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Crime and Punishment: The Eighth Amendment's Proportionality Guarantee After *Harmelin v. Michigan*

I. INTRODUCTION

The political philosopher Jean-Jacques Rousseau wrote, "The first of all laws is to respect the laws: the severity of penalties is only a vain resource, invented by little minds in order to substitute terror for that respect which they have no means of obtaining."¹ Unfortunately, the mentality to which Rousseau referred manifests itself with increasing frequency as state and federal legislators try in vain to reduce criminal activity. The quintessential example of this type of legislation is Michigan's drug possession law. The Michigan statute imposes a mandatory life sentence without possibility of parole for defendants convicted of possessing 650 or more grams of any cocaine mixture, regardless of the purity of the mixture or the defendant's degree of culpability and criminal record.² The constitutionality of similar laws in other states has been vigorously and successfully challenged.³ However, during its 1990 term the Supreme Court reversed this trend by upholding the constitutionality of Michigan's "major controlled substance offense" statute.⁴

*Harmelin v. Michigan*⁵ raises serious doubts about the future of the Eighth Amendment's proportionality guarantee. While there was no majority, a reading of the Court's and concurring Justices' opinions strongly suggests that this Court cannot be relied upon to safeguard the fundamental

1. JEAN-JACQUES ROUSSEAU, A DISCOURSE ON POLITICAL ECONOMY 119 (G.D.H. Cole trans., 1758).

2. MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West Supp. 1990-1991).

3. See *Solem v. Helm*, 463 U.S. 277 (1983) (sustaining an Eighth Amendment challenge to a South Dakota recidivist statute on the grounds that a sentence of life imprisonment without possibility of parole was disproportionate); *Robinson v. California*, 370 U.S. 660 (1962) (holding that it was cruel and unusual punishment to imprison a defendant for drug addiction).

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

5. *Id.*

principle that criminal punishments must be proportional to the crime for which they are imposed.⁶

This Note examines *Harmelin's* implications for proportionality analysis within the Eighth Amendment and what action the Court should take if it should revisit this issue. Part II reviews the historical antecedents of the Eighth Amendment, the evolution of proportionality analysis in both capital and non-capital Eighth Amendment cases, and the status of proportionality analysis within the Eighth Amendment prior to *Harmelin*. Part III provides the facts of *Harmelin v. Michigan* and the reasoning of the Court, concurring Justices, and dissent. Part IV analyzes *Harmelin's* implications and the proper role of proportionality analysis in Eighth Amendment adjudication. Finally, this Note concludes that our society's conception of humanity and justice, and the Court's incongruent handling of proportionality in capital and non-capital Eighth Amendment cases, mandates recognition of the Eighth Amendment's proportionality guarantee in all cases.

II. BACKGROUND: THE HISTORY OF PROPORTIONALITY AND THE EIGHTH AMENDMENT.

This Note will use two different approaches to constitutional interpretation. The first, a fixed historical approach,⁷ must be considered because the Supreme Court has clearly manifest its proclivity for this line of analysis.⁸ However,

6. Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 853-54 (1972).

7. When applied to the Eighth Amendment, this method "attempts to ascertain 'the particular abuses that the Framers of the Constitution had in mind to correct [by looking to] those immemorial usages in England that were not rejected by the Colonies . . .'" Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 786 (1975). However, this method of constitutional interpretation should not be exclusively relied upon. This very narrow intent-based analysis has led individual Justices, and at times the whole Court, to "suspect, if not invalid, and to inconsistent, if not incompatible, methods and explanations in applying the theory of the 'intent of the Framers' to the interpretation of the Constitution."

Id. at 787.

8. The Court's inclination to rely on the historical antecedents of the "cruel and unusual punishments" clause in interpreting the Eighth Amendment is plainly illustrated by Justice Scalia's opinion in *Harmelin*. First, Justice Scalia accurately observed, "*Solem* based its conclusion principally upon the proposition that a right to be free from disproportionate punishments was embodied within the 'cruel and

there is some disagreement regarding the Court's preference for this more static, historical mode. Not only has the Court mandated a more flexible approach for itself,⁹ but it has applied the principle often enough that at least one commentator has observed, "[T]he Court has not attempted to interpret this provision of the Constitution in a purely historical or static manner but has accepted the concept that it must develop over time."¹⁰ Thus, rather than endeavoring to resolve the conflicts over which method of constitutional interpretation is to be preferred or which has been most often applied by the Court, this Note analyzes the Eighth Amendment and its antecedents under both interpretative models.

The starting point for both methods is consideration of the historical antecedents of the Eighth Amendment's Cruel and Unusual Punishments Clause. Although a detailed history of the concept of "cruel and unusual punishments" exceeds the scope of this paper,¹¹ the evolution of this princi-

unusual punishments' provision of the English Declaration of Rights of 1689, and was incorporated, with that language, in the Eighth Amendment." *Harmelin*, 111 S. Ct. at 2686. Secondly, Justice Scalia's extensive efforts to historically justify his opinion in *Harmelin* strongly imply that the Court is still inclined in this direction. See, *id.* at 2686-2699. Finally, it should be noted that generally, this is the Court's preferred approach to the Eighth Amendment. "In its search for purposeful standards to give meaning to the eighth amendment, the Supreme Court has usually employed the method of legal historical analysis as its key tool in the process of constitutional interpretation." Schwartz & Wishingrad, *supra* note 7, at 792.

9. The Court has clearly recognized that flexibility in constitutional interpretation is essential.

In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.

Weems v. United States, 217 U.S. 349, 373 (1910).

10. John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 484 (1990).

11. Comprehensive histories of the English Declaration of Rights and the Eighth Amendment are readily available. Most notable in the context of proportionality analysis are Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378 (1980); LARRY CHARLES BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT (1975); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted." *The Original Meaning*, 57 CAL. L. REV. 839 (1969).

ple during the past century can be traced and merits brief review.

The "cruel and unusual punishment" concept has been developing for centuries. It apparently originated with King Alfred in the tenth century (A.D. 900).¹² Approximately three hundred years later the principle was included in the Magna Carta (A.D. 1215) which "contained three provisions dealing with the concept of disproportionate punishments."¹³ Three centuries later that principle was codified into English law in A.D. 1533.¹⁴ However, it was not until the English Declaration of Rights (A.D. 1688) that the concept took the form with which we now familiar. In fact, the English Declaration is the immediate progenitor of our Eighth Amendment.¹⁵ Borrowing from the English Declaration the principle was included in the Virginia Declaration of Rights (A.D. 1776), most other state constitutions, the Virginia Proposed Amendments to the Constitution (A.D. 1788), and on June 8, 1789 James Madison offered a slightly modified version of the Virginia proposal as an amendment to the United States Constitution.¹⁶ Finally, "on December 15, 1791 the Cruel and Unusual Punishment Clause became the Eighth Amendment and formally part of the law of the land."¹⁷ Because the Declaration of Rights is the most immediate predecessor to the Eighth Amendment, it should be the first step in any historical analysis of the Cruel and Unusual Punishments Clause.

