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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. Ronald Harmelin had no prior felony convictions. He was not convicted of dealing or transporting or having the intent to distribute or transport the drug. Nevertheless, Ronald Harmelin was sentenced to the harshest possible penalty available under Michigan law. No other jurisdiction punished his crime as severely. 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.

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

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.
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, Crackdown: The Emerging “Drug Exception” to the Bill of Rights, 38 HASTINGS LJ. 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.
14. See infra notes 109-37 and accompanying text.
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.

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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." As for the mitigating factors in Harmelin," the Court noted it had "drawn the line of required individualized sentencing at capital cases, and [saw] no basis for extending it further."

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.

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." 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.

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

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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 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.

27. Granucci, supra note 25, at 856-56. 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 Polifexen, 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. 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.  

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." 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* suggested that the Eighth Amendment's use of language similar to that of the English Bill of Rights is evidence of such an intent. Despite this argument, Granucci contends that the framers misinterpreted the phrase as prohibiting only torture and barbarous punishments.

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. This is how the Amendment was interpreted

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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.


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.  

It was not until *O'Neil v. Vermont,* in 1892, that a proportionality component began to emerge in Eighth Amendment jurisprudence. In *O'Neil,* the defendant was convicted of 307 separate counts of selling liquor without a license. 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. 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.

However, Justice Field, in his dissenting opinion, objected to the sentence as "exceeding in severity, considering the offenses of which the defendant was convicted." 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. Considering the punishment in relation to the crime, Justice Field found it "both cruel and unusual." While admitting that the Eighth Amendment usually prohibited only barbarous punishments, he stated that it also prevented "all punishments which by their excessive length

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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." 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." In a separate dissent, Justice Harlan concurred with Justice Field that the sentence violated the Eighth Amendment.

A. United States v. Weems

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

In Weems, the defendant was convicted of falsifying an official document and was sentenced to "cadena temporal." This punishment included imprisonment for twelve to twenty years, at hard and painful labor while chained by the wrists and ankles. In addition, various cit-
il disabilities attached and remained throughout the offender's lifetime. 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. 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.

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, the petitioner lost his United States citizenship after being court-martialed for wartime desertion. 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, the Court concluded that denaturalization was not excessive when compared to the offense of wartime desertion, a capital crime. 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." 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." 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."

C. Robinson v. California

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

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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.
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." 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. 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.

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, that capital punishment violated the Eighth and Fourteenth Amendments. However, the Court found no unifying rationale. Nine separate opinions were filed, reflecting the unsettled nature of Eighth Amendment jurisprudence.

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

Id. at 666. 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 522-33. 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).

Id. at 239-40. 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. In two companion cases, the trial courts convicted the petitioners of rape and imposed capital sentences under Georgia and Texas law respectively.

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." 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. Justice Brennan noted that death, like imprisonment, was a "traditional" punishment. This did not serve, however, to make the death penalty immune to Eighth Amendment proscription.

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. 285 (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 290-81 (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. He reasoned that a penalty might be cruel and unusual if it is excessive or unnecessary. He cited the dissent in O'Neil and the majority opinions in Weems, Trop, and Robinson as a line of authority prohibiting excessive punishments.

The Furman Court found that the unrestricted application of the death penalty constituted cruel and unusual punishment. 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. Many states soon enacted statutes to correct the prior defects. This prompted a plurality of the Court in Gregg v. Georgia to hold that the death penalty did not violate the Eighth Amendment under all circumstances. In so doing, however, the plurality recognized that the “punishment must not be grossly out of proportion to the severity of the crime.” On that same day, the Court decided four other capital cases in Woodson v. North Carolina. These cases established the principle that the standardless, mandatory imposition of the death penalty was unconstitutional.

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.
84. Id.
85. See Gregg v. Georgia, 428 U.S. 153 (1976). At the time Gregg was decided, 36 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).
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).
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

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

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. 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 878, 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 697, 698 (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. 1960), and cert. denied, 362 U.S. 922 (1960).
courts begrudgingly acknowledged a narrow proportionality principle, but only under "extraordinary and special circumstances." Still other courts, however, applied the reasoning of Coker and Gregg to sentences of imprisonment. 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. Successful challenges to terms of imprisonment on proportionality grounds, however, remained rare.


1. Rummel v. Estelle

In the 1980 decision of Rummel v. Estelle, 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. In the most extreme cases, the Court reasoned, should federal courts intervene on a defendant's behalf to reduce the sentence received.

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).


