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Notes

Harmelin v. Michigan: Punishment Need Not Fit the Crime

I. INTRODUCTION

Inherent in our sense of justice is the idea that in dealing with crime and criminals, the punishment should fit the crime.¹ The general ordering of punishments along the continuum of criminal offenses is often consensual. For example, the average citizen does not envision that his parking violation will result in a sentence of death, and similarly, a convicted mass murderer cannot reasonably believe that he will be subjected to a simple fifty dollar fine and twenty hours of community service. Nonetheless, the question of what punishment is “fit” for a given crime remains prevalent in constitutional law. In part, this continuing question stems from the interpretive ambiguity surrounding the apparent Eighth Amendment limits on criminal sentencing. Moreover, the Supreme Court has perpetuated this ambiguity with three narrowly-decided decisions concerning the principle of proportionality² in non-capital criminal sentencing cases decided within the last eleven years.³

In the 1991 Term, in *Harmelin v. Michigan*,⁴ the Supreme Court again addressed the application of the Eighth Amendment proportionality principle to a non-capital sentencing case. In a splintered decision,⁵ the *Harmelin* Court upheld a mandatory life sentence without the possibility of parole, given to a first-time offender for

1. See JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 308-09 (2d ed. 1960).

2. This term simply refers to the general idea that the length of punishment should be proportional to the severity of the crime.

3. *Solem v. Helm*, 463 U.S. 277 (1983); *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam); *Rummel v. Estelle*, 445 U.S. 263 (1980).

4. 111 S. Ct. 2680 (1991).

5. In a scattered five-part opinion to affirm the court of appeals, Justice Scalia was joined *only* by Chief Justice Rehnquist in parts I-IV, *id.* at 2684, and by Justices Kennedy, O'Connor, and Souter and Chief Justice Rehnquist in part V, *id.* Justice Kennedy filed a concurring opinion, joined by Justices O'Connor and Souter. *Id.* at 2702. Justice White filed a dissenting opinion in which Justice Blackmun and Justice Stevens joined. *Id.* at 2709. Justice Marshall and Justice Stevens also filed dissenting opinions, with Justice Blackmun joining Justice Stevens. *Id.* at 2719.

possession of cocaine. Pursuant to a Michigan statute,⁶ the sentencing judge in *Harmelin* could not take into account any mitigating factors or the individualized characteristics of the convicted offender.⁷ Upholding the sentence, the Supreme Court reasoned that capital and non-capital cases are inherently different and, thus, that the individualized sentencing doctrine used in capital cases should not be extended to the non-capital context because of the inherent differences in the methods of punishment.⁸ In addition, Justice Scalia, joined only by Chief Justice Rehnquist, declared that the existing law on the subject as last evidenced by *Solem v. Helm*⁹ was without merit.¹⁰ Thus, in *Harmelin*, Scalia concluded that the Eighth Amendment contains no proportionality guarantee for non-capital cases and, consequently, that criminal sentencing in the non-capital context is completely within the legislature's prerogative.¹¹

This Note analyzes *Harmelin v. Michigan* within the context of relevant Supreme Court decisions addressing the proportionality principle of the Eighth Amendment. First, it will present a brief summary of the confusion surrounding the proper interpretation of the Eighth Amendment.¹² Next, this Note will examine Supreme Court decisions interpreting the Eighth Amendment and the proportionality principle,¹³ including the Court's recent decision in *Harmelin*.¹⁴ This examination of *Harmelin* will expose several inconsistencies, which suggest that both Justice Scalia's five-part historical essay on the Eighth Amendment and Justice Kennedy's concurrence are neither logically sound nor precedentially valid. This Note will conclude that while the multifarious nature of *Harmelin* illustrates that the law in this area is far from settled, the Court's message is clear: criminal sentencing and punishment are the tasks of the legislature, not the courts. Consequently, legislative discretion in criminal sentencing may go unchecked, resulting

6. See *infra* note 98.

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

8. *Id.* at 2701-02.

9. 463 U.S. 277 (1983). In *Solem*, the Court found that a sentence of life imprisonment without the possibility of parole violated the Eighth amendment because it was disproportionate to the offense committed. *Id.* at 303; see *infra* notes 79-96 and accompanying text.

10. *Harmelin*, 111 S. Ct. at 2685-86.

11. *Id.* at 2686.

12. See *infra* notes 15-24 and accompanying text.

13. See *infra* notes 26-96 and accompanying text.

14. See *infra* notes 97-159 and accompanying text.

in no constitutional protection against punishment that does not "fit" the crime.

II. BACKGROUND

Any discussion of the proportionality principle must begin with an examination of the origins of the Eighth Amendment. Accordingly, this section will first discuss the considerable debate concerning the proper interpretation of the Eighth Amendment. Once the various views have been discussed, this section will then examine how the Supreme Court has interpreted the proportionality principle with respect to both capital and non-capital sentencing cases.

A. *The Historical Development of the Eighth Amendment*

The Eighth Amendment of the Constitution expressly prohibits the infliction of "cruel and unusual punishments."¹⁵ This language apparently originated from the Magna Carta of 1215, which prohibited the application of excessive "amercements."¹⁶ A virtually identical provision appears in the English Bill of Rights of 1689.¹⁷ Commentators generally agree that the language of the Eighth Amendment was borrowed specifically from this English Bill of Rights.¹⁸

While the origins of the Eighth Amendment are not readily disputed, the proper interpretation of this text generates considerable debate.¹⁹ Most notably, commentators argue about the limits of the Eighth Amendment's proscription against cruel and unusual

15. The Eighth Amendment provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

16. *Solem v. Helm*, 463 U.S. 277, 284 (1983). An amercement was the 13th century equivalent to a fine and was a commonly-used criminal sanction. *Id.* at 284 n.8.

17. The English Bill of Rights of 1689 states:

[E]xcessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.

Solem, 463 U.S. at 285 (citing Bill of Rights, 1689, 1 W. & M., ch. 2, § 2 (Eng.)).

18. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 CAL. L. REV. 839 (1969); Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378 (1980). Similarly, the Supreme Court has acknowledged that the text of the Eighth Amendment was borrowed from the English Bill of Rights. *Solem*, 463 U.S. at 285-86 n.10.

19. Compare, e.g., Granucci, *supra* note 18, at 847 (concluding that the English Bill of Rights of 1689 prohibited excessive punishments) with Schwartz, *supra* note 18, at 382 (questioning the conclusions of commentators who suggest that the Eighth Amendment embodies a principle of proportionality derived from the English history of the text).

punishment.²⁰ On one side of the debate, significant authority suggests that the Cruel and Unusual Punishment Clause was intended exclusively to prohibit specific modes of punishment.²¹ These commentators argue that the language of the Eighth Amendment developed in direct response to the Bloody Assizes of 1685, when King James II orchestrated the torture and execution²² of hundreds of people convicted of treason.²³ Conversely, others argue that the "cruel and unusual" language goes beyond the mere method of punishment and effectively codifies the longstanding English tradition against disproportionate sentences.²⁴ This debate is at the heart of Eighth Amendment jurisprudence in non-capital cases and is central to the Supreme Court's analysis in *Harmelin*.²⁵

B. *The Supreme Court, the Proportionality Doctrine, and the Eighth Amendment*

In the 1892 case of *O'Neil v. Vermont*,²⁶ Justice Field, in dissent, first introduced the proportionality doctrine to Supreme Court jurisprudence.²⁷ In *O'Neil*, Justice Field opined that excessively long

20. See generally Schwartz, *supra* note 18 (providing a comparative analysis of the differing views regarding the parameters of the Eighth Amendment's prohibition on cruel and unusual punishment).

21. See, e.g., Schwartz, *supra* note 18, at 382; cf. Granucci, *supra* note 18, at 865 (suggesting that the Framers of the Eighth Amendment misinterpreted the proper meaning of the clause prohibiting cruel and unusual punishment to prohibit torturous but not excessive punishments).

22. "[T]he condemned man was drawn on a cart to the gallows where he was hanged by the neck, cut down while still alive, disemboweled and his bowels burnt before him, then beheaded and quartered." Schwartz, *supra* note 18, at 378.

23. *Id.*

24. *Solem v. Helm*, 463 U.S. 277, 285-86 & n.10 (1983) (citing authorities arguing that the Eighth Amendment incorporates a proportionality concept).

25. See *infra* notes 111-14 and accompanying text.

26. 144 U.S. 323 (1892).

27. *Id.* at 339-40 (Field, J., dissenting). In the first one hundred years of its existence, Eighth Amendment challenges based on disproportionate sentences were rarely raised. However, three cases during this time are worth mentioning. First, in *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475, 476-77 (1867), the defendant challenged the excessiveness of a fifty-dollar fine and three-month sentence for his conviction of illegally maintaining a tenement for the sale of liquor without the proper license. The Court dismissed the claim, concluding that the Eighth Amendment did not apply to the states, and suggested that the sentence was not in any way excessive. *Id.* at 479-80.

In *Wilkerson v. Utah*, 99 U.S. 130, 131 (1879), the defendant argued that execution by firing squad should be considered cruel and unusual punishment prohibited by the Eighth Amendment. Although the Court acknowledged that the Eighth Amendment does not allow torture or barbarous forms of punishment, it did not include the firing squad, a common form of execution at the time, within those proscribed modes. *Id.* at 136.

Finally, in *In re Kemmler*, 136 U.S. 436, 446 (1890), the Court again rejected the argument that a specific type of execution, this time electrocution, was prohibited by the

or severe penalties could violate the Eighth Amendment if they were grossly disproportional to the crime.²⁸

In 1910, the Court firmly established this proportionality principle in *Weems v. United States*.²⁹ In *Weems*, the defendant was convicted of falsifying a public document and was sentenced to fifteen years of *cadena temporal*.³⁰ Acknowledging the historical ambiguity of the Eighth Amendment,³¹ the *Weems* Court observed that the Framers understood the potential for legislative abuse regarding the punishment of crime.³² Recognizing this potential for legislative abuse, the Court reasoned that the Framers anticipated a broad³³ and evolving³⁴ interpretation of the Eighth Amendment that allows the Court, while paying great deference to legislative discretion, to undertake its proper role of judicial review.³⁵ Undertaking this role, the Court compared the punishment in *Weems*

Eighth Amendment. While these cases provide a slight example of how an individual may utilize the Eighth Amendment in making a constitutional challenge, such early challenges were far too infrequent to have any substantially probative meaning.

28. *O'Neil*, 144 U.S. at 339-40 (Field, J., dissenting).

29. 217 U.S. 349 (1910). One other case of minimal importance that arose after *O'Neil* and before *Weems* involved a proportionality challenge to a criminal sentence. See Schwartz, *supra* note 18, at 384. In *Howard v. Fleming*, 191 U.S. 126, 135-36 (1903), the Court rejected the defendant's claim that his sentence was too severe. The Court argued that the fact that less severe sentences are available does not necessarily make the given sentence cruel. *Id.*

30. *Weems*, 217 U.S. at 363. A punishment in *cadena temporal*—Latin for temporary chain—subjects the prisoner to imprisonment, shackles at the ankle and wrist, hard and painful labor, and a permanent loss of basic civil liberties, such as marital authority, property ownership, parental authority, and capacity for public office. *Id.* at 366.

31. *Id.* at 369-70.

