (White, J., dissenting). Justice White reasoned that, unlike possession with intent to distribute, the consequences of mere possession of drugs affect the user

*inson v. California*³¹¹ that addiction to narcotics cannot be made a crime.³¹² Even the problems accompanying cocaine trafficking and use,³¹³ such as violence and proclivity to commit other crimes, cannot justify such a harsh punishment.³¹⁴ According to Justice White, the magnitude of the problem cannot justify ignoring the constitutional rights of the defendant.³¹⁵

In Michigan, a separate statute is aimed at those who manufacture, deliver, or possess with intent to manufacture or distribute narcotics.³¹⁶ Possession of narcotics does not involve the same degree of culpability as drug trafficking. Nor does possession of illicit drugs invoke the same "collateral consequences" in kind or degree as drug dealing.³¹⁷ In Justice White's view, punishing a crime of lesser culpability with the same penalty as a crime of greater culpability violates basic proportionality principles.³¹⁸ Justice White also noted that, although Harmelin had no previous felony convictions, he received the same sentence as would a repeat offender.³¹⁹

most directly. Therefore, a more severe penalty might be required for possession with intent to distribute on account of its effects on society at large. *Id.* (White, J., dissenting).

311. 370 U.S. 660 (1962).

312. *Harmelin*, 111 S. Ct. at 2716 (White, J., dissenting). See *Robinson*, 370 U.S. at 666.

313. See generally *Harmelin*, 111 S. Ct. at 2706 (Kennedy, J., concurring).

314. Justice White reasoned that punishments "must be tailored to a defendant's personal responsibility and moral guilt." *Id.* at 2716 (White, J., dissenting). Justice White likened cocaine's "collateral consequences" to those accompanying legal substances, such as alcohol, and their effects on society. *Id.* at 2717 (White, J., dissenting). To punish Harmelin for the collateral consequences of cocaine possession would be irrational and unjust. *Id.* (White, J., dissenting). See *Turner v. United States*, 396 U.S. 398, 427 (1970) (Black, J., dissenting) (warning against eroding civil liberties in the face of the "grave evil" of drug trafficking).

315. *Harmelin*, 111 S. Ct. at 2717 (White, J., dissenting) (citing *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (review of vehicle checkpoints designed to detect drunk drivers under the Fourth Amendment); *Grady v. Corbin*, 495 U.S. 508, 524 (1990) (holding that prosecution for death of accident victim after prosecution for drunk driving violates Double Jeopardy Clause).

316. MICH. COMP. LAWS ANN. § 333.7401(2)(a)(i) (West 1992) (mandating life imprisonment without possibility of parole for manufacturing, delivering, or possessing with intent to manufacture or deliver 650 or more grams of a mixture containing cocaine).

317. Justice White also pointed out that the accompanying consequences of drug possession, such as criminal activity, lost productivity, and health problems, are often the consequences of addiction, which cannot be made a crime. *Harmelin*, 111 S. Ct. at 2717 (White, J., dissenting). See *Robinson v. California*, 370 U.S. 660 (1962).

318. *Harmelin*, 111 S. Ct. at 2718 (White, J., dissenting). Justice White expressed concern that Michigan used the possession statute to avoid difficulties in proving intent to distribute, and yet still arrived at the same penalty. *Id.* (White, J., dissenting).

319. *Id.* (White, J., dissenting).

The third factor set forth in *Solem* compares the sentence received to those imposed for the same crime in other jurisdictions.³²⁰ No other state punishes first-time possession of 672 grams of cocaine as severely as Michigan does.³²¹ Under Justice White's analysis, it appears that Michigan law is out of step with the national consensus on the issue.³²² Justice White concluded that Harmelin's sentence failed the test set forth in *Solem*, and thus violated the proportionality component of the Eighth Amendment.³²³

V. IMPACT

Justice Marshall, in his final dissent on the United States Supreme Court, stated: "Power, not reason, is the new currency of this court's decisionmaking."³²⁴ The doctrine of *stare decisis* seems to carry less

320. See *supra* note 135 and accompanying text.

321. *Harmelin*, 111 S. Ct. at 2718 (White, J., dissenting). Alabama law imposes a life sentence without parole for first time possession, but only for possessing ten or more kilograms of cocaine. See ALA. CODE § 13A-12-231(2)(d) (Supp. 1992). Under federal sentencing guidelines, Harmelin's sentence could at most be ten years imprisonment. See UNITED STATES SENTENCING COMM'N GUIDELINES MANUAL § 201.1 (1990).

