

HARME LIN V. MICHIGAN: IS PROPORTIONATE SENTENCING MERELY LEGISLATIVE GRACE?

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Ronald Harmelin, a first offender with no criminal record, was sentenced pursuant to a Michigan statute to life without parole for possessing 672 grams of cocaine. In a plurality opinion, in *Harmelin v. Michigan*, the United States Supreme Court held that Harmelin's sentence was not unconstitutionally disproportionate to his crime. Two justices stated that the Eighth Amendment of the U.S. Constitution does not prohibit a term of years sentence that is disproportionate to the crime for which it is imposed. Three justices held that the Eighth Amendment's Cruel and Unusual Punishment Clause only forbids a legislatively mandated sentence that is *grossly* disproportionate to the crime for which it is imposed but found that Harmelin's sentence was not grossly disproportionate.

This Note analyzes the Court's reasoning in *Harmelin* with respect to the proportionality issue and concludes that the Court acted under the guise of deference to the legislature, but with the political effect of furthering the "war on drugs" at the cost of eviscerating one element of criminal defendants' Eighth Amendment protections.

*Ronald Harmelin should have picked a different crime. He should have mugged an old man and stolen his wallet, or kidnapped a child, or raped a woman at gunpoint, or maimed a pedestrian while driving drunk, or beaten someone to death in a quarrel. Then he would not be facing the certainty that he will never again set foot outside a Michigan state penitentiary.*¹

I. INTRODUCTION

Inherent in a sense of justice is the notion that a punishment fit the crime for which it is imposed. This precept of fairness is embodied in the Eighth Amendment's Cruel and Unusual Punishments Clause.² In *Harmelin v. Michigan*,³ Ronald Harmelin, a non-violent first offender, was convicted of possessing cocaine and sentenced to life imprisonment without possibility of parole. Harmelin argued that his sentence violated

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1. Stephen Chapman, *Kilo for Kilo, Sentence Was Cruel, Unusual*, ST. LOUIS POST DISPATCH, July 7, 1991, at 3B.

2. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. 111 S. Ct. 2680 (1991).

the Eighth Amendment's Cruel and Unusual Punishments Clause because the judge was statutorily required to impose the sentence without considering the particular circumstances of the crime and the criminal. Harmelin also asserted that the sentence was "significantly disproportionate" to the crime for which it was imposed. The United States Supreme Court ruled that mandatory life in prison without possibility of parole for possession of 650 grams of cocaine is not cruel and unusual punishment under the Eighth Amendment.⁴ Five Justices agreed⁵ that when imposing punishment a court need not consider mitigating factors unless it is a death penalty case. And, albeit for different reasons, the plurality agreed that the Michigan sentence imposed on Harmelin was not unconstitutionally disproportionate.

This Note focuses on the reasoning of the Supreme Court Justices in *Harmelin v. Michigan* with respect to the issue of proportionality.⁶ Part II outlines the facts and procedural posture of the case. Part III explores previous Supreme Court decisions in Eighth Amendment cases involving the proportionality principle under the Cruel and Unusual Punishments Clause and comments on the impact of the *Harmelin* decision on this line of precedent. Specifically, Part III examines three Supreme Court decisions in the early 1980s.⁷ The discussion illustrates that although the Court had been divided about the degree to which the Eighth Amendment protects people from disproportionate punishment, the Court clearly had acknowledged that a proportionality principle existed. This section asserts that the Court in *Solem v. Helm* correctly resolved the issue, albeit by a narrow majority. Part IV analyzes the *Harmelin* decision and demonstrates how that decision effectively overruled the much-needed proportionality guarantee espoused in *Solem v. Helm* when the Court upheld the imposition of the second most severe punishment⁸ on a non-violent first time drug offender. Finally, Part V concludes that the Court acted under the guise of deference to the legislature, with the political effect of furthering the "war on drugs."⁹

4. *Id.* at 2701-02.

5. The plurality consisted of Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Kennedy and Justice Souter.

6. The issue of admitting mitigating evidence in non-capital cases is beyond the scope of this discussion.

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

8. Harmelin's punishment was the most severe punishment available in Michigan since Michigan does not have the death penalty.

9. See *infra* notes 139-48 and accompanying text.

II. FACTS AND PROCEDURAL POSTURE

In *Harmelin v. Michigan*, a forty-five year old former Air Force Honor Guard with no prior criminal record,¹⁰ was convicted under Michigan law of possessing 672 grams¹¹ of cocaine and sentenced to life in prison without a possibility of parole.¹² On appeal, Harmelin argued that the sentence violated the Eighth Amendment guarantee of freedom from cruel and unusual punishments. Harmelin claimed that the sentence was cruel and unusual because the sentence of life imprisonment without a possibility of parole was "significantly disproportionate" to his crime. Furthermore, he asserted that the sentence was cruel and unusual because the sentencing judge was statutorily required to impose it without taking into account the particular circumstances of the crime and the defendant's criminal record.

The Michigan Court of Appeals initially reversed Harmelin's conviction because evidence supporting it had been obtained in violation of the Michigan Constitution.¹³ However, on petition for rehearing, the court of appeals vacated its prior decision and affirmed Harmelin's sentence, explicitly rejecting his Eighth Amendment argument.¹⁴ The

10. Ruth Marcus, *Life in Prison for Cocaine Possession?; High Court Weighing Strict Michigan Law*, WASH. POST, Nov. 5, 1990, at A1.

11. 672 grams is approximately one and a half pounds.

12. Harmelin was pulled over by police officers in the early morning of May 12, 1986, after he made a U-turn in the high-crime area of Oak Park, Michigan, without stopping for a red light. Harmelin responded to the police officers in a cooperative manner when asked to produce his driver's license and vehicle registration. After being ordered to step out of his car, Harmelin informed the officers that he was carrying a concealed weapon for which he had a permit because he did not want the officers to become alarmed. Although the officers had no reason to believe that the weapon registration was invalid, they patted him down because he appeared nervous. In doing so, the officers discovered marijuana in his pocket and placed him under arrest.

Pursuant to standard departmental procedure, Harmelin's car was impounded and inventoried. During the search, officers discovered the cocaine in his trunk, along with other drug paraphernalia. *People v. Harmelin*, 440 N.W.2d 75, 77-78 (Mich. Ct. App. 1989) *cert. granted in part sub nom. Harmelin v. Michigan*, 495 U.S. 956 (1990), *aff'd* 111 S. Ct. 2680 (1991).

13. Although the federal Constitution permits a police officer to order one who has been lawfully stopped out of his car without further suspicion of foul play, two judges of a three judge panel concluded that the Michigan Constitution's search-and-seizure provision provides greater protection than the federal Constitution. (The third judge, in dissent, found that Harmelin was not ordered out of his car, but voluntarily left it.) *Id.* at 76.

14. *Id.* at 80. The court of appeals summarily rejected Harmelin's Eighth Amendment argument, citing *People v. Harding*, 413 N.W.2d 777 (Mich. Ct. App. 1987), *vacated on other grounds*, 420 N.W.2d 826 (Mich. 1988).

Michigan Supreme Court denied leave to appeal, and the United States Supreme Court granted certiorari.¹⁵ On review, the United States Supreme Court affirmed the court of appeals' decision.¹⁶

In holding that Harmelin's sentence was not unconstitutionally cruel and unusual, five Justices concluded that there was no precedent or reason compelling a court to consider the particular circumstances of the crime in a non-capital case. With respect to Harmelin's proportionality claim, two Justices¹⁷ concluded that the Eighth Amendment does not contain a proportionality in sentencing guarantee and therefore, Harmelin did not have a claim. Three Justices¹⁸ recognized a narrow proportionality guarantee in the Eighth Amendment, but held that Harmelin's sentence did not violate it.

III. BACKGROUND

A. Historical Development and Application of Proportionality Principle

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁹ Although the language of the amendment does not expressly prohibit excessive sentences or disproportionate punishments, the Supreme Court has extracted this guarantee from the amendment.