A. *The English Declaration of Rights*

The relationship between the English Declaration of Rights and the Eighth Amendment is well established. In fact, the nexus between these two bodies of law is such, that it is rare to read about the "Cruel and Unusual Punishments Clause" without first reading about its English

12. Berkson, *supra* note 11, at 159.

13. *Id.* at 3.

14. SOURCES OF OUR LIBERTIES 236 (Richard L. Perry ed., 1972).

15. "The eighth amendment's prohibition of cruel and unusual punishment was taken directly from the British Declaration of Rights of 1688 . . ." Wheeler, *supra* note 6, at 839.

16. "Amendment proposed by Madison . . . : 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" 5 THE ROOTS OF THE BILL OF RIGHTS 1008-09 (Edwin D. Webb ed., 1980).

17. Berkson, *supra* note 11, at 8.

forerunner. However, while it is virtually undisputed that the Declaration of Rights was the model for early American state constitutions,¹⁸ and ultimately the Bill of Rights,¹⁹ substantial controversy continues to surround the meaning of the Cruel and Unusual Punishments Clause. This controversy is best understood in terms of the two major areas of disagreement: 1) What was intended by the English Declaration's prohibition on "cruel and unusual punishments"? 2) How did the American Framers understand the prohibition, and what was their intent in adopting the Eighth Amendment?

The "cruel and unusual punishments" clause in the Declaration of Rights essentially codified preexisting legal principles.²⁰ Therefore, it is significant to note that evidence indicates proportionality was among those principles the English framers sought to reinforce by adopting that document. "The prohibition of cruel and unusual punishments was based on the longstanding principle of English law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged."²¹ There is also substantial circumstantial evidence to support this conclusion. Notably, at the time of the Declaration of Rights, not only did "punishments involving torture and

18. "Following its inclusion in the Virginia constitution, eight other states adopted the clause, the federal government inserted it into the Northwest Ordinance of 1787, and it became the eighth amendment to the United States Constitution in 1791." Granucci, *supra* note 11, at 840.

19. *Id.*

20. *Id.* at 847-60.

21. SOURCES OF OUR LIBERTIES, *supra* note 14, at 236. "[P]rior to adoption of the Bill of Rights of 1689 England had developed a common law prohibition against excessive punishments in any form." Granucci, *supra* note 11, at 847.

The English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties.

Id. at 860.

The inhibition was incorporated into the English Bill of Rights in order to restrict the degree of punishment, and not to restrict the mode of inflicting it. This is clearly established by an examination of early English documents and by analyzing the events immediately prior to and following its adoption in 1689.

Berkson, *supra* note 11, at 159.

mutilation [continue] to be legal in cases where such punishments were deemed proportionate to the crime,²² but infliction of the “[b]rutal penalties continued.”²³

However, this conclusion regarding proportionality's place in the Declaration of Rights is not without its detractors. At least one commentator, Charles Walter Schwartz, has posited two reasons to believe that proportionality was not guaranteed by the English Declaration. First, he argued that “[d]isproportionate punishment continued to occur with great frequency following enactment of the English Bill of Rights.”²⁴ The only evidence adduced to support this assertion is that the number of offenses labeled as capital crimes increased significantly between 1689 and 1800. However, this fact does little to support Schwartz' conclusion that disproportionate punishments were commonplace. The number of capital crimes in England in 1800, as compared to England in 1992, may be easily explained by acknowledging that Britain's conceptions of crime and proportionality have evolved as the framers of the Declaration intended. Furthermore, it must be remembered that disproportionality is a determination that must be based on contemporary mores and theories of punishment. Thus, the mere fact that some crimes that were labeled “capital” at the end of the eighteenth century are not so labeled today, does not support the conclusion that the original label and attendant punishment were disproportionate. Significantly, Schwartz provides no reason to believe that the labeling of crimes or the imposition of punishments in the seventeenth and eighteenth centuries was arbitrary and capricious, and considered disproportionate by any group at that time.

Schwartz' second argument is that there is no evidence that proportionality was mentioned in the parliamentary debate preceding adoption of the Declaration of Rights.²⁵ However, this unsupported assertion is clearly contrary to the historical evidence, which reflects the English framers' intent to prohibit disproportionate punishments. Therefore, because the English Declaration of Rights was clearly intended to proscribe disproportionate punishments, reason

22. SOURCES OF OUR LIBERTIES, *supra* note 14, at 236.

23. Berkson, *supra* note 11, at 3.

24. Schwartz, *supra* note 11, at 380.

25. *Id.* at 381.

dictates that rejection of proportionality analysis within the Eighth Amendment must be premised on the American Framers' renunciation of the principle, not on the historical fallacy that the English Declaration of Rights was not intended to proscribe disproportionate punishments.²⁶

B. *The American Framers and the Eighth Amendment*

While some have argued that there is insufficient historical evidence to determine the Framers' understanding of the Cruel and Unusual Punishments Clause and their intent in adopting the Eighth Amendment, there is a substantial body of historical data to aid in the resolution of these questions. There are Congressional Records of the debates regarding the Bill of Rights, correspondence between delegates during the ratification process, the state proposals for amending the Constitution and the individual states' constitutions. While each of these alone may be inadequate to establish the Framers' intent, together, particularly when combined with records of the state ratification debates, there is "sufficient contemporary comment to establish the interpretation which the Framers placed on the words 'cruel and unusual.'"²⁷

While there is disagreement over the intended role of proportionality within the Eighth Amendment, the number of answers to the question is limited. Because there is a consensus that the Framers' intended to proscribe "cruel and unusual" modes of punishment,²⁸ resolution of the ques-

26. In fact, in *Harmelin*, Justice Scalia makes a very similar argument. Although his rationale is somewhat different, Justice Scalia contends, "Unless one accepts the notion of a blind incorporation, however, the ultimate question is not what 'cruel and unusual punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment." *Harmelin v. Michigan*, 111 S. Ct. 2680, 2691 (1991).

27. Granucci, *supra* note 11, at 841.

28. "Since the Amendment was passed with almost no debate at all, all we can say with certainty is that the Framers thought they were proscribing torture and other barbarous punishments." WILLIAM COHEN & JOHN KAPLAN, *BILL OF RIGHTS*, 726 (1976). Unfortunately the case law in this area reflects the same lack of historical precision. "Of the large number of cases decided which have interpreted the constitutional prohibition against cruel and unusual punishment, several areas of significant agreement can be found. Among these is that the prohibition forbids every form of barbarism in meting out punishment that can be devised."

THE VIRGINIA COMM'N ON CONSTITUTIONAL GOV'T, *NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED* 16 (1965).

tions regarding proportionality within the Amendment can have only one of two results. Either the American Framers completely altered the meaning of the Cruel and Unusual Punishments Clause from that intended by its English authors by prohibiting undesirable methods rather than disproportionate degrees of punishment, or the Americans expanded the scope of the guarantee to protect against barbarous *and* excessive punishments.

