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EIGHTH AMENDMENT—NARROW PROPORTIONALITY REQUIREMENT PRESERVES DEFERENCE TO LEGISLATIVE JUDGMENT

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

I. INTRODUCTION

In *Harmelin v. Michigan*,[1] the United States Supreme Court held that a mandatory sentence of life in prison without possibility of parole for a conviction of possessing more than 650 grams of cocaine, without any consideration of mitigating factors,[2] did not violate the Eighth Amendment's[3] prohibition against cruel and unusual punishment. This Note examines the Harmelin opinions and concludes that although the Court's opinions fail to provide uniform guidance regarding the scope of the Eighth Amendment and the status of past Supreme Court decisions, the majority correctly concluded that the Eighth Amendment does not require consideration of mitigating factors in this case and that Harmelin's sentence of life in prison without possibility of parole was not a violation of the Eighth Amendment.

This Note contends that Justice Scalia incorrectly argued that the Eighth Amendment contains no proportionality guarantee. This Note argues that Justice Kennedy's concurrence correctly followed precedent by continuing to recognize a narrow proportionality requirement in the Eighth Amendment. This Note also argues that the concurrence's modification of *Solem's* three factor proportionality analysis was inappropriate. The dissent, on the other hand, correctly argued that the *Solem* second and third factors are important to an analysis of a punishment's proportionality. Finally, any proportionality analysis should also include a fourth factor which re-

[1] 111 S. Ct. 2680 (1991).

[2] In Harmelin's case, the main mitigating factor was the fact that Harmelin had no prior felony convictions. *Id.* at 2701.

[3] The Eighth Amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

quires courts to consider local conditions and the legislative goals sought to be achieved by the punishment.

II. BACKGROUND

The Eighth Amendment of the United States Constitution prohibits federal and state governments from imposing cruel and unusual punishments for crimes.[4] Judicial interpretation of this prohibition against cruel and unusual punishment covers three areas.[5] First, the Eighth Amendment restricts methods and modes of punishment. Second, it limits the amount of punishment which can be imposed for certain offenses. Finally, the Eighth Amendment bars any punishment in certain circumstances.[6]

The Eighth Amendment's ban on cruel and unusual punishments originated from the English Declaration of Rights of 1688.[7] The provision was adopted as part of the American Bill of Rights in 1791.[8] At that time, the provision banned modes of punishments such as pillorying, disemboweling, decapitation, drawing and quartering,[9] burning at the stake, crucifixion, breaking on the wheel, the rack and thumbscrew, and extreme instances of solitary confinement.[10] Although these specific punishments are uncommon today, the Eighth Amendment's relevance continues because the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[11] The Supreme Court has not confined the Eighth Amendment's prohibition against certain methods and modes of punishment to methods that were banned in the eighteenth century.[12]

Instead, the Eighth Amendment is both a flexible and dynamic concept.[13] For example, the Supreme Court has held that deprivation of citizenship as punishment for desertion from the United States Army in wartime is cruel and unusual.[14] While inflicting no physical pain, the punishment totally destroys "the individual's sta-

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4 *See supra* note 3.

5 1 WAYNE R. LAFAVE & A . SCOTT, JR., CRIMINAL LAW § 2.14(f) at 177 (2d ed. 1986).

6 *Id.*

7 Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636 (1966).

8 *Id.* at 637.

9 *Id.*

10 LAFAVE & SCOTT, *supra* note 5, at 177.

11 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

12 Gregg v. Georgia, 428 U.S. 153, 171 (1976).

13 *Id.* "[T]he clause forbidding "cruel and unusual" punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.' " *Id.* (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

14 *Trop*, 356 U.S. at 103-04.

tus in organized society."[15] In *Jackson v. Bishop*, the Eighth Circuit held that a modern mode of punishment, the use of the strap in Arkansas prisons, violated the Eighth Amendment's prohibition against cruel and unusual punishment.[16]

The Supreme Court has held that the death penalty as a method of punishment is not a *per se* violation of the Eighth Amendment.[17] Six years later, in *Eddings v. Oklahoma*, the Court concluded that it is unconstitutional for a sentencing judge to disregard relevant mitigating factors in capital cases.[18]

The Eighth Amendment's prohibition against cruel and unusual punishment also bars excessive punishment.[19] *Weems v. United States* is the leading case on whether excessive punishment, out of proportion to the offense committed, is unconstitutional.[20] In *Weems*, a public official in the Philippines convicted of falsifying a public and official document received a punishment of fifteen years of *cadena temporal*.[21] The punishment of *cadena temporal* included hard and painful labor, constant enchainment, deprivation of parental authority, loss of the right to dispose of property inter vivos, and constant surveillance for life.[22] The Court held the punishment unconstitutional on two grounds. The Court viewed the peculiar mode of punishment as inherently cruel and unusual in American jurisdictions.[23] The Court also concluded that the punishment of *cadena temporal* was excessive in relation to the crime of falsifying a public document.[24]

In *Coker v. Georgia*, the Supreme Court held that the death penalty for the crime of rape was unconstitutional.[25] "Death is indeed a disproportionate penalty for the crime of raping an adult woman."[26] Coker was the first modern Supreme Court decision to invalidate a punishment under the Eighth Amendment on the basis of disproportionality.[27]

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15 *Id.* at 101.

16 Jackson v. Bishop, 404 F.2d 571, 581 (8th Cir. 1968).

17 *Gregg*, 428 U.S. at 187 (imposition of death penalty for crime of murder does not, under all circumstances, violate the Eighth Amendment).

18 Eddings v. Oklahoma, 455 U.S. 104, 116-17 (1982) (death sentence for murder conviction unconstitutional where state court refused to consider petitioner's unhappy family history including severe emotional disturbance and beatings by a harsh father as mitigating evidence).

19 LAFAVE & SCOTT, *supra* note 5, at 179.

20 Weems v. United States, 217 U.S. 349 (1910).

21 *Id.* at 357-58.

22 *Id.* at 364.

23 *Id.* at 377.

24 *Id.*

25 Coker v. Georgia, 433 U.S. 584, 600 (1976).

26 *Id.* at 597.