The first acknowledgement of a proportionality requirement²⁰ in the Eighth Amendment by a Supreme Court Justice was in a dissenting

In *Harding*, the court had held that mandatory life in prison for a conviction of delivering 650 grams of cocaine was not cruel and unusual punishment. Because the issue had been considered numerous times by the Michigan Court of Appeals, and in all cases the court had held that such punishment is not unconstitutional, the *Harding* court felt "constrained" to follow precedent. However, the court invited both the Michigan Supreme Court and the Michigan legislature to review the issue because the court was persuaded by Harding's argument. *Harding*, 413 N.W.2d at 791.

15. *Harmelin*, 495 U.S. 956 (1990).

16. *Harmelin*, 111 S. Ct. 2680.

17. Chief Justice Rehnquist and Justice Scalia. *Id.* at 2685.

18. Justice O'Connor, Justice Kennedy and Justice Souter. *Id.* at 2705.

19. U.S. CONST. amend. VIII.

20. One of the first cases presenting a proportionality argument was *Pervcar v. Massachusetts*, 72 U.S. (5 Wall.) 475, 479-80 (1866). The defendant, who was fined \$50 and sentenced to three months hard labor as a result of being convicted of illegally keeping and maintaining a tenement for the sale and possession of liquor, challenged his sentence on the basis that it was disproportionate to his offense. The Supreme Court, however, dismissed his claim because the Eighth Amendment was not applicable to State action. However, in dictum the Court stated that the defendant's sentence was simply a matter of legislative choice.

opinion in *O'Neil v. Vermont*,²¹ in which Justice Field concluded that the Eighth Amendment was violated by "all punishments which by their excessive length or severity are *greatly disproportioned* to the offences charged."²² Less than twenty years later, this proportionality principle was embraced by a majority in *Weems v. United States*.²³

In *Weems*, which has been cited as the leading proportionality case,²⁴ the Court asserted two principles. First, the Court recognized that the legislature has a prominent but not absolute power to define crimes and punishments. The *Weems* Court declared that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."²⁵ Second, the Court concluded that the proportionality requirement is flexible and dynamic.²⁶

21. 144 U.S. 323 (1892). In *O'Neil*, the defendant, a licensed New York distributor of wines and liquors, was convicted of 307 separate counts of mail-order sales of liquor in Vermont, a state that prohibited the sale of liquor. The defendant's cumulative fine plus costs was \$6,638.72, and he was committed until payment. A failure to meet a payment deadline would result in the imposition of an approximately 55 year sentence. The majority dismissed O'Neil's writ for want of jurisdiction, noting that the Eighth Amendment was not applicable to the states. *Id.* at 332.

22. *Id.* at 339-40 (Field, J., dissenting) (emphasis added). Justice Field emphasized that O'Neil would have received a lesser punishment had he been found guilty of burglary or highway robbery and that O'Neil's punishment was six times as great as any Vermont court could have imposed for manslaughter, forgery or perjury. *Id.* at 339.

23. 217 U.S. 349 (1910). In *Weems*, the defendant was convicted under Philippine law of falsifying a public document and was sentenced to 15 years of punishment that included imprisonment, hard and painful labor, shackling at the ankle and wrist and permanent loss of basic civil rights, including parental authority, suffrage, privacy and the right to make inter vivos transfers of wealth. *Id.* at 362-65.

24. See *Solem v. Helm*, 463 U.S. 277, 286-87 (1983) (referring to "the leading case of *Weems v. United States*"); *Harmelin v. Michigan*, 111 S. Ct. 2680, 2702 (1991) ("We first interpreted the Eighth Amendment to prohibit 'greatly disproportionate' sentences in *Weems v. United States*." (Kennedy, J., concurring) (citations omitted); Lisa Gayle Bradley, *Proportionality in Capital and Non-Capital Sentencing: An Eighth Amendment Enigma*, 23 IDAHO L. REV. 195, 198 (1986-87) ("[*Weems*] marks the first time the cruel and unusual punishment clause was construed to forbid the infliction of penalties disproportionate to the gravity of the offense.").

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

26. *Id.* at 373. According to the Court:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. 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.

Id. Based on this interpretation and the fact that other Philippine crimes were punished less severely, the Court concluded that Weem's punishment was unconstitutional. *Id.* at 382.

After *Weems*, the proportionality principle was not revisited for fifty years, until the Supreme Court's decision in *Trop v. Dulles*.²⁷ In *Trop*, Chief Justice Warren applied *Weems* to hold that the Eighth Amendment prohibited punishing a soldier with denationalization for the crime of being absent without leave for one day.²⁸ A few years later, in *Robinson v. California*,²⁹ the Supreme Court used the proportionality principle to invalidate a criminal sentence, holding that any imprisonment would be disproportionate to the offense of addiction.³⁰ The Court recognized that states have a wide "range of valid choice"³¹ in administering punishments, but held that by criminalizing addiction, the legislature had acted unconstitutionally.³² More recently, the Supreme Court has used proportionality analysis when confronted with death penalty cases.³³

B. Recent Development of the Proportionality Principle

In the early 1980s, the Court decided three Eighth Amendment cases involving the proportionality principle with respect to term of years sentences.

27. 356 U.S. 86 (1958).

28. Drawing from *Weems*'s acknowledgment that the words of the amendment are not precise, the Court stated that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

29. 370 U.S. 660 (1962).

30. *Id.* at 666-68. Section 11721 of the California Health and Safety Code provided in relevant part that "[n]o person shall . . . be addicted to the use of narcotics. . . . Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail." *Robinson*, 370 U.S. at 660-61 n.1. The California courts had construed this to make the status of addiction punishable even if the defendant had never used any narcotics within the state or been guilty of any anti-social behavior there. *Id.* at 666.

31. *Robinson*, 370 U.S. at 665.

32. *Id.* at 667.

33. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (capital punishment was unconstitutionally excessive for the crime of felony murder when the defendant did not intend to, attempt to or actually take a life); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (capital punishment was unconstitutionally excessive for the crime of unaggravated rape of an adult woman); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) (death sentence does not violate Eighth Amendment when statutory scheme ensures that sentencing is not disproportionate to the offense).

1. *RUMMEL V. ESTELLE*

In *Rummel v. Estelle*,³⁴ Rummel was charged with obtaining \$120.75 by false pretenses.³⁵ Because it was his third felony conviction,³⁶ he received a mandatory life sentence pursuant to Texas's recidivist statute.³⁷

Rummel sought a writ of habeas corpus in federal district court claiming that his life sentence was so disproportionate to the three felonies which were the basis for his sentence that it was cruel and unusual punishment, violating the Eighth Amendment.³⁸ The district court rejected his claim,³⁹ but a divided panel of the Fifth Circuit Court of Appeals, relying on *Weems* and a Fourth Circuit decision,⁴⁰ reversed.⁴¹

On rehearing en banc, however, the Fifth Circuit affirmed the district court's denial of habeas corpus. In particular, the Fifth Circuit noted the probability that Rummel would be eligible for parole within twelve years

34. 445 U.S. 263 (1980).

35. *Id.* at 266.

36. Rummel was previously convicted of, and imprisoned for, fraudulent use of a credit card to obtain \$80 worth of goods or services and passing a forged check in the amount of \$28.36. *Id.* at 265-66.

37. The offense itself was punishable by confinement in a penitentiary for two to ten years, but the prosecutor elected to proceed against Rummel under Texas's recidivist statute. *Id.* at 266.

The recidivist statute provided that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." *Id.* at 264 (alteration in original).

38. *Id.* at 265.

39. The district court noted that the Supreme Court rejected a constitutional attack on Texas's recidivist statute in *Spencer v. Texas*, 385 U.S. 554 (1967), and the district court credited the respondent's argument that Rummel's sentence could not be viewed as life imprisonment since he would be eligible for parole in 12 years. *Rummel*, 445 U.S. at 267.

40. The panel relied on *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974). In *Hart*, the Fourth Circuit enumerated four factors that a reviewing court should consider in determining whether a punishment is constitutionally disproportionate. The factors are: (1) the nature of the offense; (2) the legislative purpose behind the punishment; (3) the punishment for the same offense in other jurisdictions; and (4) the punishment imposed in the jurisdiction for other crimes. *Id.* at 140-42.

