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Harmelin v. Michigan: Effective Application of Anti-Drug Legislation or Cruel and Unusual Punishment?

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Abstract

The traditional American concept of criminal sentencing is that prisons exist for rehabilitation and release as much as for incarceration. 1 However, in recent years Congress and state legislatures have enacted a series of stringent anti-drug laws, which have largely abandoned the concept of rehabilitating prisoners2 and instead, focused on keeping inmates locked up for longer periods of time.'

KEYWORDS: history, statue, Michigan

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I. INTRODUCTION

The traditional American concept of criminal sentencing is that prisons exist for rehabilitation and release as much as for incarceration.[1] However, in recent years Congress and state legislatures have enacted a series of stringent anti-drug laws, which have largely abandoned the concept of rehabilitating prisoners[2] and instead, focused on keeping inmates locked up for longer periods of time.[3]

1. Michael A. Kroll, *The Prison Experiment: A Circular History*, S. Exposure, Winter 1978, at 6. *See generally* Kurt Anderson, *What Are Prisons For?*, TIME, Sept. 13, 1982, at 38.

2. Michael Isikoff and Tracy Thompson, *Getting Too Tough on Drugs; Draconian Sentences Hurt Small Offenders More Than Kingpins*, THE WASHINGTON POST, November 4, 1990, at C1.

3. Brief for Respondent at 2, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter Brief for Respondent]. Since the complete revision of the federal sentencing system in 1984, sentences are no longer rehabilitative in nature and

Legislatures are reacting to an ever-increasing spiral of drug traffic, drug abuse and drug-related crime[4] by instituting these harsh penalties in an attempt to thwart drug activity.[5] The result of this "war-on-drugs legislation" is an overwhelmed court system and staggering increases in the nation's prison population.[6] Since 1986, average jail time served in federal drug cases is fifty-eight months, an increase of 151 percent.[7]

One weapon used in this war-on-drugs is the mandatory life sentence without opportunity of parole, commonly called "life without parole".[8] A mandatory life sentence without parole is the "penultimate penalty", meaning a convict will spend the rest of his natural life behind bars.[9] The recent development and current prevalence of life without parole is due to the fact that it addresses legislative policies underlying criminal penalties.[10] Legislators mandate these life sentences without parole hoping the penalty will not only prevent the offender from injuring others, but also act as a societal deterrent.[11]

Unfortunately these "life without parole sentences" without parole do not produce the desired results and often lead to injustice. Perhaps the most persuasive argument against mandatory life sentences is one of fairness.[12] While many Americans were unhappy with lenient

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parole has been eliminated in favor of determinate sentences. *Id.*

4. Ruth Marcus, *Life in Prison For Cocaine Possession?; High Court Weighing Strict Michigan Law*, THE WASHINGTON POST, November 5, 1990, at A1. Fifty seven percent of a national sample of males arrested in 1989 for homicide tested positive for illegal drugs. National Institute of Justice, 1989 Drug Use Forecasting Annual Report June, 1990. The comparable statistics for assault, robbery and weapons arrests were 55, 73, and 63 percent, respectively. *Id.* In Michigan, in 1988, 68 percent of a sample of male arrestees and 81 percent of a sample of female arrestees tested positive for illegal drugs. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2706 (1991) (Kennedy, J., concurring).

5. Brief for Respondent, *supra* note 3, at 7.

6. Isikoff and Thompson, *supra* note 2, at C1.

7. Dennis Cauchon, *The Scales of Justice May be Tipped Unfairly*, USA TODAY, June 24, 1991, at A8.

8. Wright, *Life-Without-Parole: An Alternative To Death Or Not Much Of A Life At All?*, 43 VAND. L. REV. 529 (1990).

9. *Id.*

10. *See* People v. Lemble, 303 N.W.2d 191 (Mich. Ct. App. 1981).

11. *Id.*

12. Concerned that mandatory minimum sentences, which already affect about one-third of federal sentences are unfair, judges in several federal circuits have joined in formal protests against this type of sentencing. *See* Sturgess, *Mandatory Sentences Draw Increased Fire; Judges, Families Join Fight Against Minimum Guidelines*, THE

judges, mandatory life imprisonment was viewed as the panacea of anti-drug legislation. No longer would the judge's discretion be the sole determinate of a criminal's punishment. Rather each drug offender would receive a harsh, but equal treatment. On the contrary, mandatory life sentences have failed to treat all criminals the same.[13] One reason for this inequity is due to the prosecutors' authority to dictate a criminal's penalty by their choice of charges filed.[14] In Harmelin's case, for instance, had prosecutors filed charges against him in federal court, rather than in state court, he would be facing a much more lenient sentence.

Another inequity in this anti-drug legislation is the frequency by which large-scale drug traffickers evade these mandatory sentences. It is ironic that drug kingpins, the targets of these anti-drug laws, have been given lesser sentences for providing law enforcement with information regarding their drug ring.[15] In 1988, the House Judiciary Subcommittee on Crime learned of a drug kingpin who was released from custody for providing law enforcement with the names of twelve lower-level dealers.[16] All twelve lower-level dealers received mandatory sentences.[17]

In a recent decision, *Harmelin v. Michigan*,[18] the Supreme Court considered the scope of the Eighth Amendment's prohibition on cruel and unusual punishments against the imposition of a mandatory life sentence without parole for a nonviolent first offense of possession of 672 grams of cocaine.[19] The Court held that "mandatory [life] penalties may be cruel, but they are not unusual in the constitutional sense."[20] Accordingly, this decision sharply limits the holding in *Solem v. Helm*,[21] a 1983 Supreme Court case which incorporated the notion that criminal sentences should be proportional to the crime.[22]

RECORDER, May 7, 1991 at 1.

13. W. John Moore, *Mindless Minimums*, NATIONAL JOURNAL, June 1, 1991 at 1310.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. 111 S. Ct. 2680 (1991).

19. *Id.*

20. *Id.* at 2701.

21. 463 U.S. 277 (1983)(holding the defendant's sentence was significantly disproportionate to the crime, and therefore was prohibited by the Eight Amendment).

