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Abstract: In Harmelin v. Michigan, the United States Supreme Court held (5-4) that a legislatively-mandated life sentence without parole for possession of 672.5 grams of cocaine did not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. In reaching the result, two Justices abrogated the proportionality principle in the Eighth Amendment and three Justices abridged the proportionality standard promulgated in Solem v. Helm. This Note examines the Harmelin decision and suggests that the Court does not adequately justify abrogating or limiting the Solem proportionality standard. This Note recommends application of the Solem proportionality standard and concludes that imposition of a mandatory life sentence without parole for drug possession is unconstitutional.

When Ronald Harmelin failed to make a complete stop at a red light, two police officers stopped and searched him. They found marijuana cigarettes, assorted pills and small vials of cocaine in his possession. The officers searched Harmelin's trunk and discovered two bags containing 672.5 grams of cocaine. In 1989, Michigan convicted Harmelin, a first time offender, under a controlled substance statute that mandated life imprisonment without the possibility of parole. Five Justices of the Supreme Court upheld the life sentence. Justice Scalia, joined by Chief Justice Rehnquist, found Harmelin's sentence constitutional because the Eighth Amendment embraced no proportionality guarantee. Justice Kennedy, joined by Justices O'Connor and Souter, found no gross disproportionality between the legislatively mandated life sentence and the crime.

This Note examines Harmelin and concludes that the Court erred in disregarding the existing Eighth Amendment proportionality doctrine.

2. Id. at 77.
3. Id. at 78. The two bags contained roughly 1.5 pounds of cocaine. This amount of cocaine has a potential yield of 32,500 to 65,000 doses. See ARNOLD M. WASHTON, COCAINE ADDICTION: TREATMENT, RECOVERY, AND RELAPSE PREVENTION 18 (1989).
4. Harmelin, 440 N.W.2d at 76-77. The Michigan statute provides that a person who "knowingly or intentionally possess[es] a controlled substance . . . [w]hich is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life." MICH. COMP. LAWS §333.7403(1), (2)(a)(f).
5. Justices Scalia, Rehnquist, Kennedy, O'Connor and Souter.
7. Id. at 2686.
8. Id. at 2705-08.
Part I summarizes the origin of the Eighth Amendment's Cruel and Unusual Punishment Clause and the development of the proportionality principle. Part II criticizes Justice Scalia's abrogation of the proportionality principle and Justice Kennedy's abridgement of proportionality standard promulgated in *Solem v. Helm.* Part III discusses the negative implications of *Harmelin.* Finally, Part IV argues for the use of the *Solem* proportionality standard and applies it to find that Harmelin's sentence violates the Eighth Amendment.

I. THE EVOLUTION OF THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE

The belief that the punishment should fit the crime is deeply rooted in Western civilization. The proportionality concept appears in fundamental social documents, such as the Bible and the Magna Carta. In the Old Testament, God introduced to Moses the *lex talionis* or law of retribution, giving rise to the concept "an eye for an eye, a tooth for a tooth." The Magna Carta devoted three chapters to the rule that "amer cement" may not be excessive. Chapter 20, for instance, declared that a "freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it."

The English Bill of Rights formally codified the proportionality concept that had become part of English common law. The Framers of the Eighth Amendment in turn adopted the words of the English predecessor. Later, however, questions arose as to the precise purpose and meaning of the Cruel and Unusual Punishment Clause. Although commentators agreed that the Eighth Amendment afforded at least those protections embodied in its English counterpart, there was considerable disagreement about exactly what protections the...
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English Bill of Rights guaranteed. Some commentators believed that the Framers intended the words “cruel and unusual” to prohibit only barbaric punishments such as pillorying, decapitation, and drawing and quartering. In light of the evidence that the English never prohibited barbaric punishment, other commentators argued that the clause actually prohibited excessive punishments. American courts, relying on the former interpretation, virtually ignored the Cruel and Unusual Punishment Clause for nearly one hundred years because the so-called “barbaric” practices had long become obsolete.

A. The Development of the Proportionality Approach

Not until the nineteenth century did the Supreme Court, in Weems v. United States, recognize that disproportionately excessive punishments violated the Cruel and Unusual Punishment Clause. After Weems, the Supreme Court grappled with defining the precise boundaries of the Eighth Amendment protection. While the Court firmly applied the proportionality concept in the context of capital punishment cases, considerable controversy surrounded the application of

16. See id. The Eighth Amendment was taken directly from the English Bill of Rights of 1689 which prohibited only excessive punishments. Id. However, the American Framers misinterpreted the English Bill’s purpose and subsequently designed the Eighth Amendment to prohibit barbaric punishments. Id.; see also William H. Mulligan, Cruel and Unusual Punishments: The Proportionality Rule, 47 Fordham L. Rev. 639 (1979) (arguing that the Eighth Amendment was intended only to prohibit torture); Deborah A. Schwartz & Jay Wishingrad, The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine, 24 Buff. L. Rev. 783 (1975) (arguing that the Framers were greatly influenced by the Italian writer Cesare Beccaria, a firm believer in having punishment proportionate to the seriousness to the offense).

17. See Weems v. United States, 217 U.S. 349, 389–400 (1910) (discussing early attitudes toward the Eighth Amendment). The Weems Court noted that although the scope of the clause had never been clearly defined, the Eighth Amendment could be interpreted to proscribe, at a minimum, tortuous and barbaric punishments. Id. at 368; see also Nancy Keir, Solem v. Helm: Extending Judicial Review Under the Cruel and Unusual Punishments Clause to Require “Proportionality” of Prison Sentences, 33 CATH. U. L. REV. 479, 481 (1984).