A consideration of the American Framers' intent would be inadequate without an examination of the different sources of their understanding of the Cruel and Unusual Punishments Clause. Contrary to popular belief, the Framers were influenced by more than their English experience. By the time the Framers began introducing and debating amendments to the Constitution, there was already a significant body of colonial law identifying fundamental rights. Furthermore, by 1775 the European Enlightenment was well underway, and its influence had already extended to the Founders of this fledgling republic.

1. *The English Intent—An American Misunderstanding?*

In an effort to reconcile the Framers' clear intent to proscribe inhumane methods with the English Declaration of Rights' prohibition of excessive punishments, it has been suggested that the Framers' simply misunderstood their own legal history.

However, a fresh look at the history of punishment in England, and especially the framing of the English Bill of Rights of 1689, indicates that the Framers themselves seriously misinterpreted English law. Not only had Great Britain developed, prior to 1689, a general policy against excessiveness in punishments, but it did not prohibit "barbarous" punishments that were proportionate to an offense.²⁹

However, this argument proceeds from an illogical premise. Mr. Granucci correctly argued that the Framers intended to prohibit inhumane forms of punishment. However, as a concomitant to this he asserted that the Framers must have misunderstood the intent of the English Declaration because

29. Granucci, *supra* note 11, at 843-44.

"their interpretation of the cruel and unusual punishments clause [was] opposite to that of the English view."³⁰ However, this conclusion assumes that the prohibition of inhumane modes of punishment is mutually exclusive with the proscription of excessive punishments. Clearly this is not the case, and Granucci does not attempt to explain why it might be.

A more plausible explanation of this American modification is that the American Framers recognized the flaw in the English interpretation of the "cruel and unusual punishments" clause and sought to remedy it. It is well established that the Americans valued the proportionality principle so greatly that they explicitly provided for it in many of their state constitutions. "The authors of the state constitutions knew precisely how to prohibit disproportionate punishments and clearly did so."³¹ However, Schwartz argued that because many of the state constitutions expressly recognized the proportionality principle, the Framers must not have intended to include it in the Federal Bill of Rights because they did not explicitly mention it.³² This argument is counterintuitive. Proceeding from the premise that the principle was important enough to include in state constitutions, surely the Framers considered it important enough to include in the Federal Constitution. After all, it was the federal government that many of the Framers feared most. This is consistent with the second alternative above, that the Framers intended to expand the scope of the Clause, not to redefine it.³³ The Framers' failure to explicitly pro-

30. *Id.* at 860.

31. Schwartz, *supra* note 11, at 381.

32. *Id.* at 382.

33. There are a number of possible explanations for why the Americans would broaden the scope of the Eighth Amendment. The most likely is that they were particularly concerned about inhumane punishments, and this concern highlighted the weaknesses of the Declaration of Rights. There is considerable historical evidence of the early colonists' concerns with barbarous punishments.

"When the concept reached American shores, however, it took on a different meaning. From the very beginning, Americans expressed a great concern over cruel and unusual modes of punishment, as is illustrated in the Massachusetts Body of Liberties (1641). Many were rarely, if ever, utilized in the colonies." Berkson, *supra* note 11, at 159. Berkson further explains that in spite of the English Declaration's focus on proportionality, "Upon introduction to North America, the concept took on *expanded meaning* and emphasis was placed upon restricting the kind of punishment that might be imposed." *Id.* at 65 (emphasis added). However, Berkson concludes that although the excessiveness doctrine was neglected, it was not excised

vide for proportionality by proscribing excessive punishments is most logically understood to reflect the Framers' view that the proportionality principle is inherent in the Eighth Amendment, and therefore there was no need to explicitly provide for it.

2. *The Enlightenment and the Colonial Conception of the Cruel and Unusual Punishments Clause*

In the abstract, the fixed historical approach to constitutional interpretation is methodologically sound. However, the validity of any such conclusion necessarily depends on the adequacy of the historical research. One of the fundamental problems with the evolution of Eighth Amendment jurisprudence has been the Court's failure to base its opinions on horizontally and vertically cumulative historical data.³⁴ It is not enough for the Court to consider a single historical strand of the Cruel and Unusual Punishments Clause. Rather, if the Court is to indulge its preference for legal historical analysis, it must consider all historical aspects of the prohibition's evolution.

What the prohibition of cruel and unusual punishments was intended to forbid remains questionable. Acceptance of the clause as the outcome of only 17th Century thought and history is to ignore nearly 100 years of American historical development. It is also a denial of 100 years of critical thinking by the philosophers who were widely read and influential in the new, as well as the old, world prior to the Bill of Rights of the United States Constitution.

from the Eighth Amendment.

As the decades and centuries wore on, the notion that the phrase restricted the degree of punishment was *deemphasized*, while at the same time emphasis was placed on the idea that the phrase restricted the mode of punishment. This led many scholars and jurists to believe that the cruel and unusual punishment inhibition restricted only certain methods of punishment, as is evidenced in the nineteenth century decisions of both state and federal courts. *Nevertheless, the idea that the prohibition restricted the degree as well was by no means dead.*

Id. at 159 (emphasis added).

34. In this vein, it has been noted that, "Errors are the inevitable result of the use of incomplete historical sources. More specifically, the Court has relied on English history while slighting the importance of the Enlightenment which swept Europe and influenced the political ideology of the Framers." Schwartz & Wishingrad, *supra* note 7, at 792.

Such an omission is clearly illogical, yet that is, in effect, the position of the Supreme Court.³⁵

In short, if an historical approach to interpreting the Eighth Amendment prohibition of "cruel and unusual punishments" is taken, that analysis must include consideration of the Enlightenment and its impact on the American Framers.³⁶

A complete discussion of the Enlightenment's role in the development of American Eighth Amendment understanding necessarily involves consideration of some of the European philosophers. The most noteworthy among these are Voltaire, Montesquieu, and "especially Beccaria."³⁷ While Voltaire, Montesquieu and others questioned the premises of their respective criminal codes, as a group they "found their spokesman in Cesare Beccaria, whose treatise *On Crimes and Punishments* was written in Italy in 1764."³⁸

There can be no debate regarding the influence of the Enlightenment thinkers on the Founding Fathers.³⁹ Not only do we know that the Framers were familiar with the writings of "social critics such as Voltaire, Rousseau, Montesquieu, and Beccaria,"⁴⁰ but there is irrefutable evidence that "these ideas were studied earnestly by the revolutionary leaders, during and after the war, in an effort to

35. *Id.* at 815-16.

36. "Incorporating these Enlightenment doctrines into the historical method of reasoning would insure that the eighth amendment becomes the viable protection it was meant to be, rather than an historical curiosity with limited contemporary impact." *Id.* at 793.

37. *Id.* at 784-85.

38. *Id.* at 808.

39. It is essential not to underestimate the influence Beccaria and others had on American thought.

The force of Beccaria's treatise *On Crimes and Punishments* was felt as much in America as in Europe. There were three American translations of Beccaria, each coupled with Voltaire's *Commentary*, which were published in America before the formulation of the Bill of Rights. They became immediately popular at both bookstores and lending libraries. In every colony, the ideas and writing of such social critics and reformers as Voltaire, Rousseau, Montesquieu, and Beccaria were known and often quoted. As Justice Douglas recognized nearly two centuries later: "The Italian jurist Beccaria and his French and English followers influenced American thought in the critical years following our Revolution."

