Proportionality and the Eighth Amendment: And Their Object Not Sublime, to Make the Punishment Fit the Crime

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_Harmelin v. Michigan_

I. INTRODUCTION

In June 1991, the United States Supreme Court, in _Harmelin v. Michigan_, considered anew whether the Eighth Amendment clause prohibiting cruel and unusual punishment includes a proportionality requirement. The Court addressed the question: Is there a constitutional requirement that the _length_ of a sentence be tailored to fit the crime? The opinions are closely divided, and reveal strong disagreement among the Justices over a wide array of constitutional issues, such as the historical standards to be used in interpreting the Constitution, the deference due to the principles of federalism, the limits of judicial review, and the balance to be struck between state interests and individual rights. In Eighth Amendment jurisprudence, the opinions reflect moral and philosophical differences as to the purposes of punishment (whether a retributivist or utilitarian model is more appropriate). The Justices also disagree as to whether a changing moral consensus in society should yield different standards for evaluating cruel and unusual punishment. The decision reflects the Court's continuing struggle to interpret the cruel and unusual punishment clause in the Eighth Amendment.

The three major decisions in this area, which have all come out in the last decade, are narrow five-four decisions. There are significant shifts in these decisions; the majority in one case endorses and elaborates the arguments of the dissent in the previous case. These shifts in the decisions turn on subtle distinctions drawn by the majority between the facts of one case and the facts of the next case. They can be explained too by changes in the composition of the Court. The prior decision on proportionality made it

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3. The Eighth Amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
difficult to predict the outcome of Harmelin, and while it is likely that the present Court will interpret future proportionality cases narrowly, it is unclear which approach in Harmelin the Court will use.

This Note outlines the current debate on proportionality. As one commentator suggests, it is "easier to provide the perplexities" in this area than the answers. The focus is on one aspect of the cruel and unusual punishment clause of the Eighth Amendment: Does the clause require a proportionality analysis for non-capital penalties? There are other aspects of the clause that are not discussed here; for example, its application to death penalties or its prohibition of inhumane methods of punishment. This Note suggests that a helpful way to approach the proportionality debate is to employ a due process analysis. The Supreme Court has recognized a due process strain in the Eighth Amendment in death penalty cases and the rationale used to import this due process strain—"respect due to the uniqueness of individuals"—makes it logical that it should be extended to non-capital punishment cases.

II. THE FACTS

On the morning of May 12, 1986, Petitioner Harmelin was stopped by two police officers for running a red light. Petitioner stepped out of the car—whether or not under police orders was not established—and he volunteered to the police that he was carrying a pistol, offering documents to show that it was properly registered. The police subjected him to a pat-down search asserting that the gun, the defendant's nervous behavior, and the bulge in his pocket constituted reasonable grounds for such a search. Petitioner was placed under arrest after police found marijuana on him. A search of the petitioner after his arrest turned up "assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia and a telephone beeper." Later his car was impounded and police found inside "$2900 in cash and two bags of white powder determined to be 672.5 grams of cocaine."
Petitioner Harmelin was convicted by the Oakland Circuit Court of Michigan for "possession of 650 grams or more of a mixture containing cocaine." He was sentenced to life imprisonment without parole pursuant to a Michigan statute. The Michigan Court of Appeals first reversed the conviction on the grounds that the search and seizure provision of the Michigan constitution had been violated. It then vacated this judgment and on reconsideration decided that the search and seizure provision of the Michigan constitution did not provide any greater protection than the federal search and seizure provision. It thus upheld the trial court's sentence, rejecting the argument that the mandatory sentence constituted cruel and unusual punishment under the Eighth Amendment. The Michigan Supreme Court denied leave to appeal, and the United States Supreme Court granted certiorari.

Petitioner argued that the Michigan statute was unconstitutional because his sentence was "significantly disproportionate to the crime he committed" and therefore was "cruel and unusual." He also challenged the sentence because of its mandatory nature. At sentencing, the judge did not have discretion to take account of the fact that he had no prior felony convictions. Petitioner's attack on the Michigan statute was arguably both a facial attack, because he was challenging its mandatory nature, and an attack on its application because he contested its validity as applied to the circumstances of his crime.

Justice Scalia delivered the judgment of the Court. He affirmed the decision of the Michigan Court of Appeals. He was joined in his five part opinion by Chief Justice Rehnquist. Justices Kennedy, O'Connor, and Souter concurred in the judgment and in Part V of the opinion. Justice White, with whom Justice Blackmun and Justice Stevens joined, dissented. Justice Marshall dissented in a separate one-page opinion and Justice

15. Id. at 77.
18. Id. at 76.
19. Id.
21. Id. at 2684.
22. Id. at 2700.
23. Id. at 2681.
24. Id. at 2702.
25. Id. at 2709.
26. Id. at 2719.
Blackmun and Justice Stevens also wrote a one-page opinion in which they placed different emphasis on an issue raised by Justice White in his dissent.27