22. Marcus, *supra* note 4, at A1.

Traditionally, the Eighth Amendment[23] has regulated the mode of punishment, as well as the length of a sentence.[24] This Comment explores whether the Eighth Amendment's prohibition of cruel and unusual punishments limits the authority of legislatures to prescribe these mandatory life sentences without the possibility for parole. The answer to this issue has both social and legal impacts.[25] As a matter of social policy, this issue poses questions about the purpose of our prison system, the role, if any, of rehabilitation and the degree to which individual moral culpability and mitigating circumstances should be taken into account during sentencing.[26] As a question of law, this issue sheds light on the scope of cruel and unusual punishments under the eighth amendment and the meaning of the proportionality principle as defined in *Solem*.[27]

This Comment's central thesis is that *Harmelin* was wrongly decided for three reasons: 1) prior Supreme Court precedent firmly establishes that the power of legislatures to set criminal sentences is subject to an Eighth Amendment proportionality review;[28] 2) mandatory life sentences without parole should be subject to the individualized sentencing prevalent in capital cases,[29] and 3) Harmelin's sentence of life in prison without parole was disproportionate to the crime.[30]

This Comment will be divided into five sections. Following this introduction, section II provides an historical analysis of eighth amendment jurisprudence. Specifically, this section interprets the eighth amendment as incorporating a principle of proportionality of punishments. It then examines the evolution of the individualized sentencing doctrine adopted in capital cases. Next, section III reviews the Supreme Court's recent decision in *Harmelin v. Michigan*.[31] Section IV addresses the flaws in the Michigan statute under which Harmelin re-

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23. U.S. CONST. amend. VIII provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

24. *Solem*, 463 U.S. at 284.

25. Marcus, *supra*, note 4, at A1.

26. *Id.*

27. *Id.*; *Solem*, 463 U.S. at 277.

28. *E.g.*, *id.*

29. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty does not violate Eighth Amendment's ban on cruel and unusual punishment); Woodson v. North California, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

30. *Harmelin*, 111 S. Ct. at 2719 (White, J., dissenting).

31. 111 S. Ct. 2680 (1991).

ceived life in prison without parole, and applies the *Solem* proportionality factors[32] to the facts in *Harmelin* to demonstrate how the case was wrongly decided. Finally, Section V concludes by stressing the detrimental effects caused by the recent trend of mandatory minimum sentences in anti-drug legislation illustrated by the Michigan statute[33] which was upheld in *Harmelin.*

II. HISTORICAL ANALYSIS OF THE EIGHTH AMENDMENT

Legislatures have the power to define crimes and to establish punishment.[34] However, no penalty is per se constitutional.[35] Legislative power is subject to judicial review to ensure that the punishment passes constitutional muster.[36] The judicial role of enforcing the cruel and unusual punishment clause of the Eighth Amendment " 'cannot be evaded by invoking the obvious truth that the legislature has the power to prescribe punishments for crimes. That is precisely the reason the clause appears in the Bill of Rights.' "[37] Consequently, in order to pass constitutional muster a punishment must fall within the scope of proportionality which has evolved along with the Eighth Amendment.[38]

A. *The Scope of Proportionality Under the Eighth Amendment*

The principle that a punishment must be proportionate to the crime has deep roots that stem back as far as the Magna Carta, which established the right against excessive "amercements" or fines.[39] Chapter twenty of the Magna Carta provided that "a free man shall not be amerced for a trivial offense, except in accordance with the degree of the offense."[40]

The principle of proportionality also appeared in the English Bill

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32. Solem v. Helm, 463 U.S. 277, 290-93 (1983).

33. MICH. COMP. LAWS ANN. § 333.7403 (West 1980).

34. Brief in Support of Petitioner at 12, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter Brief for Petitioner].

35. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (noting that a single day in prison may be unconstitutional).

36. *Solem*, 463 U.S. at 290.

37. Brief for Petitioner, *supra* note 34, at 12 (quoting Furman v. Georgia, 408 U.S. 238, 268 (1972) (Brennan, J. concurring)).

38. *See, e.g., Solem*, 463 U.S. at 277; Robinson v. California, 370 U.S. 660 (1962); United States v. Weems, 217 U.S. 349 (1910).

39. *Solem*, 463 U.S. at 284 n.18.

40. A.E. DICK HOWARD, MAGNA CARTA TEXT AND COMMENTARY 40 (1964).

of Rights of 1689 as "a longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged".[41] The framers of the Eighth Amendment repeated nearly verbatim the cruel and unusual punishment clause referenced in the English Bill of Rights of 1689.[42] Thus, as a result, some historians conclude that American colonists sought protection of the same liberties enjoyed by English citizens.[43] The Eighth Amendment ensures that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[44] Despite the fact that the reference to "cruel and unusual" punishment is less specific than the reference to "excessive bail" and "excessive fines", the Supreme Court has concluded that the amendment was designed to impose "parallel limitations" on bails, fines and other punishments.[45]

The concept of proportionality is well entrenched in this country's eighth amendment jurisprudence.[46] In *United States v. Weems*,[47] the Supreme Court first articulated the notion that proportionality was "a precept of justice that [the] punishment for crime should be graduated and proportioned to [the] offense."[48] Applying this principle, the Court held that a fifteen year sentence of hard labor in chains was a dispro-

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41. RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 236 (Am Bar Found.,1959). Another historian who believes English law includes disproportionality is Granucci. *See* Anthony F. Granucci, *'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

42. *Solem*, 463 U.S. at 285 n.10.

43. *See* Perry, *supra* note 41, at 234-38. Following independence, a number of state constitutions adopted the notion that the punishment must fit the crime. *See, e.g.*, PA. CONST. at § 38 (1776) (calling for a review of its penal system to make "punishments in some cases less sanguinary and in general more proportionate to the crime"); S.C. CONST. at § XL (1776) (supporting a reformation to make punishments "more proportionate to the crime"); *see* Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Michigan in Support of Petitioner at 12, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter ACLU Brief for Petitioner].

44. U.S. CONST. amend. VIII.

45. *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977). The Supreme Court has noted that it would be illogical if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, while the intermediate punishment of imprisonment was not. Solem v. Helm, 463 U.S. 277, 289 (1983).

46. Brief of Amici Curiae in Support of Petitioner at 11, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter Brief of Amici Curiae for Petitioner] (citing Solem v. Helm, 463 U.S. 277, 285 (1983)).

47. 217 U.S. 349 (1910).

48. *Id.* at 367 n.14.

portionate penalty for falsifying public documents.[49] Part of the Court's concern was unquestionably based on the mode of punishment, which bordered on the torturous[50] as well as the length of the punishment.[51] The Court in *Weems* maintained that even though it had not determined the exact scope of the Eighth Amendment's cruel and unusual punishments clause; the Eighth Amendment did include the requirement that the penalty be proportionate to the crime.[52]

More than fifty years later, the Court reached a similar conclusion in *Robinson v. California*.[53] The defendant in *Robinson* was a drug addict who was convicted under a California statute which classified drug addiction as a misdemeanor.[54] The Court stated that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the crime of having a common cold."[55] The Court reasoned that allowing a sickness to be made a crime and permitting sick people to be punished for being sick would be a violation of the eighth amendment.[56] Accordingly, the *Robinson* Court further incorporated the principle of proportionality into Eighth Amendment jurisprudence.[57]

Following *Robinson*, the question of proportionality arose in a series of Eighth Amendment challenges involving capital punishment.[58] In *Coker v. Georgia*,[59] a plurality of the Court held that the death penalty was an excessive punishment for the crime of rape.[60] Similarly, in *Enmund v. Florida*,[61] the Court held that felony murder does not