322. *Harmelin*, 111 S. Ct. at 2718-19 (White, J., dissenting).

323. *Id.* at 2719 (White, J., dissenting). Since Justice White would have held Harmelin's sentence unconstitutional on proportionality grounds, he did not address Harmelin's argument that his sentence also violated the Constitution because the sentencing determination did not include a consideration of individual factors. *Id.* at 2719 n.8 (White, J., dissenting).

324. *Payne v. Tennessee*, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting). Justice Marshall's statement was in reference to the Supreme Court's decision to overturn *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), thus allowing victim-impact evidence at the sentencing phase of a capital trial. In *Payne*, the Court reasoned that, although following the doctrine of *stare decisis* is ordinarily preferred, the Court may deviate from precedent when it feels the decisions are poorly reasoned or have proved untenable in practice. *Payne*, 111 S. Ct. at 2609-10 (Rehnquist, C.J. for the Court). The Court determined that it should apply the doctrine of *stare decisis* more cautiously in constitutional cases, as the possibility of corrective action by the legislative branch is almost impossible. *Id.* at 2610.

While Justice Marshall agreed with the Court in principle, he strongly criticized the majority for departing from precedent without the necessary justification. *Id.* at 2621 (Marshall, J., dissenting) (citing *Arizona v. Ramsey*, 467 U.S. 203, 212 (1984)). Justice Marshall found no changes in the law that undermined the reasoning of *Booth* and *Gathers*. *Id.* (Marshall, J., dissenting). Nor did he see a need to overrule precedent based on experience or newly-discovered facts. *Id.* at 2621-22 (Marshall, J., dissenting). The one thing that had changed in the interim between *Booth* and *Payne*,

weight with certain members of the Court, particularly when dealing with the Bill of Rights.³²⁵ Certainly Justice Scalia's opinion in *Harmelin* can fairly be characterized as paying less attention to established precedent than to historical interpretation and legislative intent.³²⁶ Recently, in a speech at the University of Chicago Law School, Justice Stevens warned that this "extraordinarily aggressive Supreme Court has reached out to announce a host of new rules narrowing the federal constitution's protection of individual liberties."³²⁷ The present Court's retreat from the strides that the Warren and Burger Courts made in protecting civil rights continues unabated.³²⁸

however, was the Court's personnel. *Id.* at 2622 (Marshall, J., dissenting).

Justice Marshall decried the willingness of the majority to overturn precedent despite the dissent of four justices. *Id.* at 2619 (Marshall, J., dissenting). He concluded:

The implications of this radical new exception to the doctrine of *stare decisis* are staggering. The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case.

Id. (Marshall, J., dissenting).

325. See *Harmelin*, 111 S. Ct. at 2686 ("We have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents [and this is] especially true of a constitutional precedent that is both recent and in apparent tension with other decisions."); *Payne*, 111 S. Ct. at 2609-10 (stating that the Court is not constrained to follow the doctrine of *stare decisis* in constitutional cases where the underlying decisions are badly reasoned or unworkable). Cf. *Florida Dep't of Health and Rehabilitative Serv. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 153 (1981) (Stevens, J., concurring) (asserting that there should be a strong presumption of validity afforded to recently-decided cases to afford the maximum protection to the individual).

326. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decision Making and Theory*, 60 GEO. WASH. L. REV. 68, 109, 121-22 (1991) (observing that Justice Scalia argued in *Harmelin* to overrule *Solem* because it was erroneously reasoned, proposed an unworkable standard, and was inconsistent with the original meaning of the Eighth Amendment, while Justice Kennedy would narrow, but not overrule, *Solem*).