18. A pillory is a device with holes for the head and hands in which petty offenders were formerly locked and exposed to public scorn. Webster’s Unabridged Dictionary 1360 (2d ed. 1983).

19. Drawing and quartering is dismembering the body into four parts. Id. at 1476.


21. See Keir, supra note 17, at 481.


23. Id. The principle of proportionality had been advanced previously by Justice Field, dissenting in O’Neil v. Vermont, 144 U.S. 323 (1892). Field concluded that the Cruel and Unusual Punishment Clause “is directed . . . against all punishments which by their excessive length or severity are greatly disproportional to the offenses charged.” Id. at 339–40.

the Eighth Amendment to mere sentences of imprisonment. The Supreme Court, in *Rummel v. Estelle*, refused to apply the proportionality principle to a life sentence that contemplated the possibility of parole. Only three years later, however, the Court in *Solem v. Helm*, on slightly different facts, determined that a discretionary life sentence without parole violated the proportionality principle and thereby triggered the proscriptions of the Eighth Amendment.

I. Articulating a Proportionality Principle

In *Weems v. United States*, the Supreme Court first recognized that the Eighth Amendment had a broader scope than perhaps originally intended by the Framers. Relying on evolving standards of justice, the Court found *cadena temporal* comparatively disproportionate to the crime of falsifying an official document. The Court concluded that the Eighth Amendment required graduated and proportioned punishment. Just as the Framers considered torture cruel and unusual punishment, the *Weems* Court believed that *cadena temporal* was cruel and unusual by modern standards.

Some lower courts recognized in *Weems* a constitutional requirement that all offenses and punishments be proportionate. Other courts interpreted *Weems* narrowly, and maintained that absent the

Amendment when statutory scheme ensures that sentencing is not disproportionate to offense), *stay granted*, 429 U.S. 1301 (1976), *order vacated*, 429 U.S. 875 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam, with each Justice filing a separate opinion in addition) (death penalty unconstitutional under Eighth Amendment).


27. *Id.* at 266, 272.
29. *Id.* at 288-89.
31. *Id.* at 380-81.
32. *Cadena temporal* punishment included imprisonment, hard and painful labor, and chains at the ankles and wrists. *Id.* at 364.
33. *Id.* The Court engaged in a comparative analysis to determine whether *cadena temporal* was disproportionate. It compared *cadena temporal* with punishments for similar offenses in the United States as well as penalties inflicted for more severe crimes in the Philippines. *Id.* at 380-81.
34. *Id.* at 367.
35. *Id.* at 364-65, 377.
unusual penalties of *cadena temporal*, the Court would not have held Weems' punishment disproportionate.\(^{37}\) Despite the discord, *Weems* provided a foundation for the proportionality principle that the Court would eventually carve into Eighth Amendment jurisprudence.

2. Applying the Proportionality Principle to Capital Punishment

The Supreme Court extended Eighth Amendment proportionality review to death penalty cases in *Coker v. Georgia*.\(^{38}\) Stressing that the death penalty "[was] unique in its severity and irrevocability,"\(^{39}\) the Court found that rape constituted a far less serious crime than crimes deserving the death penalty.\(^{40}\) The Court inquired into the nature of the crime and the punishment, the punishments imposed in other jurisdictions for rape, and the penalties available in the same jurisdiction for other offenses.\(^{41}\) The Court concluded the death penalty excessive for the crime of rape.\(^{42}\)

The *Coker* Court did not address whether the proportionality standard applied to non-capital sentences.\(^{43}\) As a result, lower courts developed widely different interpretations regarding the meaning and scope of the proportionality principle. Some courts restricted proportionality analysis to punishments considered cruel in their methods or inherent irrevocability, such as capital punishment.\(^{44}\) Other courts liberally applied proportionality analysis to prison sentences, and held punishments cruel and unusual solely on the basis of excessive length.\(^{45}\)

3. Restricting Proportionality Review to Capital Punishment

The Supreme Court's decision in *Rummel v. Estelle*\(^{46}\) adopted the narrower interpretation of the Eighth Amendment.\(^{47}\) In *Rummel*, the Supreme Court rejected the argument that a life sentence with the pos-

38. 433 U.S. 584 (1977) (plurality opinion).
39. Id. at 598 (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion)).
40. Id. at 597–98.
41. Id. at 593–600.
42. Id. at 598.
43. Keir, supra note 17, at 488.
47. See supra note 44 and accompanying text.
sibility of parole imposed on a third-time offender violated the proportionality principle. The Rummel Court qualitatively distinguished the defendant's life sentence from the death penalty, and found the Coker rationale minimally helpful. The Court was reluctant to review non-capital punishments, and concluded that prison sentences could not violate the proportionality principle solely on the basis of length.

4. Expanding the Proportionality Guarantee to Non-Capital Cases

Just three years after Rummel, the Supreme Court revisited the issue of whether a life sentence fell within the scope of the Eighth Amendment. Distinguishing Solem's punishment factually from Rummel's, the Court, in Solem v. Helm, determined that a life sentence without parole, discretionarily-imposed by the trial judge, violated the Eighth Amendment. The Solem Court explicitly rejected the notion that only death penalty cases required proportionality. The Court held that cases involving prison sentences could not logically be immune from the general mandate of proportionality. The Court reasoned that the important factor was not the sentence itself, but rather the disparity between the sentence imposed and the crime committed.