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49. *Id.* at 367.
50. *Id.*
51. *Id.*
52. *Weems*, 217 U.S. at 380-81.
53. 370 U.S. 660 (1962).
54. *Id.* at 660 n.1.
55. *Id.* at 667.
56. *Id.* at 666.
57. Additionally, *Robinson* established the application of the Eighth Amendment's cruel and unusual punishment clause to the states. *Id.* at 675.
58. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (capital punishment imposed for the crime of murder cannot be viewed as invariably disproportionate to the severity of that crime); Furman v. Georgia, 408 U.S. 238 (1972) (the penalty of death imposed on three defendants, one for murder, and two for rape, violated the eighth amendments' prohibition on cruel and unusual punishment).
59. 433 U.S. 584, 592 (1977).
60. *Id.* at 592 n.4.
61. 458 U.S. 782 (1982).

trigger the death penalty unless the state proves beyond a reasonable doubt that the defendant intended the murder in addition to the underlying felony.[62]

In the past eighty years, the one significant exception to proportionality in sentencing was *Rummel v. Estelle*.[63] The *Rummel* Court rejected the eighth amendment challenge of a Texas recidivist sentenced to life imprisonment for his third felony conviction.[64] The Court, however, did not entirely reject the proportionality principle.[65] To the contrary, the *Rummel* majority averred that "a proportionality principle would . . . come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment."[66]

Undoubtedly, the hypothetical chosen by the *Rummel* majority was intended as an "extreme example".[67] Nevertheless, since the Court maintained that some prison sentences could be constitutionally excessive, it would be illogical to conclude that "the length of the sentence actually imposed [is] purely a matter of legislative prerogative."[68] The critical question, then, is what criteria to use in determining when legislators have exceeded their constitutional limits in mandating prison sentencing guidelines. Unfortunately, *Rummel* offers no such criteria or assistance in the determination of this matter.

Three years later in *Solem v. Helm*, the Supreme Court enumerated objective factors to be considered in reviewing the proportionality of sentences.[69] In *Solem*, the defendant was convicted of attempting to cash a "no account" check, his seventh conviction of a non-violent felony. Under South Dakota law he was treated as a recidivist and sentenced to life imprisonment without parole.[70]

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62. *Id.* at 799. Between the decisions in *Robinson* and *Enmund* a number of Supreme Court decisions referred to the fact that disproportionate punishment violates the Eighth Amendment. *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 374 (1982) (per curiam); Hutto v. Finney, 437 U.S. 678, 685 (1978); Ingraham v. Wright, 430 U.S. 664, 667 (1976); Gregg v. Georgia, 428 U.S. 153, 171-72 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

63. 445 U.S. 263 (1980).

64. *Id.*

65. *Id.* at 274, n.11.

66. *Id.*

67. *Id.*

68. *Rummel*, 445 U.S. at 274.

69. Solem v. Helm, 463 U.S. 277 (1983).

70. *Id.* at 281-83. The South Dakota recidivist statute provided that when a defendant had been convicted of at least three prior convictions in addition to the principal felony, then the sentence for the principal felony should be enhanced to a maximum

The *Solem* Court distinguished *Rummel* by reasoning that a sentence under the South Dakota statute was significantly different than the sentence upheld in *Rummel* since it precluded all possibility of parole.[71] The Court invoked a comparative test employing objective criteria in determining that the sentence of life without parole was not commensurate with Helm's crimes.[72] The Court's objective criteria included consideration of the gravity of the offense and the harshness of the penalty, the sentence imposed by the same jurisdiction for other crimes, and the sentence imposed by other jurisdictions for the same offense.[73] Because the crimes were nonviolent, and the Court found the punishment to be substantially more severe than would be imposed in nearly all other jurisdictions, it declared the sentence in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[74]

The Court in *Solem* specified that its holding should not mandate appellate review of all prison sentences since courts were obligated to grant substantial deference to legislative judgment and trial court decisions when assessing proportionality.[75] However, such deference should not eliminate judicial scrutiny of those cases where a sentence may be so disproportionate as to raise a valid Eighth Amendment claim.[76] Furthermore, such scrutiny should incorporate the objective factors outlined by the Court to determine whether a punishment is excessive in relation to the crime.[77] Through the use of these objective factors the Court further entrenched the principle of proportionality in Eighth Amendment jurisprudence since this proportionality principle acts as a constitutional limit on the mode and length of criminal sentences.[78] Thus, the criminal penalties assessed by state legislatures cannot be excessive or arbitrarily imposed, but rather, the punishment must comport with this proportionality principle.[79]

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penalty of life imprisonment without the possibility of parole. *Id.* at 281.

71. *Id.* at 302-03.
72. *Id.* at 291-92.
73. *Id.* at 290-92.
74. *Solem*, 463 U.S. at 300.
75. *Id.* at 290 n.16.
76. *Id.* at 290.
77. *Id.* at 291 n.17.
78. *Id.* at 284.
79. *Solem*, 463 U.S. at 284.

B. *The Evolution of Individualized Sentencing*

Throughout the Supreme Court's holdings in a series of capital cases the Court has established a constitutional doctrine requiring individualized sentencing.[80] This doctrine requires the sentencer to consider relevant mitigating circumstances of the offense and the offender before sentencing a defendant to the death penalty.[81] Although individual sentences have been exclusively applied to capital cases, the reasoning for adopting such a doctrine is applicable to mandatory life sentences without opportunity for parole.[82] Since a defendant could spend the rest of his life in prison without any opportunity for reconsideration, the sentencing authority should be able to consider relevant mitigation circumstances.[83] Thus, an overview of some of the important Supreme Court cases highlights the philosophy that offenders who commit the same crime should not always receive the same punishment, without the consideration of relevant mitigating evidence.

Society distinguishes between those who are culpable while committing a crime and those who are not.[84] In *Lockett v. Ohio*, the defendant faced the death penalty for helping to plan an armed robbery and waiting outside in the car when a store owner was killed.[85] The Supreme Court reversed the death sentence imposed by the Ohio Supreme Court and held that the concept of individualized sentences in criminal cases has long been accepted in America.[86] The Court concluded that in order to pass constitutional muster a death penalty statute must not preclude the consideration of relevant mitigating factors.[87] Therefore, since the Ohio statute did not take into consideration whether the offender intended to cause the death of the victim it was

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80. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana 428 U.S. 325 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

81. Penry v. Lynaugh, 492 U.S. 302 (1989) (defendant is entitled to jury instruction which may include mitigating evidence such as mental retardation which the jury may consider when determining whether to impose the death penalty); Lockett v. Ohio, 438 U.S. 586, 597-609 (1978) (plurality opinion) (considering defendant's characteristics, his record and circumstances of the offense).