Based on these criteria, the Fourth Circuit held that a mandatory life sentence imposed upon the defendant pursuant to the West Virginia recidivist statute was so excessive and disproportionate to the underlying offenses of writing a check on insufficient funds, transporting forged checks across state lines and perjury, that it violated the Eighth Amendment. *Id.* at 143.

41. *Rummel v. Estelle*, 587 F.2d 651, 662 (5th Cir. 1978).

of his confinement.⁴² The United States Supreme Court granted certiorari⁴³ and affirmed the Fifth Circuit.

The Court⁴⁴ began its analysis with two premises, neither of which petitioner denied. First, the Court noted that the Texas recidivist statute had been held constitutional on its face by the United States Supreme Court.⁴⁵ Second, the Court noted that each underlying felony was constitutionally punishable as such.⁴⁶ Therefore, the issue in *Rummel* was whether the State could impose a life sentence as opposed to a substantial term of years for Rummel's third felony. The Court held that Texas could constitutionally punish Rummel with a life sentence for committing three non-violent sequential felonies.⁴⁷

The Court acknowledged that "on occasion" it had stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime, but the Court said that recent applications of the proportionality principle were limited to death penalty cases because of the uniqueness of capital punishment.⁴⁸ According to the Court, the decisions applying the Eighth Amendment to capital punishment cases were of only "limited assistance" in analyzing *Rummel*.⁴⁹

Next, the Court acknowledged that in *Weems* it found a disproportionate term of years punishment unconstitutional, but the Court limited the application of *Weems* to its facts. The *Rummel* Court emphasized that *Weems* involved both a disproportionately long sentence and cruel and unusual modes of punishment.⁵⁰ The Court also made an

42. *Id.* at 659. Six members of the Fifth Circuit dissented, arguing that Rummel had no enforceable right to parole and that *Weems* compelled a finding that Rummel's life sentence was unconstitutional. *Id.* at 665, 670-71 (Clark, J., dissenting).

For a discussion of *Weems*, see *supra* note 23.

43. 441 U.S. 960 (1979).

44. Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger, Justice Stewart, Justice White and Justice Blackmun joined. Justice Stewart also filed a concurring opinion, and Justice Powell filed a dissenting opinion joined by Justice Brennan, Justice Marshall and Justice Stevens.

45. *Rummel*, 445 U.S. at 268. The Texas statute had been upheld by the Court in *Spencer v. Texas*, 385 U.S. 554 (1967).

46. *Rummel*, 445 U.S. at 268.

47. *Id.* at 285.

48. *Id.* at 271-72.

49. *Id.* at 272.

50. *Id.* at 273. In *Weems*, the defendant was sentenced to *cadena temporal*, a very graphic and abusive type of imprisonment. Quoting *Weems*, the Court in *Rummel* described *cadena temporal*:

Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights

issue of the "triviality" of Weems's offense since Weems was convicted only of falsifying a public document. The Court then concluded that the unique and cruel nature of the punishment considered in *Weems* and in death penalty cases presented extraordinary situations that warranted the Eighth Amendment prohibition.⁵¹

Despite stating that it is arguable that "the length of the sentence actually imposed is purely a matter of legislative prerogative,"⁵² the *Rummel* Court did concede that a limited judicial role exists, based on sufficiently objective criteria, for invalidating a term of years sentence that is grossly disproportionate. In a footnote, the Court acknowledged that the proportionality principle would come into play if a legislature made overtime parking a felony punishable by life imprisonment.⁵³ But the Court emphasized its reluctance to review legislatively mandated terms of imprisonment, and noted that its intrusion was objectively warranted where it could draw a bright line between the death penalty or cadena temporal punishment and term of years sentences. The Court asserted that drawing a line between different terms of years is a legislative decision and judicial review of such legislative choices would merely be subjective.⁵⁴

Justice Powell, Justice Brennan, Justice Marshall and Justice Stevens dissented, arguing that *Rummel* had been unconstitutionally punished. Justice Powell, writing for the dissent, designed a three-prong test to determine whether a sentence is disproportionately cruel and unusual, based on the premise that a proportionality analysis is an inherent aspect

or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing.

Id. (citation omitted). See also discussion *supra* note 23.

51. *Id.* at 274.

52. *Id.*

53. *Id.* at 274 n.11.

54. *Id.* at 275. The Court rejected criteria like the absence of violence and the small sums of money involved that *Rummel* offered to support his claim that his sentence was objectively grossly disproportionate. Instead, the Court emphasized Texas's interest in dealing with recidivists and found that *Rummel's* sentence was not grossly disproportionate. The Court did not compare punishments for other Texas crimes, and the Court found that a comparison of other states' recidivist statutes was too complex because of the many variables involved, including: prosecutorial discretion, the number of offenses necessary to trigger a recidivist statute, the types of offenses that will trigger the recidivist statute and the possibility of parole. *Id.* at 275-82.

of the Cruel and Unusual Punishments Clause. According to Justice Powell, a court should consider the nature of the offense, the sentence imposed for the commission of the same crime in other jurisdictions and the sentences imposed upon other criminals in the same jurisdiction.⁵⁵ After considering each factor, Justice Powell concluded that Rummel's punishment violated the proportionality principle embodied in the Cruel and Unusual Punishments Clause of the Eighth Amendment.⁵⁶

In *Rummel*, the plurality conceded that some sentences short of the death penalty can be constitutionally invalid by virtue of their length. However, the plurality emphasized the need for objective factors to decide if a sentence is unconstitutional, but failed to provide any objective criteria. In his dissenting opinion, Justice Powell attempted to provide an objective test.

2. *HUTTO V. DAVIS*

About a year after *Rummel* was decided, the Supreme Court faced another proportionality issue in *Hutto v. Davis*.⁵⁷ In *Davis*, a Virginia court convicted the respondent of possessing less than nine ounces of marijuana with the intent to distribute and of the distribution of marijuana. As a result, respondent was fined \$10,000 and sentenced to twenty years in prison for each of the two counts.

Like Rummel, Davis brought a habeas corpus action in federal district court, asserting that the forty year sentence was so grossly disproportionate to his crime that it violated the Cruel and Unusual Punishments Clause of the Eighth Amendment. The district court agreed, and issued a writ of habeas corpus,⁵⁸ analyzing Davis's sentence in light

55. *Id.* at 295. (Powell, J., dissenting).

56. In considering the nature of the offense, Justice Powell noted that none of the three crimes that formed the predicate for Rummel's conviction as a habitual offender involved injury to or threat of injury to one's person, violence or threat of violence, or the use of a weapon, and that the three crimes totalled under \$230.

When Justice Powell compared the Texas recidivist statute to other states' recidivist statutes, he noted that of the 12 states (Texas, California, Indiana, Kansas, Kentucky, Massachusetts, New York, Ohio, Oregon, Virginia, Washington and West Virginia) which had ever enacted a habitual offender statute imposing a mandatory life sentence for the commission of two or three non-violent felonies, only three states had retained the statute (Texas, Washington and West Virginia).

When he compared sentences imposed on other criminals in Texas, Justice Powell noted that all three-time felons subjected to the recidivist statute, regardless of the particular three felonies that they committed, received the same sentence. He also noted that Rummel was sentenced to a more severe punishment than first-time offenders or two-time offenders convicted of far more serious offenses. *Id.* at 295-302.

57. 454 U.S. 370 (1982).

58. *Id.* at 371.

of an earlier Fourth Circuit decision.⁵⁹ A panel of the Fourth Circuit Court of Appeals reversed,⁶⁰ but on rehearing, the Fourth Circuit affirmed the district court's award of habeas corpus relief.⁶¹ The Supreme Court granted certiorari,⁶² and ultimately reversed.⁶³

In *Davis*, the Supreme Court reasserted *Rummel*'s proposition that Eighth Amendment judgments should not be subjective.⁶⁴ The Court repeated the language in *Rummel* which stated that successful proportionality challenges should be exceedingly rare and federal courts should be reluctant to review legislatively mandated prison terms.⁶⁵ The Court then concluded that this was not an exceedingly rare circumstance.⁶⁶ As a result, the *Davis* Court simply applied the *Rummel* holding to a non-recidivist statute. The Court acknowledged that in rare cases a grossly disproportionate sentence may be unconstitutional, but failed to provide any realistic guidelines for determining when a sentence is grossly disproportionate.⁶⁷ This decision left the law in an equally ambiguous state.