32. *Id.* at 372-73. The *Weems* Court stated:

[The Framers'] predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. . . . With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power?

Id.

33. *Id.* at 373. The Court argued: "The meaning and vitality of the Constitution have developed against narrow and restrictive construction." *Id.* Nevertheless, the Court inferred that the Eighth Amendment should not be limited to its exact words. *Id.*

34. *Id.* The Court opined that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Id.* Thus, the Court believed that the Eighth Amendment, as part of the "living" Constitution, should evolve in a manner consistent with its social context. *Id.*

35. *Id.* at 378-79. The *Weems* Court concluded:

We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then

with punishments of similar crimes in other jurisdictions,³⁶ and with punishments for more serious crimes in the same jurisdiction.³⁷ Through this comparison, the Court invalidated *Weems's* sentence,³⁸ concluding that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."³⁹

Despite the Supreme Court's acceptance of a proportionality analysis, few Eighth Amendment challenges arose during the next fifty years.⁴⁰ In 1958, however, in *Trop v. Dulles*,⁴¹ the Court reiterated the necessity of proportionality in criminal sentencing. In *Trop*, a plurality concluded that the Eighth Amendment prohibited the denationalization of a soldier who escaped a stockade and did not return for one day.⁴² In so holding, the *Trop* Court emphasized both the importance of proportionality in sentencing and the evolutionary nature of the Eighth Amendment in preserving the "dignity of man."⁴³

the legislative power is brought to the judgment of a power superior to it for the instant.

Id.

36. *Id.* at 380.

37. *Id.* at 380-81.

38. *Id.* at 382. Chief Justice Rehnquist, however, has suggested that the holding in *Weems* can be limited strictly to its facts; namely, the unique method of punishment in *cadena temporal*. *Rummel v. Estelle*, 445 U.S. 263, 273-74 (1980). Commenting on the *Weems* holding, then Justice Rehnquist stated that "[the *Weems* Court's] finding of disproportionality cannot be wrenched from the extreme facts of that case. . . . Thus, we do not believe that *Weems* can be applied without regard to its peculiar facts." *Id.*; see also Schwartz, *supra* note 18, at 385 ("It would be unfair to characterize *Weems* as merely holding that the sentence selected by the Philippine Court was disproportionate as to length.").

39. *Weems*, 217 U.S. at 367.

40. Commentators have suggested several possible reasons for this inactivity. See Thomas E. Baker & Fletcher N. Baldwin Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent"*, 27 ARIZ. L. REV. 25, 31 n.38 (1985) (offering an extensive list of probable reasons for the Eighth Amendment hiatus including: (1) the fact that the Eighth Amendment was not yet applicable to the states through the Fourteenth Amendment; (2) confusion over the *Weems* decision; and (3) concerns of federalism); Schwartz, *supra* note 18, at 386 (arguing that few cases arose post-*Weems* due to the confusion over its holding and the uniqueness of its facts); Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1119-20 (1979) (suggesting that the scarcity of Eighth Amendment cases during this time period was due to the fact that few challenges involving sentence length rise to the level of a constitutional challenge).

41. 356 U.S. 86 (1958) (plurality opinion).

42. *Id.* at 101 (plurality opinion).

43. *Id.* at 100-01 (plurality opinion). In *Trop*, Chief Justice Warren reasoned:

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within limits of civilized standards.

Four years later, in *Robinson v. California*,⁴⁴ the Court again interpreted the Eighth Amendment's proportionality principle to hold that a state cannot punish the "status" of narcotic addiction.⁴⁵ Writing for the majority, Justice Stewart stressed the limits federalism imposes on the Court in the sentencing area, but nevertheless concluded that the legislature had overstepped its constitutional bounds when it passed a law that punished narcotic addiction.⁴⁶ Thus, *Robinson* espoused both the role of the Court in reviewing legislative sentencing guidelines and the importance of the evolving nature of the Eighth Amendment.

Moreover, throughout the 1960s and 1970s, the Court both employed and significantly reinforced the proportionality doctrine in several of its capital punishment cases.⁴⁷ For example, Justice Goldberg, in dissent from the denial of certiorari in *Rudolph v. Arizona*,⁴⁸ made certain assumptions regarding criminal sentencing that expressly incorporated the proportionality principle.⁴⁹ These assumptions soon developed into considerations in most capital

Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Id.

44. 370 U.S. 660 (1962). In *Robinson*, the Court recognized that the Eighth Amendment was applicable to the states through the Fourteenth Amendment. *Id.* at 666-67.

45. The Court compared narcotic addiction to mental illness, leprosy, and venereal disease. *Id.* at 666. To be punished for such a "condition," the Court reasoned, "would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. . . . Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 666-67 (citation omitted).

46. *Id.* at 667.

47. Although a general debate about the death penalty far exceeds the scope of this Note, a brief mention of the Court's use of the proportionality argument within these cases will be instructive.

48. *Rudolph v. State*, 152 So. 2d 662 (Ala.), *cert. denied*, 375 U.S. 889 (1963). In *Rudolph*, the Supreme Court denied certiorari to a defendant who had been sentenced to death for rape. Justice Goldberg, joined by Justice Brennan and Justice Douglas, dissented from the denial of certiorari. 375 U.S. at 889.

49. *Rudolph v. State*, 152 So. 2d 662 (Ala.), *cert. denied*, 375 U.S. 889, 889-91 (1963) (Goldberg, J., dissenting from denial of certiorari).

cases including: (1) the evolving standards of decency test;⁵⁰ (2) the necessity of proportionality in sentencing;⁵¹ and (3) the least restrictive means approach.⁵² Thus, the proportionality analysis previously employed in non-capital cases such as *Weems* and *Trop* appeared to be consistent with the proportionality analysis used in capital punishment cases.

Moreover, the proportionality doctrine, as outlined by Justice Goldberg's three-pronged inquiry in *Rudolph*, has remained a central theme throughout the Court's death penalty cases.⁵³ Similarly, the importance of the judiciary as a check on legislative power, along with the Court's evolving interpretation of "cruel and unusual punishment," are both integral components of Eighth Amendment jurisprudence today.⁵⁴ The scope of the Court's death penalty decisions is nevertheless debatable. Some argue that the uniqueness and irrevocability of capital punishment limits the ap-

50. *Id.* at 889-90 (Goldberg, J., dissenting from denial of certiorari). Justice Goldberg posed the question:

In light of the trend in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate "evolving standards of decency that mark the progress of [our] maturing society" or "standards of decency more or less universally accepted"?

Id. (Goldberg, J., dissenting from denial of certiorari) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) and *Weems v. United States*, 217 U.S. 349, 373 (1910)).

51. *Id.* at 891 (Goldberg, J., dissenting from denial of certiorari). Justice Goldberg asked: "Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against 'punishments which by their excessive . . . severity are greatly disproportionate to the offenses charged?'" *Id.* (Goldberg, J., dissenting from denial of certiorari) (citing *Weems*, 217 U.S. at 371 (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting))).

52. *Id.* (Goldberg, J., dissenting from denial of certiorari). Finally, Justice Goldberg queried: "Can the permissible aims of punishment (e.g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (e.g., by life imprisonment); if so, does the imposition of the death penalty for rape constitute 'unnecessary cruelty?'" *Id.* (Goldberg, J., dissenting from denial of certiorari) (footnotes omitted).

53. See *Enmund v. Florida*, 458 U.S. 782 (1982) (holding the death penalty excessive for felony murder when the defendant did not take, or intend to take, a life); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (declaring that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (concluding that the Eighth Amendment must be interpreted in a "flexible and dynamic manner" that forbids excessive punishments); *Woodson v. North Carolina*, 428 U.S. 280, 288-90 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (stating that the Eighth Amendment "stands to assure that the State's power to punish is 'exercised within the limits of civilized standards'" (quoting *Trop v. Dulles*, 356 U.S. 96, 100 (1958) (plurality opinion))); see also *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *Furman v. Georgia*, 408 U.S. 238, 325 (1972) (Marshall, J., concurring).

54. See *Baker & Baldwin*, *supra* note 40, at 32.

plicability of the Court's reasoning in past capital cases solely to future capital cases, thereby excluding its application to non-capital issues.⁵⁵ As we shall see, this issue is of vital importance to the Court's reasoning in *Harmelin*.

C. *The Present View*

In the early 1980s, the Supreme Court decided three proportionality cases that specifically addressed the effect of the Eighth Amendment on legislative determinations of criminal punishments in non-capital cases.⁵⁶ The narrowness of these decisions, however, suggests that the Court was not yet comfortable with its application of the proportionality doctrine to non-capital sentencing cases.

1. *Rummel v. Estelle*

In 1980, in *Rummel v. Estelle*,⁵⁷ the Supreme Court upheld the application of a Texas recidivist statute⁵⁸ that imposed a prescribed sentence on a defendant convicted of his third felony.⁵⁹ Despite his relatively minor criminal activity,⁶⁰ Rummel received the prescribed mandatory life sentence with the possibility of parole.⁶¹

Before analyzing the relevant facts, Justice Rehnquist made several key assumptions. First, he argued that there is a clear distinction between capital and non-capital cases which severely limits the extension of any proportionality analysis used in capital cases to

55. In *Rummel v. Estelle*, Justice Rehnquist refused to apply the proportionality principle to a non-capital case based largely on Justices Stewart's differentiation of the death penalty from all other forms of punishment. 445 U.S. 263, 272 (1980). Justice Rehnquist quoted from Justice Stewart's concurring opinion in the capital case of *Furman v. Georgia*:

"The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

Id. (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)); see also *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (discussing the qualitative difference between death and all other penalties).

56. *Rummel v. Estelle*, 445 U.S. 263 (1980); *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam); *Solem v. Helm*, 463 U.S. 277 (1983).

57. 445 U.S. 263 (1980) (five-to-four decision).

58. A recidivist statute specifies a stricter sentence for an offender who has previous convictions for similar crimes.

59. *Rummel*, 445 U.S. at 285.

60. Rummel's three felonies consisted of fraudulent use of a credit card, passing a forged check, and obtaining funds by false pretenses. *Id.* at 265-66. Rummel gained a total of \$230 from these three offenses. *Id.*

61. *Id.* at 266-67.

non-capital cases.⁶² Rehnquist's distinction was based primarily on the uniqueness of death as a criminal sanction.⁶³ Second, Justice Rehnquist limited the *Weems* reasoning to its facts, concluding that the *Weems* case was decided not on proportionality principles, but rather on the unique form of punishment—*cadena temporal*—that was at issue in that case.⁶⁴

Finally, Justice Rehnquist emphasized the judicial hazards of invalidating a legislatively-determined criminal sentence.⁶⁵ He maintained that the "objective factors" delineated in *Weems*⁶⁶ were nothing but the subjective views of the judiciary and, once the judiciary traverses the clear distinction between capital and non-capital sentences, it cannot objectively review legislatively-mandated sentences.⁶⁷ According to Justice Rehnquist, therefore, a criminal sentence for a term of years cannot be invalidated by the Court on any Eighth Amendment grounds, much less on a claim of proportionality.⁶⁸

In his dissenting opinion, Justice Powell⁶⁹ began by attacking the distinction made by Justice Rehnquist between capital and non-capital cases, finding no evidence that such a dichotomy was justi-

62. *Id.* at 271-72; *see supra* note 55.