In an effort to shelter Eighth Amendment review from subjective values, the Solem Court proposed the use of a three factor proportionality standard to determine whether a punishment violated the Eighth Amendment. First, the Court assessed the gravity of the crime in

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49. Id. at 272.
50. Id. at 273-74.
51. Solem involved a discretionarily-imposed life sentence without parole. Solem v. Helm, 463 U.S. 277, 281-84 (1983). "[O]ur decision today is not inconsistent with Rummel v. Estelle . . . . Rummel did reject a proportionality challenge to a particular sentence. But since the Rummel Court . . . offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation." Id. at 303 n.32. By contrast, Rummel involved a mandatory life sentence with the possibility of parole. Rummel, 443 U.S. at 261.
53. Id. at 284. Jerry Helm was convicted of six non-violent and alcohol-related felonies. Id. at 279. He pleaded guilty to a seventh felony of passing a no account check for $100.00. Id. at 281.
54. Id. at 288-89.
55. Id.
56. Id. at 289.
57. Id. at 290-91. The three factor standard was a reiteration of the factors used in Weems and Coker.
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relation to the severity of the punishment. Second, the Court compared the punishment with penalties imposed for other crimes in the same jurisdiction. Third, the Court compared the punishment with penalties imposed in other jurisdictions for the same crime. The Solem Court applied the three factors and found the discretionarily-imposed life sentence without parole for a seventh felony grossly disproportionate.

Solem represented an important decision in Eighth Amendment jurisprudence for two reasons. First, the Solem Court expressly announced a three part proportionality standard, similar to the test promulgated in Weems and Coker. Second, Solem set broader boundaries for proportionality review by extending it to discretionary life sentences without parole. The opinion, however, left open the question whether the proportionality principle applied to mandatory life sentences without parole.

B. Restricting Proportionality: An Unclear Message

In Harmelin v. Michigan, the Supreme Court accepted the challenge of defining the proper scope of the Eighth Amendment in the context of a mandatory life sentence without parole. The Harmelin Court held that a legislatively-mandated life sentence without parole for cocaine possession did not violate the Eighth Amendment. No majority opinion prevailed, except on the issue that a mandatory life sentence did not violate the Eighth Amendment solely because it pre-

58. Id. The Court determined the gravity of the crime by examining the harm caused or threatened to the victim or society and by measuring the culpability of the offender. Id. at 296. The Court concluded that Helm's crime was one of the most passive felonies a person could commit. Id. The amount of money involved was small and no violence occurred. By contrast, a life sentence without the possibility of parole, the most severe punishment authorized in South Dakota, was imposed. Id. at 297, 281 n.6 (death penalty prohibited in South Dakota).

59. Id. at 291. The Court made a detailed analysis of punishments in South Dakota to compare Helm's sentence to sentences set for other crimes. Id. at 298–300. The Court found that South Dakota mandated a life sentence for murder, treason, first-degree manslaughter, first-degree arson and kidnapping. Id. at 298–99. The Court concluded that Helm had been treated "in the same manner as, or more severely than, criminals who [had] committed far more serious crimes." Id. at 299.

60. Id. at 291. The Court found that Helm could have received a life sentence in only one other state, Nevada. Id. at 299. Even in Nevada, however, there was no evidence that courts actually imposed the sentence for such a minor offense. Id. The Court concluded that South Dakota treated Helm more severely than any other state. Id. at 300.

61. Id. at 290–93.
62. See supra notes 33, 41 and accompanying text.
64. Id. at 2693, 2701–02; id. at 2705–08 (Kennedy, J., concurring).
cluded consideration of mitigating factors. Rather, the Court divided into three groups.

Justice Scalia, joined by Chief Justice Rehnquist, upheld the life sentence, concluding that the Eighth Amendment embraced no proportionality guarantee. Justice Scalia contended that life sentences did not qualify as barbaric punishments, and therefore Harmelin's sentence could not be considered unconstitutional. Justice Scalia, unenthusiastic about encroaching into the legislature's domain, argued for restricting proportionality analysis to capital punishment cases and for overruling Solem. Justice Kennedy, joined by Justices O'Connor and Souter, concurring in the result, determined that the Eighth Amendment prohibited only extreme or grossly disproportionate sentences. Justice Kennedy revised the Solem standard by deferring to legislative assessments regarding sentencing schemes. Justice Kennedy found the first Solem factor sufficient to determine proportionality and concluded that Harmelin's sentence was not grossly disproportionate in light of the grave threat caused by drugs.

Justices Blackmun, Marshall, Stevens, and White, dissenting, found no justification for overruling or limiting the Solem precedent and

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65. The Court refused to extend the "individualized capital-sentencing doctrine," which takes into account a defendant's criminal history and character to mandatory life sentences. Id. at 2701-02 (part V of Justice Scalia's opinion, in which Chief Justice Rehnquist joined, and with which Justices Kennedy, O'Connor and Souter concurred).

66. Id. at 2686, 2692. For support, Justice Scalia cited a controversial interpretation of the Framers' original intent. According to Justice Scalia, the Framers intended the Eighth Amendment to protect only against barbaric punishments, like torture, pillorying and decapitation. Id. 2691-96.

67. Id. at 2686, 2692.

68. Justice Scalia found judicial intrusion into the power of state legislatures to enact and enforce criminal laws unacceptable. Id. at 2684-86. This Note argues that Justice Scalia's deference to legislatures substantially eliminates judicial review of mandatory sentencing schemes. See infra notes 135-43 and accompanying text.


70. Id. at 2705 (Kennedy, J., concurring).

71. Id. at 2707 (Kennedy, J., concurring).

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

73. Justice Kennedy concluded that intra- and inter- jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality. Id. at 2707 (Kennedy, J., concurring).

