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Constitutional Law - Eighth Amendment - Cruel and Unusual Punishment - Proportionality Guarantee

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Recent Decisions

CONSTITUTIONAL LAW—EIGHTH AMENDMENT—CRUEL AND UNUSUAL PUNISHMENT—PROPORTIONALITY GUARANTEE—The United States Supreme Court held that the Eighth Amendment contains no proportionality guarantee and thus upheld a mandatory sentence of life imprisonment with no possibility of parole for possession of 672.5 grams of cocaine in violation of a Michigan statute.

Harmelin v Michigan, US , 111 S Ct 2680 (1991).

Ronald Allen Harmelin (hereinafter "petitioner") was convicted of possessing 672.5 grams of cocaine, a violation of Michigan's Public Health Code,[1] and consequently received a mandatory sentence of life in prison without possibility of parole.[2] On May 12, 1986, two Oak Park police officers twice observed the petitioner's car entering a motel parking lot in which several stolen vehicles had previously been found.[3] The officers stopped the petitioner after they observed the petitioner's vehicle making a U-turn at an intersection without stopping for a red light.[4] The petitioner stepped out of his car and informed one of the two officers that he was carrying

1. Mich Comp Laws Ann § 333.7403(2)(a)(i) (Supp 1990-91) makes possession of 650 grams or more of "any mixture containing [a schedule 2] controlled substance" a crime for which an offender receives a mandatory sentence of life in prison. Cocaine is labeled as a schedule 2 controlled substance in § 333.7214(a)(iv). *Harmelin v Michigan*, US , 111 S Ct 2680, 2684 n 1 (1991). Eligibility for parole after ten years in prison is allowed pursuant to § 791.234(4) with the exception of those convicted of either first-degree murder or a "major controlled substance offense," which is defined in § 791.233b[1](b) as including a violation of § 333.7403. Id.

The petitioner was also convicted of possession of a firearm during the commission of a felony, a violation of Mich Comp Laws § 750.227b, for which he was sentenced to two years in prison. *People v Harmelin*, 176 Mich App 525, 440 NW2d 75, 76-77 (1989). This conviction is not at issue in this note.

2. *Harmelin*, 111 S Ct at 2684.

3. *Harmelin*, 440 NW2d at 77.

4. Id.

a pistol for which he had a permit.[5] The same officer, however, was concerned for his own safety and subsequently performed a pat-down search of the petitioner during which the officer discovered a quantity of marijuana in the petitioner's coat pocket.[6] After the petitioner's arrest, his car was impounded.[7] A search of the vehicle resulted in the discovery of two bags of white powder, later identified as 672.5 grams of cocaine.[8]

The petitioner was convicted in the Oakland Circuit Court and appealed to the Michigan Court of Appeals.[9] The Michigan Court of Appeals reversed the conviction, ruling that the Michigan Constitution had been violated as a result of the manner in which the evidence supporting the conviction had been obtained.[10] Upon rehearing, however, the Court of Appeals vacated its prior decision and affirmed the petitioner's sentence.[11] The Michigan Supreme

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5. Id.
6. Id.
7. Id at 77-78.
8. Id at 78.
9. Id at 77. The Oakland Circuit Court sentenced the petitioner to a mandatory term of life imprisonment as a result of the cocaine conviction. Id. For the felony-firearm conviction, the petitioner received a two-year prison sentence. Id.
10. *Harmelin*, 111 S Ct at 2684. The Michigan Court of Appeals initially determined that under the search-and-seizure provisions of the Michigan Constitution, a driver in the petitioner's situation must be provided with more protection from unreasonable search and seizure than that which is given by the Fourth Amendment. *Harmelin*, 440 NW2d at 78. The court of appeals then held that a driver who has been stopped for a traffic violation cannot be ordered to get out of his car "unless the officer had a reasonable, articulable suspicion that the driver committed, or was about to commit, a crime." Id.
11. *Harmelin*, 111 S Ct at 2684. In his appeal, the petitioner contended that his conviction should be reversed because the evidence was acquired as a result of an unconstitutional search and seizure of his person and an unconstitutional search and seizure of his vehicle. *Harmelin*, 440 NW2d at 77. Additionally, the petitioner argued that he was denied effective assistance of counsel. Id. Finally, he contended that a mandatory life sentence without the possibility of parole was cruel and unusual punishment in violation of the Eighth Amendment, and thus he should be resentenced. Id.

The Michigan Court of Appeals concluded that the Michigan Constitution's search and seizure provisions could not protect the petitioner because they specifically stated that evidence of any narcotic drug seized outside the curtilage of a dwelling house shall not be barred from evidence in a criminal proceeding. Id at 78. The petitioner's argument was unsuccessful under federal law as the court cited *Pennsylvania v Mimms*, 434 US 106 (1977), for the proposition that it is not a violation of the Fourth Amendment for a police officer to order a driver to get out of his car upon being stopped for a traffic violation notwithstanding that the officer has no suspicion of foul play at the time. *Harmelin*, 440 NW2d at 76, 78.

The trial court denied the petitioner's pretrial motion for suppression of evidence in which he contended that the pat-down search violated his Fourth Amendment rights. Id at 79. Concluding that the judgment of the lower court was not clearly erroneous, the court of appeals found no reason to overturn the trial court's ruling. Id.

The court addressed several other issues introduced by the petitioner in his appeal. Id at 79-80. The court ruled that the officer questioning the petitioner about an object which he

Court denied leave to appeal, and the United States Supreme Court granted certiorari.[12] Before the United States Supreme Court, the petitioner contended that his mandatory sentence of life in prison without possibility of parole was unconstitutional for two reasons.[13] He first claimed that his sentence was "cruel and unusual"[14] because it was "significantly disproportionate" to the offense which he committed.[15] Second, the petitioner contended that his rights under the Eighth Amendment were violated because the sentence he received was mandatory and thus was imposed by the judge without taking into account any mitigating factors related to the crime or the criminal.[16]

Justice Scalia, writing for the Court,[17] began his analysis of the petitioner's first claim by stating that the Eighth Amendment does not contain a proportionality requirement and, consequently, the Court overruled its prior 1983 decision in *Solem v Helm*.[18] The

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felt in the petitioner's chest pocket was not equivalent to compelling the petitioner to testify against himself. Id at 79. Second, the court held that the petitioner's Fourth Amendment rights were not violated by the warrantless search of his impounded car. Id. Third, the petitioner also failed in his claim that he was denied the effective assistance of counsel and the right to plead not guilty as the court reasoned that counsel's strategy was targeted to the petitioner's best chance of acquittal. Id at 80. Finally, the court disagreed with the petitioner's contention that his mandatory sentence was disproportionate to the seriousness of his offense and was thus a violation of the Eighth Amendment's prohibition against cruel and unusual punishments. Id.

12. *Harmelin*, 111 S Ct at 2684.

13. Id.

14. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Amend VIII.

15. *Harmelin*, 111 S Ct at 2684.

