Harmelin v. Michigan: The Supreme Court Narrows the Proportionality Principle

Neil S. Whiteman
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons, and the Criminal Procedure Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol94/iss4/13
I. INTRODUCTION

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishments."¹ In 1910, the United States Supreme Court first recognized a proportionality principle as implicit within the Eighth Amendment in Weems v. United States.² Under the proportionality principle, "the Eighth Amendment bars not only punishments that are 'barabaric', but also those that are 'excessive' in relation to the crime committed."³ Since Weems, the Court has continued to recognize an Eighth Amendment

---

¹ U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").
² 217 U.S. 349 (1910). The Court held that the Eighth Amendment’s Cruel and Unusual Punishments Clause prohibited the sentence in Weems "both on account of [its] degree and kind." Id. at 377 (emphasis added).
proportionality principle.\textsuperscript{4} In \textit{Harmelin v. Michigan},\textsuperscript{5} the United States Supreme Court narrowed the Eighth Amendment’s proportionality principle and held that only sentences that are \textit{grossly disproportionate} to the crime committed violate the Eighth Amendment’s prohibition on cruel and unusual punishment.\textsuperscript{6}

In \textit{Harmelin}, the Court considered whether a sentence of life imprisonment with no parole for possession of 672 grams of cocaine\textsuperscript{7} constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution. The primary question addressed by the Court was whether the Eighth Amendment contains a proportionality principle that prohibits sentences disproportionate to the crime.\textsuperscript{8} Although differing opinions exist concerning the scope of the principle, seven Supreme Court justices agree that the Eighth Amendment does contain a proportionality principle.\textsuperscript{9}

The second issue decided by the Court was whether a sentence of life imprisonment with no parole requires an individualized sentencing scheme where the sentencer must consider factors in mitigation and aggravation and then choose from a range of available penalties.\textsuperscript{10} A majority of the Court answered this question in the negative\textsuperscript{11} holding that the Constitution does not require individualized sentencing schemes outside the context of capital punishment.\textsuperscript{12} The Court noted that prior Supreme Court cases limited the requirement for individualized sentencing schemes to sentences of death.\textsuperscript{13} The Court, therefore, refused to extend the individualized sentencing doctrine to sentences not imposing capital punishment.\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{5} 111 S. Ct. 2680 (1991).
  \item \textsuperscript{6} \textit{Id.} at 2705 (Kennedy, J., concurring).
  \item \textsuperscript{7} "This amount of pure cocaine has a potential yield of between 32,500 and 65,000 doses."
  \item \textit{Id.} at 2684 (plurality opinion).
  \item \textsuperscript{8} \textit{Id.} at 2702 (Kennedy, O'Connor, and Souter, JJ., concurring); \textit{Id.} at 2709, 2711 (White, Blackmun, and Stevens, JJ., dissenting); \textit{Id.} at 2719 (Marshall, J., dissenting).
  \item \textsuperscript{9} \textit{Id.}\textsuperscript{4} at 2684 (plurality opinion).
  \item \textsuperscript{10} \textit{Id.} at 2701-02 (majority opinion).
  \item \textsuperscript{11} \textit{Id.} at 2701-02 (plurality opinion).
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} \textit{Id.} at 2702.
  \item \textsuperscript{14} \textit{Id.} at 2701-02.
\end{itemize}
The *Harmelin* decision is complex and splintered: there are multiple issues, multiple theories for resolution of these issues, and multiple opinions. Despite the complexity, two general principles can be distilled from the opinion: (1) the Eighth Amendment of the United States Constitution prohibits criminal sentences that are *grossly disproportionate* to the crime committed,\(^{15}\) and (2) a sentence of life imprisonment with no parole does not require an individualized sentencing scheme where the sentencer must consider factors in mitigation and aggravation and then choose from a range of available penalties.\(^{16}\)

This Comment examines *Harmelin v. Michigan* and provides the reader with an analysis of the Court’s decision by considering the history of the Eighth Amendment’s Cruel and Unusual Punishments Clause. A brief statement of the case and examination of the prior law in the form of the United States Constitution and prior United States Supreme Court cases precedes a discussion and analysis of Justice Scalia’s opinion, part of which is the majority opinion, Justice Kennedy’s concurring opinion, and Justice White’s dissenting opinion. Finally, the implications of the *Harmelin* decision are explored leading to the conclusion that the Supreme Court, in *Harmelin*, has narrowed the Eighth Amendment proportionality principle.

II. PRIOR LAW

As noted above, the United States Supreme Court considered two issues in *Harmelin v. Michigan*. The Court first considered whether Michigan’s statutorily mandated sentence of life imprisonment with no parole for possession of 672 grams of cocaine violates the Eighth Amendment’s ban on cruel and unusual punishment because of the harshness of the sentence as compared to the crime.\(^{17}\) Examination of this issue requires a historical analysis of the Eighth Amendment. As initially adopted, the Bill of Rights did not apply to state governments;\(^{18}\) it was a limitation on the power of only the

\(^{15}\) Id. at 2705 (Kennedy, J., concurring).
\(^{16}\) Id. at 2701-02 (majority opinion).
\(^{17}\) Id. at 2684 (plurality opinion).
federal government and did not apply to the states. 19 However, in Robinson v. California, 20 the Supreme Court extended application of the Eighth Amendment to the states by virtue of the Fourteenth Amendment. 21 Thus, the federal Constitution now barred states from imposing cruel and unusual punishments in their criminal justice systems.

In 1892, the Supreme Court first discussed a proportionality principle between a sentence and a crime in Justice Field’s dissent in O’Neil v. Vermont. 22 Subsequently, in 1910, the Court adopted a proportionality approach to the Eighth Amendment’s prohibition on cruel and unusual punishment in Weems v. United States. 23 In Weems, the defendant received a sentence of fifteen years of cadena temporal 24 for falsifying official documents. His sentence included “hard and painful labor” while chained at the wrists and ankles 25 and a “per-

19. Id.
21. Id. at 666.
22. 144 U.S. 323 (1892). In his dissent, Justice Field argued that the Eighth Amendment ban on cruel and unusual punishment was directed not only at tortuous punishments, but “against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged.” Id. at 339-40. The Supreme Court had previously discussed the Eighth Amendment’s ban on cruel and unusual punishment in two cases: In re Kemmler, 136 U.S. 436, 437 (1890) (death by electrocution is not “inhumane and barbarous” and is therefore constitutional) and Wilkerson v. Utah, 99 U.S. 130 (1879) (death by firing squad is not cruel and unusual and is therefore constitutional).
24. The Philippine punishment of cadena temporal included the following provisions:
“They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution.” There are besides certain accessory penalties imposed, which are defined to be (1) civil interdiction; (2) perpetual absolute disqualification; (3) subjection to surveillance during life. These penalties are defined as follows: “Civil interdiction shall deprive the person punished as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the rights to dispose of his own property by acts inter vivos. Those cases are excepted in which the laws explicitly limits its effects. Subjection to the surveillance of the authorities imposes the following obligations on the persons punished. (1) That of fixing his domicile and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority in writing. . . .” The penalty of perpetual absolute disqualification is the deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to public office, the disqualification to acquire honors, etc., and the loss of retirement pay, etc.
Id. at 364-65 (1910) (citations omitted).
25. Id.
petual limitation on his liberty." 26 The Supreme Court reversed the judgment and dismissed the punishments as repugnant to the Eighth Amendment 27 "both on account of their degree and kind." 28