74. Id. at 2709 (Kennedy, J., concurring).

75. Id. at 2716 (White, J., dissenting). Justices Blackmun and Stevens joined Justice White's dissenting opinion. Justice Marshall filed a separate dissent to emphasize his continued belief that capital punishment is per se unconstitutional. Id. at 2719 (Marshall, J., dissenting). Justice Stevens, joined by Justice Blackmun, filed a separate dissent, observing that a life sentence for drug possession is too severe because the punishment rejects all possibility of rehabilitation. Id. at 2720 (Stevens, J., dissenting).
applied the three part standard to conclude that Harmelin's sentence was unconstitutionally disproportionate. 76

II. THE HARMELIN RESULT RESTS ON FLAWED ANALYSIS

Harmelin provides no legitimate reason for abrogating or abandoning the prevailing proportionality standard. By relying on the Framers' original intent, Justice Scalia denies the existence of any proportionality principle 77 and thereby ignores Supreme Court decisions that unequivocally advance a proportionality standard. Under close scrutiny, Justice Scalia's historical analysis does not justify abrogating the proportionality principle. 78 Justice Kennedy, on the other hand, adheres to the proportionality principle, but inappropriately redefines the three factor standard. 79 By collapsing the three part Solem standard into one threshold test, Justice Kennedy undermines his goal of determining disproportionality objectively. 80 This Note contends that Justices Scalia and Kennedy do not adequately justify overruling or limiting Solem's full application. 81

A. Justice Scalia Ignores Historical Controversy and Stare Decisis

1. Deferring to the Framers' Original Intent

Justice Scalia bases his conclusion that the Framers only intended to prohibit barbaric punishment on disputed historical analysis. 82 Relying on the English Bill of Rights as conclusive evidence of the Eighth Amendment's purpose, Justice Scalia concludes that the Framers only intended to prohibit barbaric punishment. 83 Justice Scalia's conclusion, however, is questionable. Commentators disagree over exactly what the English Bill of Rights prohibited. 84 As one author suggests,

76. Id. at 2716–19 (White, J., dissenting).
77. Id. at 2686, 2692.
78. See infra notes 82–98 and accompanying text.
79. See infra notes 107–24 and accompanying text.
80. See infra notes 107–24 and accompanying text.
81. See infra notes 82–124 and accompanying text.
82. Harmelin v. Michigan, 111 S. Ct 2680, 2686–91 (1991). Justice Scalia concludes that the circumstances of the English Bill of Right's enactment and the contemporaneous understanding of the English guarantee refute the notion that the Eighth Amendment protected against disproportionate punishment. Id. at 2687–91. The English guarantee was directed at the arbitrary use of the sentencing power by the King's Bench in particular cases and at the illegality, rather than the disproportionality, of punishments imposed. Id. at 2693–95. But see supra note 20 and accompanying text.
84. See supra notes 16–20 and accompanying text.
the English guarantee was never directed against barbaric punishments.\textsuperscript{85} To the contrary, the English used barbaric punishments they believed were proportionate to offenses.\textsuperscript{86} The Framers provided similar proportionality guarantees by transcribing into the Eighth Amendment the language of its English counterpart.\textsuperscript{87} Contrary to Justice Scalia's conclusion, the Eighth Amendment does not protect solely against barbaric punishment.

Moreover, the Supreme Court has explicitly held that the Eighth Amendment contains a proportionality principle, and bars more than just barbaric punishments.\textsuperscript{88} Beginning with \textit{Weems}, the Supreme Court has recognized that courts must engage in a comparative analysis to determine whether a particular punishment violates the Eighth Amendment.\textsuperscript{89} The Supreme Court progressively extended the boundaries of Eighth Amendment review first to unusual punishments,\textsuperscript{90} then to the death penalty,\textsuperscript{91} and finally to discretionarily-imposed life sentences without parole.\textsuperscript{92} Consequently, Justice Scalia's narrow reading of the Eighth Amendment not only is based on controverted interpretation of the Framers' original intent but it also ignores Supreme Court precedent.

Even if Justice Scalia's historical analysis of the Eighth Amendment were correct, his conclusion that the amendment contains no proportionality principle\textsuperscript{93} fails to consider the evolving meaning of the phrase "cruel and unusual." Justice Scalia inappropriately measures cruel and unusual punishment using the outdated standard of 1789.\textsuperscript{94} Even Justice Scalia, however, acknowledges that extreme examples, like a mandatory life sentence for a parking ticket, violate the Eighth Amendment.\textsuperscript{95} Nevertheless, Justice Scalia's strict confinement to eighteenth century interpretation of the Cruel and Unusual Punishment Clause fails to consider punishments other than torture or decapitation as violative of the Eighth Amendment. Consequently, Justice

\begin{footnotes}
\footnotetext{85}{See Granucci, supra note 10, at 847–48. By 1689, England had still not developed a prohibition on cruel or barbaric methods of punishment. \textit{Id}. Although a general policy against excessiveness was expressed repeatedly, objection to particular methods of punishment was very rare. \textit{Id}.}
\footnotetext{86}{See \textit{id}. at 843–44.}
\footnotetext{87}{Solem v. Helm, 463 U.S. 277, 284–86 (1983).}
\footnotetext{88}{See \textit{supra} notes 22–29 and accompanying text.}
\footnotetext{89}{See \textit{supra} notes 33, 41, 57–60 and accompanying text.}
\footnotetext{90}{See \textit{supra} notes 22–29 and accompanying text.}
\footnotetext{91}{See Weems v. United States, 217 U.S. 349 (1910).}
\footnotetext{92}{See Weems v. United States, 217 U.S. 349 (1910).}
\footnotetext{93}{See \textit{Coker} v. Georgia, 433 U.S. 584 (1977).}
\footnotetext{94}{See \textit{Weems} v. \textit{United States}, 463 U.S. 277 (1983).}
\footnotetext{95}{Harmelin v. Michigan, 111 S. Ct. 2680, 2686 (1991).}
\footnotetext{96}{\textit{Id}. at 2691–94.}
\footnotetext{97}{\textit{Id}. at 2696–97 n.11.}
\end{footnotes}
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Scalia's interpretation of the Eighth Amendment would allow life sentences for petty violations to remain unquestioned and unreviewable.