Id. at 813 (quoting *Ullman v. United States*, 350 U.S. 422, 450 (1956) (Douglas, J. dissenting)).

40. *Id.* at 807.

reform their own institutions."⁴¹ Examples of this influence can be found in state constitutions,⁴² correspondence between the Framers,⁴³ and in some of the political writings of the period.⁴⁴ Thus, there can be little question regarding the role of the Enlightenment in early American thought regarding the Cruel and Unusual Punishments Clause.

Not surprisingly however, it has been argued that there is no evidence of a causal relationship between Beccaria's writings and the Eighth Amendment.⁴⁵ However, there is a

41. *Id.* at 807-08.

42. A clear example of the Enlightenment philosophers influence is found by examining the history of the Pennsylvania Constitution.

Admittedly influenced by the French philosophers like Voltaire, Rousseau, and Montesquieu, the delegates [to the Pennsylvania Constitutional Convention] prepared both "A Declaration of Rights" taken almost verbatim from the "Virginia Bill of Rights" and a constitution which has been called the "closest approach to political perfection ever devised by mankind." The provision in the body of the constitution . . . reads as follows: "The penal laws, as heretofore used, shall be reformed by the future Legislature of this State, as soon as may be, and punishments made in some cases less sanguinary and in general more proportionate to the crimes." It is interesting to note that the emphasis seems to be more upon the proportionality between crime and punishment than on the sanguinary aspects. In other words, a limited use of torture or so-called inhuman or barbarous types of punishment for heinous offenses might be less objectionable than the imposition of excessive terms of imprisonment, a theoretically "humane" punishment.

Id. at 821.

43. In personal correspondence both Thomas Jefferson and Benjamin Franklin referred to the need for proportional punishments. While he was revising Virginia's laws in the summer of 1776 Jefferson wrote Edmund Pendleton:

Punishments I know are necessary, and I would provide them, strict and inflexible, but proportioned to the crime. Death might be inflicted for murder and perhaps for treason if you would take out the description of treason all crimes which are not such in their nature. Rape, buggery & c. punish by castration, all other crimes by working on high roads, rivers, gallies & c. a certain time proportioned to the offense . . . Laws thus proportionate and mild should never be dispensed with.

Id. at 817-18. Another example of the Framers' commitment to proportionality is found in a letter from Benjamin Franklin to Benjamin Vaughan, dated 1785. "Franklin objected to the lack of proportionality in English Law which provided death for offenses ranging from theft to murder. He said, '[t]o put a man to Death for an Offense which does not deserve Death, is it not Murder?'" *Id.* at 822.

44. The totality of the Enlightenment's influence on American thought is clearly illustrated by an excerpt from the writings of William Bradford, President George Washington's Attorney General. He "referred in his writings on criminal law to the ideas of Montesquieu and Beccaria as having set forth the general principles upon which penal laws ought to be founded." *Id.* at 823.

45. As an illustration of the objection, Schwartz argues that simply proving Thomas Jefferson read Beccaria does not establish that he integrated those ideas

sound body of historical data that establishes the Framers' familiarity with Enlightenment principles, and references those principles as the source of at least some of the Framers' constitutional philosophies. The proportionality principle in the Eighth Amendment was one of these.

Beccaria's treatise *On Crimes and Punishments*, together with Voltaire's and Montesquieu's works on criminal law reform, provided the philosophical basis for the principle of proportionality of punishment. Since these works influenced American colonial leaders, the principle of proportionality must necessarily be reflected in the Eighth Amendment.⁴⁶

C. *The Evolution of Proportionality in American Case Law*

Although the Supreme Court has been addressing "cruel and unusual punishment" questions for well over a century,⁴⁷ Eighth Amendment jurisprudence is still evolving. Nowhere is this more apparent than in the Court's proportionality decisions. Unfortunately, the Court has unnaturally altered this evolution by artificially distinguishing between capital and non-capital cases. The artificiality of this "distinction" is particularly significant because it lies at the heart of the Court's and concurring Justices' opinions in *Harmelin*. Therefore, it is important to examine the evolution of proportionality in capital and non-capital cases, and understand how this distinction has affected the development of Eighth Amendment jurisprudence.

1. *Proportionality in Non-capital Cases*

Although the Court has been called upon to construe the Eighth Amendment many times, proportionality has only been at issue in a handful of cases. A review of the Court's non-capital proportionality decisions should begin with *Weems v. United States*,⁴⁸ the first and arguably most important opinion in this line of cases.

into his constitutional philosophy. "Jefferson was a widely read man; certainly no one has seriously argued that all that he read was adopted by reference in the Constitution." Schwartz, *supra* note 11, at 381.

46. *Id.* at 785.

47. The Court first addressed the Eighth Amendment's prohibition of "cruel and unusual punishments" in 1867. The case was *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 608 (1867). Schwartz, *supra* note 11, at 382.

48. 217 U.S. 349 (1910).

Weems, a disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was convicted of falsifying a "public and official document" in order to misappropriate approximately 616 pesos (Philippine currency). Following his conviction Weems was sentenced to 15 years *cadena temporal*.⁴⁹ On appeal, the United States Supreme Court clearly recognized the principle of proportionality for non-capital cases and declared Weems' sentence to be "cruel and unusual."⁵⁰ The precedent value of this case cannot be overstated. *Weems* was the first time a majority of the Supreme Court recognized the Eighth Amendment guarantee that

49. *Id.* at 358. Weems' punishment was described as follows:

The punishment of *cadena temporal* is from twelve years and one day to twenty years (arts. 28 and 96), which "shall be served" in certain "penal institutions." And it is provided that "those sentenced to *cadena temporal* and *cadena perpetua* shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrist; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." Arts. 105, 106. There are besides certain accessory penalties imposed, which are defined to be (1) civil interdiction; (2) perpetual absolute disqualification; (3) subjection to surveillance during life. These penalties are defined as follows:

Art. 42. Civil interdiction shall deprive the person punished as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos*. Those cases are excepted in which the law explicitly limits its effects.

Art. 43. Subjection to the surveillance of the authorities imposes the following obligations on the person punished.

1. That of fixing his domicile and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority in writing.

2. To observe the rules of inspection prescribed.

3. To adopt some trade, art, industry, or profession, should he not have known means of subsistence of his own.

"Whenever a person punished is placed under the surveillance of the authorities, notice thereof shall be given to the government and to the governor general."

The penalty of perpetual absolute disqualification is the deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to public office, the disqualification to acquire honors, etc., and the loss of retirement pay, etc.

Id. at 364-65.

50. *Id.* at 366-67, 377.

punishments must be proportioned to crimes.⁵¹ Furthermore, although the *Harmelin* Court attempted to limit the holding in *Weems*, the case has never been overruled. Thus, the *Weems* Court's analysis continues to be the cornerstone of contemporary Eighth Amendment proportionality law.