327. John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 16 (1992) (positing that historical and textual analysis should not prevent the Court from interpreting the Constitution in a dynamic and evolving manner). See Nat Hentoff, *Justice Stevens's Dissent*, WASH. POST, Jan. 18, 1992, at A23.

328. See J. Steven Beckett, *Essay on the Bill of Rights: Whatever Happened to the Bill of Rights? A Criminal Defense Lawyer's Perspective*, 1992 U. ILL. L. REV. 213, 216 (lamenting the demise of the Warren Court's protections of individual rights); Guido Calabresi, *The Supreme Court, 1990 Term: Forward: Anti-Discrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 139-40 (1991) (contending that the Rehnquist Court has virtually ignored its power to protect underrepresented social groups and to act as a check on legislative power, especially in the area of criminal procedure); *The Supreme Court 1990 Term: Leading Cases*, 105 HARV. L. REV. 177, 185 & n.65 (1991) (illustrating the diminished

Harmelin narrows the ability of the courts to review legislative decisions in criminal sentencing. Although *Harmelin* did not expressly overrule *Solem* and its proportionality analysis, it certainly calls the viability of the *Solem* test into question.³²⁹ At the very least, *Harmelin* narrows *Solem* to the point where it will have effect only in the most outrageous of circumstances.³³⁰ After *Harmelin*, the courts of appeal have been consistent in rejecting Eighth Amendment claims.³³¹ The Court in *Harmelin* once more affirmed its commitment to defer to the state legislatures on complex social issues. Although some commentators welcome such deference as an example of judicial restraint,³³² others are alarmed at the abandoned judicial check on legislative power.³³³

The opinion in *Harmelin v. Michigan*³³⁴ has significance outside the decision itself. Justice Souter, who replaced retiring Justice Brennan in October 1990, cast the deciding vote in favor of the majority. Although only ten of more than one hundred cases heard were probably decided differently on account of Justice Souter's arrival, *Harmelin* was certain-

respect the current Supreme Court affords precedent in criminal procedure cases). *Cf. id.* at 245-55 (approving Justice Scalia's approach to Eighth Amendment jurisprudence as a blow against judicial rule-making and supporting the decisions of the democratically-elected legislature).

329. See Crag W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. PITT. L. REV. 1, 55 (1991) (noting that the inconsistent opinions in *Harmelin* and the lack of a unifying rationale makes the various appellate courts' approaches even more important).

330. See *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (stating that the narrow proportionality principle would prohibit a penalty of life imprisonment for overtime parking).

331. See, e.g., *United States v. Knapp*, 955 F.2d 566, 569-70 (8th Cir. 1992) (holding that an 87-month sentence for conspiring to cultivate and deliver marijuana is within statutory limits and, thus, does not violate the Eighth Amendment), *cert. denied*, 113 S. Ct. 175 (1992); *United States v. Kramer*, 955 F.2d 479, 488 (7th Cir. 1992) (holding that life imprisonment without possibility of parole for marijuana trafficking is not cruel and unusual punishment under the Eighth Amendment), *cert. denied*, 113 S. Ct. 595 (1992); *United States v. Lowden*, 955 F.2d 128, 131 (1st Cir. 1992) (holding that a seven-year sentence for distributing 7.7 grams of LSD is not a disproportionate sentence under *Harmelin*).

332. *Power, Reason and the Constitution*, WASH. TIMES, July 1, 1991, at D2.

333. *Wisotsky*, *supra* note 10, at 906 (arguing that disproportionate penalties will go unchallenged if the courts endorse a sentence as constitutional merely because it was enacted). See also *Harmelin v. Michigan*, 111 S. Ct. 2680, 2713 (1991) (White, J., dissenting) (arguing that if a punishment is deemed "legal" simply because it has been legislatively mandated, the Eighth Amendment prohibition against "cruel and unusual punishments" will be rendered devoid of any meaning).