In 1976, five Justices again agreed that excessive or disproportionately harsh sentences constitute cruel and unusual punishment prohibited by the Eighth Amendment in Gregg v. Georgia. 29 In Gregg, a habeas corpus petitioner argued that the death penalty was cruel and unusual punishment and therefore barred by the Eighth Amendment. 30 The Court rejected the petitioner’s argument that the death penalty constitutes cruel and unusual punishment in all cases and held that death is an appropriate penalty for certain crimes and therefore is not cruel and unusual punishment in and of itself. 31

The following year, in Coker v. Georgia, 32 the Court held the death penalty disproportionate to the crime of rape and therefore barred by the Eighth Amendment. 33 The Court stated that "the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." 34 Thus, the Court recognized the inherent nature of the proportionality principle in an Eighth Amendment cruel and unusual punishment analysis.

The Supreme Court next considered the proportionality principle in 1980. In Rummel v. Estelle, 35 the Court upheld a life imprisonment sentence with the possibility of parole, under a Texas re-

26. Id. at 366. See supra note 24.
27. Id. at 382.
28. Id. at 377 (emphasis added).
29. 428 U.S. 153, 171, 173, 187 (1976) (Powell, Stewart, and Stevens, JJ., plurality opinion);
Id. at 227-31 (Brennan, J., dissenting); Id. at 231-41 (Marshall, J., dissenting).
30. Id. at 153 (plurality dissenting);
Id. at 153-54.
31. Id. at 153-54.
33. Id. at 597.
34. Id. at 592. The Court further stated that:
a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.
cidivist statute, as not violating the Eighth Amendment’s prohibition of cruel and unusual punishment. With two previous felony convictions, Rummel was convicted of obtaining $120 by false pretenses. Justice Rehnquist, writing for the majority, noted that because the Court had applied the Eighth Amendment proportionality principle most often in death penalty cases, the doctrine had limited application in non-capital cases.

The Court did note that the proportionality principle may apply in the non-capital context in an extreme situation. Justice Powell dissented and argued that the death penalty cases did not contain any language that would limit the 70-year-old proportionality principle announced in Weems v. United States to cases involving capital punishment.

The Supreme Court upheld Rummel’s narrow application of the proportionality principle in Hutto v. Davis. Davis had been convicted of possession and distribution of nine ounces of marijuana and sentenced to two consecutive twenty year prison terms and two fines of $10,000. Davis claimed that his sentence was so grossly out of proportion to the severity of his crimes that the sentence amounted to cruel and unusual punishment barred by the Eighth Amendment. The Supreme Court disagreed with Davis and affirmed his sentence in a per curiam decision. The Court reiterated the Rummel proposition that “federal courts should be ‘reluctan[t] to review legislatively mandated terms of imprisonment’ and that ‘successful challenges to the proportionality of sentences’ should be ‘exceedingly rare.’”

The Supreme Court last considered the Eighth Amendment’s proportionality principle in Solem v. Helm. In Solem, the Court con-

---

36. Id. at 265.
37. Id. at 265-66.
38. Id. at 272.
39. Id. at 274 n.11 (“if a legislature made overtime parking a felony punishable by life imprisonment”).
40. 217 U.S. 349 (1910).
42. 454 U.S. 370 (1982).
43. Id. at 370-71.
44. Id. at 371.
45. Id. at 374 (quoting Rummel v. Estelle, 445 U.S. 263, 272, 274 (1980)) (citations omitted) (alteration in original).
sidered whether the Eighth Amendment prohibited petitioner Helm’s sentence of life imprisonment with no parole for a seventh nonviolent felony conviction.\textsuperscript{47} The Court interpreted the Eighth Amendment’s Cruel and Unusual Punishments Clause to prohibit not only barbaric punishments, but also disproportionate sentences.\textsuperscript{48} The Court distinguished \textit{Rummel} on the basis of Rummel’s eligibility for parole.\textsuperscript{49} Helm was not eligible for parole.\textsuperscript{50} To apply the rule, the Court outlined three objective factors for comparison to the sentence in question: (1) the gravity of the offense, (2) the sentences imposed for other crimes in the same jurisdiction, and (3) the sentences imposed for the same crime in other jurisdictions.\textsuperscript{51} Using these three factors, the Court concluded that Helm’s sentence was “significantly disproportionate” to the crime and therefore prohibited by the Eighth Amendment.\textsuperscript{52} \textit{Solem} represented a firm extension of the proportionality principle to sentences of imprisonment.\textsuperscript{53}

The second issue before the Court in \textit{Harmelin v. Michigan}\textsuperscript{54} was whether a sentence of life imprisonment with no parole requires an individualized sentencing scheme where the sentencer must consider factors in mitigation and aggravation and then choose from a range of available penalties.\textsuperscript{55} In 1976, the Supreme Court held in \textit{Woodson v. North Carolina}\textsuperscript{56} that all cases involving the sentence of death require individualized sentencing schemes. The \textit{Woodson} plurality said, “we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”\textsuperscript{57} Justice

\begin{itemize}
\item \textsuperscript{47} \textit{Id.} at 279.
\item \textsuperscript{48} \textit{Id.} at 284.
\item \textsuperscript{49} \textit{Id.} at 300-03.
\item \textsuperscript{50} \textit{Id.} at 282.
\item \textsuperscript{51} \textit{Id.} at 290-92.
\item \textsuperscript{52} \textit{Id.} at 303.
\item \textsuperscript{53} \textit{Id.} at 288-90; \textit{See also} Jonathan C. Aked, Note, \textit{Solem v. Helm: The Supreme Court Extends the Proportionality Requirement to Sentences of Imprisonment}, 1984 Wts. L. Rev 1401, 1402.
\item \textsuperscript{54} 111 S. Ct. 2680 (1991).
\item \textsuperscript{55} \textit{Id.} at 2684 (plurality opinion).
\item \textsuperscript{56} 428 U.S. 280 (1976).
\item \textsuperscript{57} \textit{Id.} at 304 (plurality opinion) (citations omitted).
\end{itemize}
Brennan and Justice Marshall, who both believed the death penalty always violates the Eighth Amendment prohibition of cruel and unusual punishment,58 joined the plurality in reversing the petitioner's death sentence.59 This alliance had the primary effect of establishing that the Court would sustain death sentences only if they resulted from the use of individualized sentencing schemes at trial.