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. Under the Texas system of "good time" credits, however, Rummel could be eligible for parole in as few as ten years. Rummel's prior convictions were for fraudulent use of a credit card and for passing a forged check for $28.36. His most recent offense involved obtaining $120.75 by false pretenses. The Court ruled that a life sentence for theft of approximately $230 was not cruel and unusual punishment under the Eighth Amendment. 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. The Court also distinguished Weems' peculiar facts, and argued that "the length of the sentence actually imposed is purely a matter of legislative prerogative."

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.


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.


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).

2. *Hutto v. Davis*

The Supreme Court followed the reasoning set forth in *Rummel* in its 1982 memorandum opinion for *Hutto v. Davis*. 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. The Court rejected the application of the proportionality principle in this case, maintaining that *Rummel* prevented its application to cases involving "excessive" imprisonment.

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* was sentenced to life in prison under a South Dakota recidivist statute. Unlike the petitioner in *Rummel*, however, the petitioner here did not retain the possibility of parole. The felony offense at issue in *Solem* was the issuance of a "no account" check for $100. Because Helm had six previous felony convictions, the trial court sentenced him under South Dakota's repeat offender statute. 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-

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121. 454 U.S. 370 (1982).
122. Id. at 371.
123. Id. at 372. *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. LJ. 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").*
125. Id. at 281.
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.
Soem did not expressly overrule Rummel; in fact, it strained to distinguish the two cases factually. The Soem 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. The Court stressed that Soem did not pave the way for appellate review of all sentences; indeed, it envisioned that such appeals would be “exceedingly rare.”

The Soem 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. Second, courts should compare the sentence received to those imposed for more serious crimes in the same jurisdiction. Third, courts should compare the sentence received to that imposed for the same crime in other jurisdictions. In applying these factors to the case at hand, the Court noted that Helm received the harshest penalty possible under South Dakota law, while his underlying offenses were relatively minor and nonviolent.

129. Id. at 290. See generally Barton C. Legum, Note, “Down the Road Toward Human Decency:” Eighth Amendment Proportionality Analysis and Soem v. Helm, 18 GA. L Rev. 109 (1983) (finding that Soem 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, Soem v. Helm: Extension of Eighth Amendment Proportionality Review to Noncapital Punishment, 69 IOWA L Rev. 775 (1984) (arguing that Soem 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. Soem, 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. Soem, 463 U.S. at 297, 300-03. See Keir, supra note 23, at 509-10; see also Johnathan C. Aked, Note, Soem 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 Soem); Campbell-Eaton, supra note 129, at 790 (citing the mandatory nature of Helm’s sentence as the key factor distinguishing Soem from Rummel).

131. Soem, 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.

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III. HARMELIN v. MICHIGAN

Ronald Harmelin relied on Solem for the proposition that sentences of imprisonment must be proportionate to the crime charged. 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. At this time and twice later that morning, the officers observed Harmelin's car entering and leaving the lot. Other than these early morning comings and goings, nothing about Harmelin's activities attracted the officers' attention.

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.

He immediately told the officers that he was carrying a gun in his ankle holster. 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-

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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. 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.

A more thorough search pursuant to the arrest revealed additional contraband. Harmelin's car was impounded and an inventory search was conducted. 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. Additionally, the petitioner's fingerprints were found on books inside the shaving bag and next to the packets of cocaine.

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. On appeal, the court ruled that the search was illegal and reversed Harmelin's conviction. The dissenting judge argued that the record was unclear as to whether the petitioner was ordered out of the car or got out voluntarily. Two months later, the court vacated this judgment on its own motion and reconsidered the case. Upon further review, the court concluded that its initial ruling was in error and reinstated the conviction. The Michigan Supreme Court ruled that the search-and-seizure provision under the Michigan Constitution as more protective than the Fourth Amendment to the United States Constitution. Cf. Pennsylvania v. Minimus, 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).

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.
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 78-77. 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. Minimus, 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. In 1990, the United States Supreme Court granted the petitioner's writ of certiorari.

IV. ANALYSIS OF HARMELIN V. MICHIGAN

Reflecting the unsettled nature of the Cruel and Unusual Punishments Clause, especially regarding the proportionality component, the Court in Harmelin v. Michigan 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.

A. Justice Scalia's Opinion

Justice Scalia's opinion consisted of five parts. The majority only joined Part V. 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”
Justice Scalia began his analysis with the proposition that *Solem v. Helm* wrongly concludes that the Eighth Amendment contained a proportionality component. 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.’” According to *Solem*, when the framers incorporated the language of the English Bill of Rights into the Eighth Amendment, they meant to guarantee American citizens all of the rights enjoyed by British subjects. 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. Justice Scalia contended that if the English framers had meant to prohibit “disproportionate” or “excessive” punishments, they would have said so. Under Justice Scalia’s reasoning, an excessive penalty can be considered “cruel” but not necessarily “unusual,” thereby circumventing the prohibition. 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. Thus, the clause prohibits arbitrary penalties that are not authorized by either the common law or statute. 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. Justice Scalia further supported his theory by proposing that the word “illegal” was used interchangeably with the word “unusual” at that time.