334. 111 S. Ct. 2680 (1991).

ly one of the most important.³³⁵

Justice Souter, a former state court judge and New Hampshire attorney general, has provided the fifth vote for the conservative majority in several key cases.³³⁶ *Harmelin* is another example of the Court's recent trend: making it more difficult for prisoners to regain their freedom by claiming a violation of their constitutional rights.³³⁷

The *Harmelin* decision can also be seen as a part of the growing "drug exception" to the Bill of Rights. The "War On Drugs," declared by former President Reagan in 1982³³⁸ and continued by the Bush Administration, has steadily eroded defendants' rights in criminal procedure, including the rights against unreasonable searches and seizures,³³⁹ the right to counsel,³⁴⁰ the right to privacy,³⁴¹ and the rights found in the

335. Richard Willard, *Digging In, But Not Tearing Down*, LEGAL TIMES, July 1, 1991, at 26.

336. See, e.g., *Barnes v. Glen Theatre Inc.*, 111 S. Ct. 2456, 2460-63 (1991) (upholding a state ban on nude dancing); *Rust v. Sullivan*, 111 S. Ct. 1759, 1767-69 (1991) (upholding a ban on federally funded abortion counseling); *Arizona v. Fulminante*, 111 S. Ct. 1246, 1257-61 (1991) (allowing application of the harmless error rule to coerced confessions).

337. Richard Willing, *What Supreme Court Vote on Cocaine Case Means*, GANNETT NEWS SERV. June 27, 1991, available in LEXIS, Nexis library, Omni file.

338. See Wisotsky, *supra* note 10, at 890 & nn.9-10.

339. See, e.g., *Florida v. Bostick*, 111 S. Ct. 2382, 2385-88 (1991) (holding constitutional officers' practice of boarding passenger buses and asking for permission to search luggage); *California v. Acevedo*, 111 S. Ct. 1982, 1985-91 (1991) (upholding warrantless search of container within a car when there is probable cause to search only the container); *United States v. Leon*, 468 U.S. 897, 922-25 (1984) (establishing a "good faith" exception to exclusionary rule for warrants issued on less than probable cause); *Illinois v. Gates*, 462 U.S. 213, 241-46 (1983) (adopting "totality of circumstances" test for determining whether informant's tip is reliable for purposes of search warrant); *United States v. Ross*, 456 U.S. 798, 817-24 (1982) (approving warrantless search of automobiles, as well as closed containers inside the vehicle).

340. See, e.g., The Comprehensive Crime Control Act, 18 U.S.C. § 1963(c) (1987) (stating that upon conviction of client for controlled substances violation, prosecutor can ask that fee be forfeited to United States as proceeds of a criminal enterprise); Deficit Reduction Act, 26 U.S.C. § 6050I (1984) (requiring attorney's fees of more than \$10,000 in cash to be reported to Internal Revenue Service, along with name, address, and tax number of client); *United States v. Monsanto*, 491 U.S. 600, 614-16 (1989) (finding that prohibiting a defendant from using assets seized in forfeiture proceedings to retain counsel did not violate the Sixth Amendment); *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 260-63 (2d Cir. 1985) (en banc) (approving, as not violative of attorney-client privilege, the use of grand jury subpoena to compel defense counsel to disclose amount, source, and method of payment for fee received).

341. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 182-89 (1990) (upholding a warrantless entry based upon the consent of a third party whom police reasonably believed to possess common authority over premises); *California v. Greenwood*, 486 U.S. 35, 39-44 (1988) (holding that a warrantless search of garbage bags for items in-

Eighth Amendment.³⁴² For example, the Anti-Drug Abuse Act of 1986³⁴³ provides, among other things, strict punishments for those convicted of drug-related offenses.³⁴⁴ The Act imposes mandatory minimum sentences for a wide array of drug-related crimes. For example, it punishes possession with intent to distribute five kilograms of cocaine with a mandatory prison term of ten years to life.³⁴⁵ These long sentences of imprisonment combined with mandatory minimums should implicate the Eighth Amendment guarantee against disproportionate penalties.