27 LAFAVE & SCOTT, *supra* note 5, at 180 (quoting Radin, *The Jurisprudence of Death:*

The Supreme Court in *Solem v. Helm* extended the Eighth Amendment's proportionality guarantee to felony prison sentences.[28] The *Solem* Court set aside as disproportionate a sentence of life imprisonment without possibility of parole for a conviction under a South Dakota recividist statute for seven successive offenses that included three convictions of third-degree burglary, one of obtaining money by false pretenses, one of grand larceny, one of third offense driving while intoxicated, and one of writing a "no account" check with intent to defraud.[29]

Last, the constitutional prohibition against cruel and unusual punishment bars punishment of any kind in certain situations.[30] The Eighth Amendment restricts what conduct legislatures can define as criminal.[31] In *Robinson v. California*, Robinson was sentenced to ninety days in prison upon being convicted of violating a California statute which made it a criminal offense for a person to be addicted to the use of narcotics.[32] The Supreme Court held unconstitutional the California statute criminalizing an addiction to narcotics.[33] The Court stated that to punish someone for the "status" of narcotic addiction without proof of purchase, sale, or possession of narcotics is cruel and unusual punishment.[34]

III. Facts and Procedural History

In the early morning hours of May 12, 1986, two police officers stopped Ronald Allen Harmelin for failure to make a complete stop at a red light.[35] Harmelin, who remained seated in his car, complied in a cooperative manner when asked to produce a driver's license and vehicle registration.[36] Harmelin then stepped out of his car.[37]

After getting out of his car, Harmelin voluntarily informed one of the officers that he was carrying a pistol in an ankle holster.[38] Harmelin then handed the officer a general permit to carry a con-

Evolving Standards for the Cruel and Unusual Punishment Clause, 126 U. Pa. L .Rev. 989, 990 (1978)).

28 Solem v. Helm, 463 U.S. 277, 303 (1983).

29 *Id.* at 279-81.

30 LaFave & Scott, *supra* note 5, at 182.

31 *Id.*

32 Robinson v. California, 370 U.S. 660, 663 (1962).

33 *Id.* at 667.

34 *Id.* at 666. Similarly, to impose a punishment of one day in prison for the crime of having a common cold would be cruel and unusual punishment. *Id.* at 667.

35 Brief for Petitioner at 2, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter Brief for Petitioner].

36 People v. Harmelin, 176 Mich. App. 524, 528, 440 N.W.2d 75, 77 (1989).

37 *Id.*

38 *Id.* at 529, 440 N.W.2d at 77.

cealed weapon and a safety inspection certificate for the .38 caliber which was later found in Harmelin's ankle holster.[39]

A search of Harmelin's person led to the discovery of some marijuana, and the officers placed Harmelin under arrest.[40] In searching Harmelin after his arrest, the officers found assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia and a telephone beeper.[41] Later, the police impounded Harmelin's car and a search of the trunk revealed a travel bag containing a shaving-kit bag.[42] The kit contained $2900 in cash and two bags of white powder subsequently determined to be 672.5 grams of cocaine.[43] Harmelin's fingerprints were found on books inside the travel bag and next to the bags of cocaine.[44]

At trial, Harmelin neither testified in his own behalf nor presented any witnesses.[45] A jury convicted Harmelin of possessing 672 grams of cocaine, and the judge sentenced him to a mandatory term of life in prison without parole.[46] Even though Harmelin had no prior felony convictions,[47] Michigan law[48] dictated a mandatory sentence of life in prison without parole.[49]

The Michigan Court of Appeals initially reversed Harmelin's conviction because the supporting evidence had been obtained in violation of the Michigan Constitution.[50] On petition for rehearing,

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39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 529, 440 N.W.2d at 78.

43 *Id.*

44 *Id.*

45 *Id.*

46 Harmelin v. Michigan, 111 S. Ct. 2680, 2684 (1991).

47 *Id.* at 2701.

48 Michigan Compiled Laws Section 333.7403(2)(a)(i) provides a mandatory sentence of life in prison for possession of 650 grams or more of any mixture containing a schedule 1 or 2 controlled substance. MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West Supp. 1991). Section 333.7214(a)(iv) defines cocaine as a schedule 2 controlled substance. MICH. COMP. LAWS ANN. § 333.7214(a)(iv) (West Supp. 1991). Section 791.234(4) provides eligibility for parole after ten years in prison, except for those convicted of either first-degree murder or "a major controlled substance offense." MICH. COMP. LAWS ANN. § 791.234(4) (West Supp. 1991). Section 791.233b(1)(b) defines "major controlled substance offense" as including a violation of § 333.7403. MICH. COMP. LAWS ANN. § 791.233b(1)(b) (West Supp. 1991).

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

50 People v. Harmelin, 176 Mich.App. 524, 526-27, 440 N.W. 75, 76 (1989). The Michigan Court of Appeals initially reversed Harmelin's conviction after considering the issue of the propriety of a police officer commanding a driver out of his car after having stopped the driver for a traffic violation. *Id.* Under the federal constitution, a police officer ordering a driver to get out of his car after the car has been lawfully stopped for a traffic violation, even though the officer had no reason to suspect foul play at the time, does not violate the Fourth Amendment. Two of the three judges of the Michigan Court

the Michigan Court of Appeals vacated its prior decision and affirmed Harmelin's conviction and sentence.[51] The Court of Appeals rejected Harmelin's argument that his sentence of life in prison without possibility of parole was "cruel and unusual" under the Eighth Amendment.[52] The Michigan Supreme Court denied leave to appeal,[53] and the United States Supreme Court granted certiorari to determine whether a mandatory term of life in prison for possessing over 650 grams of cocaine constitutes cruel and unusual punishment.[54]

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,[55] Justice Scalia announced the judgment of the Court that Harmelin's mandatory sentence of life in prison without possibility of parole without consideration of mitigating factors, such as the fact that Harmelin had no prior felony convictions, did not violate the Eighth Amendment.[56] The majority rejected Harmelin's "required mitigation" argument that a sentencer may not impose such a severe sentence as life in prison without parole before hearing mitigating and aggravating factors.[57]

Harmelin argued that death penalty jurisprudence required the consideration of mitigating factors in his case. The Supreme Court has held that imposition of a capital sentence without an individualized determination that the punishment is appropriate constitutes cruel and unusual punishment under the Eighth Amendment.[58]

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of Appeals held that the Michigan Constitution's search and seizure provision provided greater protection in this situation than the Fourth Amendment to the Federal Constitution. *Id.*

51 *Id.* On reconsideration, the Michigan Court of Appeals decided that under the circumstances in this case, the Michigan Constitution's search and seizure provision did not provide greater protection than the Fourth Amendment under the United States Constitution. *Id.*

52 *Id.*

53 *Id.*

54 110 S. Ct. 2559 (1990).

55 Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Souter joined this portion of Justice Scalia's opinion.

56 Harmelin v. Michigan, 111 S. Ct. 2680, 2701-02 (1991).

57 *Id.* at 2701.