82. Brief of Amici Curiae for Petitioner, *supra* note 46, at 42-43.

83. *Id.*

84. *Lockett*, 438 U.S. at 626.

85. *Id.*

86. *Id.* at 605 n.13. The Lockett opinion expressly left open the application of individualized sentencing to mandatory minimum sentences in noncapital cases. *Id.*

87. *Id.*

incompatible with the Eighth Amendment.[88]

Similarly, in *Woodson v. North Carolina*, the defendant faced capital punishment for first-degree murder.[89] The Supreme Court declared the North Carolina statute[90] unconstitutional since it failed to provide for the consideration of relevant aspects of the character and record of the defendant.[91] In support of its holding the Court quoted Justice Black's statement made over twenty-seven years earlier that " '[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.' "[92]

More than ten years later, in *Sumner v. Shuman*,[93] the Supreme Court faced the question of whether the Eighth Amendment prohibits a statute which sentences an inmate who commits murder while already serving a sentence of life imprisonment without parole to the death penalty.[94] The Court held that, even given these aggravating circumstances, the Eighth Amendment did not allow a departure from the requirement of individualized sentencing.[95] Consequently, this sentencing doctrine requires that the sentencing authority consider, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense.[96]

III. *HARMELIN V. MICHIGAN*: AN OVERVIEW

A. *Facts and Procedural History*

The issue of whether a mandatory sentence of life imprisonment without parole violates the Eighth Amendment's prohibition of cruel and unusual punishment was recently decided by the Supreme Court in *Harmelin v. Michigan*.[97] In *Harmelin*, the defendant, a forty-two year old man with no prior criminal record was pulled over for failing to

88. *Id.* at 608.
89. 428 U.S. 280 (1976).
90. N.C. GEN. STAT. § 14-17 (Supp. 1975) (imposing a mandatory death sentence for first degree murder).
91. *Woodson*, 428 U.S. at 303.
92. *Id.* at 296-97 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).
93. 482 U.S. 66 (1987).
94. *Id.*
95. *Id.* at 73-76.
96. *Id.* at 70-76.
97. 111 S. Ct. 2680 (1991).

stop at a red light.[98] Harmelin voluntarily revealed to the police officer that he was carrying a gun and produced a permit to carry a concealed weapon. Nevertheless, the police subsequently searched his person and impounded his vehicle.[99] The search of his person revealed marijuana cigarettes, assorted pills, ten small packets of cocaine,[100] three vials of cocaine and a telephone pager. The search of the impounded vehicle revealed a travel bag containing $2900 in cash, 672.5 grams of cocaine[101] and a coded address book. Harmelin was charged and convicted of possession of 650 or more grams of cocaine,[102] and possession of a firearm during the commission of a felony.[103] He was sentenced by the Oakland County Circuit Court to a mandatory life term of imprisonment without possibly of parole.[104]

On appeal to the Michigan Court of Appeals, Harmelin argued that his mandatory sentence of life without the possibility of parole constituted cruel and unusual punishment under the Eighth Amendment.[105] Additionally, he claimed the sentence was unconstitutional since the sentencing judge was required to impose it regardless of the particular circumstances of his case.[106] The Michigan Court of Appeals eventually affirmed his conviction[107] and the Michigan Supreme Court

98. People v. Harmelin, 440 N.W.2d 75, 77-78 (Mich. Ct. App. 1989).

99. *Id.*

100. *Id.* One such packet was analyzed and found to contain 0.14 grams of a mixture containing cocaine. *Id.*

101. Approximately one and one-half pounds.

102. *Harmelin*, 440 N.W.2d at 75-76; *see* MICH. COMP. LAWS ANN. § 333.7403(1)(i) (West 1980).

103. *Harmelin*, 440 N.W.2d at 77; *see* MICH. COMP. LAWS ANN. § 750.227(b) (West 1991).

104. *Harmelin*, 440 N.W.2d at 77; *see also* MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West 1980)(provides a mandatory sentence of life imprisonment for possession of 650 grams or more of "any mixture containing [a schedule 2] controlled substance"); MICH. COMP. LAWS ANN. § 333.7214(a)(iv) (West 1980)(defines cocaine as a schedule 2 controlled substance); MICH. COMP. LAWS ANN. § 791.234(4) (West 1982) (allows for eligibility of parole after ten years in prison, except for convictions of first-degree murder or "a major controlled substance offense"); MICH. COMP. LAWS ANN. § 791.233b[1](b) (West 1982) (defines "major controlled substance offense" as a violation of section 333.7403). *See generally* Brief for the United States as Amicus Curiae Supporting Respondent at 3-4, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272).

105. Brief for Petitioner, *supra* note 34, at 5-6.

106. *Id.*

107. *Harmelin*, 440 N.W.2d at 75. Harmelin also argued on appeal that his conviction must be reversed since the evidence against him was obtained as a result of an

denied leave to appeal.[108] Harmelin subsequently filed a petition for writ of certiorari to the United States Supreme Court which was granted.[109]

B. *The Supreme Court's Holding and Rationale*

In a five-four decision, the Supreme Court upheld Harmelin's sentence holding that this case did not deserve the individualized sentencing usually reserved for capital cases.[110] The *Harmelin* decision suggests that a mandatory life sentence without parole might be unconstitutional for some crimes, but the Court was split on where it would draw the line beyond where a sentence would violate the Eighth Amendment as cruel and unusual punishment.[111] The *Harmelin* decision sharply limits the holding in *Solem*, which only eight years earlier, had established that the Eighth Amendment required an element of proportionality in criminal sentencing.[112] Justice Scalia, in the only portion of his lead opinion adopted by the majority, stated that only in capital punishment cases has the Court interpreted the Eighth Amendment to require individualized sentencing.[113] The Court held that because of the qualitative differences between death and all other punishments, consideration of the defendant's circumstances and the appropriateness of the penalty should not be extended outside the capital context.[114]

The majority, in affirming the Michigan Court of Appeals decision, conducted an in-depth analysis of the Eighth Amendment's history and cases interpreting the cruel and unusual punishments

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unconstitutional search and that he had been deprived effective assistance of counsel. Brief for Petitioner, *supra* note 34, at 4. The Michigan Court of Appeals agreed and reversed his conviction, stating that the evidence against him was obtained from an unconstitutional search. *Id.* However, in an order dated March 9, 1989, the Michigan Court of Appeals vacated that judgment. *Id.* In an opinion (on reconsideration) dated April 18, 1989, the Michigan Court of Appeals affirmed Harmelin's conviction. *Id.* at 6.