63. *Rummel*, 445 U.S. at 271-72.

64. *Id.* at 273-74; *see supra* note 38.

65. *Rummel*, 445 U.S. at 274. In *Rummel*, Justice Rehnquist stated:

Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, 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.

Id.

66. *Id.* at 275; *see supra* text accompanying notes 36-37.

67. *Rummel*, 445 U.S. at 281-82. Specifically, Justice Rehnquist questioned the utility of an inter-jurisdictional analysis, given our structure of federalism. Citing Justice Holmes's famous dissent in *Lochner v. New York*, which states that the Constitution "is made for people of fundamentally differing views," 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), Justice Rehnquist reiterated this notion, determining that "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282.

68. *Rummel*, 445 U.S. at 274-76. Strangely enough, Justice Rehnquist acknowledged that in an "extreme example" such as a life sentence for an overtime parking violation, the Court could invalidate the sentence on Eighth Amendment grounds. *Id.* at 274 n.11. As Justice Scalia recognized in *Harmelin*, this footnote has been the source of much debate since *Rummel* was decided. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2685 (1991).

69. Justice Powell was joined in dissent by Justices Brennan, Marshall, and Stevens. *Rummel*, 445 U.S. at 285.

fied.⁷⁰ Next, Justice Powell reiterated the usefulness of analyzing the proportionality of a sentence by reviewing certain objective factors.⁷¹ Finally, he dismissed the majority's assertions relating to federalism, arguing that it is the affirmative obligation of the Court to review such matters.⁷²

2. *Hutto v. Davis*

Just two years after *Rummel*, the Court again reviewed an Eighth Amendment challenge regarding the proportionality doctrine in a non-capital case. In *Hutto v. Davis*,⁷³ the Court, per curiam, reversed the court of appeals decision granting habeas corpus relief to a Virginia prisoner sentenced to forty years imprisonment, along with a \$20,000 fine, for possession with intent to distribute less than nine ounces of marijuana.⁷⁴ In reaching its conclusion, the *Hutto* Court essentially reiterated the ideas of *Rummel*⁷⁵ that: (1) intrinsic differences between capital and non-capital sentences prohibit application of the proportionality principle to non-capital cases;⁷⁶ (2) criminal sentencing is primarily the task of the legislature, and therefore, bars judicial review except in those exceedingly rare instances when such review is constitutionally necessary;⁷⁷ and (3) courts cannot properly differentiate between varying sentences for terms of years without imposing the

70. *Id.* at 292-93 (Powell, J., dissenting) ("Nothing in the *Coker* analysis suggests that principles of disproportionality are applicable only to capital cases.").

71. *Id.* at 295 (Powell, J., dissenting). Justice Powell applied the factors developed in *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion), and in *Weems v. United States*, 217 U.S. 349 (1910). *Rummel*, 445 U.S. at 295 (Powell, J., dissenting). These factors included looking at the nature of the offense, the sentences for similar crimes in other jurisdictions, and the sentences imposed on other criminals in the same jurisdiction. *Id.* (Powell, J., dissenting).

72. *Rummel*, 445 U.S. at 303 (Powell, J., dissenting). Justice Powell observed: [E]ven as the Constitution recognizes a sphere of state activity free from federal interference, it explicitly compels the States to follow certain constitutional commands. When we apply the Cruel and Unusual Punishments Clause against the States, we merely enforce an obligation that the Constitution has created.

Id. (Powell, J., dissenting).

73. 454 U.S. 370 (1982).

74. *Id.* at 371-72.

75. In dissent, Justice Brennan, joined by Justices Marshall and Stevens, argued that the *Hutto* Court actually was extending *Rummel* to discredit *any* proportionality analysis in a non-capital case. *Id.* at 382-83 (Brennan, J., dissenting). Such a construction, Justice Brennan argued, contradicted *Rummel*, which acknowledged a proportionality principle in non-capital cases, albeit a minimal one. *Id.* at 383 (Brennan, J., dissenting).

76. *Id.* at 373.

77. *Id.* at 373-74.

subjective views of the reviewing court.⁷⁸ Accordingly, the *Hutto* decision evidenced the Court's increasing solidarity regarding the application of proportionality to non-capital cases.

3. *Solem v. Helm*

The year after *Hutto*, however, in another closely decided decision, the Court shifted course in its application and construction of proportionality and the Eighth Amendment. In *Solem v. Helm*,⁷⁹ the Court held that a sentence of life imprisonment without the possibility of parole, imposed on a defendant convicted of passing a delinquent check for \$100 and who had six prior convictions for "non-violent" felonies,⁸⁰ was significantly disproportionate to his crime and, therefore, prohibited by the Eighth Amendment.⁸¹

Justice Powell,⁸² writing for the majority, began his analysis by tracing the proportionality principle back to the English concept of justice.⁸³ Next, Justice Powell pointed to the Supreme Court precedent establishing a principle of proportionality, beginning with *Weems*⁸⁴ and proceeding to the then-recent capital punishment cases of *Coker v. Georgia* and *Gregg v. Georgia*.⁸⁵ Dispelling a central premise of both *Rummel* and *Hutto*, Justice Powell argued that there is no historical justification for distinguishing between capital and non-capital cases regarding the proportionality principle.⁸⁶ Powell reasoned that the Court previously established that

78. *Id.* at 373.

79. 463 U.S. 277 (1983) (five-to-four decision).

80. *Id.* at 279-82. These "non-violent" felonies included three convictions for third degree burglary, and convictions for grand larceny, driving while intoxicated, and obtaining money under false pretenses. *Id.* at 279-80.

81. *Id.* at 303.

82. As noted above, Justice Powell wrote the dissenting opinion in *Rummel*. See *supra* notes 69-72 and accompanying text. Powell's majority opinion in *Solem* incorporates basically the same arguments as his *Rummel* dissent.

83. *Solem*, 463 U.S. at 284-86. Justice Powell traced this concept from the Magna Carta to the English Bill of Rights, concluding that, "When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality." *Id.* at 285-86 (footnote omitted).

84. *Weems v. United States*, 217 U.S. 349 (1910), see *supra* notes 29-39 and accompanying text.

85. *Solem*, 463 U.S. at 287-88; see *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153 (1976); see also *infra* notes 173-84 and accompanying text.

86. *Solem*, 463 U.S. at 288-89. Justice Powell observed that there are Eighth Amendment limitations on bails and fines, and similar limitations on capital sentences. *Id.* at 289. Thus, he argued:

It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical sup-

the Eighth Amendment's proportionality component applies to both minimum sentences (such as excessive bails) and maximum sentences (such as capital punishment), so it should apply to the intermediate term of years sentences as well.⁸⁷ Moreover, Justice Powell noted that in its capital cases, the Court never had distinguished away the application of the proportionality principle to non-capital cases.⁸⁸ Therefore, he concluded that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted."⁸⁹

In responding to the dissent's charge that his opinion "blithely discards any concept of *stare decisis*,"⁹⁰ Justice Powell agreed with the *Rummel* Court that the courts must pay extreme deference to legislative discretion, but disagreed that a criminal sentence is "*per se* constitutional."⁹¹ Instead, Powell asserted that judges can objectively determine when imprisonment for a term of years is unconstitutionally excessive.⁹² Powell argued that this objective judicial determination can be achieved by applying a three-part test that examines: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for commission of similar crimes in other jurisdictions.⁹³ Furthermore, Justice Powell dismissed the dissent's claim that these factors were meritless by noting the several instances in criminal law and sentencing in which distinctions regarding the severity of a crime are both defined and given priorities.⁹⁴

port for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applies to prison terms. . . . When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment.

Id.

87. *Id.* at 289.

88. *Id.* at 289-90.

89. *Id.* at 290.

90. *Id.* at 304 (Burger, C.J., dissenting). In an angry attack on the majority opinion, Chief Justice Burger, joined in dissent by Justices White, Rehnquist, and O'Connor, declared that the facts of *Solem* were controlled by the reasoning and conclusions of *Rummel* and *Hutto*. He argued that both of these cases expressly dismissed exactly the same reasoning used by the Court in *Solem*. *Id.* at 306-11 (Burger, C.J., dissenting).

91. *Id.* at 290.

92. *Id.* at 290-94.

93. *Id.* at 290-92. These factors are virtually identical to those discussed by Justice McKenna in *Weems*. See *supra* text accompanying notes 36-37.

94. *Solem*, 463 U.S. at 292-94. Justice Powell examined what he considered obvious examples of objective determinations regarding the seriousness of criminal offenses. He noted several examples including, but not limited to considerations that: (1) violent crimes are usually considered more serious than less violent or non-violent crimes; (2) the absolute magnitude of the crime, i.e., if a person steals a million dollars it is generally

Finally, Justice Powell conceded that although it will be difficult to distinguish between those sentences that violate the Eighth Amendment and those that do not,⁹⁵ this determination is both a duty of the Court and a task that the Court has already accepted in other constitutional areas.⁹⁶ Consequently, in *Solem v. Helm*, the proportionality principle, first espoused by a majority in *Weems*, was justified once again by a majority of the Supreme Court. It was against this backdrop of wavering Court acceptance of the proportionality principle in non-capital cases that the Court decided *Harmelin v. Michigan*.

III. HARMELIN V. MICHIGAN

A. The Facts

After a bench trial, Ronald Harmelin was convicted of possessing more than 650 grams of a mixture containing cocaine⁹⁷ and sentenced to a mandatory term of life imprisonment without possibility of parole.⁹⁸ Originally, the central issue for review involved the constitutionality of the police stop of Harmelin, which pre-

considered more serious than if a person steals five dollars; (3) completed offenses are more serious than attempts; (4) a principal committing an offense is usually treated more seriously than an accessory; and (5) intentional conduct is more serious than negligent conduct. *Id.* He concluded that it is reasonable to assume that judges will be able to differentiate between varying sentences involving terms of years for Eighth Amendment purposes. *Id.* at 294.

95. *Id.* at 289-90. This simply will result in few successful challenges to sentencing guidelines based on Eighth Amendment arguments. *Id.*

96. *Id.* at 294-95. Justice Powell demonstrated that the Court often has encountered such line drawing successfully in the gray areas of constitutional jurisprudence by noting the problems in Sixth Amendment law involving the right to a speedy trial and the right to a jury. *Id.* While there are few obvious time periods that make the delay before a trial per se unconstitutional, the Court, through a case-by-case application of certain objective factors, has been able to distinguish between instances when the time lapse was constitutionally permissible and other times when it was not. *Id.* (discussing *Barker v. Wingo*, 407 U.S. 514 (1972) (unanimous opinion)). Similarly, in trying to determine when a defendant has a right to a jury trial, the Court has looked to the consensus among the state jurisdictions to come up with a standard. *Id.* at 295 (discussing *Baldwin v. New York*, 399 U.S. 66 (1970)).

97. Harmelin was also convicted of possession of a firearm during the commission of a felony and given a mandatory two year term of imprisonment. *People v. Harmelin*, 440 N.W.2d 75, 76-77 (Mich. Ct. App. 1989). This charge, however, is irrelevant to the Eighth Amendment discussion.