III. PROPORTIONALITY: LEGAL HISTORY AND BACKGROUND

Discussions of the proportionality principle usually begin with a study of the framers' intent when they adopted the Eighth Amendment as part of the Bill of Rights. The amendment was adopted almost word-for-word from the English Declaration of Rights of 1689.28 Americans were familiar with this clause before 1791 because it had been incorporated in the Bill of Rights of many states.29 The scholarly work on the framers' intent is inconclusive. Some commentators point to early judicial interpretations of the Eighth Amendment that they argue show the clause was intended to abolish torture and barbarous methods of punishment. Others argue that the clause is rooted in an English tradition (dating back to the Magna Charta of 1215) that was sensitive to excessive punishments.30 Still others argue that proportionality is a principle that the framers could naturally have been expected to embrace given their familiarity with and interest in Enlightenment thinking.31

In Supreme Court precedent, proportionality doctrine did not feature in an important way until the 20th century. In a 1910 case, Weems v. United States,32 a Philippines court sentenced the defendant to fifteen years of cadena temporal after he was convicted of falsifying a public document. This punishment condemned the defendant to arduous and painful labor performed with shackles on his wrists and ankles, and also deprived him of all future civil rights.33 The Supreme Court, declaring the sentence unconstitutional and contrary to the Eighth Amendment, stated "it is a precept of justice that

27. Id.
29. Harmelin, 111 S. Ct. at 2686.
30. See Del. Declaration of Rights, § 16 (1776); Md. Declaration of Rights, § XXI (1776); Mass. Declaration of Rights, Art. XXVI (1780); N.C. Declaration of Rights, § X (1776); N.H. Bill of Rights, § XXXIII (1784). Two prohibited "cruel" punishments. See Pa. CONST., art. IX, § 13 (1790); S.C. CONST., art. IX, § 4 (1790).
33. Id. at 364.
punishment for crime should be graduated and proportioned to the offense." \(^{34}\)
The Court hinted that the measure of punishment should reflect contemporary social norms. This theme was again taken up some five decades later in Trop v. Dulles. \(^{35}\) In that case a soldier was deprived of his citizenship rights for being absent without leave for one day. This sentence too was declared as violative of the cruel and unusual clause. In a phrase that has gained much prominence, Justice Warren wrote, "[t]he amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." \(^{36}\)

Beginning with the 1960's, proportionality assumed greater importance in capital punishment cases. The Court concluded in decisions like Coker v. Georgia, \(^{37}\) Gregg v. Georgia, \(^{38}\) and Enmund v. Florida, \(^{39}\) that the unique nature of the death penalty, its irrevocability, and its magnitude justified proportionality analysis in capital punishment cases. Thus, during sentencing in such cases, a court should review the defendant's individual circumstances and consider mitigating factors such as lack of prior convictions. Proportionality in capital cases, however, is beyond the scope of this Note.

In the 1980s, the Supreme Court squarely confronted the proportionality principle in three cases: Rummel v. Estelle, \(^{40}\) Hutto v. Davis, \(^{41}\) and Solem v. Helm. \(^{42}\) They are of special interest because many of the themes in these cases are taken up again in Harmelin v. Michigan.

In Rummel v. Estelle the defendant, who had previously been convicted for minor felonies (fraudulent use of a credit card for goods worth $80 and forging a check for $28.36), was convicted of a third felony, and pursuant to a Texas recidivist statute received a mandatory life sentence. \(^{43}\) His appeal came to the Supreme Court, which affirmed in a narrow five-four decision. Justice Rehnquist, writing for the majority, \(^{44}\) rejected Rummel's argument that recent opinions dealing with the death penalty forced the conclusion that his sentence was disproportionate to his felonies. Justice Rehnquist distin-

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34. Id. at 367.
36. Id. at 101.
44. 445 U.S. 263 (1980). (Justice Rehnquist was joined in his opinion by Chief Justice Burger and Justices Blackmun and White. Justice Stewart concurred separately.).
guished between death penalty cases and terms for life: "A bright line" could be drawn between the death penalty and lesser punishments. As for the Weems precedent, Justice Rehnquist argued that the case showed "successful
to the proportionality of particular sentences have been exceedingly rare ... [and] proportionality could not be wrenched from the extreme facts of the case." He feared that judicial review of proportionality would undermine the legislative prerogative, and would ignore the fact that a wide variety of punishment schemes were acceptable. Comparisons were particularly inappropriate in the context of recidivist schemes because such schemes reflect a complex balance of societal interests and a mix of deterrent, retributive, and rehabilitation goals peculiar to each state. The Court also noted that Texas' relatively liberal parole policy mitigated the harshness of Rummel's sentence.

Justice Powell, in a strong dissent, rejected the bright line division between death sentences and non-capital sentences, and found proportionality an inherent aspect of the cruel and unusual punishment clause. Further, he found the focus on the possibility of parole entirely too speculative. He argued it was possible for federal courts to formulate objective standards to determine whether a particular sentence was grossly disproportionate and he set out a test that was taken up later in Solem v. Helm.