Despite Justice Scalia's view, the Eighth Amendment compels a different result. Whether a punishment may be characterized as barbaric should depend on evolving standards of justice. Forms of punishment the Framers tolerated should not be imposed under modern standards of fairness and decency. To accommodate the evolving understanding of cruel and unusual, courts must evaluate the severity of a particular punishment and ensure that, according to current standards, the punishment fits the crime.

2. Extending Proportionality Review to Mandatory Life Sentences Without Parole

A liberal interpretation of the Court's proportionality doctrine would extend review to all forms of criminal sentencing. The narrower interpretation, however, restricts proportionality analysis only to cases involving the death penalty. In 

Harmelin, Justice Scalia adopted the narrower view and insisted on differentiating the death penalty and a life sentence without parole.

Extending proportionality review to mandatory life sentence without parole follows logically in light of the view that capital punishment falls within the scope of Eighth Amendment review. Capital punishment and mandatory life sentences without parole share one important characteristic: the offender never regains freedom. Both punishments assume that the offender exhibits an incapacity for reform and rehabilitation. Justice Scalia, however, differentiates the death penalty from a mandatory life sentence without parole. Justice Scalia offers reassurances that retroactive legislative reduction and executive clemency provide means by which life sentences may be reduced or

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96. Weems v. United States, 217 U.S. 349, 373 (1910) ("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.")

97. See supra notes 30–35, 38–42, 51–61 and accompanying text (for example, cadena temporal for falsifying a documents; death penalty for rape; discretionarily-imposed life sentence for seventh nonviolent crime).


99. See supra note 45 and accompanying text.

100. Id.

101. Id. at 2719 (Stevens, J., dissenting).

102. Id. at 2720 (Stevens, J., dissenting).

103. Id. at 2702 (distinguishing death penalty from mandatory life sentence because death penalty is "unique in its total irrevocability . . . [and] rejection of rehabilitation").
rescinded. Elected officials rarely enact retroactive reductions in
drug sentences, however, for fear of revealing a weak stance against
drugs. Executive clemency similarly offers little hope because gov-
ernors rarely exercise this power. The irrevocability and rejection
of rehabilitation inherent in the death penalty and in mandatory life
sentences without parole support treating the two punishments simi-
larly. Thus, proportionality analysis naturally extends to cases involv-
ing life imprisonment without parole.

**B. Justice Kennedy Abridges the Solem Standard**

From *Weems* to *Solem*, the comparative analysis under the propor-
tionality principle has entailed a three part comparison. In *Harme-
lin*, however, Justice Kennedy revises the existing proportionality
standard. Justice Kennedy adheres to the proportionality principle,
but disregards the three part *Solem* standard. Instead, Justice Ken-
nedy concludes that the first *Solem* factor—comparing the severity of
the punishment to the gravity of the crime—constitutes a sufficient
means of evaluating the disproportionality of a particular sentence.
The language of *Solem* and the earlier Court decisions contradict Jus-
tice Kennedy’s interpretation. The *Solem* decision recognizes that
no one factor will be dispositive in determining disproportionality.

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104. Id.
105. Susan LaCava, Comment, Taking and Federal Impairment of Contract Issues in the Extension of Preemption of Due-on-Sale Restrictions Beyond Federal Savings and Loans, 58 Ind. L.J. 651, 661 (1983) (“retroactive legislation traditionally has been regarded as undesirable because it reduces the possibility of planning conduct with reasonable certainty of the legal consequences”).
106. See Jeffrey Kassel, Comment, Sentence Modification by Wisconsin Trial Courts, 1985 Wts. L. Rev. 195, 233 (1985) (executive clemency is rarely granted to criminals serving sentences); see also *Solem* v. Helm, 463 U.S. 277, 303 (1983) (“possibility of commutation is nothing more than a hope for an ad hoc exercise of clemency”).
107. See supra notes 30–68 and accompanying text; see also *Solem*, 463 U.S. at 290 n.17 (“The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment . . . [A] combination of objective factors can make such analysis possible.”).
108. *Harmelin*, 111 S. Ct. at 2702 (Kennedy, J., concurring) (“stare decisis counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years”).
109. Id. at 2706–07 (Kennedy, J., concurring).
111. *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring). Only when the threshold comparison results in gross disproportionality do the second and third factors enter into the calculus.
113. Id.
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Thus, Justice Kennedy’s emphasis on the first factor goes against Solem’s recommendation and the pattern of earlier decisions.

Justice Kennedy points to objectivity as one of four important principles in proportionality review. Justice Kennedy, however, undermines his important goal by using the least objective Solem factor to measure disproportionality. The first Solem factor is central to the proportionality concept, but applied alone, it is the factor least capable of objective measurement.

Comparing a crime’s gravity to the punishment imposed requires a subjective judgment. Judges can lessen subjectivity about the relative gravity of various crimes and punishments by using accepted precepts of criminal law. These criteria, however, are hardly helpful when balancing a particular crime against a particular punishment. Subjective judgments enter when comparing two fundamentally different elements: punishment and crime. The elements require different scales of measurement and assessment. For example, judges gauge the severity of the punishment by considering the societal goals of deterrence, rehabilitation, retribution and incapacitation. On the other hand, judges use the criminal’s culpability, intent, and motive, and the nature of the injury to measure the gravity of the crime.