58 Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (North Carolina's mandatory death sentence for first degree murder without consideration of the character and record of each offender or the circumstances of a particular offense unconstitutional); Lockett v. Ohio, 438 U.S. 586, 608-09 (1978) (holding unconstitutional Ohio's death penalty statute which required a trial judge, once a verdict of aggravated murder with specifications returned, to impose death sentence unless one or more specified mitigating factors was present. The statute, however, did not allow the sentencing judge to

Harmelin argued that the Court should extend the "individualized capital-sentencing doctrine" to an "individualized mandatory life in prison without parole sentencing doctrine."[59] In other words, Harmelin contended that a sentencing court should be required to consider aggravating and mitigating factors before it can impose such a severe sentence as life imprisonment without possibility of parole. In his case, Harmelin contended that the Michigan sentencing judge should have been required to consider the fact that Harmelin had no prior felony convictions before sentencing Harmelin to life in prison without possibility of parole.[60]

The Court refused to extend individualized sentencing in capital cases to noncapital cases because of the qualitative difference between death sentences and all other forms of punishment.[61] Its total irrevocability and rejection of rehabilitation makes the death penalty unique.[62] The majority concluded that although Harmelin's sentence was the second most severe known to the law,[63] the possibilities of retroactive legislation and executive clemency were still available to reduce his sentence.[64]

B. JUSTICE SCALIA'S PROPORTIONALITY ANALYSIS

Justice Scalia[65] concluded that the Eighth Amendment does not contain a proportionality guarantee. Rejecting Harmelin's argument that his sentence was unconstitutionally disproportionate to the crime committed,[66] Justice Scalia began by examining recent

consider defendant's lack of specific intent to cause death and defendant's role as accomplice as mitigating evidence); Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (*see supra* note 18); Hitchcock v. Dugger, 481 U.S. 393, 399 (1987) (holding sentence of death unconstitutional when trial judge instructed advisory jury not to consider nonstatutory mitigating circumstances and he himself refused to consider nonstatutory mitigating circumstances).

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

60 *Id.* at 2701.

61 *Id.* (citing *Lockett*, 438 U.S. at 605) ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence"); *Woodson*, 428 U.S. at 305 ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two"); Rummel v. Estelle, 445 U.S. 263, 272 (1983) ("This theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions").

62 *Harmelin*, 111 S. Ct. 2702 (quoting Furman v. Georgia, 92 S.Ct. 2726, 2760 (1972)).

63 The most severe penalty being the death penalty.

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

65 Only Chief Justice Rehnquist joined this portion of Justice Scalia's opinion.

66 *Harmelin*, 111 S. Ct. at 2684 (opinion of Scalia, J.).

Supreme Court Eighth Amendment decisions.[67] Justice Scalia recognized that the Court in *Rummel v. Estelle*[68] rejected the dissent's argument that a punishment's disproportionality could be established by weighing three factors[69]: 1) the gravity of the offense compared to the severity of the penalty, 2) the comparability to penalties imposed on other criminals in the same jurisdiction, and 3) the comparability to penalties imposed in other jurisdictions for the same offense.[70] In *Hutto v. Davis*,[71] the Supreme Court again rejected an application of the three factors discussed in the *Rummel* dissent.[72]

However, in *Solem v. Helm*[73], the Supreme Court stated that a general principle of proportionality exists and applied the three-factor test.[74] Justice Scalia recognized that the three-factor test had been explicitly rejected in both *Rummel* and *Hutto*.[75] Justice Scalia, therefore, concluded "that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."[76]

Justice Scalia criticized *Solem's* proposition that a right to be free from disproportionate punishments was embodied within the "cruel and unusual punishments" provision of the English Declaration of Rights of 1689 and then incorporated with that same language into the Eighth Amendment.[77] Justice Scalia argued that the principle of proportionality was familiar to English law at the time the Declaration of Rights was drafted, and despite this familiarity, the drafters did not explicitly prohibit disproportionate or excessive punish-

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

68 In *Rummel*, the Supreme Court held that imposition of a life sentence, under a recidivist statute, upon a defendant who had been convicted, successively, of fraudulent use of a credit card to obtain $80 worth of goods and services, passing a forged check in the amount of $28.36, and obtaining $120.75 by false pretenses did not constitute cruel and unusual punishment. *Rummel*, 445 U.S. at 285.

69 *Harmelin*, 111 S.Ct. at 2684 (opinion of Scalia, J.).

70 *Rummel*, 445 U.S. at 295 (Powell, J., dissenting).

71 In *Hutto*, the Supreme Court held that a prison term of forty years and a fine of $20,000 for possession and distribution of approximately nine ounces of marijuana did not violate the Eighth Amendment. *Hutto*, 454 U.S. at 375.

72 *Id.* at 373.

73 In *Solem*, the Supreme Court held that a sentence of life imprisonment without possibility of parole imposed under a South Dakota recividist statute for successive offenses that included three convictions of third-degree burglary, one conviction of obtaining money by false pretenses, one conviction of grand larceny, one conviction of third-offense driving while intoxicated, and one conviction of writing a "no a account" check with intent to defraud violated the Eighth Amendment because the sentence was disproportionate to the crime of recidivism. Solem v. Helm, 463 U.S. 277, 303 (1983).

74 *Id.* at 290-92.

75 *Hutto*, 454 U.S. at 373; Rummel v. Estelle, 445 U.S. 263, 281-82 (1980).

76 Harmelin v. Michigan, 111 S. Ct. 2680, 2686 (1991) (opinion of Scalia, J.).

77 *Id.* (opinion of Scalia, J.).

ments.[78] Instead, the drafters prohibited "cruel and unusual" punishments. Justice Scalia argued that the *Solem* Court incorrectly assumed that one included the other.[79] Justice Scalia used a historical analysis[80] to support his argument that the English Cruel and Unusual Punishments Clause was probably not meant to forbid "disproportionate" punishments.[81] Instead, Justice Scalia concluded the "unusual" requirement prohibited punishments contrary to "usage" or "precedent."[82]

Justice Scalia argued that the word "unusual" does not mean "contrary to law" today, but instead means "such as does not occur in ordinary practice."[83] The "cruel and unusual" punishments clause forbids the legislatures from authorizing particular forms or modes of punishment, specifically punishments that are not regularly employed.[84] Justice Scalia continued his historical analysis by examining several state constitutions, the state ratifying conventions, and early judicial constructions of the Eighth Amendment and its state counterpart to confirm his argument that the cruel and unusual punishments clause prohibits certain methods of punishment.[85]

Justice Scalia criticized the three factors that the *Solem* Court found relevant to the proportionality determination because these

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78 *Id.* at 2687 (opinion of Scalia, J.).

79 *Id.* (opinion of Scalia, J.).

80 *Id.* at 2687-91 (opinion of Scalia, J.). Justice Scalia argued that the abuses of Lord Chief Justice Jeffreys of the King's Bench during the Stuart reign of James II inspired the cruel and unusual punishments provision of the English Declaration of Rights. *Id.* at 2687. Jeffreys allegedly created penalties which were not authorized by common-law precedent or statute. *Id.* at 2688. Justice Scalia contended that the English cruel and unusual punishments clause focused on the illegality rather than disproportionality of Jeffreys' King's Bench activities. *Id.* Justice Scalia asserted that at that time, "illegal" and "unusual" were identical. *Id.* at 2690. Punishments were objectionable because they were contrary to law or precedent but not because punishments were disproportionate to the crime committed. *Id.* (opinion of Scalia, J.).