In Lockett v. Ohio,60 a seven member majority reversed a death sentence. A four member plurality of the Court expressed the view that the Ohio individualized sentencing scheme prescribed by statute unconstitutionally restricted the range of mitigating factors the sentencer could consider.61 The plurality concluded that "[t]he Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases."62 Justice Marshall concurred and expressed the view that the death penalty was cruel and unusual punishment under all circumstances.63

In Hitchcock v. Dugger,64 the Court unanimously reversed a death sentence because the advisory jury and the sentencing judge did not consider relevant evidence in mitigation.65 The Court ruled that the sentencing proceeding unconstitutionally violated the standards set forth in Lockett v. Ohio66 for individualized sentencing schemes.67 The Hitchcock Court stated that "in capital cases, 'the sentencer' may not . . . 'be precluded from considering' any relevant mitigating evidence."68

In summary, the Supreme Court firmly requires use of an individualized sentencing scheme, in which the sentencer must consider factors in mitigation and aggravation and then choose from a range

58. Id. at 305 (Brennan, J., concurring); Id. at 306 (Marshall, J., concurring).
59. Id. at 305 (Brennan, J., concurring); Id. at 306 (Marshall, J., concurring).
61. Id. at 608-09 (plurality opinion).
62. Id. at 606.
63. Id. at 619 (Marshall, J., concurring).
64. 481 U.S. 393 (1987).
65. Id. at 399.
68. Id. at 394 (quoting Skipper v. South Carolina, 476 U.S. 1 (1986)).
of available penalties, in all cases involving the penalty of death. However, the Court has never required the use of individualized sentencing schemes outside the context of capital punishment.

III. STATEMENT OF THE CASE

Petitioner, Ronald Allen Harmelin, was convicted in a Michigan bench trial of possessing 672 grams of cocaine in violation of Michigan law. Early one morning, two police officers stopped Harmelin’s car in a high crime area for running a red light. Harmelin got out of his vehicle and informed the officers that he possessed a licensed .38 caliber revolver. After performing a pat-down search of Harmelin for their own safety and discovering a quantity of marijuana, the officers placed Harmelin under arrest. A subsequent search of Harmelin’s person revealed assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia, and a telephone beeper. A search of Harmelin’s vehicle uncovered a satchel containing $2,900 in cash and two bags of white powder later determined to be 672 grams of cocaine. Harmelin was charged and convicted of possession of 672 grams of cocaine. Under Michigan law, Harmelin received the statutory mandated term of life imprisonment with no parole. Harmelin appealed several issues to the Michigan Court of Appeals: (1) ineffective assistance of counsel, (2) unconstitutional seizure and pat-down of his person, (3) unconstitutional search of his automobile, and (4) unconstitutional

70. Id at 77.
71. Id.
72. Id.
73. Id.
74. Id. at 77-78.
75. Harmelin v. Michigan, 111 S. Ct. 2680, 2684 (1991) (plurality opinion). Note that Harmelin was convicted of possession of 672 grams of cocaine and not possession of 672 grams of cocaine with intent to distribute.
77. Mich. Comp. Laws Ann. § 791.234(4) (West 1990-91) provides eligibility for parole after ten years in prison, except for those convicted of either first-degree murder or a “major controlled substance offense”; § 791.233b[1](b) defines “major controlled substance offense” as, among other things, a violation of § 333.7403(2)(a)(i) (see supra note 76).
sentencing: his statutorily mandated sentence of life imprisonment with no parole constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution. The Michigan Court of Appeals initially reversed Harmelin’s conviction on state constitutional grounds. However, the court reconsidered and reversed its holding on the state constitutional issue and affirmed Harmelin’s conviction and mandatory sentence of life imprisonment with no parole. The Michigan Supreme Court denied Harmelin’s appeal.

Finally, Harmelin petitioned the United States Supreme Court for a writ of certiorari. Granting certiorari, the Supreme Court limited the case to two issues. First, the Court considered whether Harmelin’s sentence of life imprisonment with no parole for possession of 672 grams of cocaine violates the Eighth Amendment’s prohibition of cruel and unusual punishment. Second, the Court examined whether a sentence of life imprisonment with no parole requires an individualized sentencing scheme that requires the sentencer to consider factors in mitigation and aggravation and then choose from a range of available penalties.

IV. CASE ANALYSIS

The United States Supreme Court affirmed Harmelin’s sentence of life imprisonment with no parole. Justice Scalia announced the

79. Id. at 78. The Michigan Court of Appeals initially held that the search which uncovered the cocaine was conducted in violation of the search and seizure provision of the Michigan Constitution which provides:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a police officer outside the curtilage of any dwelling house in this state.

80. Id. at 76.
84. Id.
85. Id. at 2702.
judgment of the Court and delivered an opinion in which Chief Justice Rehnquist joined and three other Justices joined in part. As noted above, the Supreme Court considered two issues in *Harmelin*. First, the Court considered whether a sentence of life imprisonment with no parole for the crime of possession of 672 grams of cocaine constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Second, the Court examined whether a sentence of life imprisonment with no parole requires an individualized sentencing scheme where the sentencer must consider factors in mitigation and aggravation and then choose from a range of available penalties.

As to the first issue, Justice Scalia rejected Harmelin’s Eighth Amendment constitutional challenge to his sentence of life imprisonment with no parole. Justice Scalia, joined only by Chief Justice Rehnquist, argued that, outside the context of capital punishment, the Eighth Amendment contains absolutely no proportionality principle. The other seven Justices rejected Justice Scalia’s interpretation of the Eighth Amendment’s Cruel and Unusual Punishments Clause. They interpreted the Eighth Amendment to contain a general proportionality principle. However, these seven Justices disagreed on the proper standard to determine if a sentence violated this proportionality principle. Three of the seven Justices supported a two-step test: (1) an initial determination of whether the sentence under question was “grossly disproportionate” to the crime committed, and if so, (2) an application of the intra- and inter-jurisdictional analyses described in *Solem*. The other four Justices argued for a

86. Justice Scalia announced the decision of the Court and delivered the lead opinion joined by Chief Justice Rehnquist. *Id.* at 2684 (plurality opinion). In Part V of his opinion, Justice Scalia wrote for a majority of the Court as he was also joined by Justice O’Connor, Justice Kennedy, and Justice Souter. *Id.* at 2701-02 (majority opinion). Justice Kennedy filed a concurring opinion joined by Justice O’Connor and Justice Souter. *Id.* at 2702 (Kennedy, J., concurring).
87. *Id.* at 2684 (plurality opinion).
88. *Id.*
89. *Id.* at 2684-2701.
90. *Id.* at 2686, 2701.
91. *Id.* at 2702-07 (Kennedy, J., concurring).
92. *Id.* at 2707.
93. See supra text accompanying note 51 for the three *Solem* factors.
plain application of the three factor test described in Solem.\textsuperscript{94}