Following its 1910 decision in *Weems*, the Court did not revisit the issue of Eighth Amendment proportionality in a significant way until 1958.⁵² At that time the Court decided *Trop v. Dulles*.⁵³ In *Trop*, a native-born American was convicted of wartime desertion, and subsequently stripped of his United States citizenship. On appeal *Trop* argued that the sentence contravened the Eighth Amendment prohibition of "cruel and unusual punishments." In its opinion the Court observed that even after *Weems*, "[t]he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court."⁵⁴ However, in spite of that the Court relied on the general policy rationale set forth in *Weems*,⁵⁵ and held the sentence to be "cruel and unusual." Although the Court did not find the sentence to be disproportionate, the Court implicitly recognized the validity of the proportionality principle.⁵⁶ Hence, *Trop* further solidified the role of proportionality analysis within Eighth Amendment jurisprudence.

The next significant development in non-capital Eighth Amendment proportionality cases occurred in *Robinson v. California*.⁵⁷ In that case the petitioner challenged the validity of a California statute that made it illegal to "be addicted to the use of narcotics." The petitioner contended that the statute violated the Eighth Amendment ban of "cruel and unusual punishments." The Court's opinion was noteworthy for two reasons. First, as in *Trop*, the Court implicitly recognized the role of proportionality in Eighth Amendment adjudication.⁵⁸ The second, and more revolu-

51. *Id.* at 382.

52. Schwartz, *supra* note 11, at 387.

53. 356 U.S. 86 (1958).

54. *Id.* at 99 (footnote omitted).

55. *Id.* at 100-02.

56. "[B]y negative implication the *Trop* Court recognized the disproportionality principle: 'Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime.'" Schwartz, *supra* note 11, at 387.

57. 370 U.S. 660 (1962).

58. *Id.* at 666-67.

tionary change wrought by *Robinson* was the Court's extension of the Eighth Amendment to the states, via the Fourteenth Amendment.⁵⁹ Since *Robinson*, the Eighth Amendment has been read to proscribe "cruel and unusual punishments" at both the state and federal levels.

The fourth case to significantly affect the evolution of the proportionality principle in non-capital cases was *Rummel v. Estelle*.⁶⁰ In that case Rummel was sentenced to life imprisonment after his third felony conviction. He challenged the sentence on the ground that it "was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."⁶¹ However, in contrast to its decisions in *Weems*, *Trop*, and *Robinson*, the Court refused to consider the disproportionality of the sentence. Rather, the Court attempted to justify its decision by arguing that capital and non-capital cases are inherently different, and that the length of the prison sentence imposed for a felony is "purely a matter of legislative prerogative."⁶² Thus, in one fell swoop, and with absolute disregard for the principle of *stare decisis*, the Court removed proportionality from Eighth Amendment analysis in all non-capital cases.

The final non-capital predecessor to *Harmelin* that merits attention is *Solem*.⁶³ Ironically, although the facts of this case are nearly identical to those in *Rummel*, it is difficult to imagine a more antithetical opinion. Solem was sentenced to life imprisonment without possibility of parol under South Dakota's recidivist statute. He appealed contending the sentence violated the Eighth and Fourteenth Amendments. The Court agreed, citing the disproportionality of the punishment as the reason for its decision. *Solem*, more than any case since *Weems*, explicitly recognized proportionality as an element of the Eighth Amendment.⁶⁴ In fact, for the first time since *Weems* recognized the principle

59. *Id.* at 666-67, 675.

60. 445 U.S. 263 (1980).

61. *Id.* at 265.

62. *Id.* at 274.

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

64. The Court wrote, "We hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the Defendant has been convicted." *Id.* at 290.

of proportionality, the Court provided clear criteria for determining the Eighth Amendment's scope.⁶⁵ Thus, after *Solem* and until the Court issued its decision in *Harmelin*, there was little doubt that proportionality was an integral part of the Supreme Court's Eighth Amendment jurisprudence for non-capital cases.

2. Proportionality in Capital Cases

Proportionality review of capital punishment has proven to be far less controversial than application of the proportionality principle in non-capital cases.⁶⁶ In fact, after a plurality of the Court recognized the proportionality principle for these cases in 1976,⁶⁷ there has been little if any question regarding the propriety of such analysis. Ironically, perhaps the best evidence of the acceptance of proportionality in capital punishment review is found in *Rummel*, a non-capital case. In that case Justice Rehnquist, writing for the Court, argued that because of the inherent differences between capital punishment and all other criminal sanctions, the use of proportionality analysis in capital cases could not justify its application to non-capital questions.⁶⁸ However, ignoring for the moment the validity of this distinction, Justice Rehnquist's argument clearly reflects the Court's strong support for applying the proportionality principle to capital cases. Thus, the historical paradox is clear. If the distinction between capital and non-capital cases is invalid, the Court cannot consider the proportionality of the punishment in capital cases and disregard the proportionality principle when confronted by Eighth Amendment challenges to non-capital sentences.

65. "[A] Court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.

66. "[A]fter 1971 the proportionality principle was frequently developed within [death penalty] cases." Schwartz, *supra* note 11, at 388.

67. *Id.* at 389.

68. *Rummel v. Estelle*, 445 U.S. 263, 270-75 (1980).

III. HARMELIN V. MICHIGAN

A. *The Facts*

On May 12, 1986, Ronald Allen Harmelin was arrested for possessing 672 grams of cocaine. He was subsequently convicted, and sentenced under Michigan state law to a mandatory life term without the possibility of parole. After initially reversing Harmelin's conviction because of an illegal search,⁶⁹ the Michigan Court of Appeals vacated its original decision and affirmed the sentence.⁷⁰ In 1990 the Michigan Supreme Court refused to hear Harmelin's appeal,⁷¹ but later that year the United States Supreme Court granted certiorari.⁷²

B. *The Supreme Court's Rationale*

As previously indicated, there was no majority opinion in *Harmelin*. Justice Scalia, writing for the Court, was joined by Chief Justice Rehnquist. Justice Kennedy wrote the concurrence, and was joined by Justices O'Connor and Souter. Finally, Justice White drafted the dissent, and was joined in all relevant respects by Justices Blackmun, Marshall and Stevens. Since there was no majority, there is no single explanation of the opinion. This section will provide the reasoning of all three factions on the Court.

1. *The Court's Opinion*

The essence of the Court's opinion is that "the Eighth Amendment contains no proportionality guarantee."⁷³ To support this conclusion Justice Scalia made a number of arguments. Justice Scalia's first target was *Solem*. In his attack he returned to Justice Rehnquist's analysis in *Rummel*. He then reasserted *Rummel's* fundamental premise, that the length of a sentence imposed for felonies is "purely a matter of legislative intent."⁷⁴ Justice Scalia also contended that *Solem's* three-prong test is necessarily invalid

69. 440 N.W.2d 75 (Mich. Ct. App. 1989).

70. *Id.* at 80.

71. 434 Mich. 863 (1990).

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

73. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2686 (1991).