The *Davis* outcome is troubling because the Court stated that the situation was not distinguishable from *Rummel*. However, in *Rummel*, the Court placed significant emphasis on *Rummel*'s recidivism. The *Rummel* Court rejected an inter-jurisdictional comparison, stating that recidivist statutes are complex and difficult to compare because they depend on both

59. The court relied on *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974). See discussion *supra* note 40.

60. The court noted that the Supreme Court "has never found a sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual punishment under the Eighth Amendment." *Davis v. Davis*, 585 F.2d 1226, 1229 (4th Cir. 1978).

61. *Davis v. Davis*, 601 F.2d 153 (4th Cir. 1979).

62. *Hutto v. Davis*, 445 U.S. 947 (1980).

63. Initially, the Court vacated the judgment of the court of appeals, and remanded for reconsideration in light of *Rummel v. Estelle*. *Hutto v. Davis*, 445 U.S. 947 (1980). The Fourth Circuit again affirmed the district court, and granted habeas corpus relief. The Supreme Court reversed, however, asserting that the Fourth Circuit did not follow the Supreme Court precedent in *Rummel*, finally denying respondent habeas corpus relief. *Davis*, 454 U.S. at 375.

64. *Davis*, 454 U.S. at 373.

65. *Id.* at 374.

66. The Court rejected the lower court's reliance on *Hart v. Coiner*, noting that the lower-court dissenters in *Rummel* also relied on *Hart v. Coiner*, which was then implicitly disapproved of by the *Rummel* Court's rejection of the dissenters' view. *Id.* at 373.

67. The Court's only reference to unconstitutionally disproportionate term-of-years sentences was its mention of the *Rummel* footnote which stated that the proportionality principle would come into play if the legislature made overtime parking a felony punishable by life imprisonment. *Id.* at 374 n.3.

the number and types of crimes committed. However, in *Davis*, the defendant was convicted of possession of marijuana with intent to distribute and with the distribution of marijuana. An inter-jurisdictional comparison of sentences for these two crimes would be relatively easy. Furthermore, since *Davis* was not convicted under a recidivist statute, the state's interest in punishing habitual offenders, which seemed paramount to the Court's analysis in *Rummel*, was not a factor.

Justice Powell, author of the *Rummel* dissent, reluctantly concurred in *Davis*,⁶⁸ emphasizing, however, that *Rummel* and *Davis* did not hold that there is *no* proportionality principle in the Eighth Amendment.⁶⁹ Constrained by *Rummel*'s precedent, Justice Powell concurred because the crime in *Davis* was more severe than the crime in *Rummel*, and the punishment in *Davis* was less severe than the punishment in *Rummel*.⁷⁰ Therefore, he concluded that, in light of *Rummel*, the sentence did not violate the Eighth Amendment.

Davis and *Rummel* left the law in a dissatisfying state. Neither decision affirmatively stated that the Constitution does not require that a sentence be proportioned to the crime for which it is imposed. However, because the Court validated a forty year sentence for possession and distribution of marijuana and failed to give any realistic measure of what would be unconstitutionally disproportionate, a reasonable person could infer that the Court disavowed a proportionality principle.

3. SOLEM V. HELM

Less than two years after *Davis*, the Court decided *Solem v. Helm*.⁷¹ *Helm* provided the needed assurance that all punishments will be proportionate by articulating a three-part test to determine the constitutionality of sentences.

In *Helm*, the respondent was convicted in a South Dakota state court of issuing a "no account" check for \$100.⁷² Although the maximum punishment for the crime itself was five years imprisonment and a \$5000 fine, the respondent was sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute⁷³ because of

68. *Id.* at 375. (Powell, J., concurring).

69. *Id.* at 377.

70. *Id.* at 379-80.

71. 463 U.S. 277 (1983).

72. *Id.* at 281.

73. South Dakota's recidivist statute provided that "[w]hen a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." *Id.* at 281 (citing S.D. Codified Laws Ann. § 22-7-8 (1979) (amended 1981)). The

his six prior felony convictions. All of Helm's convictions were for non-violent felonies that were not crimes against a person,⁷⁴ yet the South Dakota Supreme Court affirmed the sentence and rejected Helm's argument that it violated the Eighth Amendment.⁷⁵

After the Governor of South Dakota denied Helm's request for commutation, Helm sought habeas corpus relief in federal district court. The district court denied relief based on *Rummel v. Estelle*, but the Eighth Circuit Court of Appeals reversed.⁷⁶ The Eighth Circuit distinguished *Rummel* because *Rummel* involved a life sentence, whereas in *Helm*, the respondent was sentenced to life imprisonment *with no possibility of parole*.⁷⁷ Further, the Eighth Circuit examined the nature of Helm's offenses, the length of his sentence, and the sentence he could have received in other states for the same offense. Based upon the comparison, the Eighth Circuit determined that Helm's sentence was grossly disproportionate to his crime⁷⁸ and directed the district court to issue the writ of habeas corpus unless the State resented him.⁷⁹ The United States Supreme Court affirmed the Eighth Circuit Court of Appeals' decision.

The Supreme Court held 5-4⁸⁰ that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted."⁸¹ Justice Powell, author of the *Rummel* dissent, wrote the majority opinion, asserting that the principle of proportionality is deeply rooted in common-law jurisprudence⁸² and that the principle of proportionality has been recognized by the Court for

maximum imprisonment for a "Class 1 felony" was life imprisonment and a \$25,000 fine. *Id.*

74. Helm had previously been convicted of three instances of third-degree burglary, obtaining money under false pretenses, grand larceny and third-offense driving while intoxicated. *Id.* at 279-80.

75. *Id.* at 283.

76. *Heim v. Solem*, 684 F.2d 582 (8th Cir. 1982).

77. *Id.* at 585.

78. *Id.* at 586-87. The court noted that Helm could have received life imprisonment without parole for his offense in only one other state. The court also considered the fact that alcohol was a contributing factor in each of Helm's crimes and therefore found that Helm's life sentence forsaking rehabilitation was offensive and unconstitutional.

79. *Id.*

80. Justice Powell delivered the opinion of the Court in which Justice Brennan, Justice Marshall, Justice Blackmun and Justice Stevens joined. Chief Justice Burger filed a dissenting opinion joined by Justice White, Justice Rehnquist and Justice O'Connor.

81. *Helm*, 463 U.S. at 290.

82. *Id.* at 284. Justice Powell referred to the Magna Carta, English common law and the English Bill of Rights which all embraced a proportionality principle, and from which the language of the Eighth Amendment was derived. *Id.* at 284-85.

nearly a century.⁸³ Justice Powell acknowledged that reviewing courts should give substantial deference to the legislature, but emphasized that no penalty is *per se* constitutional.⁸⁴ He then developed a test for proportionality challenges, since one had not yet been embraced by a majority of the Court.

Acknowledging that review must be guided by objective factors, Justice Powell outlined the three-factor test advocated in his *Rummel* dissent.⁸⁵ First, a reviewing court should compare the harshness of the sentence with the gravity of the crime. Second, a reviewing court should examine the punishments imposed in that jurisdiction for other crimes. Third, a reviewing court should consider the punishments imposed in other jurisdictions for the same crime. After asserting that this test would most accurately and objectively help courts determine whether a sentence is grossly disproportionate and violative of the Eighth Amendment, Justice Powell applied the test to the specific facts of *Helm*.⁸⁶ Justice Powell concluded that Helm's sentence was grossly disproportionate to the crime for which he was convicted, and therefore affirmed the Eighth Circuit Court of Appeals.⁸⁷

An outraged dissent, written by Chief Justice Burger, stated that "the Court blithely discards any concept of *stare decisis*."⁸⁸ The dissent argued that Justice Powell's three step analysis was explicitly rejected in

83. *Id.* at 286. Justice Powell referred to *O'Neil v. Vermont*, 144 U.S. 323 (1892). See discussion *supra* note 21.