However, the present public outcry over illegal drugs has strongly influenced judicial review.³⁴⁶ The majority of the Court has consistently deferred to the will of Congress in expanding the powers of law enforcement agencies.³⁴⁷ Without the Supreme Court providing a much-

dicative of narcotics use did not violate the defendant's reasonable expectation of privacy); *United States v. Place*, 462 U.S. 696, 706-07 (1983) (upholding the use of drug-detecting dogs to conduct a sniff examination of luggage without probable cause); *United States v. Knotts*, 460 U.S. 276, 280-85 (1983) (approving the use of transmitters or beepers to conduct surveillance of suspects).

342. *Wisotsky*, *supra* note 10, at 907-10.

343. Anti-Drug Abuse Act of 1986, 21 U.S.C. §§ 801-966 (1988). The purpose of this Act is to

strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic, to improve enforcement of federal drug laws and enhance interdiction of illicit drug shipments, to provide strong Federal leadership in establishing effective drug abuse treatment and education programs, to expand Federal support for drug abuse treatment and rehabilitation efforts, and for other purposes.

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (Oct. 27, 1986) (preface).

344. *Wisotsky*, *supra* note 10, at 904. See 21 U.S.C. § 841 (b)(1) (Supp. 1992).

345. 21 U.S.C. § 841(b)(1) (Supp. 1992).

346. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 211-15 (1986) (validating aerial surveillance over private property); *United States v. Leon*, 468 U.S. 897, 922-25 (1984) (creating a "good faith" exception to the exclusionary rule); *Albernaz v. United States*, 450 U.S. 333, 343-44 (1981) (upholding consecutive sentences of imprisonment for violation of two different conspiracy statutes arising from a single agreement to import marijuana).

347. See, e.g., *Florida v. Rodriguez*, 469 U.S. 1, 5 (1984) (upholding the use of the "drug courier profile" to stop and question citizens); *United States v. Place*, 462 U.S. 696, 706 (1983) (approving the use of drug-sniffing dogs to inspect luggage without probable cause); *United States v. Villamonte-Marquez*, 462 U.S. 579, 593 (1983) (approving issuance of a warrant on an undisclosed informant's tip); *United States v. Knotts*, 460 U.S. 276, 284 (1983) (upholding the power of drug agents to search ships in inland waterways without a warrant or probable cause); *United States v. Ross*, 456

needed check on a Congress zealously enacting increasingly stringent drug-offense laws, the constitutional rights of suspected drug offenders are quickly vanishing beneath the waves of the current drug hysteria.³⁴⁸ The erosion of civil liberties might be tolerable in some segments of society if it resulted in less crime and the elimination of the drug problem. But such has not been the case. Although the "War on Drugs" has changed public attitudes towards the casual use of illegal narcotics, it has had less success in curbing drug-trafficking and the accompanying violence.³⁴⁹

For Ronald Harmelin, the Michigan Supreme Court's decision in *People v. Bullock*³⁵⁰ provided the relief he did not find from the United States Supreme Court. In *Bullock*, the Michigan Supreme Court held that the statute imposing mandatory life imprisonment for possession of 650 or more grams of cocaine violated the Michigan Constitution.³⁵¹

U.S. 798, 821 (1982) (allowing warrantless searches of cars and containers inside).

348. Wisotsky, *supra* note 10, at 904.

349. See *supra* notes 3-14 and accompanying text. The administration's budget for 1992 drug control funding was \$12.7 billion and is expected to increase by \$780 million in 1993. *Senate Judiciary Committee Hearing on National Drug Control Strategy*, FED. NEWS SERV., Feb. 4, 1992, available in LEXIS, Nexis Library, Omni File. Meanwhile, an estimated 200,000 more Americans reported frequent cocaine use than the year before. *Id.* See generally STEVEN WISOTSKY, BREAKING THE IMPASSE IN THE WAR ON DRUGS (1986); David Boaz, *A Drug-Free America—or a Free America?*, 24 U.C. DAVIS L. REV. 617 (1991) (emphasizing the futility of prohibiting narcotics, and proposing a framework to legalize drugs that would, among other things, lessen government intrusion on constitutional rights); Michael J. Flannery, *Abridged Too Far: Anticipatory Search Warrants and the Fourth Amendment*, 32 WM. & MARY L. REV. 781 (1991) (illustrating the decline in Fourth Amendment protection due in part to public concern over drug trafficking); Wisotsky, *supra* note 10.