The complexity of sentencing decisions and the absence of agreement on the goals of punishment, or the best methods of achieving those goals, make this comparison inevitably subjective. Without further intra- and inter-jurisdictional comparisons, reasonable persons

114. See Harmelin, 111 S. Ct. at 2704–05 (Kennedy, J., concurring). First, courts should grant substantial deference to legislative determinations. Id. at 2703–04. Second, the Eighth Amendment does not mandate adoption of any legitimate sentencing scheme. Id. at 2704. Third, marked divergences of sentencing schemes are the product of federalism. Id. Fourth, proportionality review should be informed by objective factors to the maximum possible extent. Id. at 2704–05.

115. See infra notes 116–24 and accompanying text.


117. Id.

118. Id. at 133–34.

119. For example, judges should punish crimes against persons more severely than ones against property. Stealing one million dollars is more severely punished than stealing one hundred dollars. Solem v. Helm, 463 U.S. 290, 293 (1983). Negligent acts are less culpable than reckless acts and therefore punished less severely, and reckless acts less than malicious acts. Id. Moreover, in the hierarchy of punishments the death penalty is considered the harshest punishment.

120. See WAYNE R. LAFave & Austin W. Scott, CRIMINAL LAW 23–25 (1986).

121. Solem, 463 U.S. at 292–94.

122. See LAFAVE & Scott, supra note 120, at 22–27.
can easily disagree on the appropriateness of the punishment.\textsuperscript{123} Even Justice Scalia argues that the first \textit{Solem} factor necessitates a subjective determination.\textsuperscript{124} Justice Kennedy's effective abandonment of the second and third factors makes any attempt at consistent proportionality analysis futile because the comparison made under the first \textit{Solem} factor constitutes a value judgment. Justice Kennedy consequently fails to satisfy his own criterion of objectivity in determining whether a punishment is proportionate to the crime.

III. THE RAMIFICATIONS OF \textbf{HARMELIN}

\textbf{A. Harmelin Does Not Provide Adequate Guidance for Lower Courts}

\textit{Harmelin} leaves lower courts with no clear statement regarding the scope of the Eighth Amendment. Much confusion stems from the incongruous rationales employed by Justices Scalia and Kennedy to reach the same outcome.\textsuperscript{125} Justice Scalia directly rejects prior Court decisions,\textsuperscript{126} and bases his position on controverted interpretations of the Framers' original intent.\textsuperscript{127} Justice Kennedy, on the other hand, defers to stare decisis,\textsuperscript{128} but abridges the three factor proportionality standard promulgated in \textit{Solem}.\textsuperscript{129} Moreover, Justice Kennedy undermines his own goal of achieving objectivity in proportionality review by emphasizing the least objective factor.\textsuperscript{130} Thus, \textit{Harmelin} fails to provide answers to the questions of whether the proportionality principle applies to legislatively-mandated life sentences, and if so, what kind of proportionality review standard applies. Without guidance, lower courts will find assessing the constitutional validity of punishment schemes difficult, if not impossible.

Given the inconsistent opinions of the \textit{Harmelin} Court, lower courts should confine \textit{Harmelin} to the three discrete points on which a majority of Justices agrees. First, although subject to debate regarding

\begin{itemize}
  \item \textsuperscript{123} For example, Justice Kennedy, applying the first \textit{Solem} factor, found a life sentence without parole for 672.5 grams of cocaine possession a reasonable punishment. \textit{Harmelin} v. Michigan, 111 S. Ct. 2680, 2706–07 (1991) (Kennedy, J., concurring). Justice White, applying the first factor, found the same sentence excessive. \textit{Id.} at 2716–18 (White, J., dissenting).
  \item \textsuperscript{124} \textit{Id.} at 2697–98.
  \item \textsuperscript{125} \textit{See supra} notes 66–74 and accompanying text.
  \item \textsuperscript{126} \textit{See supra} notes 88–92 and accompanying text.
  \item \textsuperscript{127} \textit{See supra} notes 82–87 and accompanying text.
  \item \textsuperscript{128} \textit{Harmelin}, 111 S. Ct. at 2702 (Kennedy, J., concurring).
  \item \textsuperscript{129} \textit{Id.} at 2707 (Kennedy, J., concurring).
  \item \textsuperscript{130} \textit{See supra} notes 114–24 and accompanying text.
\end{itemize}
Mandatory Life Sentence for Cocaine Possession

its precedential value, the majority view establishes that a mandatory life sentence without parole for possession of 672.5 grams of cocaine is not unconstitutional. Second, a majority agrees that a mandatory life sentence does not violate the Eighth Amendment solely because the sentence precludes consideration of mitigating factors. Third and most importantly, seven Justices hold firm to some kind of proportionality principle. Harmelin provides support for these three propositions.

B. Harmelin Inappropriately Curtails Judicial Review by Deferring to Legislatures

Despite the narrowness of its holding, Harmelin essentially eliminates judicial review of legislatively-mandated prison sentences. Justice Scalia denounces judicial intrusion into criminal sentencing because punishments are a matter of legislative prerogative. Justice Kennedy similarly defers to legislatures by concluding that legislative determinations are “fortified by presumptions of right and legality.” By forming a presumption of constitutionality, five Justices have abdicated virtually all power to review legislatively-mandated prison sentences.