98. *Id.* Harmelin was sentenced to a mandatory sentence of life in prison for possession of 650 grams or more of "any mixture containing [a schedule 2] controlled substance." MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West Supp. 1991). Section 333.7214(a)(iv) defines cocaine as a schedule 2 controlled substance; § 791.234(4) provides eligibility for parole after 10 years in prison, except for those convicted of either first degree murder or a "major controlled substance offense;" and § 791.233(1)(b) defines "major controlled substance offense" as a violation of § 333.7403.

ceded the discovery of the cocaine.⁹⁹ After the Michigan Court of Appeals vacated the judgment concerning this issue, it reconsidered the facts and reaffirmed Harmelin's earlier conviction.¹⁰⁰ The court of appeals summarily discarded Harmelin's claim that his sentence was significantly disproportionate to the crime and violative of the Eighth Amendment.¹⁰¹ The United States Supreme Court granted certiorari specifically to review Harmelin's Eighth Amendment claims.¹⁰²

B. *The Supreme Court Opinion*

In a five-to-four decision,¹⁰³ the Court affirmed the holding of the Michigan Court of Appeals, declaring that the imposition of a mandatory life sentence without any consideration of "mitigating factors" does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.¹⁰⁴ The majority further held that although Harmelin's claim found some support in the "individualized capital sentencing" doctrine of the Court's death penalty cases, that doctrine may not be extended outside of the capital case context because of the qualitative difference between death and all other penalties.¹⁰⁵ Justice Scalia, joined only by Chief Justice Rehnquist, went even further, concluding that because the Eighth Amendment contains no proportionality guarantee whatsoever, Harmelin's sentence could not be considered unconstitutionally disproportionate.¹⁰⁶

99. *Harmelin*, 440 N.W.2d at 76. More specifically, the question on appeal was whether the police had sufficient cause to ask Harmelin to step out of his car, as dictated by *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), and pursuant to the Fourth Amendment. *Harmelin*, 440 N.W.2d at 76.

100. *Harmelin*, 440 N.W.2d at 76. The Michigan Supreme Court, however, chose not to hear the case. *People v. Harmelin*, 440 N.W.2d 75 (Mich. Ct. App. 1989), *appeal denied*, 434 Mich. 863 (1990).

101. *Harmelin*, 440 N.W.2d at 80. Strangely enough, the court of appeals did not even entertain the merits of Harmelin's Eighth Amendment claim. Instead, the court simply stated that it "disagree[d]" that the sentence constituted cruel and unusual punishment. *Id.*

102. *Harmelin v. Michigan*, 110 S. Ct. 2559 (1990).

103. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991). As noted earlier, in a scattered five-part opinion to affirm the court of appeals, Justice Scalia was joined *only* by Chief Justice Rehnquist in parts I-IV, *id.* at 2684, and by Justices Kennedy, O'Connor, and Souter and Chief Justice Rehnquist in part V, *id.* Justice Kennedy, joined by Justices O'Connor and Souter, filed a concurring opinion. *Id.* at 2702. Justice White filed a dissenting opinion in which Justice Blackmun and Justice Stevens joined. *Id.* at 2709. Justice Marshall and Justice Stevens also filed dissenting opinions, with Justice Blackmun joining Justice Stevens. *Id.* at 2719.

104. *Id.* at 2701-02.

105. *Id.*

106. *Id.* at 2701.

1. The Majority Opinion

Writing for a majority of five justices of the Court, Justice Scalia concluded that the Eighth Amendment does not require the application of a direct proportionality scheme in non-capital criminal sentencing cases.¹⁰⁷ Disposing of Harmelin's claim that his sentence was "cruel and unusual" because it imposed a life sentence without parole absent any consideration of mitigating factors, Justice Scalia reemphasized that the Eighth Amendment provides no historical support for such a claim.¹⁰⁸ In addition, Scalia noted that a sentence does not become cruel and unusual simply because it is mandatorily imposed.¹⁰⁹

Potentially more troublesome to the Court was Harmelin's argument that his sentence should require an individual inquiry into mitigating factors.¹¹⁰ Justice Scalia acknowledged the merits of this suggestion, but concluded that the validity of individualized sentencing is limited to capital punishment cases.¹¹¹ Reiterating an argument central to *Rummel*, *Hutto*, and the dissent in *Solem*, Justice Scalia stated that the proportionality principle of capital cases cannot be extended to non-capital cases because of the inherent difference between death and all other forms of punishment.¹¹² According to Scalia, Harmelin's sentence, which is subject to retroactive legislative reduction and executive clemency, is fundamentally different from a sentence of death.¹¹³ Therefore, mandatory life sentences without the possibility of parole need not invoke a mitigating factor analysis in order to be constitutionally valid.¹¹⁴

107. *Id.* at 2701-02.

108. *Id.* at 2701. Justice Scalia stated that Harmelin's "claim has no support in the text and history of the Eighth Amendment. Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Id.*

109. *Id.*

110. *Id.* Harmelin argued that a mandatory sentence of life imprisonment imposed on him without any consideration of his individual circumstances, i.e., that he was a first-time offender, was cruel and unusual. *Id.* He argued that this idea, known in capital cases as the individualized capital sentencing doctrine, should be applied to his situation. *Id.* at 2701-02.

111. *Id.* at 2701-02.

112. Justice Scalia stated: "Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative differences between death and all other penalties." *Id.* at 2702 (citing *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)).

113. *Id.*

114. *Id.*

2. Justice Scalia's Opinion

In the remainder of his opinion, in which only Chief Justice Rehnquist joined, Justice Scalia undertook an exhaustive review of the origins of the Eighth Amendment.¹¹⁵ Within this framework, he attempted to refute the *Solem* Court's premise that the Framers of the Eighth Amendment incorporated a principle of proportionality within the text.¹¹⁶ Rather, Scalia found that the Eighth Amendment was intended to prohibit certain *modes* of punishment—not lengths of punishment.¹¹⁷ Consequently, sentencing length is a legislative decision that cannot be reliably questioned by judges.¹¹⁸ Justice Scalia concluded by reiterating the fundamental difference between capital punishment and imprisonment.¹¹⁹ This difference, he argued, precludes a useful comparison of capital and

115. *Id.* at 2686-96. Drawing from many of the same historical sources as the *Solem* Court, Justice Scalia refused to accept the idea that the Framers of the Eighth Amendment adopted any idea of proportionality regarding punishments, but insisted rather that they were only prohibiting arbitrary and illegal punishments. *Id.* at 2686-91. After analyzing the textual origins of the Eighth Amendment, Justice Scalia concluded that a "punishment is not considered objectionable because it is disproportionate, but because it is 'out of [the Judges'] Power,' 'contrary to Law and ancient practice,' 'without Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or 'imposed by Pretence to a discretionary Power.'" *Id.* at 2690 (footnote omitted). Justice Scalia then reviewed early interpretations of the Eighth Amendment by both state legislatures and state courts, finding the general consensus to be that the cruel and unusual provision of the Eighth Amendment "[does] not proscribe disproportionality but only certain modes of punishment." *Id.* at 2695.

116. After recognizing the familiarity the original Drafters of the 1689 English Declaration of Rights had with the proportionality principle, Justice Scalia concluded that the Framers

did not explicitly prohibit "disproportionate" or "excessive" punishments. Instead they prohibited punishments that were "cruell and unusuall." The *Solem* court simply assumed, with no analysis, that the one included the other. . . . As a textual matter, of course, it does not: a disproportionate punishment can perhaps always be considered "cruel," but it will not always be (as the text requires) "unusual."

Id. at 2687 (citations omitted). Justice Scalia went on to refute the "objective factors" first introduced in *Weems* and later used in *Solem*, arguing that these factors were correctly dismissed in *Rummel*. *Harmelin*, 111 S. Ct. at 2697-99. Therefore, he concluded, the *Solem* decision was wrong and should be overruled. *Id.* at 2686.

117. *Id.* at 2696 ("While there are relatively clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are 'cruel and unusual,' *proportionality* does not lend itself to such analysis.").

118. This is essentially a return to the ideas expressed by Justice Rehnquist in *Rummel*. See *supra* notes 62-68 and accompanying text. In *Harmelin*, Justice Scalia argued that we must allow for variety in criminal sentencing to satisfy "different social attitudes, different criminal epidemics, different public fears, and different theories of penology" inherent in the federalist structure of our system of justice. *Harmelin*, 111 S. Ct. at 2696.

119. *Harmelin*, 111 S. Ct. at 2699-2702.

non-capital cases.¹²⁰ In sum, Justice Scalia, joined only by Chief Justice Rehnquist, found no proportionality principle in the history or precedent of the Eighth Amendment that could invalidate the length of a prison sentence for a term of years.

3. Justice Kennedy's Concurring Opinion

Justice Kennedy began his analysis of *Harmelin* by refusing to side with either Justice Scalia's or the dissent's interpretation of the original intent of the Eighth Amendment.¹²¹ Analyzing *Harmelin* based strictly on case law, Justice Kennedy found that the Eighth Amendment does contain a narrow proportionality principle in non-capital cases, but that the facts in *Harmelin* did not fall within this limited doctrine.¹²²

In a very thorough analysis, Justice Kennedy reasoned that the scarcity of challenges under the Eighth Amendment and the peculiar nature of those challenges left the analytical guidelines of Eighth Amendment jurisprudence muddled, yet discernible.¹²³ Drawing from these precedential guidelines, Kennedy noted several general principles which dictated that Harmelin's sentence be affirmed: (1) sentences for terms of years, as a general matter, are for the legislature; thus substantial deference should be given the legislature regarding such matters;¹²⁴ (2) the Eighth Amendment does not require the adoption of one specific penological theory;¹²⁵ (3) the federal structure results in a variety of sentencing guidelines;¹²⁶ and (4) any proportionality analysis should utilize strictly objective criteria.¹²⁷ Based on these principles, Justice Kennedy surmised that "the Eighth Amendment does not require strict pro-

120. *Id.* at 2702.

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

122. *Id.* at 2709 (Kennedy, J., concurring).

123. *Id.* at 2703 (Kennedy, J., concurring) ("Though our decisions recognize a proportionality principle, its precise contours are unclear.")

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

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

126. *Id.* (Kennedy, J., concurring). Justice Kennedy stated that "the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate." *Id.* (Kennedy, J., concurring) (citing *Rummel v. Estelle*, 445 U.S. 263, 281 (1980)).

127. *Id.* at 2704-05 (Kennedy, J., concurring). Justice Kennedy noted that the most significant objective factor that a court should review is the type of punishment imposed. *Id.* at 2704 (Kennedy, J., concurring). Thus, he concluded that the line separating capital and non-capital cases substantially decreases the likelihood that a sentence for a term of years will be found constitutionally invalid, since there is no clear cut distinction between such sentences whereas there is such a distinction between death and all other sentences. *Id.* at 2704-05 (Kennedy, J., concurring).

portionality between crime and sentence. . . . But rather it forbids only extreme sentences that are 'grossly disproportionate' to the crime."¹²⁸

Applying this analytical framework to the case, Kennedy argued that although Harmelin's sentence was the second most severe penalty permitted by law, the gravity of his offense was also severe.¹²⁹ Such severity, Justice Kennedy reasoned, eliminates the necessity of applying the test developed in *Solem v. Helm* in its entirety.¹³⁰ Rather, Kennedy argued that *Solem* simply suggested objective factors that a court *may* look to if the crime is questionably severe.¹³¹ In sum, Justice Kennedy recognized that the Eighth Amendment contains a narrow proportionality principle in non-capital cases, but he did not find that this proportionality had been constitutionally violated by the Michigan legislature regarding Harmelin's life sentence.¹³²

4. The Dissent¹³³

Responding to the substantially different approaches taken by Justice Scalia and by Justice Kennedy, Justice White rejected both Justice Scalia's complete abandonment of the proportionality principle and Justice Kennedy's extremely limited interpretation of the Eighth Amendment regarding its application to non-capital criminal sentencing.