81 *Id.* at 2691 (opinion of Scalia, J.).

82 *Id.* (opinion of Scalia, J.).

83 *Id.* (opinion of Scalia, J.).

84 *Id.* (opinion of Scalia, J.).

85 *Id.* at 2692-96 (opinion of Scalia, J.). Several state constitutions explicitly contained proportionality guarantee provisions. *Id.* at 2692. For example, the Pennsylvania Constitution stated that punishments should be "in general more proportionate to the crimes." Pa. Const., Sec. 38 (1776). The New Hampshire Bill of Rights declared that "all penalties ought to be proportioned to the nature of the offence." N.H. Bill of Rights, Pt. 1, Art. XVIII (1784). Therefore, Justice Scalia argued that those men who framed and ratified the American Bill of Rights were aware of these state constitution provisions and purposely chose not to include a similar provision in the American Bill of Rights. *Harmelin*, 111 S. Ct. at 2692 (opinion of Scalia, J.). Justice Scalia cited early judicial cases in which judges found the proportionality of punishments irrelevant and instead, focused on modes of punishment. *Id.* at 2695 (opinion of Scalia, J.).

factors invite imposition of judges' subjective values.[86] As to the first factor, the inherent gravity of drug possession depends on how one views the social threat posed by drug use. Justice Scalia argued that the Michigan Legislature should decide this and not judges unfamiliar with the drug situation on the streets of Detroit.[87] The second factor, the sentences imposed for similarly grave offenses in the same jurisdiction, also fails because judges will decide what they consider comparable.[88] The third factor, the sentences imposed for the same crime in other jurisdictions, is irrelevant to the Eighth Amendment.[89] As a result of our federalist system, one state will often treat particular offenders more severely than other states because states have different needs and concerns.[90]

Finally, Justice Scalia argued that although twentieth century Supreme Court cases have not always followed the proposition that the Eighth Amendment contains no proportionality requirement, these cases have not departed from that proposition to the extent suggested by *Solem*.[91] Scalia attempted to minimize the holdings of *Weems v. United States*[92] and *Coker v. Georgia*[93] which both apply a requirement of proportionality to criminal penalties.

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86 *Id.* at 2697 (opinion of Scalia, J.).

87 *Id.* at 2698 (opinion of Scalia, J.).

88 *Id.* (opinion of Scalia, J.).

89 *Id.* (opinion of Scalia, J.).

90 *Id.* at 2699 (opinion of Scalia, J.).

91 *Id.* (opinion of Scalia, J.).

92 217 U.S. 349 (1910). In *Weems*, a government disbursing officer convicted of making false entries of small sums in his account book was sentenced by a Philippine court to fifteen years of *cadena temporal*. *Id.* at 357-58. The punishment called for incarceration at "hard and painful labor" with chains fastened to the wrists and ankles at all times. There were also accessory penalties imposed which included permanent disqualification from holding any position of public trust, subjection to government surveillance for life and "civil interdiction" which among others consisted of deprivation of the rights of parental authority and guardianship of person or property. *Id.* at 364. The Supreme Court held that the imposition of *cadena temporal* was cruel and unusual punishment. *Id.* at 382.

Justice Scalia admitted that the language of *Weems* could be interpreted to support either the principle that the Eighth Amendment forbids barbaric modes of punishments or the principle that the Eighth Amendment bars those punishments that are excessive in relation to the crime committed. *Harmelin*, 111 S. Ct. at 2700 (opinion of Scalia, J.). Justice Scalia argued that *Weems* probably did not announce a constitutional proportionality guarantee because neither the Supreme Court nor lower federal courts produced any decisions using a proportionality requirement for six decades after the *Weems* decision. *Id.* (opinion of Scalia, J.).

93 433 U.S. 584 (1976). In *Coker*, the Court held that imposition of capital punishment for rape of an adult woman is grossly disproportionate and constituted a violation of the cruel and unusual punishment clause. *Id.* at 600. Justice Scalia minimized this holding by arguing that Coker is part of the Supreme Court's death penalty jurisprudence and not a generalized aspect of Eighth Amendment law. *Harmelin*, 111 S. Ct. at 2701. "Death is different." *Id.* (opinion of Scalia, J.).

C. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy[94] filed an opinion concurring in part and concurring in the judgment. Although agreeing that the Eighth Amendment does not require the consideration of mitigating factors in noncapital cases, Justice Kennedy's Eighth Amendment proportionality analysis differed from Justice Scalia's. Justice Kennedy argued that regardless of historical arguments, stare decisis required adherence to the narrow proportionality principle that exists in the Court's Eighth Amendment jurisprudence.[95] The concurrence admitted that past proportionality decisions were not clear or consistent but concluded that past decisions could be reconciled.[96]

Justice Kennedy began by stating that past decisions recognize a narrow proportionality principle embodied in the cruel and unusual punishment clause of the Eighth Amendment. Justice Kennedy examined past decisions and offered several common principles that explain the uses and limits of the proportionality analyses.[97]

First, the fixing of prison terms for specific crimes is "properly within the province of legislatures, not courts."[98] Second, the Eighth Amendment does not mandate adoption of any one penological theory.[99] Third, a federalist system inevitably results in different theories on sentencing and the proper length of prescribed prison terms.[100] Finally, to the maximum extent possible, objective factors should guide proportionality reviews.[101] Justice Kennedy concluded that these principles suggest that the Eighth Amendment does not require strict proportionality between crime and sentence.[102] Instead, Justice Kennedy argued the Eighth Amendment prohibits only extreme sentences that are "grossly disproportionate" to the crime.[103]

Justice Kennedy distinguished *Harmelin's* facts from *Solem's* facts and concluded that Harmelin's crime was much more serious than Solem's crimes.[104] Justice Kennedy concluded that the Michigan Legislature could with reason decide that the threat posed to society

94 Justice Kennedy was joined by Justices O'Connor and Souter.
95 *Harmelin*, 111 S. Ct. at 2702 (Kennedy, J., concurring).
96 *Id.* (Kennedy, J., concurring).
97 *Id.* at 2703-05 (Kennedy, J., concurring).
98 *Id.* at 2703 (quoting Rummel v. Estelle, 445 U.S. 263, 275-276 (1980)) (Kennedy, J., concurring).
99 *Id.* at 2704 (Kennedy, J., concurring).
100 *Id.* (Kennedy, J., concurring).
101 *Id.* (Kennedy, J., concurring).
102 *Id.* at 2705 (Kennedy, J., concurring).
103 *Id.* (Kennedy, J., concurring).
104 *Id.* (Kennedy, J., concurring).