161. Harmelin, 111 S. Ct. at 2686.
163. The English Bill of Rights provides that “excessive Baile ought not to be required nor excessive Fines imposed nor cruel and unusual Punishments inflicted.” 1 W. & M., sess. 2, ch. 2 (1689) (Eng.). See *supra* notes 23-33 and accompanying text.
165. Harmelin, 111 S. Ct. at 2690.
166. Id. at 2867.
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." However, the sparse legislative history that accompanied the adoption of the Eighth Amendment makes this task difficult.

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. After all, he reasoned that "proportionality provisions had been [explicitly] included in several state constitutions." He rejected the contention that the framers thought that the term "cruel and unusual" implicitly guaranteed proportional punishments. From the little legislative history that does exist and according to many commentators, the Eighth Amendment was interpreted as prohibiting only certain modes of punishment. Early state court interpretations of the Eighth Amendment bear out this construction.

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 2591.
173. See supra note 34 and accompanying text.
174. Harmelin, 111 S. Ct. at 2592.
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 2686-96 (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); Hobb v. State, 32 N.E. 1019, 1020-21 (Ind. 1892) (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. It is relatively easy for judges to determine whether or not a particular mode of punishment is “torturous or barbaric.” Proportionality, on the other hand, is a more subjective analysis that is best left to the legislature.

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.

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591, 692 (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), affd, 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 (1968). 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).


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.\textsuperscript{184} Assessing "gravity" depends on "how odious and socially threatening" one perceives the crime to be.\textsuperscript{185} Justice Scalia illustrated this difficulty with examples of various crimes and their punishments,\textsuperscript{186} noting that there seems to be little logic in apportioning penalties.\textsuperscript{187} He believed that "the Michigan Legislature, and not [the Court], knows the situation on the streets of Detroit."\textsuperscript{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.\textsuperscript{189} He pointed out that "similarly grave" offenses could receive disparate penalties for a variety of reasons.\textsuperscript{190} For example, one crime that is equally as "grave" as another might receive a harsher sentence because it occurs more frequently.\textsuperscript{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.\textsuperscript{192} The same sentence was authorized for crimes such as murder, treason, arson, and kidnapping.\textsuperscript{193} The Solem Court also found that Helm's sentence was harsher than those received by defendants who had committed more serious offenses.\textsuperscript{194} Justice Scalia objected to the holding in Solem be-

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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 285-97. 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.

\textsuperscript{188} Harmelin, 111 S. Ct. at 2698.

\textsuperscript{189} Id.

\textsuperscript{190} Id.

\textsuperscript{191} Id.


\textsuperscript{193} Solem, 463 U.S. at 298-99.

\textsuperscript{194} Id. at 299.
cause he reasoned that there is no objective basis for comparing the gravity of two different crimes. As for the third Solem test, Justice Scalia admitted that one can easily and objectively compare sentences for the same crime among different jurisdictions. He questioned the worth of such a test, however, since states are entitled to punish, or not punish, different crimes in different ways. Justice Scalia noted that such diversity is the result of federalism. 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.

3. Proportionality Principle Cases Distinguished

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

Id. at 2698-99.

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.

Harmelin, 111 S. Ct. at 2699.

Id.

Id. at 2699-701.

217 U.S. 349 (1910).

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
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.

Eventually, the Court did use *Weems* and other cases for the proposition that proportionality was indeed a component of the Eighth Amendment. However, Justice Scalia asserted that proportionality applies only to capital cases and has no application to sentences of imprisonment. 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." 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.


203. *Harmelin*, 111 S. Ct. at 2599. 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)).


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).