128. *Id.* at 2705 (Kennedy, J., concurring).

129. *Id.* (Kennedy, J., concurring). Justice Kennedy compared the crime committed by Harmelin to that committed in *Solem*. *Id.* at 2705-06 (Kennedy, J., concurring). Relying heavily on a variety of secondary sources, he attempted to show the deleterious effects that Harmelin's crime, possession of cocaine, has on society. *Id.* (Kennedy, J., concurring). Justice Kennedy concluded by stating that "[t]he severity of petitioner's crime brings his sentence within the constitutional boundaries established by our prior decisions." *Id.* at 2706 (Kennedy, J., concurring).

130. *Id.* at 2707 (Kennedy, J., concurring). Justice Kennedy stated:

A better reading of our cases [than the reading *Solem* employs] leads to the conclusion that intra- and inter-jurisdictional analyses [prongs two and three of *Solem*] 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 gross disproportionality.

Id. (Kennedy, J., concurring).

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

132. *Id.* at 2709 (Kennedy, J., concurring). Justice Kennedy also responded to Harmelin's claim that his mandatory sentence was cruel and unusual. *Id.* at 2707-09 (Kennedy, J., concurring). Kennedy's position, however, is basically the same as Justice Scalia's majority opinion. See *supra* notes 107-14 and accompanying text.

133. Justice White authored the most significant dissenting opinion, joined by Justice Blackmun and Justice Stevens. *Harmelin*, 111 S. Ct. at 2709; see *supra* note 103.

a. Response to Justice Scalia

Taking a historical approach similar to that of Justice Scalia, Justice White¹³⁴ began his discussion by examining some of the sources that Justice Scalia used.¹³⁵ Unlike Justice Scalia, however, Justice White found the idea of proportionality firmly entrenched in both the text of the Constitution and in the tradition of the Framers and their counterparts.¹³⁶ Taking an approach analogous to that of Justice Kennedy's concurrence, Justice White enumerated the long line of Supreme Court cases which supports the idea that punishment should be proportional to the crime.¹³⁷ Finding no evidence to differentiate the proportionality aspect of capital cases from non-capital cases,¹³⁸ Justice White reiterated both the importance of the principle of proportional sentencing and the limits of a purely historical argument.¹³⁹ To meet this evolving consti-

134. Interestingly, Justice White was a member of the majority in *Rummel* but the dissent in *Solem*, intimating that the *Rummel* decision probably maintained the proportionality principle more than commentators have suggested.

135. *Harmelin*, 111 S. Ct. at 2709-10 (White, J., dissenting).

136. *Id.* (White, J., dissenting). Justice White found little merit in Justice Scalia's presumption that the Framers would have stated explicitly that punishments should be proportional if they had wanted that result. Using this reasoning, Justice White noted that one could easily come to the opposite conclusion: the Framers, who Justice Scalia acknowledged were familiar with the proportionality principle, could have been more clear if they had wished to exclude it. *Id.* at 2710 (White, J., dissenting).

137. *Id.* at 2710-12 (White, J., dissenting). Beginning with *Weems v. United States*, 217 U.S. 349 (1910), discussed *supra* notes 29-39 and accompanying text, Justice White traced the Eighth Amendment concept of proportionality through both the non-capital cases such as *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion), and *Robinson v. California*, 370 U.S. 660 (1962), and the capital cases including *Gregg v. Georgia*, 428 U.S. 153 (1976), *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion), and *Enmund v. Florida*, 458 U.S. 782 (1982). This resulted in his determination that "there can be no doubt that prior decisions of this Court have construed [the words cruel and unusual] to include a proportionality principle." *Harmelin*, 111 S. Ct. at 2710 (White, J., dissenting); see *supra* notes 41-43 and accompanying text (discussing *Trop*) and notes 44-46 and accompanying text (discussing *Robinson*).

Furthermore, Justice White pointed out that "[i]f Justice Scalia really means what he says—the Eighth Amendment contains no proportionality guarantee," then all of this precedent is constitutionally suspect." *Harmelin*, 111 S. Ct. at 2711 (White, J., dissenting).

138. *Harmelin*, 111 S. Ct. at 2712 (White, J., dissenting). Justice White argued:

[Justice Scalia's position] ignores the generality of the Court's several pronouncements about the Eighth Amendment's proportionality component. . . . Under [his] view 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 is appropriate in some cases and not in others. The same should be true of punishment by imprisonment.

Id. (White, J., dissenting).

139. *Id.* (White, J., dissenting). Justice White restated the guiding principles of earlier cases such as *Trop* and *Weems* regarding the evolutionary nature of constitutional law

tutional standard, Justice White restated the validity of the *Solem* test, which, he opined, the majority had abandoned.¹⁴⁰ Applying the *Solem* test, Justice White argued that the *Harmelin* case was one of those exceedingly rare cases in which the sentence, not the standard of analysis, should be reversed.¹⁴¹ In addition, Justice White declared that the majority clearly had eschewed its proper role of judicial review.¹⁴² According to White, the difficulty of the task for the Court should not dictate constitutional parameters.

Finally, Justice White challenged Justice Scalia to respond adequately to the problems posed under the Court's reasoning in the extreme case hypothesized in *Rummel*, which involved a life prison term for a parking violation.¹⁴³ Justice Scalia's inability to answer this inquiry, Justice White concluded, illustrated the inherent weakness of his position.¹⁴⁴

b. Response to Justice Kennedy

Justice Kennedy's modification of the *Solem* test, in Justice White's opinion, missed the point and ignored the usefulness of the *Solem* approach.¹⁴⁵ Justice White argued that Justice Kennedy's single-prong analysis removed the objective legitimacy of the *Solem* test, accomplishing exactly the end that the *Solem* Court sought to avoid; namely, the injection of judges' subjective views into the sentencing analysis.¹⁴⁶ Justice White, therefore, concluded

and, in particular, Eighth Amendment interpretation: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." *Id.* (White, J., dissenting) (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

140. *Id.* at 2712-14 (White, J., dissenting). Justice White evaluated reviewing courts' applications of the *Solem* test, finding only four cases that had reversed lower courts' decisions based on a proportionality analysis. *Id.* at 2713 n.2 (White, J., dissenting). This, he concluded, was evidence that the subjective views of judges are not impermissibly interfering with the role of the legislature in determining criminal sanctions. *Id.* at 2713 (White, J., dissenting). White found that courts are "capable of applying the Eighth Amendment to disproportionate non-capital sentences with a high degree of sensitivity to principles of federalism and state autonomy." *Id.* (White, J., dissenting) (quoting *Rummel v. Estelle*, 445 U.S. 263, 306 (1980) (Powell, J., dissenting)).

141. *Id.* at 2713 (White, J., dissenting).

142. *Id.* (White, J., dissenting) ("[T]he suggestion that a legislatively mandated punishment is necessarily 'legal' is the antithesis of the principle established in *Marbury v. Madison*.").

143. *Id.* at 2714 (White, J., dissenting).

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

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

146. *Id.* at 2714-15 (White, J., dissenting). Justice White reasoned that only by using several different factors, as suggested by *Solem*, would a court truly be able to make an "objective" analysis. *Id.* at 2715 (White, J., dissenting). By limiting the analysis to one

that the *Solem* test continues to be the best analysis and the one that the Court should have applied in *Harmelin*.¹⁴⁷

Applying the *Solem* test, Justice White first balanced the gravity of Harmelin's offense and the harshness of his penalty.¹⁴⁸ He noted that Harmelin's sentence is the most severe punishment available in Michigan.¹⁴⁹ Comparatively, Harmelin's crime, possession of cocaine, is nowhere near the most severe crime in Michigan.¹⁵⁰ Analyzing the magnitude of the crime¹⁵¹ and the culpability of the offender,¹⁵² Justice White noted the lesser mens rea requirement in the statute governing the possession of narcotics as compared to other Michigan statutes with much higher mens rea requirements that impose the same life sentence.¹⁵³ This discrepancy, Justice White concluded, objectively illustrated that Harmelin was treated as though he had been convicted of a more serious crime.¹⁵⁴

Applying the second prong of the *Solem* test, Justice White reiterated that Harmelin's sentence is the harshest available in Michigan.¹⁵⁵ He also observed that substantially more violent and threatening crimes against the person, such as second degree murder, rape, and armed robbery, carry lighter punishments.¹⁵⁶ Finally, applying the inter-jurisdictional prong of the *Solem* test,¹⁵⁷

factor, the gravity of the offense as compared to the harshness of the punishment, a court has very little practical perspective as to the legitimacy of the "fit." *Id.* (White, J., dissenting).

147. *Id.* at 2716 (White, J., dissenting).

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

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

150. *Id.* (White, J., dissenting). Justice White acknowledged that drugs are a serious problem but noted that possession of narcotics, unlike crimes directed at persons or property, usually hurts the criminal who uses the drugs the most. *Id.* (White, J., dissenting). Moreover, he stated that "[t]o justify such a harsh mandatory penalty as that imposed here . . . the offense should be one which will *always* warrant that punishment." *Id.* (White, J., dissenting).

151. *Id.* at 2717 (White, J., dissenting).

152. *Id.* at 2716-17 (White, J., dissenting).

153. *Id.* at 2717 (White, J., dissenting). Justice White noted that the underlying purpose of the statute under which Harmelin was sentenced is to "stem drug traffic." *Id.* at 2716 (White, J., dissenting) (quoting HOUSE LEGISLATIVE ANALYSIS OF MICH. HOUSE BILL OF 1977 (May 17, 1978)). This purpose, he reasoned, is undermined by the existence of a similar statute, § 333.7401(2)(a)(i), which provides the exact same punishment for drug trafficking as the statute under which Harmelin was sentenced. *Id.* (White, J., dissenting). Thus, the crime of possession with intent to distribute is treated exactly the same as simple possession, even though the criminal intent is substantially different. *Id.* at 2717 (White, J., dissenting).

154. *Id.* at 2717-18 (White, J., dissenting).

155. *Id.* at 2718 (White, J., dissenting).

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

157. *See supra* text accompanying note 93.

Justice White found that no other state provided as severe a sentence for possession of cocaine.¹⁵⁸ Consequently, Justice White, in rejecting Justice Kennedy's modification of the *Solem* test, ultimately reached a far different conclusion than Justice Kennedy regarding the facts of *Harmelin*.¹⁵⁹

IV. ANALYSIS

Throughout the Supreme Court's analysis of the Eighth Amendment, it has developed essentially two theories of interpretation.¹⁶⁰ The Court in *Rummel v. Estelle*¹⁶¹ and *Hutto v. Davis*,¹⁶² and the dissent in *Solem v. Helm*,¹⁶³ adopted the rationale that determinations regarding criminal sentencing and punishment are primarily the task of the legislature. Only in the most extreme case will a legislatively-derived punishment be questioned.¹⁶⁴ Fundamental to this perspective is the "bright line" between capital and non-capital cases.¹⁶⁵ This line forbids the extension of the proportionality doc-

158. *Harmelin*, 111 S. Ct. at 2718-19 (White, J., dissenting). Justice White noted that Alabama is the only other state that provides for a mandatory life sentence without the possibility of parole, but only for possession of ten kilograms of cocaine. *Id.* at 2718 (White, J., dissenting). In Alabama, a defendant convicted of possessing 672 grams of cocaine, the amount Harmelin was convicted of possessing, would receive a mandatory minimum sentence of only five years in prison. *Id.* (White, J., dissenting).