74. *Id.* at 2686.

because it had been rejected by the *Rummel* Court.⁷⁵ However, he offered no rationale, and cited no authority other than *Rummel*, to support either of these contentions. Nevertheless, Justice Scalia relied on these two arguments to conclude that *Solem* should be overruled.⁷⁶

The Court's second argument was also directed, in large part, at *Solem*. Justice Scalia asserted that *Solem* relied heavily upon the finding that the English Declaration of Rights contained a proportionality guarantee.⁷⁷ He then argued that the Declaration was intended to proscribe "illegal" methods of punishment, rather than disproportionality.⁷⁸

Ironically, Justice Scalia's third argument is that it does not matter what the intent of the English Declaration of Rights was because it would have been impossible to transplant that understanding into the American legal system.⁷⁹ He argued instead, that we should only consider what the American Framers intended.⁸⁰ He then proffered three reasons why the American Framers could not have intended the Eighth Amendment to proscribe disproportionate punishments. He contended that had the Framers wanted to ban disproportionate punishment, they would have done so in clear and unambiguous language.⁸¹ He further argued that because proportionality analysis relies on consideration of defined offenses, the Framers could not have intended to proscribe disproportionality because the government "had never before defined offenses."⁸² Finally, Justice Scalia asserted that the available historical evidence supports his conclusion that the Framers did not intend to include proportionality in the Eighth Amendment.⁸³

The Court's next argument is that no criteria exists to identify disproportionate punishments. "For the real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of

75. *Id.* at 2684.

76. *Id.* at 2686.

77. *Id.*

78. *Id.* at 2690-91.

79. *Id.* at 2691.

80. *Id.*

81. *Id.* at 2692.

82. *Id.* at 2693.

83. *Id.*

subjective values.”⁸⁴ Justice Scalia then proceeded to indict the *Solem* test by asserting that the first two prongs are subjective and that the third “has no conceivable relevance to the Eighth Amendment.”⁸⁵

Finally, he conceded that the Court has recognized the proportionality principle in the past. However, he dismissed those cases with three arguments. First, he attempted to moot out *Weems* by arguing that the language of that case can be read to support or reject proportionality.⁸⁶ Second, he argued that because the Supreme Court did not explicitly apply *Weems* for nearly sixty years it cannot be binding on the Court today.⁸⁷ Finally, he dismissed the line of capital cases recognizing proportionality by distinguishing them from non-capital cases involving sentences for a term of years.⁸⁸

In short, Justice Scalia argued that there is no historical, textual, or precedential justification for reading proportionality into the Eighth Amendment. While these arguments are superficially compelling, this Note will show that they rely on internally inconsistent analysis, and are little more than the easiest way to reach the Court’s desired end.

2. *The Concurring Opinion*

As could be expected, given the extreme nature of the Court’s opinion, the concurrence differed fundamentally with Justice Scalia and Chief Justice Rehnquist. The concurring Justices, unlike Justice Scalia and the Chief Justice, felt bound by *stare decisis* to recognize a “narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years.”⁸⁹ Moreover, they acknowledged that the proportionality principle extends to non-capital cases.⁹⁰ In his opinion, Justice Kennedy devoted most of his attention to discussing five principles that he argued “give content to the uses and limits of proportionality review.”⁹¹

84. *Id.* at 2697.

85. *Id.* at 2697-98.

86. *Id.* at 2700.

87. *Id.*

88. *Id.* at 2701.

89. *Id.* at 2702 (Kennedy, J., concurring).

90. *Id.* at 2703.

91. *Id.* at 2703-05.

The first of these principles is that "the fixing of prison terms for specific crimes involves a substantive penological judgment" that should be left to the legislatures.⁹² Justice Kennedy then argued from this premise that courts should give "substantial deference" to this legislative determination when reviewing sentences under Eighth Amendment proportionality challenges.⁹³ In essence, the concurrence argued that legislatively imposed sentences are presumptively constitutional, and that this presumption can only be overcome by a showing of gross disproportionality.

The second principle identified by Justice Kennedy is that under the Eighth Amendment, legislatures are free to adopt any theory of punishment they see fit.⁹⁴ This argument, like the first, was intended to support the notion that a legislatively prescribed sentence carries a presumption that is not easily overcome. Hence, a court cannot find that a sentence violates the Eighth Amendment merely because it disagrees with the penological theory underlying the statute.

Justice Kennedy's third principle is also intended to strengthen the presumption that legislatively mandated sentences enjoy. In essence, he argued that because legislatures are free to disagree with one another about theories of punishment, they inevitably impose sentences that vary in degree.⁹⁵ Thus, before a court can reject a legislatively mandated sentence because it is more excessive than those imposed in other states, it must be established that the different legislatures were operating under the same penological philosophy.

The fourth principle is that "proportionality review by federal courts should be informed by 'objective factors to the maximum possible extent.'"⁹⁶ Unfortunately, Justice Kennedy did not propose any such standards. Instead, he merely pointed out that there is a clear distinction between capital and non-capital cases, and that the lack of any such criteria for non-capital cases explains why so few non-capital sen-

92. *Id.* at 2703.

93. *Id.* at 2703-04.

94. *Id.* at 2704.

95. *Id.*

96. *Id.*

tences have been found to be disproportionate.⁹⁷ However, this need for objective criteria does not justify rejection of the *Solem* test, as the Court advocated. On the contrary, if *Solem's* are the most objective criteria available, then Justice Kennedy's need for "objective factors" operates as a warrant for *Solem's* three-prong test.

Finally, Justice Kennedy cited *Solem* and *Weems* for the proposition that "the Eighth Amendment does not require strict proportionality between crime and sentence."⁹⁸ He argued that it proscribes only "grossly disproportionate" sentences.⁹⁹ Unfortunately, as with principle four, Kennedy provided no criteria for determining when a punishment is "grossly disproportionate." He simply asserted that this should be the first inquiry by reviewing courts, and unless "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality" the court need not inquire further.¹⁰⁰ However, in the absence of any criteria for determining what is "grossly disproportionate," this position is internally inconsistent with Justice Kennedy's fourth principle, that "objective factors" must be used in proportionality review. These two principles contradict one another because absent an objective criteria for determining "gross disproportionality," Justice Kennedy is forcing courts to subjectively determine whether a punishment is "grossly disproportionate," and therefore unconstitutional. Furthermore, requiring a showing of "gross disproportionality" fundamentally alters the proportionality principle by raising the threshold at which a punishment becomes unconstitutional, and thereby limiting the scope of the Eighth Amendment's prohibition of all "cruel and unusual punishments."

3. *The Dissenting Opinion*

The first part of the dissenting opinion refutes Justice Scalia's rationale. Justice White's first point was that proportionality is implicit in the spirit and structure of the Eighth Amendment. To support this conclusion Justice White cited Benjamin Oliver, who was also cited by Justice

97. *Id.* at 2705.

98. *Id.*

99. *Id.*

100. *Id.* at 2707.