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-

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").
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.
individualized sentencing is only required in capital cases.\textsuperscript{215}

\section*{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.\textsuperscript{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.\textsuperscript{217} However, he construed this principle narrowly, thereby voting to uphold Harmelin's sentence.\textsuperscript{218}

\subsection*{1. Recognition of a Narrow Proportionality Principle}

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

\textsuperscript{215} Id.
\textsuperscript{216} Id. at 2702, 2707-08 (Kennedy, J., concurring).
\textsuperscript{217} Id. at 2703 (Kennedy, J., concurring).
\textsuperscript{218} Id. at 2707-08 (Kennedy, J., concurring).
\textsuperscript{219} 217 U.S. 349 (1910).
\textsuperscript{220} Harmelin, 111 S. Ct. at 2707-08 (Kennedy, J., concurring).
\textsuperscript{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)).
\textsuperscript{222} Id. (Kennedy, J., concurring).
\textsuperscript{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 dispropor-
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

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224. Ingraham v. Wright, 430 U.S. 651, 667 (1977) (stating that the Eighth Amendment proscribes disproportionate penalties)).
225. Id. at 2703-05 (Kennedy, J., concurring).
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. 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.\(^{280}\) 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.\(^{281}\) 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.\(^{282}\) Thus, comparisons among the different states may be of little or no help in a proportionality review.\(^{283}\)

Lastly, Justice Kennedy asserted that courts should rely on objective factors in determining whether a particular sentence is proportional to a given crime.\(^{284}\) "The easiest comparison is between capital . . . and noncapital punishment."\(^{285}\) 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.


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.\textsuperscript{236} It is this lack of
objective standards that has made "successful challenges to the propor-
tionality of particular sentences exceedingly rare."\textsuperscript{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.\textsuperscript{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 petition-
er in \textit{Solem v. Helm}:	extsuperscript{239} life without possibility of parole.\textsuperscript{240} However,
Justice Kennedy distinguished the underlying offenses committed by
Harmelin and Helm.\textsuperscript{241} Helm's crime of uttering a no account check, as
well as his other felony convictions, were passive and nonviolent.\textsuperscript{242}
Harmelin's crime, possession of narcotics, is perhaps one of the most
serious crimes facing society today.\textsuperscript{243} In Justice Kennedy's eyes, it
was this difference that justified Harmelin's sentence but not Helm's.\textsuperscript{244}
Harmelin claimed that, like the crime at issue in \textit{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.\textsuperscript{245} In applying

\textsuperscript{236} \textit{Id.} (Kennedy, J., concurring).
\textsuperscript{237} \textit{Id.} (Kennedy, J., concurring) (quoting \textit{Rummel}, 445 U.S. at 272)).
\textsuperscript{238} \textit{Id.} (Kennedy, J., concurring) (citing \textit{Weems v. United States}, 217 U.S. 349, 371
(1910) ("Eighth Amendment prohibits 'greatly disproportioned' punishments."); \textit{Coker
v. Georgia}, 433 U.S. 584, 592 (1977) ("Eighth Amendment prohibits 'grossly
disproportionate' sentences."); \textit{Rummel}, 445 U.S. at 271 (same); \textit{Solem}, 463 U.S. at
298 (same)).
\textsuperscript{239} 463 U.S. 277 (1983).
\textsuperscript{240} \textit{Harmelin}, 111 S. Ct. at 2706 (Kennedy, J., concurring).
\textsuperscript{241} \textit{Id.} (Kennedy, J., concurring). Justice Kennedy contrasted Helm's minor, proper-
ty-related offenses with Harmelin's crime of drug possession. \textit{Id.} at 2705-06 (Kennedy,
J., concurring). Justice Kennedy asserted that Harmelin's crime was neither "nonvio-
lent [nor] victimless, [rather it] threatened to cause grave harm to society." \textit{Id.} at
2706 (Kennedy, J., concurring).
\textsuperscript{242} \textit{Id.} (Kennedy, J., concurring). \textit{See supra} notes 127-28 and accompanying text.
\textsuperscript{243} \textit{Harmelin}, 111 S. Ct. at 2705 (Kennedy, J., concurring).
\textsuperscript{244} \textit{Id.} at 2706 (Kennedy, J., concurring).
\textsuperscript{245} \textit{Id.} (Kennedy, J., concurring) (citing NAT'L INST. OF JUSTICE, 1989 DRUG USE

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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.\textsuperscript{466}

Furthermore, because of the "gravity" of Harmelin's offense, Justice Kennedy reasoned that he need not go further in his \textit{Solem} analysis.\textsuperscript{467} Justice Kennedy relied on language in \textit{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.\textsuperscript{468} Justice Kennedy, however, did not provide guidelines as to when a sentence may be grossly disproportionate to the underlying offense,\textsuperscript{469} nor did he establish how disproportionate that sentence must be to continue with the comparative factors set forth in \textit{Solem}.\textsuperscript{470} 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.\textsuperscript{471}

\textsuperscript{466} See \textit{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).

\textsuperscript{467} See \textit{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); \textit{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); \textit{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. Justice Kennedy found additional support in past noncapital cases. 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. 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.