159. *Id.* at 2719 (White, J., dissenting). Justice Stevens, joined by Justice Blackmun, also submitted a dissenting opinion, as did Justice Marshall. Neither of these opinions is very illustrative, but both distinguish minor nuances of Justice White's opinion. *Id.* at 2719-20; *see supra* note 103.

160. This section will focus primarily on the Supreme Court's interpretation of the Eighth Amendment. Although Justice Scalia, and to some extent Justice White, relied on a historical interpretation for the basis of their positions, both Justices agree that their respective positions are not dependent on a historical basis. Moreover, the validity of such historical precedent has already been thoroughly undertaken by other commentators. *See, e.g., SOURCES OF OUR LIBERTIES* 222-50 (Richard L. Perry ed., 2d ed. 1972); Grannuci, *supra* note 18; Schwartz, *supra* note 18.

161. 445 U.S. 263 (1980); *see supra* notes 57-68 and accompanying text.

162. 454 U.S. 370 (1982); *see supra* notes 73-78 and accompanying text.

163. 463 U.S. 277, 304 (1983) (Burger, C.J., dissenting); *see supra* note 90.

164. Once again, the hypothetical proposed by Justice Powell in his dissent in *Rummel* provides a good example of such a punishment. In his example, Justice Powell described a statute that provides a mandatory life sentence for overtime parking as offensive "to our sense of justice." *Rummel*, 445 U.S. at 288 (Powell, J., dissenting). In the majority opinion in *Rummel*, Justice Rehnquist acknowledged this example as the only type of scenario where a proportionality principle could come into effect. *Id.* at 274 n.11. In *Harmelin*, however, Chief Justice Rehnquist agreed with Justice Scalia's suggestion that this "fanciful parking example" has led to the improper inference that the Eighth Amendment contains a proportionality principle. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2685 (1991). Thus, Chief Justice Rehnquist has taken a more extreme and more limited view of the Eighth Amendment since *Rummel*.

165. *See supra* text accompanying notes 62-63, 76, 112-13, 119-20.

trine traditionally applied in capital cases, to non-capital cases.¹⁶⁶ Without this extension, however, the persuasiveness of the proportionality principle is significantly diminished.¹⁶⁷ Moreover, details of a particular case are not relevant unless the defendant can meet the high threshold requirement of establishing that, on its face, the sentence was grossly disproportionate to the crime.¹⁶⁸ The result of this view is a limited role for both the Court and the Eighth Amendment.¹⁶⁹

The second theory of Eighth Amendment jurisprudence, as set forth in *Weems*,¹⁷⁰ *Solem*,¹⁷¹ and the dissent in *Rummel*,¹⁷² does not recognize a distinction between capital and non-capital cases regarding the proportionality principle. This theory asserts that the proportionality of a sentence is a fundamental concept inherent in the Eighth Amendment.¹⁷³ Consistent with this view, deference to the legislature is important, but not limitless.¹⁷⁴ Instead, it is the duty of the Court to review the legislature's determinations whenever they become constitutionally suspect.¹⁷⁵ The proper method of analysis under this approach begins with the three-part test presented in *Solem*, which proponents argue limits judicial subject-

166. See *supra* text accompanying notes 119-20.

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

168. *Id.* at 2705 (Kennedy, J., concurring).

169. *Id.* (Kennedy, J., concurring). Justice Kennedy stated: "Although no penalty is *per se* constitutional . . . the relative lack of objective standards concerning terms of imprisonment has meant that 'outside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare.'" *Id.* (Kennedy, J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 289-90 (1983) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275 (1980))).

170. *Weems v. United States*, 217 U.S. 349 (1910); see *supra* notes 31-39 and accompanying text.

171. See *supra* notes 86-96 and accompanying text.

172. See *supra* notes 69-72 and accompanying text.

173. This point has been emphasized in both capital and non-capital cases. In *Gregg v. Georgia*, Justice Stewart commented that "[a] penalty also must accord with the 'dignity of man,' which is the 'basic concept underlying the Eighth Amendment'. . . . This means, at least, that the punishment not be 'excessive.'" 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (upholding a Georgia statute which prescribed death as a penalty for murder)). Similarly, in the non-capital cases discussed earlier, proportionality has been included as part of the Eighth Amendment since its inception. See *supra* text accompanying note 24; *supra* notes 26-46 and accompanying text.

174. *Gregg*, 428 U.S. at 174-76 (opinion of Stewart, Powell, and Stevens, JJ.). In *Gregg*, Justice Stewart emphasized that "the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power." *Id.* at 174. (opinion of Stewart, Powell, and Stevens, JJ.).

175. *Id.* at 174-76 (opinion of Stewart, Powell, and Stevens, JJ.).

tivity¹⁷⁶ while maximizing the evolving standards of punishment.¹⁷⁷

A. *The Capital / Non-Capital Distinction*

In *Harmelin*, Justice Scalia emphasized in his majority opinion that the qualitative differences between death and all other types of punishment preclude extension of the proportionality doctrine to non-capital cases.¹⁷⁸ As Justice White pointed out in dissent, however, this reasoning is highly suspect.¹⁷⁹ Both the method¹⁸⁰ and the application¹⁸¹ of death as a criminal sanction have been clearly limited by the Eighth Amendment. As demonstrated by Justice Powell in *Solem*¹⁸² and again by Justice White in his dissent in *Harmelin*,¹⁸³ there is no precedent to suggest that the proportionality principle cannot be extended to non-capital cases. Rather, the

176. While the three factors set forth in *Weems* and reiterated in *Solem*, *supra* text accompanying note 93, are a solid foundation from which to work, it is reasonable to assume that any objectively obtained statistics or determinations would benefit a judge's proportionality analysis. See Baker & Baldwin, *supra* note 40, at 53.

This line of reasoning is common in capital punishment cases as well. See *Coker v. Georgia*, 433 U.S. 584, 594-97 (1977) (utilizing a comparison of state statutes to demonstrate "society's endorsement of the death penalty for murder" (quoting *Gregg v. Georgia*, 428 U.S. 153, 179 (1976))); *Gregg*, 428 U.S. at 179-81 (concluding that all of the post-*Furman* state statutes demonstrate that capital punishment has not been rejected by the people).

177. The evolutionary nature of the Eighth Amendment is also essential in capital punishment cases. See *Coker*, 433 U.S. at 596 (stating that the jury "is a significant and reliable objective index of contemporary values" (quoting *Gregg*, 428 U.S. at 181)); *Gregg*, 428 U.S. at 173 (noting that the Eighth Amendment should be interpreted in a "flexible and dynamic manner"); *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (arguing that the Eighth Amendment must be progressive and "draw its meaning from the evolving standards of decency" (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion))).

178. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2702 (1991). For a thorough discussion of the Supreme Court's changing treatment of the "death is different" doctrine, see Daniel Ross Harris, Note, *Capital Sentencing after Walton v. Arizona: A Retreat From the "Death is Different" Doctrine*, 40 AM. U. L. REV. 1389 (1991). The author suggests that the "death is different" doctrine simply means a heightened version of due process is necessary in capital cases. *Id.* at 1428.

179. *Harmelin*, 111 S. Ct. at 2711-12 (White, J., dissenting).

180. See *Gregg*, 428 U.S. at 170 ("In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution"); *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death."); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("[P]unishments of torture" are forbidden by the Eighth Amendment).

181. *Coker*, 433 U.S. at 592 ("[A] sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.")

182. *Solem v. Helm*, 463 U.S. 277, 288-90 (1983); see *supra* notes 79-96 and accompanying text.

183. *Harmelin*, 111 S. Ct. at 2711 (White, J., dissenting); see *supra* note 136 and accompanying text.

reasoning employed in capital cases demands a proportionality analysis for all Eighth Amendment challenges.¹⁸⁴ Contrary to Justice Scalia's conclusion, a determination that death penalty cases are different does not logically imply that the proportionality principle is part of that difference.¹⁸⁵

Justice Scalia attempted to reconcile this inferential gap by noting the irrevocability of the death penalty as compared to a life sentence without the possibility of parole.¹⁸⁶ Retroactive legislative reduction and executive clemency are possibilities, he argued, that make Harmelin's sentence fundamentally different from a capital sentence.¹⁸⁷ This argument, however, is both practically implausible and logically inconsistent. Death penalty challenges based on the irrevocable nature of the punishment point out the impossibility of a future correction of an unjust sentence. The question of excessiveness in a capital case differs significantly from the question of excessiveness in a non-capital case. A more accurate analysis suggests that the irrevocability of a particular sentence should be only one factor to consider in determining whether the sentence is constitutionally excessive.¹⁸⁸ In addition, the unlikely chance that a defendant such as Harmelin will actually be granted a sentence reduction or a pardon nullifies the practical validity of Jus-

184. *Coker*, 433 U.S. at 592. Following the analysis laid out in *Gregg*, the *Coker* Court stated that "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* Therefore, both capital and non-capital cases have employed proportionality reasoning in their analysis.

Moreover, the most influential capital cases, *Furman*, *Gregg*, and *Coker*, rely on the proportionality reasoning incorporated in the non-capital cases. Each of these cases notes the non-capital decisions of *Weems*, *Trop*, and *Robinson*. See *supra* notes 29-46 and accompanying text for a discussion of these non-capital cases. Obviously, the Court believed that this line of reasoning transcends any "qualitative differences" that may exist between death and all other sentences. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Therefore, there appears to be no logical reason to create a distinction between capital and non-capital cases regarding the proportionality principle.

185. As Justice Powell noted in his dissenting opinion in *Rummel*, the question in non-capital cases is the same as in capital cases: "whether punishment that can be imposed for one offense is grossly disproportionate when imposed for another." *Rummel v. Estelle*, 445 U.S. 263, 293 (1980) (Powell, J., dissenting); see also *Baker & Baldwin*, *supra* note 40, at 53 (explaining that line drawing "between capital punishment and life imprisonment without parole would . . . do violence to the Eighth Amendment").

186. *Harmelin*, 111 S. Ct. at 2702 (quoting *Furman*, 408 U.S. at 306 (Stewart, J., concurring)).

187. *Id.*

188. Justice Kennedy considers the *type* of punishment a valid objective consideration in assessing the harshness of the sentence. *Id.* at 2704-05 (Kennedy, J., concurring); see *supra* note 127.

tice Scalia's suggestion.¹⁸⁹

Moreover, the logical inconsistency of Justice Scalia's proposition also is evident. First, as Justice Powell noted in *Solem*, the Court has found it proper to limit excessive fines pursuant to the Eighth Amendment.¹⁹⁰ Similarly, the Court has developed specific limitations as to *when* the sentence of death can be imposed.¹⁹¹ Therefore, it seems strange to label the intermediate punishment—imprisonment for a term of years—as unworthy of enjoying the principle of proportionality so important to all other Eighth Amendment analyses.