Scalia.¹⁰¹ Oliver first reasoned that the prohibition of excessive bail and fines was intended to indirectly limit courts' authority to imprison offenders by imposing bail and fines that the defendant's were incapable of paying.¹⁰² Second, Oliver argued that the spirit of the Eighth Amendment requires a proportionality limit on courts' and legislatures' discretion to imprison.

In the absence of all express regulations on the subject, it would surely be absurd to imprison an individual for a term of years, for some inconsiderable offence, and consequently it would seem, that a law imposing so severe a punishment must be contrary to the intention of the framers of the constitution.¹⁰³

Justice White's second argument was that there were sufficient legal standards in 1787 to make consideration of proportionality possible. "[T]he people of the new Nation had been living under the criminal law regimes of the States, and there would have been no lack of benchmarks for determining unusualness."¹⁰⁴ Justice White's final response to Justice Scalia was that there is insufficient historical evidence to justify the Court's conclusion that the Framers did not intend the Eighth Amendment to encompass proportionality.¹⁰⁵

After specifically refuting Justice Scalia, Justice White made three other significant arguments. First, he pointed out that the Supreme Court has explicitly recognized the proportionality principle on several occasions.¹⁰⁶ He strengthened this argument by pointing out, "[n]ot only is it undeniable that our cases have construed the Eighth Amendment to embody a proportionality component, but it is also evident that none of the Court's cases suggest that

101. *Id.* at 2709 (White, J., dissenting).

102. *Id.*

103. *Id.* at 2710.

104. *Id.* at 2710.

105. "Even if one were to accept the argument that the First Congress did not have in mind the proportionality issue, the evidence would hardly be strong enough to come close to proving an affirmative decision against the proportionality component." *Id.*

106. "Among others, Justice White specifically cites the Court's opinions in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Coker v. Georgia*, 433 U.S. 584 (1977), and *Enmund v. Florida*, 458 U.S. 782 (1982)." *Id.* at 2711-12.

such a construction is impermissible."¹⁰⁷ Thus, in spite of the Court's assertion to the contrary, one can confidently conclude that Supreme Court precedent supports the Eighth Amendment's proportionality guarantee.

Justice White's third argument is that Justice Scalia's acceptance of proportionality in capital cases is logically inconsistent with his rejection of the proportionality principle in non-capital cases.¹⁰⁸ Justice White argued that the Court "ignore[d] the generality of the Court's several pronouncements about the Eighth Amendment's proportionality component. And it fail[ed] to explain why the words 'cruel and unusual' include a proportionality requirement in some cases but not in others."¹⁰⁹ Justice White concluded,

The Court's capital punishment cases requiring proportionality reject Justice Scalia's notion that the Amendment bars only cruel and unusual modes or methods of punishment. Under that view, capital punishment—a mode of punishment—would either be completely barred or left to the discretion of the legislature. Yet neither is true. The death penalty is appropriate in some cases and not in others. The same should be true of punishment by imprisonment.¹¹⁰

Justice White's fourth and final major contention is that the Eighth Amendment has never been and should never be bound by purely historical considerations.¹¹¹ Rather, Justice White argued the Court has long recognized the evolving nature of the Eighth Amendment.¹¹² He suggested that the test for this evolution is the "evolving standards of decency that mark the progress of a maturing society."¹¹³ Implicit in this test is that the standard must be a contemporary, rather than a historical, conception of humanity. "In evaluating a punishment under this test, 'we have looked

107. *Id.* at 2711.

108. *Id.* at 2712.

109. *Id.*

110. *Id.*

111. *Id.*

112. Citing the Court's opinion in *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) Justice White observed that the Court "has 'not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'" *Id.*

113. *Id.* at 2712 (quoting *Trop v. Dulles*, 356 U.S. 86, 101(1958)).

not to our own conceptions of decency, but to those of modern American society as a whole' in determining what standards have evolved."¹¹⁴ The essence of Justice White's opinion is that contemporary American society has evolved to the point that the Eighth Amendment must be construed to include a proportionality guarantee.

IV. ANALYSIS: SUPREME COURT PRECEDENT AND THE CONSTITUTION, GUIDES FOR PROPORTIONALITY ANALYSIS WITHIN THE EIGHTH AMENDMENT

Although the Eighth Amendment does not contain the word "proportionality," the average American probably believes that disproportionate criminal punishments violate the constitutional prohibition of "cruel and unusual punishments." Nevertheless, in *Harmelin* the Court would completely destroy the Eighth Amendment's proportionality guarantee, while the concurring justices would render it completely impotent. The two opinions make a number of arguments premised on the following: 1) the Framers did not intend the Eighth Amendment to guarantee proportionality of all criminal punishments; 2) Supreme Court precedent does not establish a proportionality guarantee for non-capital cases; and 3) capital and non-capital punishments are constitutionally distinguishable. Having asserted these arguments either implicitly or explicitly, the Court and concurring justices reach their respective conclusions. The Court concluded that there is no proportionality guarantee for non-capital cases. The concurring justices determined that while the Eighth Amendment does guarantee proportionality, the presumption afforded state legislatures can only be overcome by a showing of "gross disproportionality." While both opinions are superficially compelling, neither withstand equitable and logical scrutiny. Because the logical foundations of the two opinions are the same, refutation of those three premises invalidates both the Court's and the concurring Justices' opinions.

A. *Proportionality Analysis is Historically Justified*

While historical evidence may be read to support the conclusion that the Framers did not intend the Eighth

114. *Id.*

Amendment to guarantee proportionality in all cases, an important caveat exists. When examining available evidence, that information must be placed in its historical context. In fact, after considering the theoretical underpinnings of the Eighth Amendment, some commentators have concluded that "[t]he legislative history of the eighth amendment gives no indication that the Framers intended to proscribe only specific forms of punishment."¹¹⁵ Those commentators emphasize that there were only two dominant theories of punishment in America in the late Eighteenth Century, and both support the inclusion of proportionality within the Eighth Amendment.¹¹⁶ "[W]e cannot treat lightly the fact that the only two significant contemporary theories of punishment [retributivism and utilitarianism] both emphasized a single limitation—proportionality between crime and punishment."¹¹⁷ This fact, and the continuing role of retributive and utilitarian philosophies in our criminal justice system, has caused one commentator to observe:

Since it has been the cornerstone of penological thinking and practice in Western civilization for centuries, since it dominated when the eighth amendment was adopted, and since it underlay the document from which the amendment was drawn, proportionality stands as the underlying principle most surely relied upon by the amendment's Framers. Furthermore, since retributive and utilitarian considerations continue to dominate our penal structure, there is little reason to believe that the constitution has outgrown the proportionality requirement.¹¹⁸

B. Stare Decisis Mandates Adherence to the Proportionality Principle in All Cases

In considering Supreme Court precedent in this area it is important to remember the distinction the Court drew in *Rummel*, and attempted to draw in this case, between proportionality in capital and non-capital settings. There is a consensus that the Eighth Amendment mandates proportionality analysis in capital cases. Therefore, this section will

115. Wheeler, *supra* note 6, at 853.

116. *Id.*

117. *Id.*

118. *Id.* at 853-54.