and the individual by possession of a large amount of cocaine warranted a life sentence without parole.[105] The severity of Harmelin's crime brings his sentence within Eighth Amendment boundaries established by prior decisions.[106]

The concurrence stated that after analyzing the gravity of the offense and the harshness of the penalty, the reviewing court does not need to address the second and third factors announced in *Solem*.[107] "Intra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed lead to an inference of gross disproportionality."[108]

D. JUSTICE WHITE'S DISSENTING OPINION

Writing in dissent[109], Justice White attacked Justice Scalia's argument that the Eighth Amendment does not contain a proportionality guarantee.[110] White contended that undeniably prior Supreme Court cases have interpreted the Eighth Amendment to embody a proportionality requirement.[111] Justice White argued that contrary to Justice Scalia's suggestion, the *Solem* analysis has worked well in practice.[112] Since the *Solem* decision, only four cases have been reversed on the basis of a proportionality analysis.[113] Therefore, White concluded that reviewing courts are not substituting their subjective views for those of the legislature.[114]

Justice White found two dangers in Justice Scalia's analysis.[115] First, Justice Scalia provided no mechanism for dealing with a situation like the one suggested in *Rummel* where a legislature makes overtime parking a felony punishable by life imprisonment.[116] Instead, Justice Scalia merely assured that these extreme examples will never occur.[117] Next, Justice White argued that Justice Scalia's posi-

105 *Id.* at 2706 (Kennedy, J., concurring).
106 *Id.* (Kennedy, J., concurring).
107 *Id.* at 2707 (Kennedy, J., concurring).
108 *Id.* (Kennedy, J., concurring).
109 Justice White was joined by Justices Blackmun and Stevens.
110 *Harmelin*, 111 S. Ct. at 2709-14 (White, J., dissenting).
111 *Id.* at 2711 (White, J., dissenting) (citing Weems v. United States, 217 U.S. 349 (1910); Gregg v. Georgia, 428 U.S. 153 (1976); Robinson v. California, 370 U.S. 660 (1962); Coker v. Georgia, 433 U.S. 584 (1976); Enmund v. Florida, 458 U.S. 782 (1982); Solem v. Helm, 463 U.S. 277 (1983)).
112 *Id.* at 2712-13 (White, J., dissenting).
113 *Id.* at 2713 n.2 (White, J., dissenting).
114 *Id.* at 2713 (White, J., dissenting).
115 *Id.* at 2714 (White, J., dissenting).
116 *Id.* (White, J., dissenting).
117 *Id.* (White, J., dissenting). Justice Scalia stated, "[O]ne can imagine extreme ex-

tion that Eighth Amendment only deals with methods and modes of punishment is inconsistent with the Court's capital decisions.[118] These cases do not outlaw death as a mode of punishment but put limits on its application.[119]

Justice White also argued that Justice Kennedy's analysis contradicts the language of the *Solem* opinion and other cases interpreting the Eighth Amendment.[120] Justice White objected to Justice Kennedy's argument that one of the *Solem* factors may be sufficient to determine the constitutionality of a sentence.[121] The Court in *Solem* stated, "no one factor will be dispositive in a given case," and "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment."[122]

Justice White proceeded to apply the *Solem* factors to Harmelin's case and decided that the statutorily mandated sentence violated the Eighth Amendment.[123] The first factor requires an assessment of the gravity of the offense and the harshness of the penalty.[124] Michigan has no death penalty, and therefore, life imprisonment without parole is the most severe punishment in the state.[125] Justice White concluded that the possession of over 650 grams of cocaine does not always warrant that severe punishment.[126] Under the second factor of the *Solem* analysis, Justice White concluded that Harmelin was treated in the same manner or more severely than persons who have committed more serious crimes.[127] The third factor requires an analysis of the sentences imposed for the same crime in other jurisdictions.[128] Justice White noted that no other jurisdiction imposes a punishment as severe as Michigan's for possessing over 650 grams of cocaine.[129]

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amples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are certain never to occur." *Id.* at 2696-97 (footnote omitted) (opinion of Scalia, J.).

118 *Id.* (White, J., dissenting).

119 *Id.* (White, J., dissenting).

120 *Id.* (White, J., dissenting).

121 *Id.* (White, J., dissenting).

122 Solem v. Helm, 463 U.S. 277, 291 n.17 (1983).

123 *Harmelin*, 111 S. Ct. at 2716-19 (White, J., dissenting).

124 *Id.* at 2716. (White, J., dissenting).

125 *Id.* (White, J., dissenting).

126 *Id.* (White, J., dissenting).

127 *Id.* at 2718. (White, J., dissenting). In Michigan, second-degree murder, rape, and armed robbery are not punished with as harsh mandatory sentences as Harmelin's possession of 650 grams or more of cocaine, although judicial discretion can impose a life sentence for those three crimes. *Id.* (White, J., dissenting).

128 *Id.* (White, J., dissenting).

129 *Id.* at 2719 (White, J., dissenting).

E. JUSTICE MARSHALL'S DISSENTING OPINION

Justice Marshall agreed with Justice White's dissenting opinion except with its assertion that the Eighth Amendment does not proscribe the death penalty.[130] Justice Marshall argued that in all circumstances the constitution prohibits the death penalty.[131]

F. JUSTICE STEVENS' DISSENTING OPINION

Justice Stevens[132] also agreed with White's dissenting opinion but added that a mandatory sentence of life in prison without possibility of parole was similar to the death penalty in that the offender will never regain freedom.[133] No other jurisdiction except Michigan has rejected reform and rehabilitation for this offense.[134] Although Harmelin's offense was serious, the Michigan legislature rationally could not have decided that every similar offender is uncorrectable.[135]

V. ANALYSIS

Although a majority of the justices failed to join any one opinion, a majority of the Court correctly decided that the Eighth Amendment did not require consideration of mitigating factors in Harmelin's case and that Harmelin's sentence of life in prison for possessing over 650 grams of cocaine was constitutional. Prior Supreme Court decisions fail to support Justice Scalia's assertion that the Eighth Amendment does not contain a proportionality requirement. Justice Kennedy's concurrence inappropriately modified the *Solem* three factor test. The *Solem* second and third factors, which the concurrence argued are unnecessary to determine the constitutionality of a punishment, are relevant to any proportionality analysis. Also, proportionality analyses should include a fourth factor requiring courts to consider local conditions, the legislative goals sought to be achieved by the punishment, and whether the legislative goals are rationally related to the punishment.

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130 *Id.* at 2719 (Marshall, J., dissenting).