In Hutto v. Davis, decided a year later, the Court delivered a per curiam opinion that was strongly influenced by the Rummel decision. In Hutto, the defendant was convicted by a lower court on two counts: possession of marijuana with intent to distribute, and distribution of nine ounces of marijuana. He was sentenced to forty years in prison and fined $20,000. The per curiam opinion rejected the ruling of the Fourth Circuit Court of Appeals that this sentence was unconstitutional because it violated the cruel and unusual punishment clause of the Eighth Amendment and declared this ruling to be inconsistent with Rummel. Again the Court emphasized that challenges to proportionality of particular sentences should be "exceedingly rare."

45. Id. at 275.
46. Id. at 273.
47. Id. at 279-82.
48. Id. at 279-85.
49. Id. at 280.
50. Id. at 285, 292-93 (Powell, J., dissenting).
51. Id. at 275.
54. Id. at 371 (citing Davis v. Davis, 585 F.2d 1226, 1229 (4th Cir. 1978)).
55. Id. at 374 (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)).
Justice Powell "reluctantly" concurred in the opinion. Although he found the sentence to be "cruel and unusual" he was bound to uphold the Rummel decision because of stare decisis. He distinguished this case from Rummel because the crime here was more serious and the sentence not so harsh as in Rummel. In a vigorous dissent, Justice Brennan accused the Court of impermissibly expanding Rummel. Rummel addressed proportionality concerns in the context of recidivist statutes, where the complex balance of state interests often conflict with the proportionality principle. Even if Justice Brennan were to take the Court on its own terms, the Court had not explained why this was not one of the "exceedingly rare" instances when proportionality could come in to play.

In 1983, just three years after Rummel, the Supreme Court again considered a proportionality case: Solem v. Helm. The facts of the case would have suggested that the Court would give short shrift to Jerry Helm: compared to Rummel, he had more convictions and his offenses were not so minor. He was convicted six times for felonies: three times for third degree burglary; once for obtaining money under false pretenses; once for grand larceny; and a third time for driving while intoxicated. For his last offense, a conviction for passing a bad check, he received a mandatory life sentence under a state recidivist statute.

Justice Powell, this time writing for the majority, pronounced this sentence to be unconstitutional. The majority was the same as the dissent in Rummel and the swing vote from Rummel to Solem was that of Justice Blackmun. Justice Powell elaborated many of the points he had raised in the Rummel dissent and fleshed out the test he had argued for in that opinion. To identify a highly disproportionate sentence, a court could (1) compare the seriousness of a crime with the severity of the punishment (seriousness would be measured by such factors as whether a crime was violent, had victims, or involved large sums of money); (2) compare sentences imposed for similar offenses within a particular jurisdiction; and (3) compare sentences imposed for the same crime in other jurisdictions. Powell reiterated that these principles were quite consistent with principles of federalism and deference to

56. Id. at 379-80.
57. Id. at 375-81 (Powell, J., concurring).
58. Id. at 383 (Brennan, J., dissenting).
59. Id. at 384.
61. Id. at 280.
62. Id. at 279-82.
63. Id. at 279 (Justices Blackmun, Brennan, Marshall, and Stevens joined in Justice Powell's opinion).
64. Id. at 292.
the legislature. The fact that the proportionality principle was rooted in history, and was recognized by the Court for almost a century, showed that the principle applied not just to capital punishments but also to prison sentences. Applying the test to the facts in *Solem*, Justice Powell concluded that Helm’s punishment was disproportionate: Helm’s felonies were all minor because they involved small amounts of money and they were victimless and non-violent. He received the same sentence as people in South Dakota convicted of far more serious crimes (such as murder, treason, manslaughter, arson, and kidnapping). Further, only one other state, Nevada, imposed a penalty as severe. Justice Powell concluded that the sentence was cruel and unusual and therefore, unconstitutional. He argued that his decision was consistent with *Rummel* because *Rummel* involved a mandatory sentence with the possibility of parole; Helm’s sentence was far harsher because it imposed a life sentence without possibility of parole.

In his dissent, Chief Justice Burger accused the majority of "blithely discard[ing] any concept of *stare decisis*, trespass[ing] gravely on the authority of the states, and distort[ing] the concept of proportionality of punishment by tearing it from its moorings in capital cases." In Burger’s view, Rummel’s life sentence was found to be constitutional even though he committed fewer offenses than Helm and his offenses were more minor. Chief Justice Burger rejected Justice Powell’s test, saying it involved subjective matters of line drawing and rejected comparisons of sentences within the state as too speculative because different crimes "implicate[d] other societal interests." There was a great variation in recidivist laws of various states and comparison of these laws was not very meaningful. He accused the Court of "a bald substitution of individual subjective moral values for those of the legislature."

65. *Id.* at 290 n.16.
66. *Id.* at 289.
67. *Id.* at 292-300.
68. *Id.* at 298.
69. *Id.* at 299.
70. *Id.* at 300-01.
71. *Id.* at 304 (Burger, C.J., dissenting, joined by Justices O’Connor, Rehnquist and White).
72. 463 U.S. at 304 (Burger, C. J., dissenting).
73. *Id.*
74. *Id.* at 309 (Burger, C. J., dissenting (quoting *Rummel*, 445 U.S. at 282-283, n.27)).
75. *Id.* at 308.
76. *Id.* at 314 (Burger, C.J., dissenting).
Solem left it unclear whether Rummel was still good precedent. Justice Powell suggested that his opinion was consistent with Rummel, but given the fact that his opinion so closely resembled the dissent in Rummel, this was probably disingenuous. The next proportionality case that came before the Court might have been expected to resolve the differences between Solem and Rummel; however, Harmelin serves to further complicate the issues.