16. Id.

17. Justice Scalia announced the judgment of the Court and delivered the opinion of the Court with respect to the petitioner's claim that his mandatory sentence violated the Eighth Amendment because certain mitigating factors were not considered. Id at 2683. Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter joined in this part of the opinion. Id. Justice Scalia's opinion with respect to the petitioner's other contention that the Eighth Amendment contains a proportionality guarantee was joined by Chief Justice Rehnquist. Id. Justice Kennedy, joined by Justices O'Connor and Souter, filed an opinion concurring in part and concurring in the judgment. Id. Justice White was joined by Justices Blackmun and Stevens in his dissenting opinion. Id. Justice Marshall filed a separate dissenting opinion. Id. Finally, Justice Stevens filed a dissenting opinion in which he was joined by Justice Blackmun. Id. Thus the Michigan Court of Appeals was affirmed by a vote of 5-4. Id.

18. Id at 2686. In *Solem v Helm*, 463 US 277 (1983), the Court upheld an Eighth Amendment challenge of disproportionality against a South Dakota recidivist (habitual criminal) statute under which the defendant received a sentence of life imprisonment with no possibility of parole. *Harmelin*, 111 S Ct at 2685. In *Solem*, the defendant had been convicted of six prior offenses which included: three third-degree burglary convictions, ob-

Court in *Solem* grounded its reasoning upon the contention that a proportionality guarantee could be found in the "cruell and unusuall Punishments" clause of the English Declaration of Rights of 1689[19] which was subsequently used as the model for the Eighth Amendment of the United States Constitution.[20] However, although the English Declaration of Rights did prohibit "cruell and unusuall Punishments," it did not explicitly forbid punishments which were "disproportionate" or "excessive."[21] The Court declared that the *Solem* court assumed, without analysis, that the latter were included in the former.[22] The Court concluded "that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."[23]

The Court next examined the historical setting in which the English Declaration of Rights was adopted in order to determine the meaning of the "cruell and unusuall Punishments" clause of the English Declaration.[24] The Court found it widely accepted that this provision was adopted as a response to the manner in which Lord Chief Justice Jeffreys handed down punishments from the King's Bench during the "Bloody Assizes."[25] The Court relied on

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taining money by false pretenses, grand larceny, and a third-offense driving while intoxicated conviction. Id. The seventh conviction, which consequently permitted prosecution under the state's recidivist statute, was for writing a "no account" check with the intent to defraud. Id. See notes 136-48 and accompanying text.

19. The English Declaration of Rights (the model for our Eighth Amendment) stated "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." *Harmelin*, 111 S Ct at 2687.

20. Id at 2686.

21. Id at 2687.

22. Id. The Court pointed out that although it is possible that a disproportionate punishment may always be considered "cruel," it may not always be deemed "unusual." Id.

23. Id. The Court explained further by stating that,

> it should be apparent from the above discussion that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law. We have long recognized, of course, that the doctrine of *stare decisis* is less rigid in its application to constitutional precedents, (citations omitted), and we think that to be especially true of a constitutional precedent that is both recent and in apparent tension with other decisions. Accordingly, we have addressed anew, and in greater detail, the question whether the Eighth Amendment contains a proportionality guarantee—with particular attention to the background of the Eighth Amendment (which *Solem* discussed in only two pages, see 463 US, at 284-286, 103 S Ct, at 3006-3007) and to the understanding of the Eighth Amendment before the end of the 19th century (which *Solem* discussed not at all)."

Id at 2686.

24. Id at 2687-91.

25. Id at 2687. Jeffreys presided over a special Commission which executed hundreds of rebels following the Duke of Monmouth's uprising in 1685. Id. It is believed that Jeffreys' practice of imposing arbitrary sentences which were not sanctioned by common law prece-

the *Titus Oates* case to confirm that the focus of the prohibition against "cruell and unusuall Punishments" was the illegal nature of the Chief Justice's activities, not the disproportionality of his sentences.[26] The Court learned that it was not uncommon for Chief Justice Jeffreys to impose punishments which were not sanctioned by either statute or common law (i.e., illegal punishments).[27] Additionally, in the legal community at the time, the words "illegall" and "unusuall" had the same meaning when used in reference to punishments imposed by the Crown.[28] Therefore, the Court found it unlikely that the "cruell and unusuall Punishments" provision of the Declaration of Rights was intended to bar "disproportionate" punishments.[29]

The Court recognized that the critical determination, however, was not what "cruell and unusuall Punishments" signified to the English, but the meaning it held for those who incorporated that language into the Eighth Amendment.[30] The Court stated that according to the 1828 edition of Webster's Dictionary, "unusual" meant, and still means, "such as [does not] occu[r] in ordinary practice."[31] Thus, certain modes of punishment which are not normally implemented are prohibited by this provision.[32]

The Court provided three arguments against interpreting the prohibition of "cruel and unusual punishments" as a guarantee of proportional sentencing with respect to a particular offense.[33] The Court first contended that if the "cruel and unusual punishments"

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dent or statute is what prompted the language in the English Declaration of Rights. Id at 2688.

26. Id. This is evidenced by examining the dissents of a minority of Lords in the case of Titus Oates (convicted before the King's Bench of perjury) in which Oates was sentenced to be fined, whipped, and "stript of [his] Canonical Habits." Id at 2688-89. The Lords stated that such a judgment was incorrect and should be reversed because it was "contrary to Law and ancient Practice." Id at 2689.

27. Id at 2688.

28. Id at 2690.

29. Id at 2691.

30. Id.

31. Id. The Court cited *In re Kemmler*, 136 US 436, 446-47 (1890), for the proposition that the "cruel and unusual punishments" provision prohibits the legislature from sanctioning particular modes of punishment, particularly those which are cruel and not commonly imposed. *Harmelin*, 111 S Ct at 2691. The petitioner in *In re Kemmler* was convicted of first-degree murder and sentenced to death by electrocution. *In re Kemmler*, 136 US at 439, 441. The Court held that the mode of punishment (i.e., death by electrocution) was not unconstitutionally cruel and unusual since the evidence demonstrated that death in this manner would be instant and painless. Id at 443. See notes 76-79 and accompanying text for further discussion of *In re Kemmler*.

32. *Harmelin*, 111 S Ct at 2691.

33. Id at 2692-93.

provision had been intended to include a proportionality requirement, it is unlikely that the Framers would have used such vague terms as "cruel and unusual."[34] Secondly, the Court found it quite odd that cruelty and unusualness with respect to a particular offense would have been the intended meaning of a provision applying to a new government which as yet had not defined any offenses.[35] Finally, the Court believed that the available information evidencing contemporary understanding at that time indicated that the criteria of "cruel and unusual" was to be determined irrespective of reference to any particular offense.[36]

The Court next considered the three factors which in *Solem* were found to be useful in assessing proportionality.[37] The Court ultimately concluded that the three enumerated factors did not present a workable method for determining proportionality.[38]

Although proportionality is a consideration when the death penalty may be imposed, the Court cited several cases regarding punishment by death as special situations which warrant additional constitutional protections.[39] Thus, the Court believed that death penalty cases cannot be used as a justification for an Eighth Amendment guarantee of proportionality.[40]

The petitioner's second challenge to the Eighth Amendment rested upon the argument that it was "cruel and unusual" to impose such a severe mandatory sentence without consideration of

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34. Id at 2692. The concept of proportionality was not a new one, as several states had proportionality provisions in their constitutions. Id. Thus, the Court concluded that if proportionality was to be guaranteed, it would have been stated in direct, clear terms. Id.