131 *Id.* (Marshall, J., dissenting) (citing Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting)).

132 Justice Stevens was joined by Justice Blackmun.

133 *Harmelin*, 111 S. Ct. at 2719 (Stevens, J., dissenting).

134 *Id.* at 2720 (Steven, J., dissenting).

135 *Id.* at 2719-20 (Stevens, J., dissenting).

A. THE COURT CORRECTLY CONCLUDED THAT THE CONSTITUTION DOES NOT REQUIRE INDIVIDUALIZED SENTENCING IN NON-CAPITAL CASES

In *Harmelin*, a majority of the Court[136] correctly concluded that the Eighth Amendment does not require a consideration of mitigating factors in noncapital cases.[137] The Supreme Court has held that imposition of a capital sentence without an individualized determination of the appropriateness of the punishment constitutes cruel and unusual punishment under the Eighth Amendment.[138] Harmelin relied on this death penalty jurisprudence and argued that the Eighth Amendment required the Michigan courts to consider aggravating and mitigating factors before imposing a sentence of life in prison without possibility of parole.[139] Harmelin contended that life imprisonment without possibility of parole is the equivalent of a death sentence.[140]

First, the Constitution does not require individualized sentencing in non-capital cases.[141] Supreme Court decisions have also consistently held that no requirement of individualized sentencing exists in non-capital cases because of the difference between death and other penalties.[142] The death penalty is unique in its complete irrevocability and rejection of rehabilitation.[143] A variety of alternative techniques exist to modify an initial sentence of life in prison without possibility of parole. The possibilities of retroactive legislative reduction and executive clemency clearly exist in noncapital sentences of life in prison without possibility of parole and not in capital cases.[144]

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136 Justice Scalia delivered this portion of the opinion and Justices Rehnquist, O'Connor, Kennedy, and Souter joined. *See supra* text accompanying notes 55-64.

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

138 *Id.* at 2701 (citing Woodson v. North Carolina, 428 U.S. 280 (1976) (*see supra* note 58); Lockett v. Ohio, 438 U.S. 586 (1978) (*see supra* note 58); Eddings v. Oklahoma, 455 U.S. 105 (1982) (*see* supra note 18); Hitchcock v. Dugger, 481 U.S. 393 (1987) (*see supra* note 58).

139 Brief for Petitioner, *supra* note 35, at 21.

140 *Id.*

141 Lockett v. Ohio, 438 U.S. 586, 602-03 (1978). See *supra* note 58 for an explanation of *Lockett*.

142 *Harmelin*, 111 S. Ct. at 2702 (citing Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987)).

143 *Id.*

144 *Id.*

B. THE EIGHTH AMENDMENT CONTAINS A PROPORTIONALITY REQUIREMENT

Justice Scalia argued that *Solem* should be overruled because the decision was based on an Eighth Amendment proportionality guarantee.[145] Justice Scalia believes the Eighth Amendment contains no proportionality requirement.[146] Justice Scalia's argument is contrary to Supreme Court precedent, and therefore, Justice Scalia should have recognized an Eighth Amendment proportionality requirement on the basis of stare decisis.

Justice Scalia's argument that the Eighth Amendment contains no proportionality requirement clearly contradicts Supreme Court precedent. While stare decisis does not completely bind the Court's decisions, justices need to respect the development of the law. The concurrence correctly concluded that stare decisis required adherence to the narrow proportionality requirement recognized in the Court's prior decisions.

In *United States v. Weems*,[147] the Supreme Court first articulated the idea that the Eighth Amendment required a penalty to be proportionate to the crime. The *Weems* case involved a unique punishment. Weems was convicted of falsifying a public and official document[148] and under Philippine law, sentenced to the penalty of *cadena temporal*. *Cadena temporal* consisted of fifteen years of incarceration which included "hard and painful labor" with chains fastened to the wrists and ankles at all times. Accessory penalties were also imposed which included permanent disqualification from holding any position of public trust, government surveillance for life, deprivation of the rights of parental authority, guardianship of person or property.[149] The Supreme Court explicitly recognized proportionality as a requirement of the Eighth Amendment and struck down the punishment.[150]

The most extensive application of the proportionality requirement acknowledged in *Weems* has occurred in death penalty cases. In *Coker v. Georgia*, the Court held a death sentence for the crime of rape unconstitutionally disproportionate and therefore, cruel and unusual.[151] The Court recognized that the death penalty is unique

145 *Id.* at 2686.
146 *Id.*
147 217 U.S. 349 (1910).
148 *Id.* at 363-64.
149 *Id.* at 364-65.
150 *Id.* at 367. "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.*
151 Coker v. Georgia, 433 U.S. 584, 592 (1977).

in its total irrevocability but did not specifically address whether a proportionality requirement applied to terms of imprisonment.[152] In *Enmund v. Florida*[153], the Court again recognized the Eighth Amendment as requiring proportionality in sentencing. The *Enmund* Court held the death sentence disproportionate for felony murder, where the defendant did not commit the murder and did not intend to take a life.[154]

In *Rummel v. Estelle*, the Supreme Court refused to invalidate a sentence of life imprisonment with possibility of parole for conviction of a third felony under a Texas recidivist statute.[155] However, the majority recognized a proportionality requirement in the Eighth Amendment in capital and noncapital cases.[156] In *Hutto v. Davis*, the Court held a proportionality review inapplicable to a forty year prison sentence for the possession with intent to distribute of nine ounces of marihuana.[157] The Supreme Court recognized the possibility of a proportionality review in a situation where a legislature made overtime parking a felony punishable by life imprisonment.[158] The *Hutto* Court also stated that the *Rummel* decision stands for the proposition that federal courts "should be reluctant to review legislatively mandated terms of imprisonment . . . ."[159] Federal courts should be reluctant to review legislative terms of imprisonment, but the Court did not state that a proportionality analysis is inapplicable in noncapital cases.

In *Solem v. Helm*, the Supreme Court's most recent analysis of the Eighth Amendment and proportionality prior to *Harmelin v. Michigan*, the Court held that imposition of a sentence of life imprisonment without possibility of parole for conviction of seven successive felonies violated the Eighth Amendment.[160] The sentence of life imprisonment with possibility of parole was "significantly disproportionate" to the crime of recidivism.[161] The Court held that the Eighth Amendment's prohibition against cruel and unusual punishments forbids sentences that are disproportionate to the crime

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152 *Id.* at 598.

153 458 U.S. 782 (1982).

154 *Id.* at 787, 801.

155 Rummel v. Estelle, 445 U.S. 263, 284-85 (1980).

156 *Id.* at 271-74. The Court stated that the Eighth Amendment's proportionality requirement would come into play if a legislature made overtime parking a felony punishable by life imprisonment. *Id.* at 274 n.11.