108. Brief for Petitioner, *supra* note 34, at 6.

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

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

111. *Id.*

112. Solem v. Helm, 463 U.S. 277 (1973).

113. *Harmelin*, 111 S. Ct. at 2702; *see* Eddings v. Oklahoma, 455 U.S. 104 (1982); Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

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

clause.[115] The majority concluded that the Eighth Amendment does not provide for judicial inquiry to determine if a noncapital sentence is proportionate to the offense.[116] Rather, the Eighth Amendment was primarily intended as a check on legislators' ability to authorize particular methods of punishment.[117] Furthermore, the majority argued that the length of the sentence, however, is purely a matter of legislative prerogative.[118] Moreover, the majority averred that the proportionality principle is merely an invitation for judges to impose their own subjective values.[119] Contrary to *Solem*, the majority rejected the use of objective criteria to determine whether a penalty is disproportionate and stated that *Solem*, which decreed a "general principle of proportionality",[120] should be overruled.[121]

In a concurring opinion, Justice Kennedy, along with Justices O'Connor and Souter, agreed that individualized sentencing should not be extended to noncapital cases.[122] However, Kennedy insisted on the continued adherence to the narrow proportionality principle, which assures that the punishment fit the crime, identified in *Solem*.[123] The concurrence looked to the first prong of the Solem proportionality criteria, the gravity of the offense and the severity of the punishment, and determined that Harmelin's crime was severe enough to justify the penalty of life imprisonment without parole.[124] Kennedy concluded that in light of the severity of Harmelin's crime, his sentence was "within the constitutional boundaries established by our prior decisions."[125] Kennedy asserted that the *Solem* analysis of proportionality need not be further pursued since the Constitution only forbids sentences that are grossly disproportionate to the crime.[126] Consequently, the two other criteria

115. *Id.* at 2684-96; *see, e.g.*, Solem v. Helm, 463 U.S. 277 (1983), Hutto v. Davis, 454 U.S. 370 (1982), Rummel v. Estelle, 445 U.S. 263 (1980), Weems v. United States, 217 U.S. 349 (1910).

116. *Harmelin*, 111 S. Ct. at 2684-96.

117. *Id.*

118. *Id.*

119. *Id.* at 2687.

120. *Solem*, 463 U.S. at 288.

121. *Harmelin*, 111 S. Ct. at 2696-99.

122. *Id.* at 2703 (Kennedy, J., concurring).

123. *Id.* at 2707.

124. *Id.* at 2705, 2706.

125. *Id.* at 2706; *see Solem*, 463 U.S. at 277; Hutto v. Davis, 454 U.S. 263 (1980), Rummel v. Estelle, 445 U.S. 263, 263 (1980), Hutto v. Finney 437 U.S. 678, 685 (1978) (dicta).

126. *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring).

listed in *Solem*; the comparison of the punishment to the punishments for other crimes within the same jurisdiction, and the comparison of other jurisdiction's punishment of the same crime, "are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[127]

The dissenting Justices, White, Blackmun, Stevens and Marshall,[128] argued that this approach was nearly as bad as overruling *Solem*.[129] "While Justice Scalia seeks to deliver a swift death sentence to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell."[130] The dissent concluded that a comparative analysis, like the one used in *Solem*, is the only way to determine if a sentence is disproportionate to the offense.[131] Applying the *Solem* criteria to the present case, the dissent attacked Harmelin's sentence as too harsh: "Mere possession of drugs — even in such a large quantity — is not so serious an offense that it will always warrant, much less mandate, life imprisonment without possibility of parole."[132]

IV. *HARMELIN*'S MANDATORY LIFE SENTENCE WITHOUT PAROLE: AN ANALYSIS

A. *Lack of Individualized Sentencing and Other Flaws in the Michigan Statute*

Because of the unique nature of the death penalty, the Supreme Court has applied individualized sentences to capital cases.[133] However, like the death penalty, mandatory life imprisonment without parole "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty. . . ." [134]

An analysis of prison sentences frequently involves a comparison

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127. *Id.*

128. *Id.* at 2719 (Marshall, J., dissenting). Justice Marshall filed a separate dissenting opinion arguing that capital punishment is always unconstitutional. *Id.*

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

130. *Id.*

131. *Id.*

132. *Id.* at 2716.

133. *E.g.*, Enmund v. Florida, 458 U.S. 782 (1982).

134. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

of factors which because of complex parole and sentence reduction provisions do not lend themselves to an exact quantitative review.[135] However, many sentencing alternatives such as the possibility of parole, which normally interfere with the application of the Eighth Amendment's cruel and unusual punishment clause to routine prison sentences do not exist in *Harmelin*.[136] In fact, a number of the factors used by the Supreme Court to distinguish between capital and noncapital cases -including the availability of probation, parole, and work furloughs- are not available under the Michigan statute by which Harmelin was convicted.[137] Consequently, the individualized sentencing doctrine should be applied not only to capital cases, but also to mandatory life sentences without the opportunity for parole like the one imposed in *Harmelin*.[138]

The Michigan legislature, in an effort to curtail a steady increase in drug related crime and drug abuse in Michigan, passed a bill in 1980 increasing the penalties for possession of certain controlled substances.[139] This Michigan statute under which Harmelin was convicted mandates life imprisonment without parole to everyone convicted of possessing any mixture of 650 grams or more containing cocaine.[140] Life imprisonment is imposed regardless of the circumstances of the offense.[141] This inflexible statute neither distinguishes between varying levels of individual culpability nor does it consider a defendant's prior criminal record.[142] Consequently, a drug kingpin with an extensive criminal record is treated exactly the same as a minor participant who is a first time offender.[143] Additionally, the Michigan statute draws no

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135. Brief of Amici Curiae for Petitioner, *supra* note 46, at 8, (citing Rummel v. Estelle, 445 U.S. 263 (1980)).

136. Brief for Petitioner, *supra* note 34, at 24.

137. *See* Lockett v. Ohio, 438 U.S. 586, 605; MICH. COMP. LAWS ANN. § 333.7403(1)(i) (West 1980).

138. Brief of Amicus Curiae for Petitioner, *supra* note 46, at 42-43; *see also* United States v. Perez, 685 F. Supp. 990, 1002 (W.D. Tex. 1988). In *Perez*, the court stated: "[T]hat the defendant's ability to inform the Court of circumstances and factors should not be determined by whether the defendant faces a maximum punishment of death, a life sentence, or a lesser term of incarceration." *Id.* at 1002.

139. *See* MICH. COMP. LAWS ANN. § 333.7403 (WEST 1980).