35. Id at 2693.

36. Id. Both the actions of the First Congress and the initial commentary on the clause provided no indication that a proportionality requirement was intended. Id at 2694. Additionally, the danger that a proportionality requirement would ultimately lead to a subjective imposition of values in the sentencing process provide added support that such was not the original intention behind the clause. Id at 2697.

37. Id. The Court, citing *Solem*, 463 US at 290-91, summarized these factors as follows: "(1) the inherent gravity of the offense, (2) the sentences imposed for similarly grave offenses in the same jurisdiction, and (3) sentences imposed for the same crime in other jurisdictions." *Harmelin*, 111 S Ct at 2697.

38. Id at 2698-99. With regard to the gravity of the offense, as mentioned in factors (1) and (2) in note 37, the Court reasoned that since there is no objective standard for gravity, judges would be left with deciding and comparing what they perceive as being grave. Id at 2698. The Court found that the third factor as stated in *Solem*, although it can be applied easily, is not relevant to the Eighth Amendment as it is up to the individual states to punish crimes at their discretion. Id.

39. Id at 2701. The Court cited *Turner v Murray*, 476 US 28, 36-37 (1986), *Eddings v Oklahoma*, 455 US 104 (1982), and *Beck v Alabama*, 447 US 625 (1980). *Harmelin*, 111 S Ct at 2701.

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

any mitigating factors.[41] The Court, however, declared that this was not supported by either the text or the history of the Eighth Amendment.[42] Additionally, the petitioner contended that the principles of the "individualized capital-sentencing doctrine"[43] should be applied to the case of a mandatory sentence of life in prison to allow for the consideration of certain mitigating factors.[44] Again emphasizing that death is fundamentally different from all other penalties, the Court similarly rejected the petitioner's second claim.[45] The Court concluded that because of the fundamental difference between death and all other penalties, the "individualized capital-sentencing" doctrine cannot be applied outside the context of capital crimes.[46] The Court thus affirmed the decision of the Michigan Court of Appeals and upheld the petitioner's sentence.[47]

Justice Kennedy, with whom Justice O'Connor and Justice Souter joined, concurred in part and concurred in the judgment.[48] Justice Kennedy argued that the Eighth Amendment does in fact contain a proportionality guarantee.[49] However, that guarantee is not one of strict proportionality between the crime and the sentence, but prohibits only extreme sentences that are "grossly disproportionate" to the crime.[50] Justice Kennedy concluded that due to the severity of the offense in this case, the sentence imposed was not

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41. Id. Harmelin contended that the fact that he had no prior felony convictions should have been considered before sentencing him to life in prison without the possibility of parole. Id.

42. Id. Mandatory penalties have been imposed throughout the history of this country, and although a mandatory penalty may be cruel, it is not unusual. Id.

43. This doctrine, which allows individualized determination of the appropriateness of the imposition of the death penalty, can be found in *Sumner v Shuman*, 483 US 66, 73 (1987). *Harmelin*, 111 S Ct at 2701-02. While serving a life sentence in a Nevada prison, Shuman killed a fellow inmate and was convicted of capital murder. *Sumner*, 483 US at 67. His conviction carried a mandatory sentence of death. Id. The question addressed by the Court was whether a statute which carries a mandatory sentence of death for a prison inmate convicted of murder while serving a life sentence without possibility of parole is constitutional under the Eighth and Fourteenth Amendments. Id. The Court held that such a statute was unconstitutional and that individualized sentencing procedures must be used in this capital case. Id at 85.

44. *Harmelin*, 111 S Ct at 2702.

45. Id.

46. Id.

47. Id.

48. Id.

49. Id at 2705.

50. Id. Justice Kennedy cited *Solem*, 463 US at 288, 303, for this proposition. *Harmelin*, 111 S Ct 2705. Justice Kennedy considered four factors in making this conclusion: (1) legislative discretion in establishing punishments, (2) the variety of valid punishment theories, (3) the nature of the federal system which results in diverse sentences, and (4) the need for objective factors in proportionality review. Id at 2703-06.

unconstitutional.[51] Additionally, Justice Kennedy reasoned that the Michigan legislature's punishment scheme was constitutional, as the legislature had the authority to exercise its discretion in addressing the issue of drug possession.[52]

In a dissenting opinion, Justice White argued that since the Eighth Amendment forbids "excessive" fines, it could be construed to require a consideration of the proportionality of the fine levied as compared to the crime committed.[53] Justice White then responded to the majority's three arguments that the Eighth Amendment contains no proportionality guarantee.[54] The dissent also addressed the majority's concern that the three factors suggested by the *Solem* Court[55] would lead to the use of subjective imposition of criminal sentences.[56]

The dissent outlined two possible risks inherent in the majority's opinion.[57] First, Justice White contended that the majority did not provide an adequate procedure to deal with an extreme situation in which the punishment is one which no rational person could ac-

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51. Id at 2707. Justice Kennedy suggested that of the factors explained in *Solem*, see note 37, the only one that may be needed is the initial comparison of the gravity of the offense with the severity of the sentence. Id. Comparing the petitioner's sentence with those both within and outside of the jurisdiction should serve only to substantiate the original determination that the sentence was grossly disproportionate to the offense. Id.

52. Id at 2709. Justice Kennedy stated that the punishment scheme was the product of careful deliberation to deal with the problem which drugs present in our society. Id at 2708. The purpose of deterrence was achieved since the statute provided clear notice of the consequences of the forbidden criminal act. Id. Additionally, unjust sentences can be avoided through the use of prosecutorial discretion, or they can be corrected by legislative clemency. Id at 2709.

53. Id.

54. Id at 2710. The majority argued that if proportionality was the intent of the Framers, they would have clearly stated that principle, but Justice White pointed out similar instances where the Framers were not clear in their choice of language such as the Due Process Clause of the Fifth Amendment and the prohibition against unreasonable searches and seizures which is guaranteed by the Fourth Amendment. Id. Justice White countered the argument that the country at the time had not defined any offenses by noting that the established criminal justice systems in the states would have provided numerous examples from which to determine unusualness. Id. Finally, Justice White contended that available evidence at the time of ratification cannot be construed to find an intention on the part of the Framers to completely preclude the concept of proportionality. Id.