157 Hutto v. Davis, 454 U.S. 370, 370-75 (1982).

158 *Id.* at 374 n.3.

159 *Id.* at 374 (quoting Rummel v. Estelle, 445 U.S. 263, 274 (1980)).

160 Solem v. Helm, 463 U.S. 277, 303 (1983).

161 *Id.*

committed.[162] The *Solem* dissent disagreed with the majority's proportionality analysis of *Solem's* facts, but the dissent did admit that in extreme, extraordinary cases it might be permissible for a court to decide if a term of imprisonment is grossly disproportionate to the crime.[163]

Thus, Justice Scalia's assertion that the Eighth Amendment does not contain a proportionality guarantee is inconsistent with Supreme Court precedent which recognizes an Eighth Amendment proportionality guarantee. Consequently, a majority of the *Harmelin* Court correctly continued to recognize the proportionality guarantee engraved in judicial interpretation of the Eighth Amendment.

C. IN APPLYING THE EIGHTH AMENDMENT'S PROPORTIONALITY REQUIREMENT, REVIEWING COURTS SHOULD GIVE DEFERENCE TO LEGISLATURES

The concurrence correctly concluded that the Eighth Amendment's proportionality requirement must be narrow to avoid interference with the deference courts owe legislatures.[164] However, Justice Kennedy incorrectly argued that one factor would be sufficient to determine the constitutionality of a punishment.[165] Instead, a reviewing court should consider all three *Solem* factors: 1) the gravity of the offense compared to severity of the penalty, 2) the penalties imposed on other criminals in the same jurisdiction, and 3) the penalties imposed in other jurisdictions for the same offense.[166] An additional factor of reviewing local conditions and the legislative goals sought to be achieved by the punishment should be considered. A reviewing court should consider all four factors, and no single factor should be dispositive.

Reviewing courts should defer to legislative judgment when considering the proportionality of a punishment under the Eighth Amendment. State legislatures are responsible for determining theories of deterrence, rehabilitation, and retribution as objectives to criminal punishment in their jurisdictions. Supreme Court precedent recognizes the substantial deference that should be given to a

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162 *Id.* at 284-90.

163 *Id.* at 311 n.3 (Burger, C.J., dissenting). Burger recognized that it might be appropriate for a court to decide whether a sentence is proportional in the hypothetical case of life imprisonment for overtime parking. Burger stated that the cruel and unusual punishments clause "might apply to those rare cases where reasonable men cannot differ as to the inappropriateness of punishment." *Id.* (Burger, C.J., dissenting).

164 Harmelin v. Michigan, 111 S. Ct. 2680, 2702 (1991) (Kennedy, J., concurring).

165 *Id.* at 2707.

166 *Solem*, 436 U.S. at 290-91.

punishment selected by a democratically elected legislature.[167] "[T]he independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in chosing between competing political, economic, and social pressures."[168] Legislatures are better equipped than courts to balance penal goals with public views and then decide which sentences are appropriate for different crimes.[169] Since the Eighth Amendment's proportionality requirement is narrow, there should be few successful challenges to punishments outside of capital cases.[170]

Justice Kennedy's concurrence inappropriately modified the *Solem* three factor test. The concurrence misinterpreted the language of *Solem* and the meaning of the *Solem* opinion. In *Solem*, the Supreme Court utilized a three part test[171] to hold a life sentence without possibility of parole for conviction of a seventh felony under a South Dakota recidivist statute unconstitutional.[172] The *Solem* Court stated that "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment."[173] The *Harmelin* concurrence argued, however, that one factor may be sufficient to determine the proportionality or constitutionality of a punishment.[174]

The *Harmelin* concurrence held that a reviewing court should make an initial comparison of the crime committed and the sentence imposed. If an initial comparison creates an inference of gross disproportionality, then a court may appropriately conduct an intra- and inter-jurisdictional analysis.[175] If a comparison of the crime and

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167 *Id.* at 290 ("reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes"); Rummel v. Estelle, 445 U.S. 262, 274 (1980) (courts should be reluctant to "review legislatively mandated terms of imprisonment"); Weems v. United States, 217 U.S. 349, 379 (1910) ("The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety").

168 Gregg v. Georgia, 428 U.S. 153, 175 (1976) (quoting Dennis v. United States, 341 U.S. 494, 525 (1951)) (Frankfurter, J., concurring in affirmance of judgment).

169 *Solem*, 463 U.S. at 314 (Burger, C.J., dissenting).

170 *Rummel*, 445 U.S. at 272.

171 The *Solem* Court's three factor test to determine the proportionality of a sentence under the Eighth Amendment included: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem*, 463 U.S. at 292.

172 *Id.* at 303.

173 *Id.* at 291 n.17.

174 Harmelin v. Michigan, 111 S. Ct. 2680, 2707 (1991) (Kennedy, J., concurring).

175 *Id.* (Kennedy, J., concurring).

the sentence does not lead to an inference of gross disproportionality, an intra- and inter-jurisdictional analysis need not be performed.[176]

The concurrence's assertion that the *Solem* second and third factors are not needed if an initial determination of proportionality is found contradicts the meaning of the *Solem* opinion. In *Solem*, the Court stated that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction," and that "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."[177] The concurrence argued that by using the word "may" the Court did not mandatorily require that these factors be utilized in proportionality analyses.

The concurrence puts unwarranted weight on the word "may" to justify its modification of the *Solem* test. The *Solem* Court stated that a proportionality analysis should be guided by objective factors which have been recognized in prior Supreme Court cases.[178] Further, the *Solem* Court stated that no one factor should be dispositive in determining disproportionality.[179] By using the word "may," the *Solem* Court merely recognized that in individual cases certain factors are more helpful or useful in determining the constitutionality of a given punishment. The *Solem* Court never suggested the adoption of a bright line standard in which only the first *Solem* factor could determine the constitutionality of a given punishment.

The dissent, on the other hand, correctly argued that the *Solem* second and third factors are important to any analysis of a given punishment's proportionality.[180] Numerous Supreme Court cases have used the *Solem* second and third factors to determine the proportionality of a punishment. For example, the *Weems* Court considered the less severe punishments for more severe crimes in the Philippine criminal code.[181] The *Weems* Court also noted that the punishment of *cadena temporal* was different from any American punishment.[182] In *Coker v. Georgia*, the Supreme Court compared the Georgia punishment of death for the crime of raping an adult woman to other states' penalties for rape.[183] Finally, in *Trop v. Dulles*, the Court reviewed international law before concluding that the punishment of loss of citizenship for wartime desertion violated the

176 *Id.* (Kennedy, J., concurring).
177 Solem v. Helm, 463 U.S. 277, 291 (1983).
178 *Id.* at 290.
179 *Id.* at 291 n.17.
180 *Harmelin*, 111 S. Ct. at 2715 (White, J., dissenting).
181 Weems v. United States, 217 U.S. 349, 380 (1910).
182 *Id.* at 377.
183 Coker v. Georgia, 433 U.S. 584, 596 (1977).