Finally, the logical extension of Justice Scalia's argument would mean that either capital punishment is entirely prohibited or completely left to the discretion of the legislature.¹⁹² Neither of these, however, is true.¹⁹³ Without historical support, precedential backing, or logical persuasiveness, the distinction drawn between capital and non-capital cases is without merit.

189. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power From the King*, 69 TEX. L. REV. 569 (1991). Professor Kobil argued:

In recent times, however, the lack of consistent, principled standards governing the exercise of executive clemency has led not to the expansive use of the pardoning power, but to its atrophy. In the past twenty years, the use of the federal clemency power has precipitously declined, particularly its justice-enhancing manifestations. [Statistics demonstrate a 24% drop in the number of pardons given by the President since the Nixon Administration was in office].

.....

The atrophy of the clemency power is even more pronounced than these statistics indicate. Even when clemency is granted today, it rarely results in the remission of punishment.

Id. at 602.

At the state level, Professor Kobil indicates that the variety of views regarding granting pardons decreases both the ability to predict when a pardon will be granted and the frequency with which pardons are granted. *Id.* at 605-07. Kobil also notes that "some governors believe that to use clemency in this manner [to mitigate disproportionate sentencing] usurps the discretion of the sentencing judge" and, therefore, will rarely use this power to alter judicially imposed sentences. *Id.* at 606.

190. *Solem v. Helm*, 463 U.S. 277, 289 (1983); see *supra* note 86.

191. See *supra* notes 180-81 and accompanying text. In addition, the Court has held that mandatory death sentences without a case specific review of aggravating and mitigating circumstances are unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). This reinforces the Court's view that capital punishment must be reserved for only the most extreme criminal activity. *Furman v. Georgia*, 408 U.S. 238, 294 (1972) (Brennan, J., concurring).

192. See *supra* note 138.

193. This is evident by the fact that 36 states presently allow for the death penalty. See AMNESTY INTERNATIONAL, *WHEN THE STATE KILLS . . . THE DEATH PENALTY: A HUMAN RIGHTS ISSUE* 227 (1989). However, its use has specific, constitutional limits. See *supra* note 138 and accompanying text.

B. *The Judicial Role*

In *Marbury v. Madison*,¹⁹⁴ Justice Marshall defined what has become the essence of the role of the Supreme Court.¹⁹⁵ Chief Justice Marshall made no suggestion that when the task is not easily accomplished, the Court must defer to legislative authority.¹⁹⁶ Rather, he stated that it is the affirmative duty of the Court to set the constitutional boundaries within which the legislature should operate.¹⁹⁷

Throughout both Justice Scalia's and Justice Kennedy's lines of reasoning, legislative deference is central.¹⁹⁸ Since the line-drawing between death and any other criminal sanctions is easy to discern, these Justices have tailored their Eighth Amendment application to this dichotomy. Yet, as discussed above, this line-drawing principle is incorrect.¹⁹⁹ Moreover, as Justice White observed,²⁰⁰ the

194. 5 U.S. (1 Cranch) 137 (1803).

195. *Id.* at 177-79. In *Marbury*, the Supreme Court established the principle of judicial review. *Id.* Judicial review involves a court asserting the power to invalidate a governmental action if it is inconsistent with that court's interpretation of the Constitution. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-2, at 23 (2d ed. 1988). Chief Justice Marshall set the foundation for the Court's future role when he stated:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case comfortably to the law, disregarding the constitution; or comfortably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

Marbury, 5 U.S. at 177-78.

It is the job of the legislature to define certain behavior as criminal and to set forth specific penalties for engaging in such behavior, but it is the Court's *duty* to guarantee that these legislative determinations do not conflict with the Court's interpretation of the Eighth Amendment.

196. This is the natural implication of the *Harmelin* decision, however. As Justice Kennedy explicitly stated, "[the Court's] decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years." *Harmelin v. Michigan*, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., concurring). Thus, Justice Kennedy believes that the difficulty in comparing such sentences allows the Court to avoid such comparisons.

197. *Marbury*, 5 U.S. at 177.

198. See *supra* notes 118, 124 and accompanying text. The *Harmelin* majority cannot deny, however, that there are judicially defined limits on legislative determinations of punishment. These include limits on the method and application of capital punishment, discussed *supra* notes 180-81 and accompanying text, and limits on what behavior may be characterized as criminal, see *Robinson v. California*, 370 U.S. 660, 667 (1962) (concluding that "even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

199. See *supra* notes 178-93 and accompanying text.

Solem test has not led to the flood of subjective judicial interference that the *Rummel* Court feared. As is often the case, the lower courts have practically applied the principles set forth by the Supreme Court.²⁰¹ Surely, if the test proposed in *Solem* led to judicial anarchy, the legislature of at least one state would have challenged the test. But neither Justice Scalia nor Justice Kennedy present any such evidence. Instead, they steadfastly maintain that courts are unable to develop an objective analysis in reviewing differing term of year sentences, and thus, ignore the practical realities of the situation.

The "gray areas" of constitutional interpretation are the most troublesome in law. This does not sanction, however, the Supreme Court's complete acquiescence to the legislature to define the Eighth Amendment or any other guarantees of the Bill of Rights.²⁰² The Court must invoke its role as the protector and interpreter of the Constitution and as a check on legislative abuse,²⁰³ to define what is permissible constitutional behavior.²⁰⁴ Yet, by creating a false dichotomy when reviewing case precedent, the

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

201. *Id.* at 2713 (White, J., dissenting); see *supra* note 140. Moreover, the federal appellate courts have had little difficulty in applying the *Solem* approach, as demonstrated by several cases in which the courts disposed of Eighth Amendment proportionality challenges under *Solem*. See *United States v. Benefield*, 889 F.2d 1061, 1063-65 (11th Cir. 1989); *United States v. Savage*, 888 F.2d 528 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2567 (1990); *United States v. Sullivan*, 895 F.2d 1030, 1031-32 (5th Cir. 1989), *cert. denied*, 111 S. Ct. 207 (1990).

202. As Justice Brennan pointed out in *Furman v. Georgia*, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Furman v. Georgia*, 408 U.S. 238, 268 (1972) (Brennan, J., concurring) (citations omitted). The Court often has been presented with difficult issues allowing for no clear cut answer. See *supra* note 96 and accompanying text.

203. See William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Regarding the importance of the Court's role in terms of the interrelationship between federalism and individual rights, Justice Brennan argued:

Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Id. at 502-03.

204. See *Baker & Baldwin*, *supra* note 40, at 54-55. Professors Baker and Baldwin provide a persuasive discussion regarding the importance and necessity of the Court's role in Eighth Amendment proportionality jurisprudence. They argue that the separation of powers and traditional concepts of federalism require federal judicial review of "executive and legislative excesses." *Id.* at 54. Recognizing the importance of deference to

Court avoids these determinations, thereby minimizing its duty. As Justice Powell stated in his dissenting opinion in *Rummel*, "the Court has, in my view, chosen the easiest line rather than the best."²⁰⁵

C. *The Solem Test*

Unlike Justice Scalia's extreme position, Justice Kennedy's reasoning is easily applicable to the parking ticket scenario proposed by Justice Powell in *Rummel*.²⁰⁶ Similarly, Justice Kennedy minimized Justice Scalia's distinction between capital and non-capital cases, thereby deflecting focus on that issue.²⁰⁷ The shortcomings of Justice Kennedy's position, however, are the impracticalities of his reasoning.

Justice Kennedy determined that by comparing the severity of the crime with the harshness of the punishment, a judge can determine objectively whether further inquiry is necessary.²⁰⁸ Without using any outside considerations,²⁰⁹ however, the judge's determination will be necessarily subjective.²¹⁰ A prime example of this is

legislative decisions in general, they disregard any suggestion that this deference is the be all and end all of the Court's role in reviewing criminal punishment. *Id.*

205. *Rummel v. Estelle*, 445 U.S. 263, 307 (1980) (Powell, J., dissenting).

206. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2704 (1991) (Kennedy, J., concurring); see *supra* note 68. Justice Kennedy would argue that such an extreme illustration is simply one of those rare examples that falls within the narrow proportionality principle of the Eighth Amendment.

207. *Harmelin*, 111 S. Ct. at 2705 (Kennedy, J., concurring). Justice Kennedy simply characterized the "type" of punishment, death, as one of the objective factors that a reviewing court may analyze when assessing the constitutional validity of the criminal sanction under scrutiny. *Id.* at 2706-07 (Kennedy, J., concurring); see *supra* note 127 and accompanying text.

208. *Harmelin*, 111 S. Ct. at 2706-07 (Kennedy, J., concurring). By rejecting the idea that the Eighth Amendment requires *strict* proportionality between the seriousness of the crime and the harshness of the penalty, Justice Kennedy basically asked, "Could the crime being charged *ever* be severe enough to warrant the punishment given?" This analysis amounts to essentially a "facial challenge" to the legislation. See *Baker & Baldwin*, *supra* note 40, at 50. This type of challenge suggests that the state may not impose the suspect penalty on any person guilty of that particular crime. *Id.* Such a challenge, however, is rarely successful because it requires the state to show only a rational basis between the means and the ends of its legislation. *Id.* Here, Justice Kennedy found a life sentence without parole to be a legitimate means of protecting society against the multifaceted dangers created by a drug possessor. *Harmelin*, 111 S. Ct. at 2706 (Kennedy, J., concurring).

209. One example of such considerations is the factors proposed in *Solem*, discussed *supra* text accompanying note 93.

210. Justice Kennedy acknowledged that "proportionality review by federal judges should be informed by 'objective factors to the maximum possible extent.'" *Harmelin*, 111 S. Ct. at 2704 (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)). By deleting the second and third prongs of the *Solem* test, however,

Justice Kennedy's analysis of the *Harmelin* facts.²¹¹ By looking solely at the crime and punishment, Justice Kennedy concluded that the crime was severe enough to warrant the sentence given.²¹² Although Justice Kennedy reviewed secondary sources,²¹³ his final determination was based not on a comparison of the relevant factors, but rather on deference to the legislative judgment regarding the seriousness of the offense.²¹⁴ Thus, even Justice Kennedy's so-called "objective factor" analysis is really a simple deference to the legislative determination.

Compared to Justice Kennedy's one-dimensional approach, the *Solem* test is more satisfactory—if only for its diversity. Since no single factor is dispositive,²¹⁵ the *Solem* test neutralizes the effect that a judge's interpretation of one statistic may have on the entire analysis. Thus, if a judge considers the crime of possession to be on a par with murder, the corresponding inter-jurisdictional comparison may limit the effect of this determination by indicating to the judge that no other jurisdiction agrees with his or her view.

Equally important is the *Solem* test's recognition of an evolving standard of punishment, realized through an application of the

Justice Kennedy has substantially diminished the basis on which a judge can make an objective assessment of the case. *Id.* at 2715 (White, J., dissenting). Without the benefit of comparison to other relevant information, the judge must rely on his subjective view of the severity of the crime and harshness of the sentence, because he has nothing else on which to base his decision. *Id.* (White, J., dissenting). Moreover, as Justice White pointed out, the "intra and inter-jurisdictional comparison of punishments and crimes has long been an integral part of our Eighth Amendment jurisprudence." *Id.* at 2714 (White, J., dissenting). Therefore, Justice Kennedy's acknowledgement of a proportionality principle and his subsequent alteration of the *Solem* test appear to serve no useful purpose other than to allow the courts an easy disposal method for Eighth Amendment challenges in non-capital cases.