As to the second issue decided by the Court, Justice Scalia, writing for a majority of the Court in Part V of his lead opinion,\textsuperscript{95} rejected Harmelin's invitation to extend the requirement for individualized sentencing schemes outside the context of capital punishment.\textsuperscript{96} The Court affirmed Harmelin's sentence of life imprisonment with no parole.\textsuperscript{97}

A. Justice Scalia's Opinion

1. Opinion

As to the first and primary issue of whether the Eighth Amendment requires Harmelin's sentence to be proportional to his crime, Justice Scalia, joined by Chief Justice Rehnquist, argued that outside the capital context, the Eighth Amendment does not require a sentence to be proportional to the crime.\textsuperscript{98} Justice Scalia begins his analysis of the Eighth Amendment with a review of \textit{Rummel v. Estelle},\textsuperscript{99} where the Court stated that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."\textsuperscript{100} Justice Scalia noted that in \textit{Rummel}, the Court specifically rejected the three objective factors proposed by the dissent\textsuperscript{101} to determine whether a sentence violates the Eighth Amendment.\textsuperscript{102} However, Justice Scalia acknowledges that under

\begin{itemize}
  \item 95. Harmelin, 111 S. Ct. at 2701-02 (majority opinion).
  \item 96. \textit{Id.}
  \item 97. \textit{Id.} at 2702.
  \item 98. \textit{Id.} at 2686, 2701 (plurality opinion).
  \item 99. 445 U.S. 263 (1980).
  \item 100. Harmelin, 111 S. Ct. at 2684 (quoting Rummel v. Estelle, 445 U.S. 263, 274 (1980)) (plurality opinion).
  \item 101. These three objective factors proposed by the dissent in \textit{Rummel} are the same three factors adopted in \textit{Solem}. \textit{See supra} text accompanying note 51 for a description of the three \textit{Solem} factors.
  \item 102. Harmelin, 111 S. Ct. at 2684 (plurality opinion).
\end{itemize}
Rummel, a proportionality analysis would be appropriate in extreme examples.103

Next, Justice Scalia points out that in Hutto v. Davis,104 the Court again rejected application of the three factors proposed by the Rummel dissent.105 Justice Scalia said that although the Davis opinion invited the inference that "gross disproportionality" was one of the exceedingly rare situations where an Eighth Amendment proportionality challenge should be successful, such an inference is incompatible with the Court's sharp reversal of the finding that "40 years for possession of marijuana was grossly disproportionate and therefore unconstitutional."106

Justice Scalia then moves to Solem v. Helm,107 the most recent decision by the Supreme Court on this subject prior to Harmelin.108 Solem held that the Eighth Amendment embodies a general principle of proportionality and adopted the three-factor test rejected in Rummell and Davis.109 Justice Scalia argues that, based on a historical analysis of the Eighth Amendment, Solem was simply wrong110 and should be overruled.111

In support, Justice Scalia argues that Solem assumed, with no supporting analysis, that cruel and unusual were simply synonyms for the same concept.112 Justice Scalia then departs into an extended analysis of the history of the Cruel and Unusual Punishments Clause to examine both the historical roots of the clause and the understanding of the clause when it was adopted as an amendment to our Constitution.113 Justice Scalia traces the history of the propor-

103. "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment" Id. (quoting Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980)).
105. Harmelin, 111 S. Ct. at 2685 (plurality opinion).
106. Id. at 2685.
108. Harmelin, 111 S. Ct. at 2685 (plurality opinion).
109. Id. at 2686.
110. Id.
111. Id. at 2696.
112. Id. at 2686.
113. Id. at 2686-99.
tionality doctrine and the phrase “cruel and unusual punishments” from the Magna Carta through the English Declaration of Rights of 1689 to the adoption of our Bill of Rights. He concludes that it is “most unlikely” that the English Declaration of Rights of 1689 contained a proportionality guarantee. Furthermore, Justice Scalia adds that the English interpretation of the phrase “cruel and unusual punishments” is irrelevant since at the time of the adoption of the Bill of Rights, there was no federal common-law tradition in America upon which to base a determination of what was cruel and unusual punishment because of the infancy of the republic.

Another point made by Justice Scalia is that if the Eighth Amendment did contain a proportionality guarantee, the Americans who drafted the Eighth Amendment would have stated it directly and not in “an exceedingly vague and oblique way.”

Next, Justice Scalia argues that the contemporary understanding of the Eighth Amendment at the time of its adoption indicates that it contained no proportionality guarantee. He cites the actions of the First Congress to support this contention. The First Congress “punished forgery of United States securities, ‘run[ning] away with [a] ship or vessel, or any goods or merchandise to the value of fifty dollars,’ treason, and murder on the high seas with the same penalty: death by hanging.” The contemporary writings, Justice Scalia contends, do not contain any reference to a proportionality principle.

Justice Scalia then reviews various state interpretations of the federal and state cruel and unusual punishments constitutional clauses. He highlights the fact that many state constitutions ratified after the federal constitution are worded differently from the federal

114. The English Declaration of Rights of 1689 is the antecedent of the text of our Eighth Amendment. Id. at 2686.
115. Id. at 2686-94.
116. Id. at 2691.
117. Id.
118. Id. at 2692.
119. Id. at 2693.
120. Id. at 2694.
121. Id. (quoting 1 Stat. 114) (alteration in original).
122. Id.
constitution in that they prohibit "cruel or unusual" punishment. Justice Scalia notes that many state constitutions contain proportionality guarantees in addition to cruel and unusual punishments clauses. He contends that these state constitutional provisions and the decisions interpreting them support his conclusion that the Eighth Amendment prohibits only certain modes of punishment.

Justice Scalia examines the three factors Solem held relevant to a determination of the proportionality of a sentence. As to the first factor, the gravity of the offense, Justice Scalia points to the difficulty in drawing a line that indicates when a sentence is disproportionate in relation to a certain crime and concludes that this factor fails the test of objectivity. He argues that "no textual or historical standards" exist for determining if a sentence is excessive in relation to a crime. Justice Scalia then argues that the second factor, "the sentences imposed for similarly grave offenses in the same jurisdiction," fails for the same reason as the first the factor — there are no objective standards for determining what offenses are similarly grave. Justice Scalia argues that the third factor, "sentences imposed for the same crime in the other jurisdictions," has no conceivable relevance to the Eighth Amendment. He argues that the very reason for our federal system of government is diversity among jurisdictions. He points out that this diversity allows each state to respond to the different situations, needs, and concerns of its citizens. Justice Scalia contends that simply because the State of West Virginia chooses to penalize possession of 672 grams of cocaine as a minor offense (misdemeanor with a penalty of 90 days

---

123. Id. at 2695.
124. Id.
125. Id. at 2696.
126. Id. at 2697. See supra text accompanying note 51 for a description of the three Solem factors.
128. Id.
129. Id. at 2697.
130. Id. at 2698.
131. Id. at 2697.
132. Id. at 2698.
133. Id. at 2699.
134. Id.
to 6 months imprisonment). Finally, Justice Scalia concedes that the Supreme Court has recognized a limited proportionality guarantee within the Eighth Amendment. But, he contends that this guarantee is properly limited to cases of capital punishment because of the unique and final nature of death.