55. For the three factors utilized in *Solem*, see note 37.

56. *Harmelin*, 111 S Ct at 2712. Justice White stated that, in practice, the application of the factors has been relatively simple as well as successful. Id. Only four cases decided subsequent to *Solem* were cited in which a sentence was reversed pursuant to an analysis based on proportionality: *Clowers v State*, 522 S2d 762 (Miss 1988); *Ashley v State*, 538 S2d 1181 (Miss 1989); *State v Gilham*, 48 Ohio App 3d 293, 549 NE2d 555 (1988); and *Naovarath v State*, 105 Nev 525, 779 P2d 944 (1989). *Harmelin*, 111 S Ct at 2713 n 2.

57. *Harmelin*, 111 S Ct at 2714.

cept because it is completely disproportionate to the crime.[58] Second, the Justice believed that the majority's interpretation of the Eighth Amendment as prohibiting only certain modes of punishment cannot easily be reconciled with the fact that capital punishment cases do not prohibit the use of death as a mode of punishment, but instead place limits upon its implementation.[59]

Justice White argued that the factors announced in *Solem*[60] should be applied to determine if the sentence was proportional to the offense, ultimately deciding that the petitioner's sentence was not proportional to the offense.[61] He concluded that the punishment must fail under an Eighth Amendment challenge.[62]

In a separate dissenting opinion, Justice Marshall stated that, although he agreed with the dissent of Justice White, he would hold capital punishment unconstitutional in every situation.[63]

In a third dissenting opinion, Justice Stevens, joined by Justice Blackmun, agreed "wholeheartedly" with Justice White's dissent but commented further concerning the petitioner's sentence, ultimately contending that the sentence was "capricious."[64] Justice

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58. Id. Justice White was not satisfied with the majority's claim that such extreme situations are not likely to occur, realizing that if they did, there would be no basis for deciding such a case. Id.

59. Id.

60. The *Solem* factors are set forth in note 37. See also notes 55-56 and accompanying text.

61. *Harmelin*, 111 S Ct at 2714, 2719. Justice White, in applying the first factor announced in *Solem*, considered the nature of the offense, the petitioner's personal responsibility and the practical results of its application, and concluded that the gravity of the offense committed was not proportional to the harshness of the punishment. Id at 2716-18. Next, after comparing the sentences imposed on other criminals in Michigan as well as those rendered in other jurisdictions for the same offense, Justice White concluded that the mandatory sentence of life in prison without possibility of parole for violation of a Michigan statute prohibiting drug possession was cruel and unusual and thus violated the Eighth Amendment. Id at 2718-19.

62. Id at 2714.

63. Id at 2719. Justice Marshall said, "The Eighth Amendment requires comparative proportionality review of capital sentences. (citation omitted) However, my view that capital punishment is especially proscribed and, where not proscribed, especially restricted by the Eighth Amendment is not inconsistent with Justice White's central conclusion . . . that the Eighth Amendment also imposes a general proportionality requirement." Id.

64. Id at 2719-20. Stevens stated that a sentence of death and one of mandatory life in prison without possibility of parole share a common trait in that the offender will never be free. Id. Such a sentence of life in prison without possibility of parole must rest on the assumption that the interest of the offender in being rehabilitated is outweighed by society's interests in deterrence and retribution. Id at 2719, citing *Furman v Georgia*, 408 US 238, 307 (Stewart concurring) (1977). The Justice commented that it would be unreasonable to assume that every offender convicted under the Michigan statute at issue in this case is unable to be rehabilitated and thus should receive this mandatory sentence. Id at 2720. He concluded by noting that Michigan is the only jurisdiction that places this offense in such a

Stevens explained that the petitioner's sentence would "barely exceed 10 years" under the Federal Sentencing Guidelines, and in most states he would have received a "substantially shorter" sentence as a first-time offender.[65]

The "cruel and unusual punishments" clause of the Eighth Amendment[66] had as its model the English Bill of Rights of 1689.[67] A like provision was also included in the Virginia Declaration of Rights of 1776.[68] The clause was not placed in the text of the Constitution, and the intent of the Framers to include it in the Bill of Rights is not easily ascertained.[69] It is unlikely, however, that the Framers were only concerned with preventing torturous punishments.[70] Their interest in limiting Congress' power over punishment grew out of the realization that the broad legislative discretion in the field of punishments must be checked.[71] However, even though it can be determined why the Framers believed the Eighth Amendment was necessary, it is not possible to know precisely what they meant by the prohibition against "cruel and unusual punishments."[72]

One of earliest cases which addressed the issue of cruel and un-

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category which assumes that the possibility of rehabilitation does not exist. Id.

65. Id.

66. See note 14 for the text of the Eight Amendment.

67. Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 New Eng J on Crim & Civ Confinement 301, 305 (1989), citing Leonard Orland, *Prisons: Houses of Darkness* at 84-91 (Free Press, 1975). The purpose of the English Bill of Rights was to prohibit the prevalent forms of punishment which were both "barbarous and torturous." Note, 15 New Eng J on Crim & Civ Confinement at 306, citing Orland, *Prisons: Houses of Darkness* at 85 (cited in this note).

68. Id. Additionally, the Declaration of Rights of Delaware, Maryland, Massachusetts, and New Hampshire had similar provisions. Id.

69. *Furman*, 408 US at 258 (Brennan concurring). The only evidence of the Framers' intent can be found in the debates which took place during the ratifying conventions of two states. Id. Mr. Holmes of Massachusetts voiced his concern that Congress was not "restrained from inventing the most cruel and unheard-of punishments" for crimes. Id at 258-59, citing 2 J. Elliot's Debates 111 (2d ed 1876). In Virginia, Patrick Henry declared that in the area of punishments, "no latitude ought to be left, nor dependence put on the virtue of representatives." *Furman*, 408 US at 259 (Brennan concurring), citing 3 J. Elliot's Debates at 447 (cited within this note). Henry also spoke of "tortures, or cruel and barbarous punishment." *Furman*, 408 US at 260, citing 3 J. Elliot's Debates at 447 (Brennan concurring).

70. *Furman*, 408 US at 260 (Brennan concurring).

71. Id at 260-61. A "constitutional check" was thought to be necessary to guarantee that, "no latitude ought to be left, nor dependence put on the virtue of representatives," in dealing with punishments. Id at 261.

72. Id at 263. It can be concluded that torturous punishments were definitely intended to be prohibited, but the evidence does not indicate that "*only* torturous punishments were to be outlawed." Id.

usual punishment was *Wilkerson v Utah*.[73] Wilkerson was adjudged guilty of murder in the first degree and subsequently sentenced to death with the instruction that death be accomplished by shooting.[74] The Court acknowledged that cruel and unusual punishments were prohibited by the Constitution, but ultimately determined that death by shooting as punishment for the conviction of first degree murder was not forbidden by the clause.[75]

The issue of the Eighth Amendment as it applied to the mode of punishment was again addressed in *In re Kemmler*.[76] Kemmler was found guilty of first degree murder and sentenced to death by electrocution.[77] Kemmler argued that death by the use of electricity was a cruel and unusual punishment and thus prohibited by the Eighth Amendment.[78] The Court, however, disagreed and found that the mode of punishment prescribed was not unconstitutional.[79]

In 1910, the United States Supreme Court for the first time in *Weems v US*[80] extensively analyzed the Eighth Amendment with an emphasis upon the Framers' intent.[81] The petitioner, an officer

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73. 99 US 130 (1879), overruled by *Gregg v Georgia*, 428 US 153 (1976).