211. *Id.* at 2706-07 (Kennedy, J., concurring).

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

213. *Id.* at 2706 (Kennedy, J., concurring). Justice Kennedy examined a sampling of secondary sources in order to substantiate his claim that Harmelin's sentence was extremely serious. He concluded that "the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole." *Id.* (Kennedy, J., concurring).

214. *Id.* (Kennedy, J., concurring). Justice Kennedy concluded:

These [secondary sources] and other facts . . . detailing the pernicious effects of the drug epidemic in this country do not establish that Michigan's penalty scheme is correct or the most just in any abstract case. But they do demonstrate that the Michigan Legislature could with reason conclude that the threat posed to the individual and society . . . is momentous

Id. (Kennedy, J., concurring).

215. *Solem v. Helm*, 463 U.S. 277, 290-91 n.17 (1983) ("[N]o single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.").

Eighth Amendment that is responsive to the surrounding community standards.²¹⁶ Through the multi-factor analysis of *Solem*, no single jurisdiction will be allowed to disregard the prevailing views of punishment that are evident across the nation. This is not to say that there will not be intra- or inter-jurisdictional differences. Rather, the *Solem* test eliminates the extreme differences that would shock the general sense of proportionality inherent in the protections of the Eighth Amendment.²¹⁷ Like many judicially proposed "tests," the three-pronged approach of *Solem* does not guarantee an objective result, but at least it significantly neutralizes the inevitable subjectivity of the reviewing court.

V. IMPACT

Since it is more fragmented than most five-to-four Supreme Court decisions, the future impact of *Harmelin v. Michigan* is difficult to measure. Certainly, Justice Scalia's complete abandonment of any proportionality principle as part of the Eighth Amendment has the capacity to substantially affect both non-capital and death penalty cases.²¹⁸ However, Justice Scalia's opinion was joined only by Chief Justice Rehnquist and, thus, is hardly the settled word on the law.²¹⁹ Nevertheless, given the extreme narrowness of the majority's opinion regarding the proportionality principle, the Eighth Amendment will remain susceptible to ever more stringent and limiting interpretations.

More significant is the clear message that the Court is sending to the legislature: do what you want in defining and punishing criminal offenses. While on its face this may appear to be consistent with a democratic system of government,²²⁰ this directive assumes that the legislature is both trustworthy and responsive. A more

216. This standard is discussed *supra* notes 34, 43, 54 and accompanying text.

217. See *supra* note 67. State legislatures, however, must respect the evolving standards incorporated into the Eighth Amendment. These standards effectively restrict individual legislatures from substantially deviating from the "norm." Whether a specific legislature has overstepped these constitutional parameters will be demonstrated by a comparison of other legislative enactments in similar situations.

218. *Harmelin*, 111 S. Ct. at 2714 (White, J., dissenting).

219. The only controlling precedent in this case establishes that the imposition of a mandatory sentence of life in prison without the possibility of parole and without any consideration of mitigating factors, does not constitute cruel and unusual punishment. *Id.* at 2701-02. Therefore, Justice Scalia's discussion in parts I-IV of the opinion is merely dicta. Nonetheless, given the non-interventionist position of the present Court, the implications of this discussion are worthy of consideration.

220. This reasoning suggests that because the voting public determines who will sit as its legislators and create its laws, representatives will be more responsive to those constituents or not be re-elected. Conversely, federal judges, who normally would hear constitu-

historically accurate approach, however, suggests that the Court should maintain an active role in reviewing legislative discretion because the power of characterizing the activity of man as criminal is substantial and subject to great abuse.²²¹

In fact, if Justice Kennedy's approach is adopted by the lower courts, the dangers of both judicial non-intervention and judicial subjectivity are likely to increase.²²² Not only will courts leave state legislatures unchallenged in all but the most extreme cases, but when courts do review an Eighth Amendment challenge, they will not have to adhere to the objective reliability of the *Solem* test. Instead, judges will be unrestrained in effectuating their own evaluations of the "fit" punishment for the crime. Justice Kennedy's one-prong analysis of the facts of *Harmelin* demonstrates this point.²²³ His determination that society considers the possession of drugs to be more serious than second degree murder, rape, and armed robbery, is both questionably valid and objectively unreasonable.²²⁴ While the "war on drugs" presently tops the political agenda,²²⁵ the central "threat" of tomorrow is anyone's guess.

tional challenges, such as those under the Eighth Amendment, are appointed for life and are not subject to such political considerations.

221. See *supra* note 43. One commentator has compared the Court's duty of judicial review to the general system of democracy by determining that "somewhere between the hyperliberalism of judicial activism and participatory democracy's disdain for external checks lies a realm in which an independent judiciary can remain available to check those marked deviations from the consensual norm that cry out for intervention." Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 40 (1991).

222. Given the extreme conclusions of Justice Scalia in parts I-IV, it is reasonable to assume that Justice Kennedy's approach will fall into favor in the lower federal courts.

223. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2705-07 (1991) (Kennedy, J., concurring).

224. Public opinion polls demonstrate that in general, murder and rape are considered more serious offenses than drug offenses. *Telephone Crime Survey*, Gallup Organization, Sept. 1988, available in WESTLAW, POLL File. This is evidenced by the fact that a clear majority of the public favors capital punishment for murder and rape, but not for dealing drugs. *Id.*

Harmelin was not convicted of dealing narcotics, but rather of possession. See *supra* notes 98, 153 and accompanying text. Therefore, the intent or mens rea that has been a characteristic of serious crimes throughout history is not even present in this case. *Harmelin*, 111 S. Ct. at 2717 (White, J., dissenting).

225. President Bush put this legislative agenda into operation in a speech early in his tenure. President's Address to the Nation on the National Drug Control Strategy, II 1989 PUB. PAPERS 1136 (Sept. 5, 1989). President Bush stated:

All of us agree that the gravest domestic threat facing our nation today is drugs. Drugs have strained our faith in our system of justice. Our courts, our prisons, our legal system, are stretched to the breaking point If we fight this war as a divided nation, the war is lost. But if we face this evil, as a nation united, this [piece of crack cocaine] will be nothing but a handful of useless chemicals.

Id.

This passage illustrates the potential for abuse that could easily occur, given the

Possibilities include certain types of creative expression, late income tax returns, or maybe even simple parking infractions.

The clear-cut rule presented by the majority opinion in *Harmelin* will likely eliminate any case-by-case approach that the *Solem* test required.²²⁶ Consequently, Eighth Amendment challenges grounded on disproportional sentences will virtually disappear. Historically, few constitutional claims have arisen based on non-capital Eighth Amendment challenges.²²⁷ The Court's functional abandonment of the Eighth Amendment thus seems even more unjustifiable.

In addition, by theoretically dispensing with the evolutionary premise of Eighth Amendment interpretation, the Court has opened the door for a piecemeal system of justice whereby state legislatures may remain completely unresponsive to national trends of punishment and justice.²²⁸ Moreover, as the final strands of rehabilitative penal theories are discarded,²²⁹ the justifications for long periods of punishments will become solely retributive. As government failures in dealing with economic and social issues continue to rise,²³⁰ so will intolerance for more and more types of crimes.²³¹

The future envisions stricter and harsher punishments for most

Court's position in *Harmelin*. Without objective criteria with which to compare criminal sentencing guidelines, judges may rely solely on their *perception* of what society considers important, regardless of its objective validity. Whereas George Bush may consider drugs to be the primary domestic evil, others may argue that health care, AIDS, or violent crime should be the focus of the legislature.

226. Instead, appellate courts can simply dismiss any Eighth Amendment challenge to a sentence for a term of years following a cursory review unless the crime-punishment nexus is obviously lacking. Even then, the appellate court can confidently dismiss the challenger's claim, "without fear of contradiction," based on little more than its own conclusion about the severity of the crime. *See supra* note 67.

227. This is demonstrated by the existence of only six major cases in nearly a century. *See supra* notes 26-96 and accompanying text.

228. Without any comparative analysis required, state legislatures must only remain intra-jurisdictionally consistent. Thus, the fact that one state punishes all of its criminals much more severely than all of the other states is insignificant.

229. In practice, rehabilitation theories of punishment are fast becoming obsolete. Instead, legislatures and judges look only to imprison the offender to punish him or her, and to protect society. Brian Dumaine, *New Weapons in the Crime War*, *FORTUNE*, June 3, 1991, at 180.

230. A recent headline exemplifies this trend. *See* John Hammond & David Wessel, *Bush's Domestic Policy is in Growing Disarray, Plagued by Flipflops*, *WALL ST. J.*, Nov. 22, 1991, at A1.

231. This intolerance has already taken the form of legislation. In the recently proposed Violent Crime Control Act of 1991, application of a federal death penalty has been expanded to include over forty new crimes. S. 1241, 102nd Cong., 1st Sess. (June 6, 1991) (pending); *see also* Dumaine, *supra* note 229, at 180.

types of crime resulting in even more prisons and prisoners. If in 1991, possession of drugs can mandate a life sentence without the possibility of parole for a first-time offender, how long will it be before legislatures determine that most, if not all, crimes against the person require a similar sentence?

VI. CONCLUSION

In what looks like an effort to limit its docket²³² and avoid its judicial duty, the Supreme Court essentially has eviscerated the meaning and effect of the Eighth Amendment with respect to the proportionality principle in non-capital cases. Practically speaking, the Court's five-to-four decision in *Harmelin* simply may add more confusion to an already unclear doctrine in constitutional law.²³³ Nonetheless, the Court's opinion allows legislatures free reign to characterize and punish criminal activity as they see fit, without fear of judicial reprisal. If the legislature remains responsive to its populace, the negative implications of the *Harmelin* decision will be minimal. If, however, some individual state legislatures feel the need to redefine the norms of criminal behavior, as often they do, the *Harmelin* decision will provide "cold comfort indeed, for absent a proportionality guarantee, there would be no basis for deciding such cases should they arise."²³⁴

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232. Recently, Chief Justice Rehnquist espoused his views on this subject suggesting that "the time has come to re-examine the role of the federal courts." *Rehnquist Asks Congress for Limits on Federal Cases*, CHI. TRIB., Jan. 1, 1992, § 1, at 10. He argued that the Framers intended the federal judiciary to have only a "limited role reserved for issues where important national interests predominate." *Id.* Without a cutback of the expanding number of crimes that Congress is placing under federal jurisdiction, he argues, there is a threat of "a degradation in the high quality of justice the nation has long expected of the federal courts." *Id.*

Undoubtedly, there is much truth to what the Chief Justice preaches. There is a point at which the federal courts will be unable to handle efficiently the expanding caseload. While asking Congress to restrict any further expansion of its jurisdiction may be the proper vehicle for limiting this problem, avoiding constitutional issues that clearly demand federal court adjudication is improper. Eighth Amendment challenges based on disproportional sentences in non-capital cases are such issues.

233. The narrow margin in all of the Court's recent proportionality decisions suggests the importance of who is on the Court. See Baker & Baldwin, *supra* note 40, at 41.

234. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2714 (1991) (White, J., dissenting).