IV. THE INSTANT DECISION

In Harmelin, there are plurality opinions authored by Justices Scalia and Kennedy. There is a dissenting opinion by Justice White, and very brief dissents by Justices Marshall, Blackmun, and Stevens. It is helpful to consider the opinions of the Justices, keeping in mind the previous rulings in Rummel and Solem. The justices differ in their historical analysis, their interpretation of stare decisis, and their policy objectives.

A. The Historical Argument

Justice Scalia argues that Justice Powell distorted the history of the Eighth Amendment in Solem when he claimed that proportionality was an inherent aspect of the cruel and unusual punishment clause. Justice Scalia's reading of English history does not persuade him that Justice Powell is correct. According to Justice Scalia, historians agree that the cruel and unusual punishment clause was included in the English Declaration of Rights of 1689 to prevent the excesses that were carried out by a certain Justice Jeffreys on the King's Bench during the Stuart reign of King James II. Contemporary discussions of "cruel and unusual" (for example in the House of Lords), focussed on the illegal aspects of the punishments that Jeffreys meted out, rather than on the disproportionate aspects. In any case, says Justice Scalia, the important question is whether this clause embodied the same meaning for Americans when they adopted it in the Bill of Rights in 1791. He believes that it did not.

The meaning of the drafters can best be understood by looking to the language in the text, considering the actions of the first Congress, and

78. See supra notes 26-27 and accompanying text.
79. Harmelin, 111 S. Ct. at 2686.
80. Id. at 2687 (citing e.g., 4 W. BLACKSTONE, COMMENTARIES 372 (H. Tucker ed. 1803)).
81. Id. at 2687-90.
82. Id. at 2691.
studying the early judicial interpretations of this clause.\textsuperscript{83} Justice Scalia concedes that the clause prohibiting cruel and unusual punishment could be read to invite a comparison between the offense and the penalty, but argues against such a reading of the clause.\textsuperscript{84} Early Americans were plain-speaking and if they had meant to include the principle of proportionality they would have done so. The framers were familiar with this principle because some states had included it in their Bill of Rights.\textsuperscript{85} Further, in the first Penal Code, Congress paid scant attention to proportionality, punishing such crimes as "forgery of United States securities, 'runn[ing] away with . . . goods . . . to the value of fifty dollars,' [and] treason . . . with the same penalty: death by hanging."\textsuperscript{86} The most compelling pieces of evidence, though, are the first decisions involving the Eighth Amendment: They all reflect a preoccupation with cruel methods of punishments—"[b]reaking on the wheel, flaying alive, rendering asunder with horses"\textsuperscript{87}—and consider adequacy of sentences irrelevant.\textsuperscript{88}

The dissent takes sharp issue with Justice Scalia's historical analysis. First, there is scholarly authority that suggests the "cruel and unusual" clause in the English Declaration of Rights was aimed at disproportionate punishments as well as barbarous methods of punishment.\textsuperscript{89} Justice White is unconvinced by Justice Scalia's suggestion that as plain-speaking Americans the drafters would have included the principle of proportionality in the Eighth Amendment had they wanted to.\textsuperscript{90} Also, the early judicial interpretations are not dispositive: they do not indicate that proportionality analysis was meant to be excluded.\textsuperscript{91}

Justice White argues instead that the prohibition against excessive fines and excessive bails, set beside the cruel and unusual punishment clause, would imply that "imprisonment for an unreasonable length of time, is . . . contrary to the spirit of the Constitution."\textsuperscript{92} Taking a broad overview of Eighth Amendment jurisprudence over the past 200 years, "there can be no doubt that

\textsuperscript{83} Id. at 2691-96.
\textsuperscript{84} Id. at 2692.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 2694 (citing 1 STAT. 114 (1790)).
\textsuperscript{87} Id. at 2694 (quoting B. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 186 (1832)).
\textsuperscript{88} Id. at 2695.
\textsuperscript{89} Id. at 2710 n.1. (White, J., dissenting) (citing Granucci, supra note 30, at 860).
\textsuperscript{90} Id. at 2710.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 2709-10, (White, J., dissenting) (citing OLIVER, supra note 87, at 185-86).
prior decisions of this Court have construed these words to include a proportionality principle.\textsuperscript{n}\textsuperscript{93} Moreover, the dissent argues, a rigid adherence to historical analysis is misplaced. Prior decisions of the court have recognized that "a punishment may violate the Eighth Amendment if it is contrary to the 'evolving standards of decency that mark the progress of a maturing society.'\textsuperscript{n}\textsuperscript{94}

Justice Kennedy simply refuses to engage in the historical debate because he sees enough consistency in the decisions by the courts to settle the case using precedent and stare decisis.\textsuperscript{95}