140. *Id.*

141. Brief of Amici Curiae for Petitioner, *supra* note 46, at 52.

142. Brief for Petitioner, *supra* note 34, at 5.

143. *See* People v. Harman, 333 N.W.2d 591 (Mich. Ct. App. 1983)(Kelly, J., dissenting).

distinction based on the purity of the mixture.[144] Thus, a person convicted of possessing one gram of cocaine mixed with 649 grams of sugar would be subjected to mandatory life without parole.[145]

There is no dispute that many drug dealers and users commit violent crimes.[146] Additionally, many drug users die from overdoses or give birth to drug addicted babies.[147] Indeed, all drug dealers share the responsibility for these atrocities, and should be punished accordingly.[148] But to treat as killers *every* drug dealer and his "mules of transport" is nothing more than mass hysteria.[149] Such reasoning opposes legal principles and a series of Supreme Court Cases restricting the death penalty to those who kill intentionally or by deliberately creating a grave risk to human life.[150]

Drug dealers do not deserve to be punished as severely as murderers, unless they commit violent crimes.[151] "Intentionally killing is worlds apart, in terms of certainty of harm and moral culpability, from acting as one of many suppliers selling drugs in a mass marketplace of buyers, most of whom use drugs with knowledge of the risks."[152] Furthermore, such harsh penalties for drug activity do not accomplish their goal of ridding the streets of dealers and deterring others from drug involvement.[153]

The Michigan legislature's attempt to deter drug trafficking by targeting the higher echelon drug dealers has been criticized as unsuccessful.[154] In fact, the people actually being sentenced to life imprisonment are the "mules of transport".[155] While the real drug kingpins are often given lesser sentences in the federal system for divulging key information to the government, the couriers, who conceivably lack access to valuable information and are unable to offer information end up

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144. Brief of Amici Curiae for Petitioner, *supra* note 46, at 9.

145. *See* Michigan v. Lemble, 303 N.W.2d 191 (Mich. 1981).

146. Stuart Taylor Jr., *Don't Throw Away That Key*, LEGAL TIMES, Oct. 22, 1990, at 25.

147. *Id.*

148. *Id.*

149. *Id.*

150. *See* Sumner v. Shuman, 483 U.S. 66 (1987); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts(Harry) v. Louisiana, 431 U.S. 633 (1976).

151. Taylor, *supra* note 146, at 25.

152. *Id.*

153. *Id.* Every year thousands of youths are drawn to the drug trade despite the dangers of being killed by competitors or punished by harsh criminal sanctions. *Id.*

154. Brief for Petitioner, *supra* note 34, at 10.

155. Marcus, *supra* note 4, at A1.

serving mandatory life imprisonment without parole. The Michigan Oakland County Circuit Court, summed up these problems with the Michigan statute:[156]

> Having carefully considered this statute, I have come to the conclusion that this law is the product of emotion, not reason. Politicians, known as legislators, in an effort to respond to community pressure and frustration over a very serious drug problem, rushed to a simple formula, in search of a solution - essentially throwing away the key for life for any and all individuals who shall possess more than 650 grams of cocaine. However mindlessly throwing away the key will neither deter such crime, nor promote justice. Quite the opposite, bad laws, such as the one at issue here, promote disrespect
> . . . .
> Every thinking person must know that there are many second degree murderers, rapists, kidnappers, and other violent offenders more dangerous to the public welfare than many people who possess over 650 grams of cocaine, Yet the law does not mandate a natural life sentence for each and every such violent criminal. Why then should it do so for the drug possessor? This is not to say that select drug possessors or dealers should not be sent away for natural life; it is simply to say that it makes no sense to mandate such a sentence for this offense and not to do so for many more dangerous offenders. This law has done nothing to ameliorate the bad conditions that exist in the State of Michigan with respect to the possession and distribution of illegal drugs.[157]

Unlike the rapists, murderers, kidnappers and other violent criminal offenders referenced to by the Oakland County Circuit Court, the Michigan statute requires that upon conviction, sentencing judges and parole authorities are not to consider mitigating circumstances.[158] However, deference to legislative power does not preclude unreasonable sentences from constitutional scrutiny.[159] In fact, the Supreme Court has dictated that the level of judicial scrutiny must intensify as the

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156. Because of the problems with the Michigan statute, Judge Lippitt of the Oakland County Circuit Court disqualified himself from adjudicating, People v. Martin, No. 86-74706, slip op. (Oakland Co. Cir. August 20, 1987), a case similar to *Harmelin*. Brief for Petitioner, *supra* note 34, at 11.

157. Brief for Petitioner, *supra* note 34 at 11-12 (quoting *Martin*, No. 86-74706, slip op. at 3, 4).

158. *Id.*

159. Brief of Amici Curiae for Petitioner, *supra* note 46, at 10.

penalty increases and as the discretionary range of sentences narrows.[160] Consequently, an eighth amendment challenge for the penalty of life in prison without parole should focus on whether the mandatory life sentence is proportionate to the crime for which the defendant was convicted.[161]

B. *Under the Solem Analysis Harmelin's Sentence is Disproportionate*

Contrary to the majority's assertion, the *Solem* analysis has proved eminently workable.[162] The probability that *Solem* would "flood the appellate courts with cases in which . . . arbitrary lines must be drawn" has not resulted.[163] In the eight years since the decision, only a handful of sentences have been declared unconstitutional under the *Solem* standard. [164] In fact many courts have proven that they are "capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy."[165] When properly applied, *Solem* is consistent with these principles since it affords deference to legislatures' authority to set punishments for crimes, as well as to judges when sentencing convicted criminals.[166]

The *Solem* Court listed three workable factors for the courts to consider when evaluating the constitutionality of a criminal sentence.[167]

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160. *Id*; *see, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972).

161. Brief of Amici Curiae for Petitioner, *supra* note 46, at 12.

162. Harmelin v. Michigan, 111 S. Ct. 2680, 2696-97, 2712 (1991) (White, J., dissenting).

163. Solem v. Helm, 463 U.S. 277, 315 (1983) (Burger, C.J., dissenting).

164. *Harmelin*, 111 S. Ct. at 2713 n.2. There have been only four cases cited since *Solem* in which sentences have been reversed on the basis of a proportionality review. *See* Ashley v. State, 538 So. 2d 1181 (Miss. 1989) (reaching a similar holding for a defendant who burglarized a home to get four dollars to repay a grocer for food eaten in the store); Clowers v. State, 522 So. 2d 762 (Miss. 1988) (trial court had discretion to reduce a fifteen year sentence without parole for a defendant who uttered a forged check); State v. Gilham, 549 N.E.2d 555 (Ohio 1988). Additionally, in Naovarath v. State, 779 P.2d 944 (Nev. 1989), the court looked to both state and federal constitutions before striking a life sentence without parole imposed on an adolescent who killed and then robbed a person who had repeatedly molested him.

165. Rummel v. Estelle, 445 U.S. 263, 306 (1980) (Powell, J., dissenting); *see also* Thiess v. State Board, 387 F. Supp. 1038, 1042 (Md. 1974).

166. *Solem*, 463 U.S. at 290.

167. *Id.* at 290-94.