Guarding legislatively-mandated sentences from constitutional scrutiny, however, violates a settled principle of American jurisprudence. Although legislatures should have independence to carry out local penal and public goals, determining whether legislatures have

131. This first proposition is subject to debate because of the plurality nature of the opinion and the fact that the majority did not agree on the reason for the holding. See Linda Novak, Note, The Precedential Value of Supreme Court Plurality Decisions, 80 COLUM. L. REV. 756 (1980). The author demonstrates the difficulty of laying down clear interpretative rules that will be applicable to the many different types of plurality decisions. How a particular decision should be handled depends on a variety of factors, including the precise nature of the issues presented and their relation to the broader area of law involved, the alignment of the Justices on a particular issue, the interrelationship between the various rationales suggested, and the degree to which a subsequent case is legally or factually distinguishable.

132. Harmelin, 111 S. Ct. at 2701; id. at 2705–08 (Kennedy, J., concurring).

133. These Justices included Justices Scalia, Rehnquist, Kennedy, O'Connor and Souter. Id. at 2701–02; id. at 2707–09 (Kennedy, J., concurring).

134. Justices Kennedy, O'Connor and Souter concluded that the Eighth Amendment prohibited only extreme sentences. Id. at 2702–05 (Kennedy, J., concurring). Justices White, Marshall, Stevens and Blackmun concluded that the Eighth Amendment prohibited disproportionate sentences. Id. at 2709–20 (White, J., dissenting).

135. Id. at 2684; id. at 2703 (Kennedy, J., concurring).

136. Id. at 2684, 2696–99.

137. Id. at 2704 (quoting Weems v. United States, 217 U.S. 349, 379 (1910)).

138. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“[i]t is emphatically the province and duty of the judicial department to [s]ay what the law is.”).
overstepped the constitutional boundary of permissible punishments requires judicial review.\textsuperscript{139} Justices Scalia's and Kennedy's legislative deference argument, taken to its logical conclusion, would validate imposition of a life sentence for a petty violation, because it limits a court's ability to question the constitutionality of a legislatively-mandated sentence. \textit{Harmelin} provides no mechanism for overcoming the presumption of constitutionality, but instead offers empty reassurances that these extreme cases will never occur.\textsuperscript{140} Legislatures, however, do enact reactionary or extremist statutes.\textsuperscript{141} By over-emphasizing deference to the legislative branch of government, the \textit{Harmelin} Court has lost sight of the key issue: the judiciary remains the gate-keeper of individual rights.\textsuperscript{142} The Court must prevent states from overzealously creating penal schemes that violate the Eighth Amendment.\textsuperscript{143}

\section*{IV. \ PROPORTIONALITY REVIEW UNDER THE \textit{SOLEM} PRECEDENT SHOULD APPLY}

The \textit{Harmelin} Court should have applied the \textit{Solem} standard. The \textit{Solem} standard faithfully reflects the proportionality principle established in the Supreme Court's earlier decisions.\textsuperscript{144} Justices Scalia and Kennedy provide no adequate justification for overruling or limiting \textit{Solem}'s full application.\textsuperscript{145} On the contrary, \textit{Solem} provides a workable standard for determining whether a punishment is disproportionate because it requires a defendant to prove significant inter- and intra-jurisdictional disparities.\textsuperscript{146} Under the three part \textit{Solem} standard, Harmelin's mandatory life sentence without parole constitutes unconstitutionally cruel and unusual punishment.

\begin{itemize}
\item \textsuperscript{139} Furman v. Georgia, 408 U.S. 238 (1972). The Court stated:
  Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not.
  \textit{Id.} at 313–14.
\item \textsuperscript{140} \textit{Harmelin}, 111 S. Ct. at 2696–97.
\item \textsuperscript{141} See, e.g., Robinson v. California, 370 U.S. 660 (1962). The Supreme Court held unconstitutional a statute making it a crime for a person to be addicted to the use of narcotics. The statute required no proof of any criminal conduct.
\item \textsuperscript{142} Weems v. United States, 217 U.S. 349, 378–79 (1910).
\item \textsuperscript{143} See \textit{id.; Furman}, 408 U.S. at 313–14 (White, J., concurring).
\item \textsuperscript{144} See \textit{supra} notes 62, 107 and accompanying text.
\item \textsuperscript{145} See \textit{supra} notes 82–124 and accompanying text.
\end{itemize}
A. Solem Provides a Workable Standard

The Solem standard has worked well in practice.\textsuperscript{147} Lower courts seem to have little difficulty applying the tripartite standard.\textsuperscript{148} The initial fear that Solem would open the floodgates of Eighth Amendment litigation has not been realized.\textsuperscript{149} Although the Solem standard is not free from the imposition of subjective values,\textsuperscript{150} the application of all three factors achieves a more objective ruling than applying just the first factor, as proposed by Justice Kennedy.\textsuperscript{151} Under Solem, judges should overturn sentences when all three comparisons indicate disproportionality.\textsuperscript{152} Giving weight to all three factors reduces the likelihood that a punishment will be rejected without clear explanation by the courts.