\textbf{B. Stare Decisis}

The Justices have different perspectives on the jurisprudential history of the Eighth Amendment. For Justice Kennedy, the Court's prior decisions on the Eighth Amendment recognize proportionality considerations, but cases like \textit{Weems}, \textit{Rummel}, and \textit{Solem} illustrate how narrow this principle is.\textsuperscript{96} Justice Kennedy argues that only "grossly disproportionate" sentences have been overturned by the Court.\textsuperscript{97} Applying this narrow proportionality principle to the present case, Justice Kennedy concludes that the crime committed here is of a greater magnitude than the crimes in \textit{Solem}.\textsuperscript{98} Harmelin's crime involves possession of a large quantity of drugs. The state is justified in punishing him severely because of the undisputed link of drugs to violence and crime. Justice Kennedy insists that his opinion is consistent with the \textit{Solem} decision because his opinion respects the four principles that run as common threads in the decisions dealing with proportionality. These principles are: (1) that the crafting of prison terms for specific crimes is properly a legislative, not a judicial function; (2) a wide variety of penological schemes are legitimate; (3) a federal system may result in a "wide range of constitutional sentences;" and (4) proportionality review should be informed by objective factors as far as possible.\textsuperscript{99}

Justice Scalia is satisfied by the historical test that the Eighth Amendment embodies no proportionality requirement. He acknowledges that courts in the twentieth century have interpreted the amendment in this manner but is concerned that \textit{Solem} is a departure from prior precedent in an unwarranted

\textsuperscript{93} Id. at 2710.
\textsuperscript{94} Id. at 2712 (White, J., dissenting (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
\textsuperscript{95} Id. at 2702 (Kennedy, J., concurring).
\textsuperscript{96} See generally id. at 2702-07.
\textsuperscript{97} Id. at 2705.
\textsuperscript{98} Id. at 2705-06.
\textsuperscript{99} Id. at 2703-04.
Proportionality principles are appropriate in death penalty cases because death is irrevocable, "unique . . . in its absolute renunciation of all that is embodied in our concept of humanity." Outside these parameters, he attacks the proportionality principle in this way:

The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that some assemblage of men and women has considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.

Thus, Scalia distrusts the proportionality principle because of his fears that judges will indulge in personal preference law making. In contrast, Justice White sees the Court, as well as lower courts, gradually moving from an interpretation that the Eighth Amendment requires a very narrow proportionality principle to an interpretation that takes account of "evolving standards of decency" and a more complex and sophisticated idea of individual liberty. He is mindful of Justice McKenna's observation in Weems v. United States that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions." For this reason, a sharp distinction between capital and non-capital punishment is too arbitrary.

In a dissenting opinion, Justice Marshall reiterates his widely known view that the death penalty is unconstitutional but otherwise does not quarrel with Justice White's opinion that the Eighth Amendment recognizes a proportionality principle in non-capital as well as capital cases.

C. The Policy Arguments

Many of the policy arguments take place within the context of a discussion of the test laid out by the Court in Solem: (1) seriousness of the crime as compared to the severity of the punishment; (2) comparison of sentences imposed for similar offenses within a jurisdiction; and (3) comparison of sentences imposed for the same offense in other jurisdictions.

100. Id. at 2699.
101. Id. at 2702 (quoting Justice Stewart's concurring opinion in Furman v. Georgia, 408 U.S. 238, 306 (1972)).
102. Id. at 2696.
103. Id. at 2712 (citing Weems v. United States, 217 U.S. at 373 (1910)).
104. Id. at 2719 (Marshall, J., dissenting).
Justice Kennedy reads this test as discretionary. Where appropriate, the judge may consider these factors. Justice Scalia seems to share the dissent’s view that the test is mandatory and is concerned that judges will manipulate a test that he regards as very subjective. For the dissent, the factors provide a practical, working guideline to identify disproportionate punishments.

Justice Kennedy emphasizes that the test should be placed in the context of other considerations, such as legislative supremacy, the legitimacy of different penological schemes, federalism concerns, and the requirement that proportionality review be guided by objective factors. In analyzing the first strand of the test, that is, in determining the seriousness of a crime and comparing it to the severity of the sentence, the Court should determine if there is a rational basis for the statute under which the defendant was sentenced. Thus, the Michigan legislature could reasonably decide that in light of the drug scourge on the Detroit streets, and the detrimental consequences for individuals and society, possession of a large quantity of drugs merits a life sentence without parole. Justice Kennedy understands the Solem test to require a comparative analysis only where an initial determination has been made that a sentence is grossly disproportionate. He cautions that where such a comparative analysis is undertaken, there is a wide margin for rational disagreement as to appropriate length of prison terms because of "differing attitudes and perceptions of local conditions."

Justice Scalia harshly criticizes the Solem test. He attacks the first prong of the test— inherent gravity of the crime—by saying that there are no "textual or historical standards" for assessing seriousness. While there are many crimes that all can agree are serious, there are many others that states may want to label as serious because of legitimate policy concerns. In the latter category, there is wide room for differences of opinion. "[J]udging by the statutes that Americans have enacted, there is enormous variation—even within a given age, not to mention across the many generations ruled by the Bill of Rights. The second prong is undermined by the subjectivity of the first. Legislatures have different goals when fashioning penalties for

106. Harmelin, 111 S. Ct. at 2707.
107. Id. at 2697-98.
108. Id. at 2712-13 (White, J., dissenting).
109. Id. at 2705.
110. Id. at 2706.
111. Id.
112. Id. at 2707.
113. Id. at 2704.
114. Id. at 2698 (Scalia, J., dissenting).
115. Id. at 2697.
different crimes—deterrence, rehabilitation, and retribution—and once they are involved in balancing such considerations, it becomes difficult to speak meaningfully of proportionality. As for the third prong, the differences that inter-state comparisons yield are healthy and comport with principles of federalism. Some states criminalize actions that other states do not.