74. *Wilkerson*, 99 US at 130-31. The law of the Territory of Utah at the time provided that anyone convicted of first degree murder should suffer death. Id at 132. No other statutory regulation existed which specifically referred to an allowable mode of punishment, except that the Revised Penal Code, Section 10 placed a duty upon the sentencing court to determine and authorize the punishments prescribed in the other code sections. Id.

75. Id at 134-35. The Court briefly referred to certain other modes of punishment utilized throughout history. Id at 135. In a reference to Blackstone, the Court mentioned that the sentences for certain atrocious crimes sometimes called for the prisoner to be emboweled alive, beheaded, and quartered; dragged to the site of the execution; or burned alive. Id. However, often the parts of these judgments which involved torture or cruelty were not strictly enforced. Id. Recognizing that the precise scope of the cruel and unusual punishments clause could not be determined, the Court at least was confident in stating that punishments which were torturous and unnecessarily cruel, such as those mentioned above, were prohibited by the Eighth Amendment. Id at 135-36.

76. 136 US 436 (1890), overruled by *Gregg v Georgia*, 428 US 153 (1976).

77. *Kemmler*, 136 US at 439, 441.

78. Id at 441.

79. Id at 443. The Supreme Court held that the lower court did not commit an error when it presumed that the state legislature in enacting the New York statute authorizing death by electrocution had collected all the facts necessary to conclude that death by electrocution was not a cruel and unusual punishment. Id at 443, 449. Although electrocution was a new mode of punishment and thus unusual, it was not seen as cruel since there was a substantial amount of evidence which clearly demonstrated that a substantial electric current could be generated which would result in instant, painless death. Id at 443. The Court also identified various modes of punishment which would be viewed as "manifestly cruel and unusual" and thus within the constitutional prohibition, including burning at the stake, crucifixion, and breaking on the wheel. Id at 446.

80. 217 US 349 (1910).

81. Note, *Interpretation of the Eighth Amendment — Rummel, Solem, and the*

of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was found guilty of falsifying a public and official document.[82] The punishment for such an offense was established as cadena temporal[83] which was prescribed by the Penal Code of Spain.[84] The petitioner objected to his sentence of 15 years, contending that such punishment was prohibited by the Bill of Rights of the Philippine Islands which forbade the infliction of cruel and unusual punishment.[85]

The Court examined the history of the Cruel and Unusual Punishments Clause, commenting on various debates which occurred during specific state conventions.[86] The arguments of James Wilson made during the Pennsylvania Convention and those of Patrick Henry set forth at the Virginia Convention were contrasted.[87] Wilson concluded that a Bill of Rights was unnecessary and exhibited confidence that the legislature would uphold and not infringe upon the spirit of liberty.[88] Henry was not as optimistic and assumed a position in which he advocated a basic distrust of power, concluding that constitutional restraints were necessary to guard against abuse of power.[89] The Court in *Weems*, however, hypothesized that these men certainly did not intend to prohibit only the modes of cruel and unusual punishment which throughout history

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Venerable Case of Weems v United States, 1984 Duke L J 789, 798 (1984).

82. *Weems*, 217 US at 357, 363. The actual violation occurred when he entered in the cash book that certain sums were paid to employees of the lighthouse service when, in fact, they were not paid. Id.

83. Id. Only two types of punishment ranked higher on the scale than cadena temporal — death and cadena perpetua. Id at 364. Cadena temporal required that the offender be fined and then imprisoned for a length of time between twelve years and one day to twenty years. Id at 363-64. Those sentenced were required to wear chains upon both their wrists and ankles and to endure hard and painful labor for the benefit of the state. Id at 364. Additionally, accessory penalties included deprivation of parental authority, guardianship of person or property, and marital authority during the time of punishment. Id. The offender was also subject to surveillance by the authorities. Id. It was required that those punished fix a domicil, observe certain rules of inspection, and "adopt some trade, art, industry, or profession." Id. The final accessory penalty was the denial of the right to vote and hold pubic office. Id at 364-65.

84. Id at 363.

85. Id at 365.

86. Id at 368, 372. What was considered cruel and unusual had not been specifically decided. Id at 368. The Court examined the principles announced in *Wilkerson v Utah* (see note 73 and accompanying text) and *In re Kemmler* (see note 76 and accompanying text) in which it was found that death by shooting (*Wilkerson*) and death by electrocution (*Kemmler*) were not cruel and unusual modes of punishment and, therefore, did not violate the Eighth Amendment. Id at 369-71.

87. Id at 372.

88. Id.

89. Id.

gave rise to the Eighth Amendment prohibition.[90] The Court reasoned that, in accordance with the intent of the Framers of the Eighth Amendment, a certain power was provided to the judiciary to decide what constituted cruel and unusual punishment.[91] The Court examined other legislation of the Philippine Commission and discovered that the punishment for counterfeiting or forgery of the obligations or securities of the United States or the Philippine Islands was set at "not more than 10,000 pesos and imprisonment of not more than fifteen years."[92] The Court, in comparing this punishment with that given to Weems for falsifying one item of a public account, found that the former was no greater than the latter.[93] The Court reasoned that this similarity exhibited a contrast "between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."[94] Thus, the Court concluded that the punishment imposed upon Weems was cruel and unusual and, therefore, violated the Eighth Amendment.[95]

In *Trop v Dulles*,[96] the Court again was confronted with a challenge to the Eighth Amendment.[97] Trop was a native-born American who was deprived of his United States citizenship as a result of his conviction in a court-martial proceeding for desertion during wartime.[98] The Court held that an individual's right of citizenship

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90. Id. The Court believed that the Framers must have realized that cruelty could be inflicted by application of laws other than those which authorized bodily pain or mutilation. Id.

91. Note, 1984 Duke L J at 802 (cited in note 81).

92. *Weems*, 217 US at 380-81.

93. Id at 381.

94. Id.

95. Id at 382. Justice White authored a dissent in which he disagreed with the majority's interpretation of the cruel and unusual punishments clause. Id at 385. He observed that the legislative power of Congress to define and punish crime was limited by the right of the judiciary to oversee the exercise of that power. Id. Justice White viewed the word "cruel" as restricting the legislature from imposing punishments which would result in unnecessary bodily suffering by employing inhumane methods for bringing about bodily torture. Id at 409. Thus, he interpreted the Eighth Amendment as guarding against those methods of punishment frequently used prior to the English Bill of Rights of 1689. Id. He further believed that the use of the term "unusual" prohibited the imposition of punishments which were deemed illegal. Id at 409-10.

96. 356 US 86 (1958).

97. *Trop*, 356 US at 99.