First, the court should weigh the gravity of the offense and the harshness of the penalty.[168] Second, the court should compare the sentences imposed in the state for other crimes.[169] Third, the court should compare how other states treat the same offense.[170]

Through the incorporation of these objective factors *Solem* invokes an Eighth Amendment review of sentencing that reflects constitutional values and that works well in practice since it gives courts a standard against which to measure punishments.[171] Therefore, there is no need to reexamine these factors or overrule *Solem*.[172] Undoubtedly, *Harmelin* was one of the situations in which the *Solem* standards needed to be applied because the punishment of life imprisonment without parole was too severe given the crime committed and the defendant's lack of a previous record.[173]

Application of the *Solem* factors to the sentence in *Harmelin* reveals that the punishment is unconstitutional under the Eighth Amendment.[174] The first of the *Solem* factors requires a court to review the gravity of the offense and the harshness of the penalty.[175] In an evaluation of the gravity of the offense, a court should consider "the harm caused or threatened to the victim or society," based on such things as the degree of violence involved in the crime as well as "the absolute magnitude of the crime," and "the culpability of the offender".[176] The magnitude of Harmelin's offense includes the consideration of the ever increasing threat of illegal drugs in America.[177] There is no dispute that drugs pose serious societal problems.[178] In fact, President George Bush considers the "war" on drugs America's top priority.[179]

Mere possession of drugs, however, even in such a large quantity

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168. *Id.*
169. *Id.*
170. *Id.*
171. ACLU Brief for Petitioner, *supra* note 43, at 16.
172. *Harmelin*, 111 S. Ct. at 2714 (White, J., dissenting).
173. *Id.*
174. *Id.* at 2719.
175. *Solem*, 463 U.S. at 292.
176. *Id.* at 292-93.
177. Brief for Respondent, *supra* note 3, at 5.
178. *Harmelin*, 111 S. Ct. at 2716 (White, J., dissenting).
179. Brief for Respondent, *supra* note 3, at 19-20. The federal government will spend over $10.6 billion this year in an effort to rid our society of the scourge of illegal drugs. *Id.*

as possessed by Harmelin, should not automatically warrant life imprisonment without parole.[180] Like crimes of violence, such as murder, rape and kidnapping, Harmelin's penalty for a drug offense should be tempered by discretionary and individualized sentencing because factors such as culpability, past criminal record and other mitigating circumstances need to be considered to ensure a fair penalty.[181]

To pass constitutional muster, a punishment should be tailored to a defendant's personal responsibility and moral culpability.[182] American courts consider a defendant's intention, and his moral guilt, to be crucial "to the degree of his criminal culpability."[183] However, in *Harmelin*, the sentencing judge was not allowed to consider that Harmelin had no criminal record; he cooperated with police upon his arrest; he had not displayed any viciousness, and he did not demonstrate an inability to reform.[184] Since Michigan does not have a death penalty, Harmelin's sentence is the most severe punishment Michigan can levy for any offense, including first degree murder.[185] Mr. Harmelin will now spend the rest of his life, and ultimately die, in a Michigan prison.[186] Thus, not to take into account the particular facts of his offense, or his personal history and characteristics, is a gross miscarriage of justice.[187]

Justice Kennedy's argument for the majority that the harsh penalty is appropriate given the subsidiary effects of drug use is without merit.[188] Even though the collateral effects of cocaine are severe, they are similar to those that result from the misuse of other legal substances.[189] It would be inconceivable for a state to sentence a person who possesses large amounts of alcohol to mandatory life imprisonment without parole, because of the tangential effects which might eventually be traced to the alcohol.[190] Likewise, it is ridiculous to uphold Harmelin's sentence because of the collateral effects which might indi-

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180. *Id.*
181. Brief for Petitioner, *supra* note 34, at 16.
182. *See* Edmund v. Florida, 458 U.S. 782, 801 (1982).
183. *E.g.*, Cabana v. Bullock, 474 U.S. 376 (1986), (Stevens, J., dissenting) (citing Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)).
184. Brief for Petitioner, *supra* note 34, at 14.
185. *Harmelin*, 111 S. Ct. at 2718 (White, J., dissenting).
186. *Id.*
187. *Id.* at 2718-19.
188. *Id.* at 2717.
189. *Id.* at 4856.
190. *Harmelin*, 111 S. Ct. at 2717.

rectly ensue from the drugs he possessed.[191] " 'Unfortunately, grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden shortcuts that might suppress and blot out more quickly the unpopular and dangerous conduct.' "[192] Amazingly, this is precisely the approach adopted by the Court.[193]

Addressing the second factor of *Solem* requires evaluating the sentences imposed for other crimes in Michigan.[194] Only two other crimes in Michigan carry a mandatory penalty such as the one Harmelin received: the manufacture or sale of more than 650 grams of a Schedule 1 or 2 drug[195] and, first degree murder.[196] Thus, Michigan has equated the severity of first degree murder with the possession or sale of 650 or more grams of cocaine.[197] Of particular interest in the application of the second *Solem* factor is Michigan's sentencing scheme for murder, since it punishes only cold blooded murderers with a mandatory life sentence in prison without parole.[198] The particular circumstances of the homicide narrow the penalty to those who are the most morally reprehensible.[199]

In Harmelin's case, however, the Michigan statute required the state to prove only that he knowingly possessed over 650 grams of a substance containing cocaine.[200] The State is not required to prove that Harmelin had an intention to kill,[201] or that a death occurred because of Harmelin's actions.[202] By contrast, second degree murder, kidnapping, and hostage-taking by prisoners do not carry such a harsh mandatory sentence as the one Harmelin received, although they do

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191. *Id.* at 2716.

192. *Id.* at 2717 (quoting Turner v. United States, 396 U.S. 398, 427 (1970) (Black, J., dissenting)).

193. *Id.*

194. *See* Solem v. Helm, 463 U.S. 277, 291 (1983).

195. MICH. COMP. LAWS ANN. § 333.7401 (West 1980).

196. MICH. COMP. LAWS ANN. § 750.316 (West 1991).

197. Brief of Amici Curiae for Petitioner, *supra* note 46, at 16.

198. Brief for Petitioner, *supra* note 34, at 40; *see also* MICH. COMP. LAWS ANN. § 750.316 (West 1991).

199. Brief for Petitioner, *supra* note 34, at 40. Only first-degree murderers are considered so morally depraved as to have forfeited their right to live in society forever. *Id.*

200. MICH. COMP. LAWS ANN. § 333.7401 (West 1980).

201. Brief for Petitioner, *supra* note 34, at 40.

202. *Id.* Nor is any proof required that Harmelin even had a reckless disregard for human life. *Id.*

provide for the possibility of a life sentence in the exercise of judicial discretion.[203]

This classification for sentencing purposes of Harmelin's offense as equivalent to first-degree murder and more serious than second-degree murder is irrational.[204] The severity of harm associated with a drug possession offense cannot logically be considered, in all cases, to exceed intentional homicides.[205] It is ironic that had Harmelin panicked at the traffic stop, unpremeditatedly shot and killed the police officer, ridded himself of the cocaine, and then been arrested, he could have been subject to a lesser sentence up to life.[206] Such a difference in penalties exemplifies the disproportionate punishment since Harmelin "has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes."[207]