In his dissent, Justice White defends the Solem test. He denies that the test is too subjective, arguing that it has worked well in practice. The Solem test has not resulted in a rush by state and federal appellate courts to overturn harsh sentences. Since Solem, only four cases have been reversed on a proportionality basis. Reviewing courts have applied the test with due deference to the legislature and without undue expenditure of resources. In the opinion of Justice White, Justice Scalia’s position is dangerous because it would make judicial review of flagrant legislative abuse very difficult. Justice White also upbraids Justice Kennedy for making an "empty shell" out of the Solem test. Justice Kennedy’s analysis is contradicted by "the language of Solem itself and by our other cases interpreting the Eighth Amendment."

Weighing all these considerations, the plurality in Harmelin rejects the petitioner’s argument that his sentence was unconstitutional because it violated the cruel and unusual punishment clause of the Eighth Amendment.

V. COMMENT

In Harmelin, the Court grapples at length with the proportionality principle, but does not devise a new theoretical construct. Many of the individual opinions echo positions taken in Solem v. Helm, except that the majority and dissent switch sides. Of interest after Harmelin, are the following questions: (1) Is Solem overruled or is it still good law? How are reviewing judges to interpret the precedent? (2) Is there implicit in the cruel and unusual punishment clause of the Eighth Amendment a substantive due process strain and if so, what is the judicial standard of review? Related to this is the question whether it is appropriate to draw a bright line between the death sentence and noncapital sentences when considering the proportionality principle? (3) Many of the criticisms of proportionality are leveled at its application. Do the dangers of subjectivity justify a policy of non-interference by the judicial system?

116. Id. at 2698.
117. Id. at 2699.
118. Id. at 2712 (White, J., dissenting).
119. Id. at 2713 n.2.
120. Id. at 2714.
121. Id.
A. Is Solem Still Good Law?

The Harmelin decision leaves it unclear whether the Solem ruling has been overturned because the plurality opinions are inconsistent. Justice Scalia bluntly states that "Solem was scarcely the expression of clear and well accepted constitutional law,"122 and he advocates overturning a precedent that is "both recent and in apparent tension with other decisions"123 noting that the doctrine of stare decisis is less rigid when it comes to constitutional precedents.124 But he is joined in this part of the judgment only by Justice Rehnquist. Justice Kennedy asserts that Solem is good law because it can be reconciled with prior decisions, but his interpretation greatly dilutes the test. He would require judges to apply the test on a discretionary basis and only in narrow circumstances when there is no rational relationship between the sentencing scheme and the crime committed.125

Lower courts today could decide that the Solem test has been effectively overturned, based on Justice Scalia’s opinion or based on the narrow construction that Justice Kennedy gives the test. Alternatively, they could accept the Solem test as still valid but apply it in a limited fashion, in the manner of Justice Kennedy in Harmelin. A few courts may accept Justice Scalia’s position and declare that there is no constitutional recognition of a proportionality principle. Some courts may take advantage of the vagueness of the phrase "narrow proportionality principle" to give a more liberal construction to the Solem test than Justice Kennedy gives it in Harmelin. Lower court decisions that have come out since Harmelin have taken the second position. They argue that Solem and Harmelin are not inconsistent because they both recognize only a narrow proportionality principle. In United States v. Manuel126 the Eighth Circuit Court of Appeals wrote, "[a]lthough the extent of Harmelin’s modification of Solem is not yet clear, it is evident that Solem’s holding that the Eighth Amendment ‘forbids only extreme sentences that are "grossly disproportionate" to the crime’ is still controlling."127 In United States v. Torres,128 the Second Circuit Court of Appeals argued that sentences imposed on defendants convicted for drug-dealing were consistent with the narrow proportionality principles of both Harmelin and Solem.129 The problem with this interpretation is that it does

122. Id. at 2686.
123. Id.
124. Id.
125. Id. at 2705 (Kennedy, J., concurring).
126. 944 F.2d 414 (8th Cir. 1991).
127. Id. at 417 (quoting Harmelin v. Michigan, 111 S. Ct. 2680, 2705 (1991)).
128. 941 F.2d 124, 127 (2d Cir. 1991).
129. Id. at 127-28.
not square with the decisions themselves, given the language of the decisions and given the change in the composition of the Court between the two decisions. The same text and precedent that *Solem* broadened, *Harmelin* has narrowed.