98. Id at 87. Trop had been confined to the stockade for an earlier disciplinary infraction when he escaped. Id. He was absent for less than a day when he voluntarily surrendered to an officer in an Army vehicle whom he met on his way back to the base. Id. Trop was convicted of desertion in a court-martial proceeding and sentenced to three years of hard labor, relinquishment of all pay and allowances, and a dishonorable discharge. Id at 88.

cannot be taken away unless the individual voluntarily renounces or abandons this right, and thus decided that this alone would provide the basis for reversal since the petitioner had done neither.[99] The Court went on to pose the question of whether the Constitution allowed Congress to take away citizenship for the purpose of punishing a crime.[100] The Court considered whether denationalization pursuant to the statute was cruel and unusual and thus violative of the Eighth Amendment guarantee.[101] Declaring that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" the Court held that punishment by denationalization was cruel and unusual and was, therefore, prohibited by the Eighth Amendment.[102]

In 1977, the Court in *Coker v Georgia*[103] reversed a Georgia Supreme Court decision which held that the imposition of the death penalty as a punishment for a rape conviction did not violate the Eighth Amendment's Cruel and Unusual Punishments Clause.[104] The Court believed that it was unnecessary to reiterate the key aspects of the controversy about capital punishment and its constitutionality, and, therefore, stated the accepted principle that the punishment of death was not an "inherently barbaric or an unacceptable mode of punishment" for a crime and that it was not automatically disproportionate when compared to the crime for which it was rendered.[105]

The *Coker* Court focused on various principles which were estab-

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Several years after his conviction, he was unable to obtain a passport because he had lost his citizenship pursuant to Section 401(g) of the Nationality Act of 1940. Id. It was in response to this inability to obtain a passport that Trop commenced this suit seeking a declaratory judgment that he was a citizen. Id. The Supreme Court reversed the lower court's grant of a motion for summary judgment in favor of the government. Id at 104.

99. Id at 93. The Court also determined that there was no other legitimate purpose supporting the statute other than to punish the offender. Id at 97. Thus, the Court concluded that the statute was a penal law. Id.

100. Id at 99.

101. Id.

102. Id at 101. The majority stated that although denationalization involved no physical mistreatment or torture, it did ultimately result in the complete loss of the individual's status in society. Id. Justice Frankfurter in his dissent, however, distinguished denationalization from punishment. Id at 124. Justice Frankfurter argued that even though loss of citizenship likely resulted in severe consequences, it was not "punishment" for purposes of the Constitution. Id.

103. 433 US 584 (1977).

104. *Coker*, 433 US at 586. The petitioner was convicted of rape and received the death penalty pursuant to Ga Code Ann § 26-2001 (1972), which provided that "[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years." Id.

105. *Coker*, 433 US at 591.

lished in its opinion in *Gregg v Georgia*,[106] and concluded that the death penalty was prohibited by the Eighth Amendment from being utilized as punishment for the crime of rape.[107] Studying the objective evidence[108] relevant to the country's opinion concerning the imposition of the death penalty for the crime of rape of an adult woman, the court discovered that Georgia was the only jurisdiction at the time which imposed the death sentence in such an instance.[109]

In *Rummel v Estelle*,[110] the Court was again met with a proportionality challenge to the Eighth Amendment.[111] The petitioner, Rummel, was sentenced to life imprisonment in accordance with a Texas recidivist statute.[112] Having no success in the Texas appel-

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106. 428 US 153 (1976).

107. *Coker*, 433 US at 592. The Court noted that according to *Gregg*, a punishment is excessive in comparison to the crime committed and thus barred as unconstitutional if it (1) does not further the acceptable goal of the punishment or (2) is grossly disproportionate when compared with the crime's severity. Id. Additionally, judgments rendered under the Eighth Amendment must not reflect only the Justices' subjective views but must also be substantiated by objective factors. Id. In ascertaining the objective factors, the attitude of the public with respect to a specific sentence must be considered. Id.

108. Id at 593-96. The Court examined the enactment of death penalty statutes across the country and determined that while Georgia was the only state which authorized the death penalty for rape of an adult woman, both Florida and Mississippi provided capital punishment for the rape of a child. Id.

109. Id at 593, 595-96. Therefore, the Court's own judgment that the death penalty was a disproportionate punishment for the crime of rape of an adult woman was supported by this extrajurisdictional evidence. Id at 597. The Court did not wish to minimize the seriousness of the crime of rape, but emphasized that . . . , when compared to . . . murder in which a life is lost, rape by definition does not result in death or serious injury. Id at 598.

Justice Powell concurred in the judgment in part and dissented in part. Id at 601. He agreed that, although the death penalty is usually a disproportionate punishment for the crime of raping an adult woman, it is not always a disproportionate penalty for this crime. Id. Justice Powell suggested that in examining the objective indicators of society's views regarding rape, it would be possible to show that the death penalty may not be considered disproportionate for a rape which, for example, involved brutality or severe injury. Id at 604.

Justice Burger dissented, stating that although he agreed that the death penalty would be disproportionate for minor crimes, rape was not such a crime. Id. Therefore, he advocated review of the facts and circumstances on a case-by-case basis in order to determine if the particular rape warranted punishment by the death penalty. Id at 607. Justice Burger feared that it could be implied from the majority's holding that the death penalty may only be imposed in crimes which ultimately resulted in the victim's death. Id at 621. He concluded that this is an area in which the states should be permitted to legislate. Id at 622.

110. 445 US 263 (1980).

111. *Rummel*, 445 US at 265.

112. Id at 264. The Texas statute required that anyone convicted three times of a felony less than a capital offense shall be sentenced to life in prison following the third such conviction. Id. Rummel was first charged with fraudulent use of a credit card by which he acquired $80 worth of goods or services. Id at 265. Credit card fraud was a felony punishable by two to ten years if the amount involved was more than $50. Rummel pleaded guilty and

late courts, Rummel then filed a petition for habeas corpus[113] in the United States District Court for the Western District of Texas in which he argued that his life sentence was an unconstitutionally cruel and unusual punishment because it was disproportionate to the crimes which he committed.[114] The district court rejected his arguments, noting that the sentence was not technically one of life imprisonment because in approximately twelve years, he would have been eligible for parole.[115] The court of appeals initially reversed, agreeing with the disproportionality claim, but upon rehearing, the court vacated its prior judgment emphasizing the petitioner's possibility of parole within twelve years of confinement.[116]

The main contention of the petitioner in the Supreme Court of the United States was that the state did not have the authority to impose a life sentence for his third felony, a crime punishable only by a term of years.[117] The Court recognized that the Eighth Amendment had in the past been invoked to prohibit a disproportionate sentence when compared with the underlying crime.[118] The Court closely examined *Weems v United States*[119] because it involved an Eighth Amendment challenge outside of the arena of capital punishment.[120] The Court ultimately concluded that *Weems* could not be relied upon outside of the context of its par-

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was sentenced to three years in a state penitentiary. Id.

Five years later, Rummel pleaded guilty to passing a forged check in the amount $28.36 for which he was sentenced to four years imprisonment. Id at 265-66.