84. *Helm*, 463 U.S. at 290.

85. *Id.* at 292.

86. In addressing the first prong of the test, Justice Powell noted that Helm's crime did not involve violence or the threat of violence to any person and that his prior offenses were non-violent, relatively minor, and not crimes against a person. In contrast, Justice Powell emphasized that Helm would spend the rest of his life in prison under the sentence, which was the most severe penalty that South Dakota could have imposed.

In comparing sentences that could be imposed on other criminals in the same jurisdiction, Justice Powell found only a few crimes that statutorily required life imprisonment: murder, and on a second or third offense, treason, first-degree manslaughter, first-degree arson and kidnapping. Justice Powell concluded that Helm was treated in the same manner as, or more severely than, criminals who have committed far more serious crimes in the jurisdiction.

In comparing sentences imposed for the commission of the same crime in other jurisdictions, Justice Powell found that Helm could have received the same punishment in only one other state, Nevada, and that in Nevada, the punishment is only authorized, not required. *Id.* at 296-300.

87. The Court did not explicitly overrule *Rummel*; instead, the Court distinguished *Rummel* because the possibility for parole in *Rummel* provided a more likely and different chance for release than did the executive commutation system in South Dakota. *Id.* at 300-03.

88. *Id.* at 304 (Burger, C.J., dissenting).

both *Rummel* and *Davis*.⁸⁹ According to Chief Justice Burger, *Rummel* permitted courts to review sentences of death or bizarre and physically cruel punishments, but not sentences of imprisonment.⁹⁰ The dissent conceded that a limited judicial role in a proportionality analysis exists. Chief Justice Burger referred to the familiar overtime parking example, and he stated that in extraordinary cases where reasonable persons cannot differ as to the inappropriateness of a punishment, it might be permissible for a court to decide that a sentence is grossly disproportionate to the crime.⁹¹ However, Chief Justice Burger was concerned that the majority's characterization of that role would flood the appellate courts.⁹²

Helm marked a welcome turning point in Eighth Amendment jurisprudence.⁹³ Prior to *Helm*, the Court in varying degrees admitted or asserted that the Eighth Amendment prohibits grossly disproportionate legislative sentences. Yet, a majority of the Court never gave guidance to reviewing courts to help them determine exactly what is "grossly disproportionate." Without a mechanism of review, the guarantee that *Rummel* and *Davis* superficially acknowledged was essentially meaningless. *Helm* finally provided a mechanism.

The Court's Eighth Amendment decisions in *Rummel* and *Davis* reflected its reluctance to invalidate sentences that are within legislative bounds. However, in both cases, the Court refused to completely defer to the legislature, recognizing that a severely disproportionate legislatively mandated sentence would violate the Eighth Amendment. Recognizing that this left the law in an unsatisfactory and uncertain state, *Helm* provided the desired guidance, while still emphasizing great deference to legislative judgments. In light of *Helm*, the Supreme Court took a

89. *Id.* at 308, 311.

90. *Id.* at 307.

91. *Id.* at 311 n.3.

92. *Id.* at 315.

93. *Helm* has been extolled as the intelligent solution to the Eighth Amendment proportionality enigma. See Barton C. Legum, "Down the Road Toward Human Decency": Eighth Amendment Proportionality Analysis and *Solem v. Helm*, 18 GA. L. REV. 109, 136 (1983) ("If, as Justice Rehnquist states in his *Rummel* opinion, the *Rummel* majority had no way of knowing in which direction the road toward human decency lies, then perhaps *Helm* has pointed our judiciary in the right direction again."); Májá Campbell-Eaton, *Solem v. Helm: Extension of Eighth Amendment Proportionality Review to Noncapital Punishment*, 69 IOWA L. REV. 775, 794 (1984) ("*Solem v. Helm* represents the long-awaited constitutional triumph of the principle that a criminal sentence must be proportioned to the defendant's crime."); 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, 61 (1985) ("*Helm* was the needed return.").

disappointing turn in its most recent proportionality case, *Harmelin v. Michigan*, reverting back to pre-*Helm* analysis.

IV. *HARME LIN V. MICHIGAN*: ANALYSIS IN LIGHT OF *SOLE M V. HELM*

A. *Posture of the Case*

In *Harmelin v. Michigan*, the petitioner was convicted under Michigan law⁹⁴ of possessing more than 650 grams of cocaine⁹⁵ and was sentenced to mandatory life imprisonment with no possibility of parole, although he was a first-time offender with no criminal record or history of violence. Harmelin appealed, arguing that the sentence was cruel and unusual because it was "significantly disproportionate" to the crime he committed.⁹⁶ The Michigan Court of Appeals, however, rejected his argument, and the Michigan Supreme Court denied leave to appeal.⁹⁷ The United States Supreme Court granted certiorari,⁹⁸ and in a plurality opinion, the Court affirmed.

94. The Michigan statute at issue in the case, MICH. COMP. LAWS ANN. § 333.7403 (West 1980) (amended 1990), provides:

(1) A person shall not knowingly or intentionally possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 which is either a narcotic drug or described in section 7214(a)(iv), and:

(i) Which is in an amount of 650 grams or more of any mixture containing that substance is guilty of a felony and shall be imprisoned for life.

In addition, under MICH. COMP. LAWS ANN. § 333.7401(3) (West 1980) (amended 1990): "An individual subject to a mandatory term of imprisonment under subsection . . . 7403(2) (i), (ii), or (iii) shall not be eligible for probation, suspension of the sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life."

95. Harmelin possessed 672 grams of cocaine. *Harmelin*, 111 S. Ct. at 2684.

96. *Id.*

97. Since *Harmelin*, the Michigan Supreme Court has reviewed the statute at issue. In *People v. Bullock*, 485 N.W.2d 866 (1992), the Michigan Supreme Court held that mandatory life imprisonment without possibility of parole violated the "cruel or unusual" punishment prohibition of Michigan's constitution.

The court found that the Michigan Constitution provides greater protection than the United States Constitution. The court held that the proper remedy was to strike the prohibition on parole and allow defendants already convicted under the statute parole consideration upon serving 10 calendar years.

98. *Harmelin v. Michigan*, 495 U.S. 956 (1990).

B. Justice Scalia's Opinion: No Proportionality Guarantee in the Eighth Amendment

Justice Scalia announced the judgment of the Court and wrote an opinion joined by Chief Justice Rehnquist. Remarkably, Justice Scalia began his analysis with the assertion that the Eighth Amendment does not contain a proportionality guarantee.⁹⁹ Justice Scalia flatly rejected *Helm's* holding that a sentence must be proportionate to the crime for which the defendant has been convicted. He acknowledged that language in both *Rummel* and *Davis* "invited [the] inference" that the Eighth Amendment protects people from grossly disproportionate sentences.¹⁰⁰ However, he asserted that such an inference was completely unjustified in light of the Court's finding in *Davis* that a forty year sentence for the possession and distribution of nine ounces of marijuana was not grossly disproportionate.¹⁰¹

In advocating an outright reversal of *Helm*, Justice Scalia noted that *stare decisis* is less rigidly applied to constitutional precedent.¹⁰² Because *Helm* was in apparent conflict with earlier Eighth Amendment decisions, Justice Scalia decided to examine anew the issue of whether the Eighth Amendment contains a proportionality guarantee.¹⁰³ Particularly, Justice Scalia focussed on the background of the Eighth Amendment and the understanding of the Eighth Amendment prior to the end of the nineteenth century.

Justice Scalia began by stating that *Helm* correctly found that the Eighth Amendment's Cruel and Unusual Punishments Clause was derived from the English Declaration of Rights of 1689.¹⁰⁴ However, according to Justice Scalia's interpretation, the "cruell and unusuall Punishments" provision of the English Declaration of Rights did not contain a guarantee against disproportionate punishments.¹⁰⁵ Justice Scalia stated that the

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

100. *Id.* at 2685. Justice Scalia referred to the statement in both cases that a proportionality principle would come into play if overtime parking were made a felony punishable by death.