As to the second issue, Justice Scalia, speaking for the majority, announced that the Court refused to extend the requirement for individualized sentencing schemes outside the context of capital punishment. Justice Scalia pointed out that the Court has exclusively limited the requirement for individualized sentencing schemes to sentences of death and the fact that not all of Harmelin's opportunities for reducing his sentence are foreclosed. Harmelin retains the possibility of a reduced sentence in the form of retroactive legislation or executive clemency.

2. Analysis

Justice Scalia's contention that the cruel and unusual punishments clause in the English Declaration of Rights of 1689 did not contain a proportionality principle is contrary to the weight of authority in interpreting English law. In developing his argument, Justice Scalia cites the work of Anthony F. Granucci often but reaches a conclusion contrary to Granucci's conclusion that the Eng-

135. W. VA. CODE § 60A-4-401(c) (1989).
137. Id. at 2699.
138. Id. at 2701.
139. Id. at 2701-02.
140. Id. at 2702.
141. Id. See also Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).
143. Id.
lish Declaration of Rights did contain a proportionality principle.\textsuperscript{146} Granucci's work is recognized as "[t]he seminal work on the history of the Eighth Amendment."\textsuperscript{147}

Next, Justice Scalia argues that even if the English interpretation of their cruel and unusual punishments clause did embody a proportionality guarantee, such an interpretation of the American clause would have been impossible because there were no federal common-law punishments available upon which to make a comparative determination of what sentences were cruel and unusual. But, as pointed out by Justice White in his dissent, the new Americans had lived under the criminal laws of the states for years and therefore would not have lacked standards for determining what punishments were cruel and unusual.\textsuperscript{148} Justice Scalia argues that the proportionality principle offers no textual or historical standards for determining what is cruel and unusual punishment.\textsuperscript{149} However, this is precisely the type of line drawing the courts regularly perform.\textsuperscript{150}

Justice Scalia says that if the Eighth Amendment as adopted did contain a proportionality principle, the plain-talking Americans who drafted it would have stated it directly. Justice White sarcastically notes that those same Americans drafted the Fifth Amendment’s Due Process Clause and the Fourth Amendment’s prohibition on unreasonable searches and seizures\textsuperscript{151} which can hardly be considered plain language descriptions of the legal concepts and individual liberties they embody.

Justice Scalia concedes that the language of the Eighth Amendment allows for a construction that embodies a proportionality principle.\textsuperscript{152} His reasons against such a construction today do not overcome eighty years of Supreme Court jurisprudence that has embraced the concept of a general proportionality principle within the Eighth Amendment. Justice Scalia’s conclusion that the Eighth

\textsuperscript{146} Granucci, \textit{supra} note 144, at 860.
\textsuperscript{147} Aked, \textit{supra} note 53, at 1403 n.10.
\textsuperscript{149} \textit{Id.} at 2698 (plurality opinion).
\textsuperscript{150} Solem \textit{v.} Helm, 463 U.S. 277, 294 (1983); Aked, \textit{supra} note 53, at 1415.
\textsuperscript{151} Harmelin \textit{v.} Michigan, 111 S. Ct. 2680, 2710 (1991).
\textsuperscript{152} \textit{Id.} at 2692.
Amendment does not contain a general proportionality principle is contrary to every twentieth century Supreme Court case on the subject.\textsuperscript{153} Justice Scalia even acknowledges that these cases make allowance for an Eighth Amendment proportionality principle. \textit{Rummel}, which Justice Scalia relied upon heavily, concedes that outside the capital context, challenges to the proportionality of excessive sentences are sometimes appropriate, although rare.\textsuperscript{154} \textit{Solem} reiterated "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare."\textsuperscript{155} \textit{Davis} said the same thing.\textsuperscript{156} When put to the test, seven Supreme Court Justices rejected Justice Scalia’s argument that the Eighth Amendment does not contain a general proportionality principle.

\textbf{B. Justice Kennedy’s Concurring Opinion}

1. Opinion

Justice Kennedy concurred with Part V of Justice Scalia’s opinion\textsuperscript{157} that announced the Court’s decision on the case and the holding on the second issue decided by the Court: a life imprisonment sentence with no parole does not require an individualized sentencing scheme.\textsuperscript{158} However, Justice Kennedy wrote a separate opinion, joined by Justice O’Connor and Justice Souter, because he disagreed with Justice Scalia’s contention that the Eighth Amendment does not contain a proportionality principle outside context of capital punishment. Justice Kennedy believes that the Eighth Amendment does contain a proportionality principle.\textsuperscript{159} Convincingly, Justice Kennedy noted that regardless of the historical arguments concerning the Eighth Amendment in the seventeenth and eighteenth centuries, eighty years of Supreme Court case law rec-

---

\textsuperscript{153} See \textit{supra} part II.
\textsuperscript{156} Hutto v. Davis, 454 U.S. 370, 374 (1982).
\textsuperscript{157} Harmelin v. Michigan, 111 S. Ct. 2680, 2702 (Kennedy J., concurring).
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
Recognize an Eighth Amendment proportionality principle and stare decisis "counsels" adherence to that principal. 160

Justice Kennedy surveys the prior Supreme Court cases concerning cruel and unusual punishments and concludes: "Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle." 161 However, Justice Kennedy points out that the precise contours of the proportionality principle remain unclear. 162 To define these contours, Justice Kennedy analyzes these prior cases to discover "some common principles that give content to the uses and limits of proportionality review." 163

Justice Kennedy reports that four common principles run through the thread of the Supreme Court's prior cases concerning cruel and unusual punishments. The first principle is that the determination of the length of prison terms is generally an issue for the legislature: 164

Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and social order. . . . The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature. 165

Therefore, "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." 166

The second principle common to the cruel and unusual punishment cases is that the Eighth Amendment does not adopt any one

160. Id.
161. Id.
162. Id. at 2703.
163. Id.
164. Id.
165. Id.
166. Id. at 2703-04 (quoting Solem, 463 U.S. at 290); See also Rummel, 445 U.S. at 274 (acknowledging "reluctance to review legislatively mandated terms of imprisonment"); Weems, 217 U.S. at 379 ("The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety").
particular penological theory.\textsuperscript{167} Both the state and federal justice systems have given the different goals of "retribution, deterrence, incapacitation, and rehabilitation" varied priorities at different times.\textsuperscript{168}