In his third felony conviction, Rummel was charged with felony theft in obtaining $120.75 by false pretenses. Id at 266. For this third felony, however, Rummel was prosecuted under the Texas recidivist statute. Id. A jury convicted the petitioner of felony theft and also confirmed his two prior felony convictions, and he was ultimately sentenced to life in prison under the recidivist statute. Id.

113. Habeas corpus in this context means "[a] writ directed to the person detaining another, and commanding him to produce the body of the prisoner, or person detained." The purpose of this writ is "to test the legality of the detention or imprisonment; not whether he is guilty or innocent." *Black's Law Dictionary* 638 (West, 5th ed 1979).

114. *Rummel*, 445 US at 267.

115. Id.

116. Id at 267-68.

117. Id at 270-71.

118. Id at 271. However, the Court noted that a number of disproportionality charges had appeared in the context of the death penalty. Id at 272. Contending that the sentence of death was different in kind from one of imprisonment, the court reasoned that capital punishment cases would be little help in Rummel's case where life imprisonment was the issue. Id.

119. 217 US 349 (1910). See notes 80-95 and accompanying text for full discussion of *Weems v United States*.

120. *Rummel*, 445 US at 272.

ticular facts.[121] Therefore, the Court concluded that the length of sentences for crimes which are classified as felonies and thus punishable by substantial terms of imprisonment are subject solely to "legislative prerogative."[122] This view ultimately led to the Court's reluctance to review terms of imprisonment mandated by state legislatures.[123]

Rummel compared the Texas recidivist program with those of other states and concluded that with the exception of two states, West Virginia and Washington, he would have received a lesser penalty everywhere else in the United States.[124] However, the Court rejected this reasoning and declared that some states would always be known for imposing harsher punishments upon certain offenders than other states.[125] The Court recognized that the goals of a recidivist statute are to deter repeat offenders and to segregate such offenders from society at some point in their life following a predetermined number of offenses.[126] The Court concluded that the point at which a repeat offender should be separated from society for an extended period of time as well as the amount of time of that separation are largely to be determined by the punishing jurisdiction.[127] Thus, the Court held that the mandatory sentence of life imprisonment imposed on Rummel was not a cruel and unusual punishment.[128]

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121. Id at 274. The *Rummel* court viewed the surrounding circumstances in *Weems* as important. Id. The offense in *Weems* of falsifying a public and official document was minor, the minimum prison term of twelve years and one day to twenty years was very long, and the "accessories" included in the punishment were out of the ordinary. Id. Accessories included deprivation of parental authority, guardianship of personal property, and marital authority. *Weems*, 217 US at 364. The offender was also subject to surveillance by the authorities as well as being denied the right to vote and hold public office. Id at 364-65.

122. *Rummel*, 445 US at 274.

123. Id.

124. Id at 279.

125. Id at 282.

126. Id at 284.

127. Id at 285.

128. Id. Justice Powell dissented, joined by Justice Marshall and Justice Brennan. Id. In examining the history of the Eighth Amendment, Justice Powell concluded that punishments which in form are barbarous and those which are greatly excessive are cruel and unusual. Id at 293. If no social purpose is furthered or if the sentence is not proportionate to the severity of the crime, the sentence may be classified as excessive. Id. Justice Powell would apply a proportionality analysis to capital as well as noncapital crimes. Id. He contended that three objective factors must be examined in assessing proportionality: (1) the nature of the offense, (2) the type of sentence which other jurisdictions impose for the same crime, and (3) the sentence which the same jurisdiction imposes on its other criminals. Id at 295. Justice Powell applied these factors and ultimately concluded that Rummel's punishment was contrary to the proportionality requirement of the cruel and unusual punishments

Two years later, in *Hutto v Davis*,[129] the Court was again confronted with a proportionality challenge to the Eighth Amendment.[130] In a Virginia court, Davis was convicted of possession with the intent to distribute as well as distribution of marijuana.[131] He was thereafter sentenced to a prison term of twenty years for each of the two counts, the terms to run consecutively,[132] and required to pay a $10,000 fine.[133] Davis contended that the forty-year sentence constituted cruel and unusual punishment because it was grossly disproportionate to the crime.[134] The Court ultimately concluded that *Rummel* was controlling and thus rejected Davis' proportionality challenge.[135]

The Court most recently examined the issue of proportionality in the case of *Solem v Helm*.[136] The Court was confronted with the issue of whether a life sentence without possibility of parole for a seventh nonviolent felony was a violation of the Eighth Amendment.[137] Helm had been convicted in South Dakota of six nonviolent felonies.[138] For the seventh felony, Helm was charged with uttering a "no account" check which carried a maximum punishment of a $5,000 fine and five years imprisonment.[139] Helm's repeated convictions warranted his prosecution under South Dakota's recidivist statute, and he was sentenced to life imprisonment as a habitual criminal.[140] Helm contended that his sentence resulted in cruel

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clause and thus a violation of the Eighth Amendment. Id at 303.

129. 454 US 370 (1982).

130. *Hutto*, 454 US at 371.

131. Id.

132. Id.

133. Id.

134. Id. Davis had in his possession a quantity of marijuana which was less than nine ounces. Id.

135. Id at 374-75. Justice Brennan was joined by Justice Marshall and Justice Stevens in his dissent. Id at 381. Justice Brennan concluded that this punishment was harsh as well as cruelly in excess of the punishments which the Virginia courts had imposed on other offenders convicted of similar crimes. Id at 385. Justice Brennan claimed that such punishment was disproportionate and not substantiated by any judgment of the legislature declaring that the punishment imposed and the crime committed were comparable. Id at 386.

136. 463 US 277 (1983).

137. *Solem*, 463 US at 279.

138. Id. The six felonies included third-degree burglary (in 1964, 1966, and 1969), obtaining money under false pretenses (1972), grand larceny (1973), and a third-offense driving while intoxicated (1975). Id at 279-80. According to the record, all the offenses were nonviolent, none were classified as a crime against a person, and in each instance alcohol was involved. Id at 280.

139. Id at 281.

140. Id at 281-82.

and unusual punishment.[141]

The Court began by affirming that the concept of proportionality between the punishment and the crime is apparent throughout the development of the common law.[142] The Court also concluded that the concept of proportionality was one which had been recognized for nearly one hundred years.[143] Thus, the Court held that a criminal sentence must be proportionate to the severity of the crime.[144]

The Court relied upon three objective factors which should be reviewed in assessing proportionality.[145] After applying the objective criteria, the Court concluded that Helm was subjected to "the penultimate sentence for relatively minor criminal conduct."[146] The Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."[147] Finding that Helm's sentence was "significantly disproportionate to his crime," the Court held that it was prohibited by the Eighth Amendment.[148]

Harmelin v Michigan is the first case in which the United States Supreme Court has addressed the issue of a proportionality guarantee in the Eighth Amendment since its decision in *Solem v Helm*.[149] The *Harmelin* Court decided to examine this issue "anew,

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141. Id at 283.