101. *Id.*

102. *Id.* at 2686. Indeed, in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), the Supreme Court asserted that its practice has been to overrule prior decisions that are badly reasoned. *Id.* at 2609.

For a general discussion of the role of precedent, see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

103. *Harmelin*, 111 S. Ct. at 2686. Justice Scalia admonished the *Helm* majority for not embarking on a more detailed historical analysis of this issue. *Id.*

104. *Id.*

105. *Id.* at 2691.

English guarantee was to protect people from arbitrary uses of sentencing power (e.g., "inventing" special penalties for the King's enemies that were not authorized by precedent or statute).¹⁰⁶

Further, Justice Scalia concluded that Americans who adopted the Eighth Amendment intended the Cruel and Unusual Punishments Clause as a protection against legislative authorization of particular *modes* of punishment, not against disproportionate punishment.¹⁰⁷ Particularly compelling to Justice Scalia was the fact that although some state constitutions deliberately and expressly forbade disproportionate punishments, the federal Constitution did not.¹⁰⁸ According to Justice Scalia, since no federal proportionality guarantee existed, Harmelin could not claim that his sentence was unconstitutional because it was disproportionate.

In addition to his historical analysis and conclusion that the Eighth Amendment does not contain a proportionality in sentencing guarantee, Justice Scalia sought to overrule *Helm* because he concluded that the length of the sentence imposed is merely a matter of legislative prerogative. He reasoned that despite the test promulgated in *Helm*, there are no adequate objective standards to determine if a particular punishment is disproportionate.¹⁰⁹

Justice Scalia's argument raises several concerns. Despite his conclusion that there is not a proportionality guarantee in the Eighth Amendment, Justice Scalia paradoxically admitted that the Amendment requires proportionality in a particular class of cases—those that involve the death penalty.¹¹⁰ He did not explain, however, why the Cruel and Unusual Punishments Clause imposes a proportionality principle in these particular situations and no others.¹¹¹ Furthermore, Justice Scalia did not provide a remedy for the hypothetical situation mentioned first in *Rummel*. That is, what will happen if the legislature suddenly deems overtime parking a felony punishable by life imprisonment? Justice Scalia simply dismisses that as an absurdity, stating that "for the same reason

106. *Id.* at 2690.

107. *Id.* at 2696. According to Justice Scalia, "a disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be (as the text also requires) 'unusual.'" *Id.* at 2687.

108. *Id.* at 2692.

109. *Id.* at 2696. Justice Scalia stated that "the proportionality principle becomes an invitation to imposition of subjective values." *Id.* at 2697.

110. *Id.* at 2701.

111. Justice Scalia simply concluded that "[p]roportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides [citations omitted] We would leave it there, but will not extend it further." *Id.*

these examples are easy to decide, they are certain never to occur.”¹¹² However, one can imagine situations in which a seeming absurdity becomes punishable.¹¹³ Justice Scalia’s analysis, however, affords no constitutional remedy unless the punishment is death.

Finally, Justice Scalia conceded that the language of the Eighth Amendment had been interpreted to include a proportionality principle.¹¹⁴ Based on his own historical analysis, he concluded that the language should not be so construed. His analysis, however, is neither unreplicated nor undisputed. Other scholars have concluded that the clause in the English Declaration of Rights from which the Eighth Amendment’s Cruel and Unusual Punishments Clause was derived did forbid disproportionate punishment.¹¹⁵

Justice Scalia would overrule *Helm* because it was wrongly decided. However, *Helm* was only wrongly decided in light of Justice Scalia’s own historical analysis of the Eighth Amendment and his disputed conclusion that it did not contain a proportionality principle when it was enacted. Until *Harmelin*, there could be no doubt that decisions have derived a proportionality principle from the Eighth Amendment.¹¹⁶ Even the majorities in *Rummel* and *Davis* and the dissent in *Helm* reluctantly acknowledged that the Eighth Amendment’s Cruel and Unusual Punishments Clause has been interpreted to include a proportionality guarantee.¹¹⁷

112. *Id.* at 2696-97.

113. Indeed, Harmelin’s punishment has been considered absurd. See Stephen Chapman, *Kilo for Kilo, Sentence Was Cruel, Unusual*, ST. LOUIS POST-DISPATCH, July 7, 1991, at 3B (“Even by the standards of a nation that is absurdly ferocious in punishing drug users, [Harmelin’s] sentence is exceptionally draconian, which is another way of saying it is cruel and unusual.”).

114. *Harmelin*, 111 S. Ct. at 2687.

115. See, e.g., Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 860 (1969) (concluding that “[t]he English evidence shows that the Cruel and Unusual Punishments Clause of the Bill of Rights of 1689 was . . . a reiteration of the English policy against disproportionate penalties.”).

Ironically, Granucci is a scholar upon whose research Justice Scalia relied throughout his opinion. See *Harmelin*, 111 S. Ct. at 2690-91, 2693.

116. See discussion *supra* Part III.A-B.

117. See *Rummel*, 445 U.S. at 271 (“This Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime.”); *Davis*, 454 U.S. at 374 (“[S]uccessful challenges to the proportionality of particular sentences’ should be ‘exceedingly rare.’”) (citations omitted); *Helm*, 463 U.S. at 306 (“It is true . . . that the ‘Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime.’”) (Burger, C.J., dissenting) (citation omitted).

Although no one can be certain whether the Framers intended to include a proportionality guarantee in the Eighth Amendment, either by incorporation or deliberate decision, it is clear that a proportionality doctrine has evolved. Constitutional amendments, which are intended to weather the changes of a growing nation, must be capable of wide application.¹¹⁸ Even assuming that Justice Scalia's historical argument is correct, adopting his resort to the original intent ignores the development and progress that culminated in the *Helm* decision, which reflected our society's evolving standard of human decency.

C. Justice Kennedy's Opinion: Narrow Proportionality Guarantee in the Eighth Amendment

Adopting a less extreme position than Justice Scalia, the concurrence written by Justice Kennedy, and joined by Justice O'Connor and Justice Souter, conceded that the Eighth Amendment contains a proportionality guarantee, but still found that Harmelin's sentence was not unconstitutionally disproportionate. Unlike Justice Scalia, Justice Kennedy did not advocate overruling *Helm* but his analysis and application of *Helm* would effectively overrule and eviscerate it.¹¹⁹

According to Justice Kennedy, the Eighth Amendment encompasses a narrow proportionality guarantee that applies to non-capital sentences.¹²⁰ Recognizing precedent, Justice Kennedy acknowledged that the Court has sustained a proportionality guarantee,¹²¹ but he asserted that reviewing courts should give substantial deference to a legislative determination of sentences. Next, Justice Kennedy stated that a variety of legitimate penological schemes exist, including retribution, deterrence and rehabilitation; the Eighth Amendment does not embrace a particular one, and, as a result of the federal structure, different attitudes and local conditions create a variety of prescribed prison terms for the same crime, all of which may be rational.¹²² Justice Kennedy then re-emphasized the concern that federal courts use objective factors in reviewing proportionality cases,¹²³ and he asserted that because few objective factors are available, there have been very few successful proportionality challenges outside the context of capital sentences.¹²⁴

118. *Weems v. U.S.*, 217 U.S. 349, 373 (1910).

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

120. *Id.* at 2703.

121. *Id.* at 2702. ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle.")

122. *Id.* at 2704.

123. *Id.*

124. *Id.* at 2705.

As a result, Justice Kennedy concluded that the Eighth Amendment does not require strict proportionality, but only forbids sentences that are grossly disproportionate to the crime.

The first steps of Justice Kennedy's analysis were consistent with *Helm* because *Helm* accorded great deference to legislative judgment and expected successful challenges to be exceedingly rare. However, the remainder of Justice Kennedy's analysis sharply departed from *Helm* when he focussed on the severity of drugs. He stated that illegal drugs pose a grave threat to society in terms of violence, crime and social displacement.¹²⁵ In a compelling presentation of statistics,¹²⁶ Justice Kennedy attempted to justify the Michigan legislature's decision to punish a first-time non-violent offender with such a harsh sentence.