350. 485 N.W.2d 866 (Mich. 1992). In *Bullock*, the defendants were convicted of possessing 650 or more grams of cocaine and sentenced to life in prison without possibility of parole. *Id.* at 868. The defendants challenged their sentences under the Michigan Constitution. *Id.* The court reasoned that the language of the Michigan Constitution prohibiting "cruel or unusual" punishments was more protective than the Eighth Amendment's prohibition against "cruel and unusual" punishments. *Id.* at 872. Additionally, Michigan adopted the "cruel or unusual" language 50 years after the United States Supreme Court had interpreted the words "cruel" and "unusual" as prohibiting disproportionate penalties. *Id.* at 872-73. See *supra* notes 47-55 and accompanying text. Thus, the court found reason to believe that Michigan adopted its constitutional language with an intent different from the interpretation Justice Scalia offered of the Eighth Amendment in *Harmelin*. *Bullock*, 485 N.W.2d at 872-73 & n.15. Finally, the court observed that Michigan precedent provided a third "compelling reason" for interpreting the Michigan Constitution as broader than the United States Constitution. *Id.* at 873. See *People v. Lorentzen*, 194 N.W.2d 827 (Mich. 1972) (holding that a mandatory sentence of 20 years for selling any quantity of marijuana constitutes cruel and unusual punishment).

351. *Bullock*, 485 N.W. 2d at 877. The Michigan Constitution provides in pertinent part: "Excessive bail shall not be required; excessive fines shall not be imposed; cruel

The state supreme court's decision commuted the sentences of all defendants convicted under the statute.³⁵² Of course, this decision provides small comfort to defendants in drug-related cases in other states.³⁵³ For them, the Supreme Court of the United States has opened the door wide for state legislatures to enact severe mandatory penalties across the board.³⁵⁴

VI. CONCLUSION

The decision in *Harmelin* leaves the future of the proportionality principle as a part of Eighth Amendment jurisprudence in some doubt. For now, it means simply this: death penalty cases require proportionality and individual sentencing, while sentences of imprisonment do not in all but the most extreme cases. However artificial this distinction may seem, the Court is unlikely to alter the placement of this bright line anytime soon. The majority's philosophy of deference to the legislative branch, combined with the current "get tough" attitude towards

or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." MICH. CONST., art. 1, § 16.

352. *Bullock*, 485 N.W.2d at 878. See MICH. COMP. LAWS ANN § 333.7403(2)(a)(1) (West 1992).

353. Defendants in drug-related prosecutions across the country may have to rely, like Ronald Harmelin, on the state courts to safeguard their individual rights. See *Constitutional Law Conference: Choper Canvasses Media Reaction*, 61 U.S.L.W. 2237 (Oct. 27, 1992) (noting that a number of state appellate courts have granted criminal defendants greater protection under the state constitution in response to United States Supreme Court decisions).

354. The Court, it seems, has ignored Chief Justice Warren's admonition that the Eighth 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, 101 (1958). This oft-quoted statement reflected Chief Justice Warren's belief that

[t]he provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress [or the act of a state legislature] is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

Id. at 103-04.

Rather than move forward in our concept of "civilized" standards of punishment, it appears that our society is prepared to slide backward. Whether out of frustration or vengeance, legislatures have responded to the twin problems of drugs and crime by locking the offenders away for ever-longer sentences of imprisonment. Without the Eighth Amendment to provide a check on the legislative branch and as protection for individual rights, prison sentences are free to grow at the whim of the majority.

criminal and drug-related activity, preclude any hopes of general proportionality in sentencing for the present. Yet, times change. Eventually, the "evolving standards of decency" referred to in *Trop v. Dulles*³⁵⁵ may effect a change in public attitudes and Supreme Court decisions so that rehabilitation, and not retribution, is the main focus of our criminal sentencing scheme. But for now, the Supreme Court is content to let state legislatures slam the prison doors on criminal defendants. And, after *Harmelin*, the Eighth Amendment no longer provides a key.

SCOTT K. PETERSEN

355. 356 U.S. 86 (1958).