Eighth Amendment.[184]

When reviewing courts utilize the *Solem* third factor to compare the sentences imposed for commission of the same crime in other jurisdictions, they should always consider the nature of our federal system. Our federalist system invites states to adopt their own theories of deterrence, rehabilitation, and retribution. Each state possesses the independent power to express public interests through criminal laws.[185] Besides different theories and philosophies on criminal law, each state has different local conditions and problems which influence the length of its prison terms for given crimes.[186] Therefore, under our federalist system, one state will often treat similarly situated criminals more severely than other states.[187] Reviewing courts must remember that because a state possesses the most severe punishment for a certain crime does not in itself demonstrate a violation of the Eighth Amendment.

A state with the most severe punishment also may be considered the most progressive. One may argue that although the Michigan statute imposes the most severe penalty for possession of a controlled substance of the quantity involved *Harmelin's* case, the Michigan statute is the most progressive.[188] The Michigan statute provides graduated penalties depending upon the amount possessed. Punishments range from probation for possession of a small amount to life in prison without possibility of parole for possession of an amount of 650 grams or more.[189] Most other jurisdictions provide one penalty for all offenders.[190]

A proportionality analysis should also include a fourth factor which considers local conditions, the legislative goals sought to be achieved be imposing a certain punishment,[191] and whether these goals are rationally related to the punishment imposed for a certain crime. If a state's sentencing scheme or punishment for a given crime is rationally related to legitimate state goals, then this could contribute to the punishment's constitutionality.

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184 Trop v. Dulles, 356 U.S. 86, 103 (1985) (plurality opinion). "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Id.*

185 Harmelin v. Michigan 111 S. Ct. 2680, 2704 (1991). (Kennedy, J., concurring) (citing McCleskey v. Zant, 111 S.Ct. 1454, 1469 (1991)).

186 *Id.* at 2704 (Kennedy, J., concurring).

187 *Id.* (Kennedy, J., concurring) (citing *Rummel*, 445 U.S. at 281).

188 Brief for Respondent at 11, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter Brief for Respondent].

189 *Id.* at 11-12.

190 *Id.* at 12.

191 Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973).

First, courts must consider relevant local circumstances. The local prevalence of a certain criminal problem is a plausible justification for a state creating more severe penalties for certain crimes than other states.[192] For example, the *Solem* dissent recognized that horse thievery in Texas might be punished differently and more severely than stealing a horse in Rhode Island.[193] Similarly, drug trafficking poses severe problems for highly urban states like New York which are fighting large scale drug operations in their cities.

After determining the legislative goals sought to be achieved by the punishment, courts should analyze whether the state legislative goals are rationally related to the punishment. "If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted,"[194] then this would also contribute to a conclusion of disproportionality.[195] Courts should ask whether the state's punishment is rationally related to the legitimate legislative purpose. For example, a state could punish overtime parking with life imprisonment. This punishment would serve the purpose of deterring vehicular lawlessness. However, the punishment is not rationally related to the state goal because significantly less severe punishments could serve the same goal. In sum, if a punishment fails to contribute to legitimate state goals and therefore, inflicts unnecessary pain, this fact points to the unconstitutionality of the punishment.

Carmona v. Ward demonstrates an approach which reviewing courts could follow to ensure consideration of local conditions and policies.[196] In *Carmona*, the plaintiffs sought a federal writ of habeas corpus arguing that their mandatory life sentences for convictions of possessing one ounce of cocaine and a "street sale" of .00445 ounce of cocaine violated the Eighth Amendment.[197] The Second Circuit held constitutional the mandatory life sentences for the minor drug

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192 Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1144 (1979).

193 Solem v. Helm, 463 U.S. 277, 309 (1983) (Burger, C.J., dissenting).

194 Furman v. Georgia, 408 U.S. 238, 279 (1972).

195 In *Gregg*, the Court stated that an excessive punishment involves "the unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173 (1976). In *Coker*, the Supreme Court stated that an excessive and unconstitutional punishment "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering . . . . " Coker v. Georgia, 433 U.S. 584, 592 (1977).

196 See People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338, *cert. denied*, 423 U.S. 950 (1975) for a similar approach in reviewing punishments under the same New York statute.

197 Carmona v. Ward, 576 F.2d 405, 406, 417 (2nd Cir. 1978).

offenses.[198] The court took into account the punishments for other serious crimes in New York and the punishments in other jurisdictions for the same crime.[199]

The *Carmona* court also considered the local situation in New York and the legislature's goals.[200] The court stated that the purpose of the New York drug law was both isolation of offenders and deterrence.[201] In 1967, the governor of New York sponsored a statute which emphasized treatment of drug addicts and not imprisonment.[202] However, most of those treated were not cured but became recidivists.[203] The court noted that more than half of all the addicts in the nation resided in New York City.[204] The court stated that New York's determination that drug trafficking posed an immediate enough threat to pass the most severe punishment in the nation[205] could not be characterized as "arbitrary or irrational."[206] Finally, the court stated, "If the punishment must fit the crime, the legislature must look at the crime as found in its own borders and the action of the states with drug problems of lesser magnitude are of little relevance."[207]

VI. CONCLUSION

The *Harmelin* Court addressed the issue of whether the Eighth Amendment contains a proportionality requirement and held that a mandatory sentence of life in prison without possibility of parole for a conviction of possessing more than 650 grams of cocaine, without any consideration of mitigating factors, did not violate the Eighth Amendment. The concurrence correctly concluded that the Eighth Amendment forbids not only certain methods and modes of punishment but also punishments that are disproportionate to the crimes committed. A narrow proportionality guarantee serves two purposes. First, the Eighth Amendment proportionality requirement serves as a check on legislatures unconstitutionally infringing on individual rights. Second, a narrow proportionality guarantee pre-

198 *Id.* at 417.
199 *Id.* at 414-15.
200 *Id.*
201 *Id.* at 414.
202 *Id.* at 413.
203 *Id.*
204 *Id.* at 415.
205 *Id.* at 414.
206 *Id.* at 415. The court distinguished this case from the punishment of death for the crime of rape in Coker v. Georgia. Georgia's punishment of death was unique among the states, but there was no indication that significantly more rapes occurred in Georgia. *Id.*
207 *Id.*

serves legislatures' broad power to fashion punishments which reflect their local conditions and theories of deterrence, rehabilitation, and retribution. In addition to the three *Solem* factors, proportionality reviews should include a rational basis test. Courts should consider local conditions when determining whether state goals are legitimate and rationally related to a given punishment.

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