The consideration of the gravity of the offense and the severity of punishment is only the first step in the *Helm* test. However, for Justice Kennedy, it was the only step. Justice Kennedy stated that given the severity of the crime, there was no need to conduct the survey outlined in *Helm* to analyze Harmelin's sentence in light of sentences for other Michigan crimes or in light of sentences for the same crime in other states. In fact, Justice Kennedy asserted that *Helm* did not announce a rigid three-part test. Justice Kennedy read *Helm* to mean that intra- and inter-jurisdictional analyses are only necessary in rare instances where an initial comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.¹²⁷ In this particular case, Justice Kennedy asserted that the threshold comparison of the crime committed and the sentence imposed did not support an inference of gross disproportionality.

Justice Kennedy's analysis of *Helm* is incomplete. He asserted that an objective proportionality test is necessary. *Helm* purported to announce an objective three-part test. However, of the three *Helm* factors, the two that Justice Kennedy would only conditionally consider¹²⁸ are the most objective factors. The first factor,¹²⁹ upon which Justice Kennedy solely rested his judgment in this case is clearly the most subjective factor. Therefore, while advocating an objective test, Justice Kennedy created a subjective one. Furthermore, there is no indication in *Helm* that Justice Powell's three-prong test is divisible. In fact, if anything, the three-part test is underinclusive, as *Helm* held that:

125. *Id.* at 2706.

126. Justice Kennedy noted that in Detroit in 1988, 68% of a sample of male arrestees and 81% of female arrestees tested positive for use of illegal drugs, and in 1990, an estimated 60% of Detroit homicides were drug-related, primarily cocaine-related. *Id.*

127. *Id.* at 2707.

128. Namely, intra- and inter-jurisdictional comparisons.

129. An analysis of the gravity of the crime and the severity of the punishment.

[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, *including* (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.¹³⁰

This language implies that all three factors must be considered and that others could also be considered.¹³¹ Certainly, the language does not indicate that one factor may be conclusive. In fact, the Court stated in *Helm* that no one factor will be dispositive.¹³² Yet Justice Kennedy was content to base his decision on one factor of the test.

A true application of *Helm*'s test would also have entailed an examination of the sentences imposed on other criminals in Michigan and an examination of the sentences imposed in other states for the possession of 650 grams of cocaine. Had Justice Kennedy performed this analysis, he would have found that life imprisonment without parole was reserved for three crimes in Michigan: first-degree murder,¹³³ manufacture, distribution, or possession with intent to manufacture or distribute 650 grams or more of narcotics; and possession of 650 grams or more of narcotics. No other crimes, including violent crimes against a person, were punishable in Michigan by the mandatory sentence that Harmelin received.¹³⁴

A comparison of the punishment in other jurisdictions for possessing 650 grams of cocaine would have revealed that no other state imposes a punishment as severe as Michigan's for possession of the amount of cocaine involved. Only Alabama requires mandatory life imprisonment without parole for a first-time drug offense, but only when the defendant

130. *Helm*, 463 U.S. at 292 (emphasis added).

131. Many courts and commentators have referred to *Helm* as developing a three-part test. *See, e.g.*, *Alexander v. Thornburgh*, 943 F.2d 825, 835 (8th Cir. 1991) ("The Supreme Court has set forth a three-part test for determining whether a sentence violates the eighth amendment."); *Cocio v. Bramlett*, 872 F.2d 889, 891 (9th Cir. 1989) ("The Supreme Court in *Solem* delineated an objective three prong test for analyzing the proportionality of noncapital sentencing."); *McLester v. Smith*, 802 F.2d 1330, 1333 (11th Cir. 1986) (referring to "the three-prong test announced in *Solem v. Helm*"); Tamu Sudduth, *The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments*, 72 CAL. L. REV. 1299, 1311 (1984) ("In *Solem v. Helm*, the Supreme Court articulated a three-pronged test . . ."); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 130 (1983) (referring to *Helm*'s "three-factor test").

132. *Helm*, 463 U.S. at 290-91 n.17.

133. *See* MICH. COMP. LAWS § 750.316 (1991).

134. *Harmelin*, 111 S. Ct. at 2718 (White, J., dissenting).

is convicted of possessing ten kilograms or more of cocaine, over fifteen times as much cocaine as Michigan law requires.¹³⁵ Even under the Federal Sentencing Guidelines, Harmelin would have received only slightly more than ten years for his offense.¹³⁶

Clearly, had Justice Kennedy completed the *Helm* analysis, he would have had a difficult time reconciling the outcome of *Harmelin* with *Helm*.

V. PROPORTIONALITY AFTER *HARMELIN*: RATIONALE BEHIND THE RATIONALE

In *Harmelin*, the Court left the arena of Eighth Amendment proportionality cases uncertain. Two Justices of the five-Justice plurality would have overruled *Helm*, a case which had finally given some direction and structure to proportionality analyses. The other three Justices of the plurality refused to literally overrule *Helm*, but effectively eviscerated it, leaving its full application to rare circumstances. Justice Kennedy would only perform the three-part *Helm* test where a balance of the gravity of the crime and the severity of the punishment leads to an inference of gross disproportionality.¹³⁷

Although *Harmelin* did not overrule *Helm*, it is significant because it may foreshadow the direction the Court will take in the next proportionality case. *Helm*'s impact has been greatly minimized. Because the issue remains unsettled, it is likely that the Court will hear another proportionality case. *Helm* was the only recent decision that expanded the proportionality doctrine. However, since *Harmelin* has severely dismembered *Helm*, the Court may return to a more limited view of the proportionality principle.

In considering whether the Court will return to a narrower proportionality principle, it is helpful to explore the particular motivations of the Court in *Harmelin*. Clearly, the decision was not based on strict adherence to precedent, although Justice Kennedy attempted to rationalize his concurrence in light of precedent. Justice Scalia's forthright denunciation of precedent also induces one to consider his motivation, particularly because his historical analysis is somewhat tenuous.

The Court may have departed from precedent in this case to demonstrate deference to legislative judgment. The Court could have as easily demonstrated deference by refusing to review the case. However,

135. *Id.* (citing ALA. CODE § 13A-21-231(2)(d) (Supp. 1992)).

136. *Id.* at 2718.

137. When balancing life imprisonment without parole with a first-time drug offense does not lead to an initial inference of gross disproportionality, one questions what would lead to such an inference.

in light of *Helm*, the Court was compelled to review the Michigan statute. If the Court wanted to give unbridled deference to the legislature, it should have overtly overruled *Helm*, which only two Justices were willing to do. Furthermore, as Justice Brennan has declared, "[j]udicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights."¹³⁸ More plausibly, this case is a result of the Court's increasing concern with the "war on drugs."

The conflict between individual rights and effective law enforcement did not just recently emerge with the advent of the war on drugs.¹³⁹ However, since the early 1980's, cracking down on drugs has been a prevailing national concern.¹⁴⁰ Citizens repeatedly blame the nation's crime problem on drugs.¹⁴¹ Sixty-three percent of citizens polled think that it is good public policy that the police and judicial system step up enforcement and *punishment* for victimless crimes, such as possession of illegal drugs.¹⁴²

The Michigan legislature had already responded to the perceived drug crisis in 1980 when it enacted the statute under which Harmelin was convicted. The nation's judiciary has also responded. Courts have attributed increases in general criminal caseloads to the drug epidemic.¹⁴³ As a result, perhaps out of self-preservation and concern, the judiciary has been increasingly tough on drug offenders. Judges want to send harsh messages to the offenders, and are thus looking for increased "muscle" to deal with them.¹⁴⁴ If courts cannot deal harshly with drug offenders, they lose their credibility and send a message that they are unable to confront the drug problem.¹⁴⁵

The Supreme Court has been an active force in waging the drug war. Unfortunately, this affirmative role of the Court has resulted in the compromise of individual liberties. Indeed, Justice John Paul Stevens

138. *Furman v. Georgia*, 408 U.S. 238, 269 (1972) (Brennan, J., concurring).

139. See, e.g., Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (examining the tension between crime control and due process).

140. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 890 (1987).

141. In a September 1990 Gallup Poll, 60% of the respondents stated that drugs are most responsible for crime in the United States today. Available in WESTLAW, DIALOG Poll Database.

142. Research and Forecasts Poll, August 1983. Available in WESTLAW, DIALOG Poll Database.

143. Robert D. Lipscher, *The Judicial Response to the Drug Crisis*, STATE CT. J., Fall 1989, at 13, 14.

144. *Id.* at 16.

145. *Id.*

referred to the High Court's actions as "narrowing the federal Constitution's protection of individual liberties."¹⁴⁶ This sacrifice is particularly evident in the Fourth Amendment arena, as the Court has been willing to ease restrictions on law enforcement officers so that they may more effectively curb drug activities.¹⁴⁷ The Supreme Court also implicated Sixth Amendment rights in two 1989 drug cases.¹⁴⁸

This concern with the drug war is apparent in Eighth Amendment jurisprudence by comparing the two proportionality decisions immediately preceding *Harmelin*. In *Hutto v. Davis*, where the respondent was convicted of a drug offense, the Court strained to reaffirm its holding in *Rummel* that the sentence was not disproportionate, despite the fact that there were clear factual distinctions. This decision indicated the Court's concern with treating drug offenders harshly. However, in its seemingly contradictory holding in *Helm*, the Court treated the proportionality principle more liberally and devised an objective three-part test. Notably, *Helm* did not involve a drug offense; it involved a recidivist statute and a defendant who had been convicted of six consecutive felonies. By simply comparing the holdings of *Helm* and *Rummel*, one could reasonably assume that the Court was expanding the proportionality principle.

Unexpectedly, however, the Court in *Harmelin* returned to a hard-line proportionality view, similar to the *Rummel* view. Not ironically, *Harmelin* involved a drug offense.

The Court's decision in *Harmelin* is another example of the Court's willingness to engage itself in the war on drugs and to impinge citizens'

146. Nat Hentoff, *Justice Stevens's Dissent*, WASH. POST, Jan. 18, 1992, at A23. In a speech at the University of Chicago Law School, Justice Stevens called the Court "extraordinarily aggressive," and Justice Stevens referred to *Harmelin* in his speech admonishing the Court for eviscerating individual liberties. *Id.*

147. See *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (police officers may lawfully board busses and ask passengers for consent to search luggage without implicating Fourth Amendment); *Florida v. Jimeno*, 111 S. Ct. 1801 (1991) (consent to search a suspect's vehicle to look for drugs presumes consent to search closed containers found in vehicle); *Michigan v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoint stops lawful under Fourth Amendment); *United States v. Sokolow*, 490 U.S. 1 (1989) (reasonable to detain airport travelers based on drug-courier profile); *United States v. Leon*, 468 U.S. 897 (1984) (evidence seized in reasonable good faith reliance on an invalid search warrant admissible).

148. See *United States v. Monsanto*, 491 U.S. 600 (1989) and *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617 (1989). The Supreme Court held in *Monsanto* and *Caplin & Drysdale* that the Comprehensive Forfeiture Act provision of 21 U.S.C. § 853(e)(1)(A) (1984) does not exempt assets needed by a defendant to retain private counsel and does not violate a defendant's Sixth Amendment right to counsel.

liberties for a "higher purpose."¹⁴⁹ This time, the Eighth Amendment was the victim. The Court misapplied Eighth Amendment precedent and drew overly-technical distinctions to find that life imprisonment without the possibility of parole for a first time drug offender did not constitute cruel and unusual punishment.

This author does not dispute the magnitude of the American drug problem and its associated evils. Indeed, it is imperative to deal with drug offenders harshly. But it is also imperative to deal with them decently. The Court's decision in *Harmelin* offends the evolving standards of decency that *Weems v. United States* reasonably held the Eighth Amendment to protect. *Harmelin*, by eviscerating *Helm*, essentially abrogates the proportionality principle.

There are obvious virtues in adhering to precedent—consistency, fairness, predictability, and efficiency.¹⁵⁰ However, arguing that *Harmelin* was wrongly decided simply because it did not follow *Helm*'s precedent is bound to evoke the response that *Helm* was really the anomaly in Eighth Amendment jurisprudence. Narrowly read, *Helm* may be considered an aberration.¹⁵¹ However, by creating a test to determine when a term of years sentence is unconstitutionally disproportionate, *Helm* did not generate a new idea; the proportionality principle had been discussed and acknowledged in cases for several hundred years.¹⁵² Instead, *Helm* gave objective definition to the proportionality principle.

Harmelin, however, not only eviscerated *Helm*'s objective test, it also challenged the entire historical *stare decisis* that created the proportionality principle. In *Harmelin*, two Justices, Chief Justice Rehnquist and Justice Scalia, held that there is no proportionality principle in the Eighth Amendment, contrary to much established case law. Although the challenge to traditional notions is troublesome because it challenges the consistency, stability and efficiency associated with

149. Thomas F. Liotti, *War on Drugs: At What Cost to Our Liberty?*, N.Y.L.J., Feb. 28, 1990, at 2 ("It is predicted that the War on Drugs, coupled with the predisposition of prosecutors and a Reagan/Bush Supreme Court, will eventually erode the constitution in favor of some higher purpose which they claim takes precedence over individual liberties.").

150. See, e.g., ARTHUR J. GOLDBERG, *EQUAL JUSTICE* 75 (1971) (suggesting that loyalty to precedent gives the public confidence in the courts and their decisions because it gives the appearance of impersonal, consistent and reasoned opinions); Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 70 (1988) (explaining that fidelity to precedent promotes efficient judicial decisions and predictability).

151. That is, *Helm* advocated intra- and inter-jurisdictional analyses of sentences. This comparison had not been embraced by the Court prior to *Helm*.

152. See *supra* Part III.

deference to precedent, this apparently outcome-determinative finding is more troublesome because it severely abridges constitutional rights. What notion could be more fundamental than the concept that a punishment must fit a crime? Although the concurrence was careful not to deny the existence of a proportionality principle entirely, the *only* measure of disproportionality in term of years sentences that it gave was the overtime parking example.

The result of the Court's continual abrogation of citizens' constitutional protections in order to advance a political agenda is shattering. Even conceding that the drug war is a national non-partisan agenda, the erosion of individual liberties is too high a price to pay. Although the Court in *Harmelin* was dealing with a drug case, the implications of its decision will permeate any situation where an offender is punished. Is a twenty-five year sentence for a first time speeder unconstitutionally disproportionate? Is a life sentence without parole for a third conviction of gambling unconstitutionally disproportionate? Is a ten year mandatory sentence for forgery unconstitutionally disproportionate? Under *Helm*, a defendant had reasonable assurance that a court would objectively assess the punishment in light of the crime. Under *Harmelin*, however, a defendant has no such assurance. In fact, Chief Justice Rehnquist and Justice Scalia would affirmatively condone these and any other legislatively mandated sentences.

Americans are fed up and urge strong government action to eradicate the drug plague that has enveloped our nation, and the Court's decision in *Harmelin* reflects its political response. Should the Court review another proportionality case, if it is in the drug arena, it is unlikely that the Court will expand the proportionality principle. Ironically, had Harmelin panicked when the police officers pulled him over, shot and killed the two officers without premeditation, ditched the cocaine, and then been arrested, he would have been subject to any term of years sentence up to life and if sentenced to life, he would be eligible for parole in ten years.

VI. CONCLUSION

In *Harmelin v. Michigan*, the United States Supreme Court held that a mandatory life sentence without a possibility of parole for a first time drug offender did not constitute cruel and unusual punishment within the meaning of the Eighth Amendment. The Court effectively overruled precedent which provided an objective test to determine whether a term of years sentence is unconstitutionally disproportionate. As a result, the Court has virtually eliminated any proportionality guarantee, leaving its application to situations where the Court subjectively determines that the severity of the punishment is grossly disproportionate to the crime for

which it is imposed. However, the only criterion for gross disproportionality that the Court provided is the amorphous pre-*Harmelin* example of a life sentence for an overtime parking violation.