The third principle noted by Justice Kennedy is that under our federal system of government, significant differences in sentencing theories and terms are inevitable and often beneficial.\textsuperscript{169} "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law."\textsuperscript{170} This situation makes interstate comparison of sentences difficult.\textsuperscript{171} Also, differing penological attitudes and differing local conditions may justify different, yet rational, prison terms for the same crime.\textsuperscript{172} The fact that one state has the most severe penalty for a certain crime does not, by itself, render that penalty unconstitutional.\textsuperscript{173}

The final principle common to the Supreme Court's Eighth Amendment cases is that the proportionality analysis should be guided by "objective factors to the maximum possible extent."\textsuperscript{174} Justice Kennedy notes that the Court has easily drawn an objective line between capital punishment and imprisonment, but the Court "lack[s] clear objective standards to distinguish between sentences for different terms of years."\textsuperscript{175} Because of this lack of objectivity concerning prison sentences, "outside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare."\textsuperscript{176}

Upon consideration of these common principles,\textsuperscript{177} Justice Kennedy synthesizes the principle that "the Eighth Amendment does

\textsuperscript{167} Harmelin v. Michigan, 111 S. Ct. 2680, 2704 (1991) (Kennedy, J., concurring).
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id. (quoting McClesky v. Zant, 111 S. Ct. 1454, 1469 (1991)).
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{175} Harmelin v. Michigan, 111 S. Ct. 2680, 2704-05 (1991) (Kennedy, J., concurring).
\textsuperscript{177} "[T]he primacy of the legislature, the variety of legitimate penological schemes, the nature
not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.'\textsuperscript{178}

Without commenting on the wisdom of the Michigan sentencing scheme, Justice Kennedy concludes that "the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine\textsuperscript{179} — in terms of violence, crime, and social displacement — is momentous enough to warrant the deterrence and retribution of a life sentence without parole."\textsuperscript{180} Justice Kennedy reasons that the comparative analyses prescribed in \textit{Solem}\textsuperscript{181} are therefore not necessary in this case. In support, he notes the primacy of the legislature\textsuperscript{182} and the fact that \textit{Solem} did not mandate such analyses:\textsuperscript{183}

A better reading of our cases leads to the conclusion that intra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of \textit{gross disproportionality} . . .

The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime.\textsuperscript{184}

Thus, Justice Kennedy argues that the proper standard for determining whether Harmelin's sentence is cruel and unusual involves a two-step test:\textsuperscript{185} (1) an initial determination of whether the sentence

\begin{flushright}
\textit{Id.} at 2706.
\end{flushright}

\textsuperscript{178} \textit{Id.} (emphasis added). See also \textit{Solem} v. Helm, 463 U.S. 277, 303 (1983) (the Eighth Amendment prohibits "significantly disproportionate" sentences); \textit{Coker} v. Georgia, 433 U.S. 584, 592 (1977) (the Eighth Amendment prohibits "grossly disproportionate" sentences).


\textsuperscript{180} \textit{Id.} at 2706.

\textsuperscript{181} The second and third \textit{Solem} comparative factors are: a comparison of the sentence in question with (2) penalties imposed in the same jurisdiction for other crimes and (3) penalties imposed in other jurisdictions for the same crime. \textit{Solem} v. Helm, 463 U.S. 277, 291-92 (1983).

\textsuperscript{182} See supra text accompanying note 166.

\textsuperscript{183} The \textit{Solem} Court stated that "it may be helpful to compare sentences imposed on other criminals in the same jurisdiction," and "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." \textit{Solem}, 463 U.S. at 291-92 (emphasis added).


\textsuperscript{185} \textit{Id.} at 2702-07.
in question is *grossly disproportionate* to the crime committed, and if so, (2) an application of the second and third *Solem* intra- and inter-jurisdictional comparative factors. Harmelin argued that his crime was nonviolent and victimless. Justice Kennedy dismissed this claim as "false to the point of absurdity." Justice Kennedy summarized multiple studies that demonstrate a strong positive correlation between illegal drugs and crime. On comparing Harmelin's sentence with the crime committed, Justice Kennedy saw no inference of gross disproportionality, and concluded that the sentence is therefore constitutional and the *Solem* intra- and inter-jurisdictional comparative analyses were not necessary here.

Justice Kennedy finishes his opinion with a reiteration of his support for the Opinion of the Court on the second issue: imposition of a life sentence with no parole does not require an individualized sentencing scheme. He points out that the Supreme Court cases detailing requirements for individualized sentencing schemes have been exclusively limited to cases involving capital punishment. Justice Kennedy noted that "[s]ince the beginning of the Republic, Congress and the States have enacted mandatory sentencing schemes," and that "[i]t is beyond question that the legislature 'has the power to define criminal punishments without giving the courts any sentencing discretion.'" Justice Kennedy concludes that the severity and mandatory nature of Harmelin's sentence of life imprisonment with no parole is entirely within the bounds of state power to deal with serious societal problems.

2. Analysis

Justice Kennedy's concurring opinion integrates the entire range of Supreme Court jurisprudence on the issue of cruel and unusual

---

186. *Id.* at 2707.
187. *Id.* *See supra* text accompanying note 51 for the *Solem* factors.
188. Harmelin, 111 S. Ct. at 2706 (Kennedy, J., concurring).
189. Justice Kennedy focused on the link between cocaine and violent crime. *Id.*
190. *Id.* at 2707.
191. *Id.*
192. *Id.*
193. *Id.* at 2708.
194. *Id.* (quoting Chapman v. United States, 111 S. Ct. 1919, 1929 (1991)).
195. *Id.* at 2709.
punishment and synthesizes a principle common to all of these cases. Justice Kennedy's analysis of the case law yields the conclusion that the Eighth Amendment prohibits only sentences that are grossly disproportionate to the crime.196

Relying on the extremely negative impact illegal drugs have on modern society, Justice Kennedy reasoned that Harmelin's sentence does not give rise to an inference of gross disproportionality.197 This conclusion is supported by numerous studies that reflect the deleterious effects of illegal drug abuse.198 Our federal government has declared the war on drugs to be one of the nation's highest priorities.199 In this war, the possession of 672 grams of cocaine with a yield of 32,500 to 65,000 street doses would seem to deserve a particularly harsh penalty. The Michigan Legislature, in adopting the penalty of the imprisonment with no parole for someone convicted of possessing 650 grams or more of cocaine, obviously made the inference that such a large amount of cocaine was intended not for personal use, but for distribution.

Justice Kennedy correctly characterized Harmelin's claim that his crime was victimless as "false to the point of absurdity."200 The effects of the illegal drug trade are extensively documented:

The new terror on America's streets is inseparable from the explosion of the drug trade... .