Not all judges have accepted the *Harmelin* decision with equanimity. In *United States v. Dunson*,130 the concurring judge expresses his "continuing hope that federal courts, like the Emperor in Gilbert and Sullivan's *The Mikado*, may fashion 'punishment to fit the crime.' Severe mandatory minimum sentences oft-times frustrate that goal."131

**B. Due Process Strain to the Eighth Amendment?**

The Court in *Harmelin* does not use the language of due process analysis when considering the proportionality principle, but it is helpful to cast the debate in these terms because we gain a sharper focus on the constitutional interests at stake. The debate between the plurality and dissent in *Harmelin* can be characterized as a debate about the kind of review to be given to the "right" embedded in the Eighth Amendment, the right against cruel and unusual punishment. This Note argues that implicit in the notion of "cruel and unusual punishment" is the idea of substantive due process—the idea that pain or infringement of autonomy should not be inflicted on individuals beyond what is "just." A thorny issue of contention is how to define "just" in this context. It seems fair to say that Justices Scalia and Kennedy would characterize a punishment as "just" if it reflected legitimate utilitarian concerns on the part of the legislature: It is "just" to punish a defendant beyond his moral culpability if there is a net benefit to society in terms of deterrence. The dissenting Justices would say that utilitarian considerations are often appropriate, but that a punishment should be chiefly tailored to reflect "a defendant’s personal responsibility and moral guilt."132

The due process issue in the cruel and unusual punishment clause is this: When a state uses its police power to inflict excessive punishment on an individual, is judicial review justified, and if so, what standard of review should there be? Justice Scalia seems to be equivocal over whether there is any role for the judiciary at all beyond what is mandated by the legislature, but he concedes that a clearly irrational sentencing scheme can be overturned by a reviewing judge (as in the hypothetical where a parking violation incurs a sentence of life imprisonment).133 Justice Kennedy accepts that a place exists for judicial review, and for him, the standard is arguably rational basis

130. 940 F.2d 989 (6th Cir. 1991).
131. Id. at 995 (Welford, J., concurring).
133. Id. at 2697 n.11.
review. In Harmelin, he says that if the legislature has reasonable grounds for its penological scheme and if this scheme is not grossly disproportionate on its face, then the scheme is valid even if the judge personally believes it is a harsh sentencing scheme. Justice Kennedy seems to require only a loose fit between the legislature’s purpose in devising a particular penological scheme and the means it fashion to achieve that purpose. Thus in Harmelin, he states that the legislature may “boldly experiment” with a harsh sentencing scheme to counter its drug problem.

Justice White could plausibly be said to argue that substantial, important interests must be shown by the state to punish an individual beyond his moral culpability. The Solem test could be interpreted as a way of testing these substantial interests. If a sentencing scheme fails to pass the three prongs of the Solem test, then arguably the state interests do not survive intermediate review. (There are difficulties and ambiguities associated with the application of the Solem test that will presently be examined). Justice White seems to argue for intermediate review rather than a strict scrutiny standard because, he argues, the legislature should be given flexibility and deference in drafting penological schemes. Justice White would require a narrower means-end fit than Justice Kennedy. For him, the causal link between possession of drugs and a ripple effect on criminal activity was made cavalierly by the plurality in Harmelin. “[T]he severity of the problem ‘cannot excuse the need for scrupulous adherence to our constitutional principles.”

This Note argues that the dissent has the more compelling argument. Considerations of justice necessarily involve a measurement of an offender’s "personal responsibility and moral guilt." It is fair to deprive an offender of his rights based on this personal responsibility. If, however, a state purports to exercise its police power to deprive the individual of rights beyond the extent of this personal responsibility, then it has to have very significant reasons and there should be a narrow relationship between the means and the end, despite the difficulties inherent in measuring this relationship. Judicial review in this context is important because it acts as a "countermajoritarian check on majority rule.”

134. Id. at 2709.
135. Id.
136. Id. at 2716.
137. Id. at 2713 (quoting Rummel v. Estelle, 445 U.S. 263, 306 (1980)) ("[C]ourts have demonstrated 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.’").
138. Id. at 2717 (citing Grady v. Corbin, 110 S. Ct. 2084, 2095 (1990)).
139. Id. at 2716.
140. See Margaret J. Radin, Cruel Punishment and Respect for Persons: Super
classic case of Justice Stone's famous footnote in United States v. Carolene Products. 141 "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 142 The political capital gained from imposing harsh penalties for narcotics offenses may tempt legislatures to take constitutional shortcuts and erode the basic liberties of drug offenders. Individuals convicted under a particularly harsh statute rarely will be able to make their voices heard in the legislature. Prisoners complaining of degrading or inhumane treatment usually turn to the judicial process rather than to the legislative process because complaints to a legislature representing an unsympathetic majority usually fall on deaf ears. Similarly, a defendant convicted under an especially harsh sentencing scheme should have recourse to the judicial system for review.