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. 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. Additionally, Justice Kennedy observed that consideration of individual circumstances does occur through pre-sentence prosecutorial discretion or post-sentence legislative or executive clemency.

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)).
255. 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 (1989) (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).
256. Harmelin, 111 S. Ct. at 2708 (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 Clause\(^{268}\) and the Fourth Amendment's guarantee against "unreason-

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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 2708-10 (White, J., dissenting).
267. Id. at 2710 (White, J., dissenting) (quoting BEnjamin Oliver, THE RIGHTS OF AN AMERICAN CITIZEN 186-86 (1832)).
268. U.S. CONST. amend. V.
able searches and seizures," 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

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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.
278. *Id.* (White, J., dissenting).
279. 217 U.S. 349 (1910).
penalties. Indeed, Rummel v. Estelle, a case on which Justice Scalia relied in his analysis, expressly recognized that the proportionality principle developed in Gregg v. Georgia, Coker v. Georgia, and Enmund v. Florida, also applies to sentences of imprisonment.

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. 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. 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. Since neither case holds true, proportionality must exist as an element of the Cruel and Unusual Punishments Clause.

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

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.
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,"

Justice White reasoned that this was the purpose of the tests set forth in Solem v. Helm:

He observed that courts have had no trouble applying the Solem test.

The parties in Harmelin cited only four state cases that had to be reversed under Solem.

Likewise, the Solem review has not burdened federal courts either.

Further, Justice White asserted that under Marbury v. Madison, deferring to the judgment of the legislature on the reasonableness of criminal penalties is an abdication of judicial responsibility.

Justice White also disputed Justice Kennedy's assertion that an analysis under only the first Solem factor is sufficient for a proportionality review.

He argued that because of the difficulty of conducting a pro-

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293. Id. (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).
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, 886 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. 969 (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.
301. Id. at 2714 (White, J., dissenting). See supra notes 247-48 and accompanying
proportionality review, the Court in *Solem* required a combination of several factors for a proper analysis. These factors together provide a "relative scale" that makes an objective proportionality analysis possible. 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. The Court has consistently rejected relying on the subjective determination of judges in criminal sentencing.

Justice White proceeded to apply the *Solem* factors to Harmelin's sentence. In addition to noting that Harmelin's sentence was the most severe possible under Michigan law, 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. 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. After all, he noted, the Supreme Court held in *Rob-

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

In Michigan, a separate statute is aimed at those who manufacture, deliver, or possess with intent to manufacture or distribute narcotics. 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. 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. Justice White also noted that, although Harmelin had no previous felony convictions, he received the same sentence as would a repeat offender.

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).

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. 388, 427 (1970) (Black, J., dissenting) (warning against eroding civil liberties in the face of the “grave evil” of drug trafficking).
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. No other state punishes first-time possession of 672 grams of cocaine as severely as Michigan does. Under Justice White’s analysis, it appears that Michigan law is out of step with the national consensus on the issue. Justice White concluded that Harmelin’s sentence failed the test set forth in *Solem*, and thus violated the proportionality component of the Eighth Amendment.

**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.” The doctrine of stare decisis seems to carry less

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320. See supra note 135 and accompanying text.
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. 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. 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." The present Court's retreat from the strides that the Warren and Burger Courts made in protecting civil rights continues unabated.

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).


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. At the very least, Harmelin narrows Solem to the point where it will have effect only in the most outrageous of circumstances. After Harmelin, the courts of appeal have been consistent in rejecting Eighth Amendment claims. 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, others are alarmed at the abandoned judicial check on legislative power.

The opinion in Harmelin v. Michigan 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...

respective 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).


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).


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).

One of the most important. 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.\textsuperscript{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.\textsuperscript{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 1982\textsuperscript{338} and continued by the Bush Administration, has steadily eroded defendants' rights in criminal procedure, including the rights against unreasonable searches and seizures,\textsuperscript{339} the right to counsel,\textsuperscript{340} the right to privacy,\textsuperscript{341} and the rights found in the


\textsuperscript{338} See Wisotsky, supra note 10, at 890 & nn.8-10.


\textsuperscript{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).

\textsuperscript{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. For example, the Anti-Drug Abuse Act of 1986 provides, among other things, strict punishments for those convicted of drug-related offenses. 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. 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. The majority of the Court has consistently deferred to the will of Congress in expanding the powers of law enforcement agencies. Without the Supreme Court providing a much-
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. 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.

For Ronald Harmelin, the Michigan Supreme Court's decision in People v. Bullock 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.340

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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 $760 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. Of course, this decision provides small comfort to defendants in drug-related cases in other states. 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.

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

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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* 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.

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