The 1980s have the seen the resurgence of street gangs, many of which profit

---

196. Id. at 2705.
197. Id. at 2707.
from narcotics and enforce their own ruthless brand of law with drive-by shootings and turf wars that leave the real lawmen ducking for cover. 201

"During every 100 hours on our streets we lose three times more men than were killed in 100 hours of ground war in the Persian Gulf." 202

The damaging effects of the cocaine trade are not limited to America's borders. The murder rate in Columbia is the highest of any nation not involved in a civil war with more than 20,000 murders in 1988 in a country of 25 million. 203 More than 220 Columbian judges have been killed in the last ten years and more than 1,600 were threatened. 204

Justice White complains that Justice Kennedy's two-step test "eviscerates" Solem by failing to apply all three objective factors. Justice Kennedy points out that Justice White's strict adherence to the Solem three-factor test ignores the Rummel 205 and Davis 206 decisions where the Court upheld sentences against proportionality attacks without performing such comparative analyses. Justice Kennedy's two-step test integrates all three recent decisions into a practical standard that can be readily applied by the lower courts.

C. Justice White's Dissenting Opinion

1. Opinion

Justice White 207 believed that the Eighth Amendment embodies a "proportionality component." 208 He argued that all three of the factors enumerated in Solem should be applied to Harmelin's sen-

204. Id.
205. See supra text accompanying notes 35-41 for a discussion of Rummel.
206. See supra text accompanying notes 42-45 for a discussion of Davis.
208. Id. at 2711 (White, J., dissenting).
tence and that, as a consequence, Harmelin’s sentence violated the Eighth Amendment’s ban on cruel and unusual punishments.209

Justice White begins with a critical analysis of Justice Scalia’s opinion. Justice White highlights Justice Scalia concession that the language of the Eighth Amendment bears the construction of a general proportionality principle.210 Justice White then noted that Justice Scalia’s contention that the English Declaration of Rights of 1689 does not contain a proportionality component lacks strong support and that other scholars disagree with Justice Scalia on this point.211 Also, no matter what the intention of the constitutional framers was, for over eighty years the Supreme Court has recognized a proportionality principle embodied within the Eighth Amendment.212 During this time, “none of the Court’s cases suggest that such a construction is impermissible.”213

Justice Scalia boldly states “the Eighth Amendment contains no proportionality guarantee.”214 However, he later moves to what Justice White calls Justice Scalia’s fallback position: proportionality review is not required by the Eighth Amendment, except in cases of capital punishment.215 Justice White laments Justice Scalia’s failure to explain why the Eighth Amendment includes a proportionality review in some cases but not in others. Justice Scalia suggests that the qualitative difference between death and all other punishments is a sound basis for this distinction,216 but Justice White points out that the Court’s capital punishment proportionality cases totally reject Justice Scalia’s contention that the Eighth Amendment prohibits only certain modes or methods of punishment.217 Justice White noted that if Justice Scalia was correct, “capital punishment — a mode of punishment — would either be completely barred or left to the discretion of the legislature. Yet neither is true. The death penalty

209. Id. at 2716.
210. Id. at 2710.
211. Id. at 2710 & n.1.
212. Id. at 2710-11.
213. Id. at 2711.
214. Id. at 2686 (plurality opinion).
215. Id. at 2712 (White, J., dissenting).
216. Id. at 2701 (plurality opinion).
217. Id. at 2712 (White, J., dissenting).
is appropriate in some cases and not in others. The same should be true of punishment by imprisonment."\textsuperscript{218}

Next, Justice White criticizes Justice Kennedy’s reading of \textit{Solem}. Justice White argued that \textit{Solem} insisted that all three factors be applied in the proportionality analysis. Justice White quoted from \textit{Solem} that “no one factor will be dispositive in a given case,”\textsuperscript{219} and “no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.”\textsuperscript{220} Justice White asserts that Justice Kennedy’s omission of the second and third \textit{Solem} factors makes the proportionality analysis an exercise in judicial subjectivity,\textsuperscript{221} “which is the very sort of analysis our Eighth Amendment jurisprudence has shunned.”\textsuperscript{222}

Because Justice White saw no justification for overruling or limiting \textit{Solem}, he proceeds to apply the three \textit{Solem} factors to Harmelin’s sentence. The first factor requires a comparison of the gravity of the offense and the harshness of the penalty.\textsuperscript{223} Justice White concludes that “[t]he ‘absolute magnitude’ of petitioner’s crime is not exceptionally serious.”\textsuperscript{224} Justice White concedes that drug abuse is a serious societal problem, but believes that possession of a large quantity of drugs, as here, will not always warrant life imprisonment with no parole. Justice White complains that, in justifying Harmelin’s sentence, Justice Kennedy focused on the subsidiary or indirect effects of illegal drug use. Justice White asserts that the indirect consequences of cocaine abuse can be equated to the consequences that flow from misuse of legal substances, such as alcohol, which lessens the seriousness of the crime. Finally, Justice White argues that, in effect, Harmelin was convicted of the greater crime of possession of cocaine \textit{with intent to distribute} without proof of Harmelin’s intent to distribute, because, under Michigan law, the

\textsuperscript{218} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 2715.
\textsuperscript{222} Id.
\textsuperscript{223} Id. at 2716; \textit{Solem} v. Helm, 463 U.S. 277, 290-91 (1983).
\textsuperscript{224} Harmelin v. Michigan, 111 S. Ct. 2680, 2717 (1991) (White, J., dissenting).
penalties for (1) possession of 672 grams of cocaine and (2) possession of 672 grams of cocaine with intent to distribute are the same.225

The second Solem factor involves a comparison of Harmelin's sentence to the sentences imposed on other criminals in the same jurisdiction.226 Imposition of the same or a lesser sentence for a more serious crime may render a punishment excessive.227 Since Harmelin's sentence was mandatory and the harshest available in Michigan228 while crimes such as second-degree murder, rape, and armed robbery allow for judicial discretion, Justice White declared that Harmelin "has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes."229

The third and final Solem factor examines the sentences imposed for the same crime in other jurisdictions.230 Justice White notes that Michigan’s sentence for Harmelin’s crime is, by far, the most severe in the country.231 For example, in Alabama, the only other state that imposes a mandatory sentence of life imprisonment with no parole for first time drug offenders,232 Harmelin would be subject to a mandatory minimum sentence of five years in prison.233 Also, Justice White highlighted that under the federal sentencing guidelines, Harmelin’s sentence would be approximately ten years.234 Justice White concludes that "the fact that no other jurisdiction provides such a severe, mandatory penalty for possession of this quantity of drugs is enough to establish 'the degree of national consensus this Court has previously thought sufficient to label a particular punishment

225. Life imprisonment with no parole. Id.
226. Id. at 2718; Solem v. Helm, 463 U.S. 277, 291 (1983).
229. Id. at 2718 (quoting Solem, 463 U.S. at 299).
230. Id.; Solem, 463 U.S. at 291-92.
233. Harmelin, 111 S. Ct. at 2718 (White, J., dissenting). See also Ala. Code § 13A-12-231(2)(b) (Supp. 1991). If Harmelin was convicted of the same crime in W. Va., his sentence would be not less than ninety days nor more than six months. W. Va. Code § 60A-4-401(c) (1989).
cruel and unusual.""235 After reviewing the analysis of the three Solem factors above, Justice White states there is "‘no doubt’ that Harmelin’s sentence violates the Eighth Amendment’s prohibition of cruel and unusual punishment.