B. A Mandatory Life Sentence Without Parole for Drug Possession Is Unconstitutional

1. Disparity Between Crime and Punishment

Ronald Harmelin was convicted for possession of 672.5 grams of cocaine. Harmelin had no criminal record.\textsuperscript{153} His offense was not exceptionally serious.\textsuperscript{154} Although the amount of cocaine suggests intent to sell or deliver,\textsuperscript{155} Harmelin was convicted only for possession. For this nonviolent, first offense, Harmelin received life imprisonment without the possibility of parole. Harmelin's life imprisonment constitutes an unconscionable punishment. For the crime of possession, Michigan mandated its harshest punishment.\textsuperscript{156} States generally reserve their harshest punishments for crimes involving great moral turpitude, such as first-degree murder.\textsuperscript{157} Crimes of moral turpitude are immoral or wrong in themselves, or naturally evil.\textsuperscript{158} In contrast, drug possession constitutes a crime of \textit{mala prohibatum}\textsuperscript{159}—a crime

\textsuperscript{147} Harmelin v. Michigan, 111 S. Ct. 2680, 2712 (1991) (White, J., dissenting).
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 2713 n.3 (White, J., dissenting).
\textsuperscript{150} See supra notes 107–24 and accompanying text.
\textsuperscript{151} See supra notes 107–24 and accompanying text.
\textsuperscript{152} Solem v. Helm, 463 U.S. 277, 290 n.17 (1983).
\textsuperscript{153} Harmelin, 111 S. Ct. at 2716 (White, J., dissenting).
\textsuperscript{154} Id.
\textsuperscript{155} 673.5 grams of cocaine is roughly equivalent to 1.5 pounds; see supra note 3.
\textsuperscript{156} Michigan prohibits the death penalty, therefore life imprisonment without possibility of parole is the most severe punishment. See Harmelin, 111 S. Ct. at 2716 (White, J., dissenting).
\textsuperscript{157} LAFAVE & SCOTT, supra note 120, at 32–35.
\textsuperscript{158} See id. at 32–33.
not inherently evil, but prohibited by legislative enactment.\textsuperscript{160} Despite the distinction, Michigan punished Harmelin with its harshest penalty.

2. \textit{Intra-Jurisdictional Comparison}

Harmelin has been punished more severely than criminals committing more severe crimes in Michigan. Michigan mandates life imprisonment without parole for two other crimes: first-degree murder,\textsuperscript{161} and manufacture and distribution of drugs.\textsuperscript{162} These crimes can be easily distinguished from Harmelin’s offense. First-degree murder involves an intentional or premeditated taking of life, often through violence. The manufacture and distribution of drugs requires an intent to contribute to the severe, subsidiary effects of drug abuse. Drug possession, on the other hand, merely requires a knowing retention of a controlled substance.\textsuperscript{163} Unfairly, however, Harmelin was punished as severely as a drug manufacturer and distributor or murderer.

In addition, in Michigan, some violent crimes draw lesser sentences. For example, mutilating or maiming a person\textsuperscript{164} and assault with intent to do great bodily harm\textsuperscript{165} carry terms of 10 years or less. The intra-jurisdictional comparison reveals that Michigan punished Harmelin more or as severely than defendants committing more serious crimes.

3. \textit{Inter-Jurisdictional Comparison}

Michigan is the only state in the country that mandates a sentence of life imprisonment without parole for possession of 650 grams of cocaine.\textsuperscript{166} Only one other state, Alabama, has a similar mandatory life sentence.\textsuperscript{167} Alabama, however, requires possession of ten kilograms, or over fifteen times the amount that Harmelin possessed, to justify a mandatory life sentence.\textsuperscript{168} For Harmelin’s crime, Alabama mandates a five-year minimum term.\textsuperscript{169} In comparison, some states provide less than one year for an offense such as Harmelin’s.\textsuperscript{170}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See supra note 4.
\item \textsc{Mich. Comp. Laws} §750.397 (1991).
\item \textsc{Mich Comp. Laws} §750.84 (1991).
\item Id.
\item \textsc{Ala. Code} §13A–12–231(2)(b) (Michie Supp. 1991).
\item See, \textit{e.g.}, \textsc{Wyo. Stat.} §35–7–1031(c) (1988) (not more than 6 months).
\end{enumerate}
\end{footnotesize}
The mandatory nature of Michigan’s statute contributes to the disparity. Some states provide a possible maximum sentence of life imprisonment for Harmelin’s offense.\textsuperscript{171} These states, however, allow judges discretion in sentencing and grant an opportunity for parole. In contrast, the Michigan statute denies judges any discretion in sentencing and forecloses any consideration of a defendant’s character. A comparison with federal penalties further evidences the disproportionality of Michigan’s statute.\textsuperscript{172} The inter-jurisdictional comparison demonstrates that Michigan mandates the most severe punishment in the country. In short, all three \textit{Solem} factors indicate that Harmelin’s sentence violates the Eighth Amendment.

V. CONCLUSION

Although the Eighth Amendment does not expressly protect against disproportional punishment, the Supreme Court has consistently read into the Eighth Amendment a proportionality guarantee. The Supreme Court progressively expanded the scope of the Eighth Amendment first to unusual punishments, then to capital punishment, and finally to discretionarily-imposed life sentences. In light of these explicit holdings, \textit{Harmelin} imprudently limits the scope of the Eighth Amendment and finds a legislatively-mandated life sentence for cocaine possession constitutionally permissible. Justice Scalia’s conclusion that the Eighth Amendment does not contain a proportionality principle finds no support in Supreme Court precedent and is based on controverted historical analysis. In addition, Justice Kennedy’s threshold test for proportionality undermines both his own goal of objectivity and the language of \textit{Solem}, upon which he relies. \textit{Harmelin} provides lower courts with inadequate guidance and inappropriately curtails judicial review of legislatively-mandated sentencing schemes. Rather, the \textit{Harmelin} Court should have applied \textit{Solem}, which provides a consistent and workable standard of review. Under the three part \textit{Solem} standard, Harmelin’s mandatory life sentence without the possibility of parole violates the Eighth Amendment’s prohibition against disproportionate punishment.


\textsuperscript{172} 21 U.S.C. §841 (b)(1)(B)(ii) (1988) (possession with intent to manufacture or distribute 500 grams or more of cocaine punishable by a prison term not less than five or more than forty years).