The third criteria under the *Solem* proportionality test is a comparison of the sentence imposed for commission of the same offense in other jurisdictions.[208] No other jurisdiction imposes so harsh a punishment as Michigan for possession of the amount of drugs in the present case.[209] Only Alabama imposes a similar punishment, and then only when a defendant possesses ten kilograms or more of cocaine.[210] If Harmelin had been convicted in Alabama, he would have been subject to a five year mandatory minimum term of imprisonment for the offense of possession of 500 grams to one kilogram of cocaine.[211]

In fact, in the United States, only Michigan imposes a mandatory life sentence without parole for possession of cocaine, regardless of other relevant mitigating circumstances.[212] Only a few states including Connecticut, Idaho, Kansas, Montana, North Dakota, Nevada,

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203. MICH. COMP. LAWS ANN. §§ 750.31, 750.349, 750.349(a) (West 1982). Michigan law allows a prisoner "under sentence for life or for a term of years" to be eligible for parole after ten years. MICH. COMP. LAWS ANN. § 791.234(4) (West 1982).

204. Brief of Amici Curiae for Petitioner, *supra* note 46, at 17.

205. *Id.* at 18.

206. *Id.* On a sentence calling for any term of years Harmelin would be eligible for disciplinary credits which means that the minimum sentence could not exceed his life expectancy. *See* MICH. COMP. LAWS ANN. § 800.33(5) (West 1982); Brief of Amici Curiae for Petitioner, *supra* note 46, at 18-19.

207. Solem v. Helm, 463 U.S. 277, 299 (1983).

208. *Id.* at 291-92.

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

210. *See* ALA. CODE § 13A-12-231(2)(d) (Supp. 1990).

211. Brief for Petitioner, *supra* note 34, at 42; *see* ALA. CODE § 13A-12-231(2)(b) (Supp. 1990).

212. Brief for Petitioner, *supra* note 34, at 25.

Oklahoma, Rhode Island, Tennessee, and Texas authorize a possible life sentence for first offenders.[213] These states, however, do not preclude the possibility of parole, nor the exercise of discretion by the sentencing judge.[214]

Even under federal law, if a first offender possessed the same amount of cocaine as Harmelin, the maximum prison sentence would be a term of not less than five or more than forty years.[215] Under the United States Sentencing Guidelines, with all relevant enhancements, a defendant in a similar situation as Harmelin, would expect to receive a sentence that "would barely exceed ten years."[216] Moreover, under Rule thirty five of the Federal Rules of Criminal Procedure, the government reserves the right to move for a reduction of a defendant's sentence under the mandatory minimum of the Sentencing Guidelines if the defendant has provided substantial assistance to the government.[217] The state of Michigan has no similar provision.[218]

Based on the foregoing, it is obvious that Michigan's mandatory life imprisonment without parole for the possession of 650 grams or more of a substance containing cocaine is out of sync with both federal law and the laws of other states.[219] Therefore, "[i]t appears that [Harmelin] was treated more severely than he would have been in any other State."[220] The fact that no other jurisdiction mandates such a harsh penalty for Harmelin's offense establishes "the degree of national consensus [that the Supreme] Court has previously thought sufficient to label a particular punishment cruel and unusual."[221]

Application of the *Solem* criteria to Harmelin's situation reveals

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213. *Id.* at 26.

214. *Id.*

215. Brief of Amicus Curiae in Support of Petitioner, *supra* note 46, at 28-29. Under federal law the only possibility of a mandatory sentence of life without parole is under Title 21 U.S.C. section 848, the Continuing Criminal Enterprise Statute. A conviction under this statute requires a person to be an organizer, supervisor, or manager of five or more people; commit a continuing series of violations; derive substantial resources from the activities; and the organization must have grossed at least ten million dollars per year, or distributed at least 150 kilograms of cocaine. *Id.*

216. *Harmelin*, 111 S. Ct. at 2718 (White, J., dissenting); *see also* United States Sentencing Commission Guidelines Manual, § 2D1.1 (1990).

217. FED. R. CRIM P. 35; *see also* Brief for Petitioner, *supra* note 34, at 46.

218. Brief for Petitioner, *supra* note 34, at 46.

219. *Harmelin*, 111 S. Ct. at 2718-19 (White, J., dissenting).

220. *Id.* at 2719.

221. Stanford v. Kentucky, 492 U.S. 361, 371 (1989) (plurality opinion).

the Michigan statute is unconstitutional.[222] The statutorily imposed mandatory life sentence without parole for possession of 650 or more grams of cocaine is disproportionate to the offense and thus, violates the Eighth Amendment's prohibition against cruel and unusual punishments.[223]

V. CONCLUSION

The Supreme Court's decision in *Harmelin* profoundly displays the new boldness of a solidly conservative court which seems determined to subvert individual rights.[224] The Justices' concern over the threat of drugs in society influenced them to uphold a Michigan law imposing a mandatory sentence of life imprisonment without parole for possession of more than 650 grams of cocaine.[225] Consequently, by upholding such an excessive sentence the Court has likened drug possession as the moral equivalent of first-degree murder.[226]

Although stiff anti-drug laws have emotional appeal, they frequently do not produce the results expected by legislators.[227] Practically speaking, harsh sentences for drug offenses send some non-violent drug dealers to prison for longer terms than murderers, rapists and armed robbers.[228] Therefore, if the eighth amendment's prohibition on cruel and unusual punishment is to retain any vitality, such grossly disproportionate treatment must be outlawed.[229]

Unfortunately, the majority in *Harmelin* largely abandoned the ancient notion that the punishment must fit the crime.[230] In doing so, the Court sharply limited the Eighth Amendment's prohibition on cruel and unusual punishments.[231] Thus, the Court incorrectly gave a constitutional stamp of approval to the increasingly popular tactic of impos-

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222. *Harmelin*, 111 S. Ct. at 2719 (White, J., dissenting).

223. *Id.*

224. Savage, *Justices Uphold Victims' Rights, 'Cruel' Penalties*, THE LOS ANGELES TIMES, June 28, 1991, § A at 1.

225. Marcus, *High Court Upholds Life Sentence in Drug Case; Mandatory Michigan Penalty Imposed for Possession of 1½ Pounds of Cocaine*, THE WASHINGTON POST, June 28, 1991, § A at 16.

226. Taylor, *supra* note 146, at 25.

227. *Id.*

228. *See* Brief for Petitioner, *supra* note 34, at 36.

229. Taylor, *supra* note 146, at 25.

230. *Harmelin*, 111 S. Ct. at 2638.

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

ing mandatory minimum terms of imprisonment for drug offenses without consideration of mitigating circumstances or judicial discretion. [232]

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232. Marcus, *supra* note 225, at § A at 16.