It is helpful to consider the Supreme Court rationale for recognizing a due process strain in the Eighth Amendment in death penalty cases. In Lockett v. Ohio, 143 Chief Justice Burger argued that reviewing courts must carefully weigh individualized circumstances of offenders faced with the death sentence. 144 Chief Justice Burger reasoned that all mitigating factors had to be considered because of the "degree of respect due the uniqueness of the individual." 145 However, he emphatically drew a line between capital and non-capital cases. "Given that the imposition of death by public authority is so profoundly different from all other penalties, . . . [t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." 146

This argument is specious. "Respect due to the uniqueness of the individual" should remain a guiding principle whether we are concerned with deprivation of liberty or deprivation of life. In death penalty cases, the Court recognizes that a sentencing judge should carefully weigh individualized circumstances because of the moral gravity of the risk of error. The consequences of error may not be as stupendous in excessive punishment cases as in death penalty cases, but that is simply to recognize that a death sentence represents the most extreme form of punishment along a continuum.

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141. 304 U.S. 144 (1938).
142. Id. at 152 n.4.
144. Id. at 604.
145. Id. at 605.
146. Id.
of severe punishments. Courts should be equally concerned when an offender is threatened with arbitrary deprivation of freedom as when she is threatened with unjust death. In an insightful article, Margaret Jane Radin explores the concept of personhood and the idea of the uniqueness of the individual:

[T]o respect someone's personhood means to behave toward them in a way that manifests an understanding that every individual possesses an inner life which is no less important than anyone else's. . . . Infliction of unnecessary pain . . . [h]umiliation and degradation seem to transgress the individual's capacity and commitment to make choices and to constitute herself by them as does manifest disregard for the individual's future life or quality of life.

This Note suggests that the Court robs the phrase "respect due the uniqueness of individuals" of its true moral significance in so far as it refuses to extend the due process rationale recognized in death penalty cases to non-capital cases.

C. Separation of Power Concerns

One of the chief objections that Justices Kennedy and Scalia maintain against a "close scrutiny of state interests" standard is that such scrutiny is simply not workable. It involves an evaluation of too many subjective factors like "seriousness," "severity," and "similarity." Judges may be tempted to manipulate these factors to suit their own individual preferences. If anyone should get into the business of a balancing process, it should be the legislature, say Justices Kennedy and Scalia. The legislature can evaluate factors democratically, if not always objectively. There is some justification in Justice Kennedy's and Justice Scalia's criticisms of the Solem test. Justice Powell was vague as to how the Solem test was to be applied. He did not indicate whether a sentencing scheme should fail all three prongs or just one of the prongs to be declared unconstitutional. Neither did he elaborate how much weight was to be given to any one prong. He declared that no prong was necessary for the sentencing scheme to be declared unconstitutional. His main thrust was that judges should engage in a balancing test using these criteria.

147. See Radin, supra note 140.
148. Id. at 1175, 1177.
149. Harmelin, 111 S. Ct. at 2697-98.
151. Id.
While the Solem test is not a model of clarity, it does not seem unworkable, as the plurality in Harmelin suggests. It is part of the judicial function to consider many objective facts and to weigh these facts against each other to make determinations. Justice Powell, in Solem, seems to be exhorting a sliding scale approach. No doubt there is a danger with the Solem test that a judge will be subjective in the kind of "objective facts" she chooses to consider, but this is a danger inherent in the idea of judicial review. It is true that ordinarily we prefer the legislature to perform balancing tests involving subjective preferences. But when fundamental rights of minorities are threatened, and their interests are not likely to be addressed by the legislature, then the judicial forum is proper.\textsuperscript{152}

Moreover, some of the boundaries drawn between the legislative and judicial functions in this area are not so sharp as critics of proportionality suggest. Within the broad guidelines set up by legislatures, judges often have wide latitude to shape sentences according to individual circumstances. Although this was not the situation in Harmelin, where the sentence was mandatory, judges are given discretion and flexibility in many sentencing schemes. The legislature itself performs a balancing test often with the recognition that the test will have to be fine-tuned by judges when applying sentences. Much legislation is fashioned ad-hoc and involves a process of compromise and political give-and-take, so that the resulting legislation does not always have the precision and consistency that is desired. There is some expectation that the judicial process will correct the flaws and inconsistencies that may result. Sometimes correction occurs by overt declarations that certain statutory schemes are invalid; sometimes a particular line of interpretation in judicial decisions will help to shape future legislation.

In any case, fears of judicial overreaching are hardly justified in Eighth Amendment cases. Judges traditionally have been conservative in invalidating harsh sentencing schemes, and lawyers whose clients are threatened with severe sentences usually direct their efforts to plea bargain arrangements and parole possibilities rather than to challenges of the sentencing schemes.\textsuperscript{153}

\textsuperscript{152} See, e.g., J. Ely, Democracy And Distrust 87 (1980) (Judicial review must focus on "whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.").

VI. CONCLUSION

The debate on proportionality, as reflected in *Harmelin* and prior decisions, is long and protracted and involves difficult pragmatic choices, as well as issues of high moral complexity. It is not surprising that there has been no consensus on proportionality given the fact that the principle implicates the Justices’ sharply differing views on such questions as the purposes of punishment, the limits of judicial review, and separation of powers. A proper focus on proportionality should begin with the due process strain that is implicit in the cruel and unusual punishment clause of the Eighth Amendment. The Supreme Court should logically extend its rationale for due process recognized in the death penalty context to the context of non-capital sentences. Judicial review of excessive punishment is appropriate because offenders’ access to the democratic process is usually very limited.

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