142. Id at 284. The Court examined the language of the English Bill of Rights noting that it condemned punishments which were severe or excessive. Id at 285. The Framers, by incorporating the language of the English Bill of Rights into the Eighth Amendment, evidenced their intent that American citizens should receive at least this same protection, which included the right to be free from excessive punishments. Id at 286.

143. Id.

144. Id at 290. Additionally, it was noted that courts should, whenever possible, defer to legislatures which have the responsibility for fixing the types of crimes and the punishments for those crimes and defer to the trial courts which possess discretion in sentencing criminals. Id.

145. Id at 290-91. The first factor which the Court contended should be examined was the gravity of the offense as compared to the harshness of the penalty. Id at 291. Second, comparison of sentences imposed in the same jurisdiction upon other criminals should occur. Id. Finally, the Court should consider the sentences imposed in other jurisdictions for commission of the same offense. Id. The assumptions underlying these factors are that courts have the ability to judge the relative gravity of an offense as well as the ability to compare different sentences. Id at 292, 294.

146. Id at 303.

147. Id at 290.

148. Id. In *Solem*, Chief Justice Burger was joined by Justices White, Rehnquist, and O'Connor in his dissent. Id at 304. The Chief Justice contended that the Court's holding in *Solem* could not be reconciled with the holding in *Rummel*, and he therefore dissented because the Court did not overrule this prior holding. Id.

149. *Harmelin*, 111 S Ct at 2685.

and in greater detail"[150] because of the closeness of the decision in *Solem*[151] as well as the recognized practice which allows a more relaxed application of *stare decisis* to constitutional precedents, especially those that are recent and appear to conflict with other decisions.[152] The Court carefully studied the background of the Eighth Amendment as well as the early understanding of it and consequently determined that *Solem* was wrong in its conclusion that the Eighth Amendment contains a proportionality guarantee.[153] Although the *Harmelin* Court significantly departs from the precedent set out by *Solem*, the Court is justified in its conclusion that the Eighth Amendment contains no guarantee of proportionality. Furthermore, the Court in *Harmelin* leaves nothing open to the subjective judgment of the judiciary regarding the proportionality, or lack thereof, of legislative schemes of punishment.[154]

Since the history of the Eighth Amendment is firmly rooted in the English Declaration of Rights, the Court first examined the purpose of the English Declaration and concluded that its "cruell and unusuall Punishments" prohibition was directed at the illegality of the sentences at the time rather than their disproportionality.[155] Additionally, the text of the English Declaration of Rights did not literally refer to punishments which were "disproportionate" or even "excessive."[156] The Court concluded that the Eighth Amendment prohibition was intended to disallow certain modes of punishment and was particularly aimed at punishment methods not "regularly or customarily employed."[157] In explicitly rejecting the three factors which the *Solem* Court deemed relevant to assessing proportionality,[158] the Court concluded that there was a lack of applicable guidelines which could be applied to determine proportionality.[159] In contrast, "cruel and unusual" modes of punishment can be recognized by utilizing history and accepted practices as a guide.[160] The Court definitively stated that "the propor-

150. Id at 2686.

151. *Solem v Helm*, 463 US 277 (1983), was a 5-4 decision. *Harmelin*, 111 S Ct at 2686.

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

153. Id.

154. Id at 2696-97.

155. Id at 2687-88. See notes 25, 26 and accompanying text.

156. *Harmelin*, 111 S Ct at 2687. The text of the English Declaration of Rights is set out in note 19.

157. *Harmelin*, 111 S Ct at 2691.

158. The three factors appear in note 37.

159. *Harmelin*, 111 S Ct at 2697.

160. Id at 2696.

tionality principle becomes an invitation to the imposition of subjective values."[161]

The danger that a proportionality requirement may lead to subjective interpretation cannot be underestimated. Justice Kennedy in his concurring opinion concluded that, although strict proportionality between the crime and the punishment are not required by the Eighth Amendment, sentences which are "grossly disproportionate" to the crime are prohibited.[162] Justice Kennedy considered the amount of cocaine which the petitioner possessed as well as the potential harm which society could suffer and concluded that no inference of gross disproportionality resulted when the petitioner's crime of drug possession was compared to his sentence of life in prison without possibility of parole.[163] Even though Justice Kennedy reached the same result as the majority, the means he employed to reach that result required the Court's subjective assessment that Harmelin's crime was not "grossly disproportionate" to the sentence which he received. It is this subjectivity which the Court in *Harmelin* feared and sought to avoid.

An important consideration in assessing the appropriateness of punishments is the legislative discretion employed in their creation. Legislatures must be permitted to objectively identify the pervasive problems present in their state which they believe can be effectively addressed by an appropriate scheme of punishment. The Michigan legislature, in this case, has recognized the gravity of the drug problem and has developed penalties which it believes are warranted by the severity of the offenses. The United States Supreme Court would risk the danger of disregarding the effect of the state's judgment if a proportionality principle were applied. The petitioner assumed a risk and was apprehended with a large quantity of drugs, an offense which the Michigan legislature has determined should be punished by life in prison with no possibility of parole. Michigan has already considered the severity of the offense in fashioning the punishment, and the Eighth Amendment does not allow the United States Supreme Court to preempt that judgment by assessing whether they believe it is proportional.

In the time between the decisions in *Solem* and *Harmelin*, three

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161. Id at 2697.

162. Id at 2705.

163. Id at 2705-07. The petitioner possessed over 1.5 pounds of cocaine which could potentially yield 32,500-65,000 doses. Id at 2705. Justice Kennedy emphasized the connection between drugs and violent crime and concluded that "grave harm to society" could result from the petitioner's conduct. Id at 2706.

new justices were added to the Supreme Court. Chief Justice Burger and Justices Powell and Brennan were replaced by Justices Scalia, Kennedy, and Souter. These new justices accounted for three of the five members of the majority in *Harmelin*, and thus it appears that they significantly contributed to the change in the Court's position since the *Solem* decision. Chief Justice Rehnquist and Justice O'Connor complete the *Harmelin* majority. It appears that the recent departure of Justice Marshall and the addition of Justice Clarence Thomas will do little to affect the Court's position on the issue of proportionality in the Eighth Amendment, as Justice Thomas could either add to the majority of five which already exists or take the place among the four dissenters left vacant by Justice Marshall.

Among the majority of five, however, Justices O'Connor, Kennedy, and Souter filed a concurring opinion in which they advocate a type of proportionality requirement. They contend that the Eighth Amendment does not contain a guarantee of strict proportionality between the crime and the sentence, but prohibits only extreme sentences that are "grossly disproportionate" to the crime.[164] If Justice Thomas shares this view, only one more vote is required to make this position the majority. It is unlikely however that either Chief Justice Rehnquist or Justice Scalia will readily relinquish their belief that the Eighth Amendment contains no proportionality guarantee. Therefore, in the foreseeable future, it is unlikely that those who are convicted of crimes punishable by extremely harsh prison terms will be able to successfully challenge their sentences under the Eighth Amendment's "cruel and unusual punishments" clause.

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164. Id at 2705.