2. Analysis

Justice White’s dissent first focuses on a critical analysis of Justice Scalia’s argument that the Eighth Amendment contains no proportionality guarantee outside context of capital punishment. Justice White points out that Justice Scalia’s contention lacks strong support and disregards eighty years of Supreme Court case law.

Next, Justice White criticizes Justice Kennedy’s decision not to apply the three Solem factors to Harmelin’s sentence. Justice White argues that Justice Kennedy’s two-step test “‘eviscerates’” Solem.236 He contends that the intra- and inter-jurisdictional analyses have long been part of Eighth Amendment jurisprudence and should not be ignored.237 However, as Justice Kennedy correctly pointed out, Justice White totally ignores Rummel238 and Davis239 which, other than Solem, are the Supreme Court’s most recent analyses of the Eighth Amendment’s proportionality principle.

Justice White’s claim that Harmelin’s crime was not exceptionally serious suffers from the same criticism as Harmelin’s claim that his crime was victimless. The deleterious societal effects of cocaine are fully documented and well substantiated.240

Justice White’s claim that Harmelin was treated the same or more severely than criminals who have committed more serious crimes is an extremely subjective judgment. Reasonable people could disagree with Justice White’s contention that armed robbery is a more serious crime than distribution of between 32,500 and 65,000 street doses of cocaine. “A professional seller of addictive drugs may inflict

235. Id. at 2719 (quoting Standford v. Kentucky, 492 U.S. 361, 371 (1989)).
236. Id. at 2714.
237. Id.
238. See supra text accompanying notes 35-41.
239. See supra text accompanying note 42-45.
240. See supra note 198 and accompanying text.
greater bodily harm upon members of society than the person who commits a single assault." 241 Indeed, our federal government of elected officials have declared that "the illicit narcotics epidemic currently afflicting the United States represents a direct threat to the well-being of every United States citizen." 242

Finally, Justice White argues that because Harmelin's sentence is by far the most severe in the country, it must fail constitutional scrutiny. However, as noted in Rummel, a case ignored by Justice White, the fact that a state has the most severe punishment for a certain crime does not automatically render that punishment grossly disproportionate and unconstitutional. 243

Justice White's position certainly has great emotional appeal. No one can deny the harshness of Harmelin's life sentence with no parole. A rational argument can easily be made that such a sentence is cruel. However, Harmelin's sentence can hardly be considered both cruel and unusual when considered in the context of over 200 years of criminal punishment under our Constitution. Also, one must balance the severity of Harmelin's sentence with the severe effects of the illegal cocaine trade in which Harmelin was actively engaged: 244 murder, robbery, and newborn addicts just to name a few.

In summary, Justice White's dissent focuses on the most recent Supreme Court case 245 on cruel and unusual punishment to the exclusion of other relevant cases. Rummel 246 and Davis 247 were never overruled by the Supreme Court and are as much a part of the law as Solem. Thus, the major weakness of Justice White's dissent is

244. Although Harmelin was not charged and convicted with possession of cocaine with intent to distribute, the circumstances surrounding Harmelin's crime indicate that he was actively involved in the illegal distribution of cocaine. The Michigan Legislature has made the inference that anyone caught with more than 650 grams of cocaine is involved in distribution of the drug as evidenced by the fact that statutory mandated sentence is the same for both crimes (possession and possession with intent to distribute of more than 650 grams of cocaine).
that it analyzes the issues inside the vacuum of one case, *Solem* v. *Helm*, while ignoring other relevant case law.

V. IMPLICATIONS

The decision by the United States Supreme Court in *Harmelin* v. *Michigan* represents a noteworthy addition to Supreme Court’s jurisprudence concerning the Eighth Amendment’s Cruel and Unusual Punishments Clause. Most importantly, it represents a narrowing of the Eighth Amendment’s proportionality principle, recently defined in *Solem* v. *Helm*.²⁴⁸ This decision will result in a reduction of the number of cases in which a full three-factor *Solem* proportionality analysis will be performed to determine the constitutionality of a harsh sentence.

*Harmelin* represents an understanding that the wisdom of the drug war is an issue for the legislature, not the courts. The question in this case is what is the law as defined by our Constitution, not whether or not the government should fight the drug war using tough tactics. The Supreme Court, noting our federal system of government under the Constitution²⁴⁹ and recognizing that state legislatures are better situated to deal with the illegal drug problem,²⁵⁰ has indicated that it will grant substantial deference to state governments in determining how to implement the war on drugs at the state level.

Despite Justice Scalia’s lead opinion to the contrary, a wide majority of the Supreme Court interpret the Eighth Amendment to contain a proportionality principle. The net result of the splintered decision in *Harmelin* is that judicial inquiry into the Eighth Amendment constitutionality of a legislatively mandated sentence will proceed only upon an initial finding of gross disproportionality between the sentence and the crime. Upon such a finding, the *Solem* intra-and inter-jurisdictional analyses will be performed to determine the constitutionality of a given sentence.

²⁴⁹ *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2699 (1991) (plurality opinion); *Id.* at 2704 (Kennedy, J., concurring).
²⁵⁰ *Id.* at 2699 (plurality opinion); *Id.* at 2708-09 (Kennedy, J., concurring).
Justice Kennedy’s concurring opinion goes far in reconciling the seemingly conflicting prior Supreme Court case law on the subject of cruel and unusual punishments. He analyzes the prior cases and determines the controlling principle common to all of these cases: the Eighth Amendment prohibits sentences that are grossly disproportionate to the crime. He incorporates the Rummel holding that “‘[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare,’”251 and maintains the Solem three-factor analysis upon an initial finding of gross disproportionality between the sentence and crime.

Also noteworthy is the majority ruling that outside context of capital punishment, there is no requirement for individualized sentencing schemes where the sentencer must consider factors in mitigation and aggravation and then choose from a range of available penalties. This holding continues the Supreme Court’s tradition of granting deference to state legislatures in structuring their criminal justice systems.252

VI. CONCLUSION

The Supreme Court’s decision in Harmelin v. Michigan is significant for two reasons. First, it represents a narrowing of the Eighth Amendment proportionality principle in relation to Solem decision. The new standard involves not a test for proportionality, but a test for gross disproportionality. Second, the Supreme Court has reiterated that state legislatures have wide latitude to define the criminal penalties applied within their borders. Harmelin represents a signal to state legislatures that severe criminal penalties remain constitutional weapons in the war on drugs. Finally, the Supreme Court has added another important chapter to the elusive concept of cruel and unusual punishment.

Neil S. Whiteman

252. Id. at 2709.