address the implications of that concession, and the precedential justifications for applying the proportionality principle to non-capital cases. The most compelling evidence that the Supreme Court has already extended proportionality to non-capital cases are the Court's opinions in *Weems*, *Trop*, and *Robinson*. These cases have caused commentators to observe, "the eighth amendment has been held to be evolutionary and to limit both the amount and nature of permissible punishment."¹¹⁹

1. *Weems v. United States*

Given the revolutionary nature of the Court's holding in *Weems*, it should not be surprising that Justice Scalia felt compelled to attempt to reconcile the Court's holding in *Harmelin* with the proportionality analysis in *Weems*. However, Justice Scalia's efforts were logically inconsistent and are strong evidence that the *Weems* Court did in fact recognize the need for proportionality of sentences for "terms of years." Referring to *Weems*, Justice Scalia argued, "[t]hat holding, and some of the reasoning upon which it was based, was not at all out of accord with the traditional understanding of the provision we have described above."¹²⁰ The emphasis in that sentence must be upon the word "some," because there is little question that much of the Court's rationale in *Weems* is mutually exclusive with Justice Scalia's reading of the Eighth Amendment.

For example, the *Weems* Court argued, "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense."¹²¹ The Court did not qualify this statement by distinguishing between methods of punishment, or between capital and non-capital cases. Rather, the Court very clearly recognized the universality of the proportionality principle. Further evidence that the *Weems* Court did not base its decision exclusively on the unique nature of the punishment imposed is that the Court specifically referred to both the nature and degree of punishment in justifying its decision. "Its punishments come under condemnation of the Bill of Rights, both on account of

119. *Id.* at 842.

120. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2699 (1991).

121. *Weems v. United States*, 217 U.S. 349, 366-67 (1910).

their degree and kind.”¹²² The Court clearly indicated “both” degree and kind, independent of one another, invalidated the sentence. It is this part of the *Weems* Court’s analysis that is irreconcilable with *Harmelin*, and that has caused commentators to argue that *Weems* clearly recognized the application of the proportionality principle in all cases, regardless of the mode of punishment imposed.¹²³ Had the *Weems* Court intended that sentence to be read conjunctively rather than disjunctively it would not have used the word “both.” Certainly the author of the opinion recognized that using the word “both” was inconsistent with interpreting the sentence as Justice Scalia would like. Thus, if we are to afford each word in that sentence meaning, then either the degree or mode of punishment may be sufficiently “cruel and unusual” to invalidate a sentence.

Finally, the logical inconsistency of Justice Scalia’s argument is illustrated by his assertion that *Weems* can be read to apply to either disproportionate modes of punishment alone, or to both disproportionate modes and degrees of punishment.¹²⁴ Because these two positions are diametrically opposed, Justice Scalia’s assertion cannot possibly be correct. The suggestion that *Weems* applies only to modes of punishment is an “all or nothing” proposition. Thus, if any part of the *Weems* opinion must be read to apply to the

122. *Id.* at 377.

123. “In *Weems* the Court made it clear that the amendment also limits the amount of permissible punishment . . .” Wheeler, *supra* note 6, at 842.

“[In *Weems*] the Court broadened its prior eighth amendment analysis by finding that an otherwise acceptable sentence can be so disproportionate to the offense for which it is imposed as to constitute cruel and unusual punishment.” Martin R. Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103, 1113.

The *Weems* Court’s proportionality analysis and the language of the opinion suggest that a sentence could, solely because of its length, be so disproportionate to a particular crime as to constitute “cruel and unusual punishment.” *Id.* at 1114.

124. Scalia wrote:

Since it contains language that will support either theory, our later opinions have used *Weems*, as the occasion required, to represent either the principle that the Eighth Amendment bars not only those punishments that are “barbaric” but also those that are “excessive” in relation to the crime committed, *Coker v. Georgia*, 433 U.S. 584, 592 (1977), or the principle that only a “unique . . . punishment,” a form of imprisonment different from the “more traditional forms . . . imposed under the AngloSaxon system,” can violate the Eighth Amendment, *Rummel*, 445 U.S., at 274-275.

Harmelin, 111 S. Ct. at 2700.

degree of punishment, Justice Scalia must be wrong. His narrow interpretation, that *Weems* only applies to modes of punishment, renders much of the analysis in that opinion superfluous or moot. As indicated above, the *Weems* Court clearly considered both the mode of punishment and the degree. Thus *Weems* cannot be read as he suggests, but must instead be read to mandate proportionality analysis in all cases.

2. *Trop v. Dulles*

While clearly enunciating a principle of proportionality for non-capital cases, *Weems* fell short of defining the limits of this analysis. However, in *Trop*, the Court reaffirmed the role of proportionality analysis in non-capital cases and further defined the scope of the Eighth Amendment. In fact, the *Trop* Court defined the term "unusual" which lies at the heart of the debate about whether the Eighth Amendment proscription is limited to unconventional modes of punishment. After citing previous Supreme Court cases, the *Trop* Court observed, "the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.'"¹²⁵ Hence, *Trop* can and should be read to preclude Justice Scalia's narrow construction of the term unusual, as applying only to modes of punishment. Additionally, the inconsistency of this construction with the Court's Eighth Amendment jurisprudence is further evidenced by the *Trop* Court's conclusion that even if "unusual" is construed independent of "cruel," the word's meaning does not limit the Clause to only modes of punishment. "If the word 'unusual' is to have any meaning apart from the word 'cruel', however, the meaning should be the ordinary one, signifying something different from that which is generally done."¹²⁶ Thus, to satisfy the *Trop* Court's definition, it need only be shown that a punishment has been applied atypically, not that the mode of punishment imposed is out of the ordinary. This clearly was the case in *Harmelin*. In fact, at the time the *Harmelin* court issued its opinion, Michigan was the only

125. *Trop v. Dulles*, 356 U.S. 86, 100 n. 32 (1958).

126. *Id.* at 100-01.

state in the country to impose a sentence of life imprisonment without possibility of parole for the illegal possession of narcotics.¹²⁷ This alone constitutes "something different from that which is generally done."

3. *Robinson v. California*

The third, and perhaps most illustrative case in which the proportionality principle was applied without exclusive regard for the mode of punishment being used was *Robinson*. Because this case only involved imprisonment, it cannot be argued that the proportionality principle was applied to an "unusual" mode of punishment. In fact, the *Robinson* Court made it very clear that the mode of punishment in that case was not a consideration.¹²⁸ Therefore, in an effort to distinguish *Robinson*, Justice Scalia attempted to argue that *Robinson* may not have actually been applying the proportionality principle.¹²⁹ This argument has a number of flaws. First, Justice Scalia gave no reason to believe that the *Robinson* Court did not rely on the proportionality principle. Second, such an assertion is contrary to the analysis proffered by the *Robinson* Court.¹³⁰ Third, Justice Scalia offered no alternative explanation for invalidating *Robinson's* sentence. Finally, Justice Scalia's assertion that the *Robinson* court did not apply the proportionality principle patently contradicts his introduction of *Robinson*. Justice Scalia wrote, "[t]he first holding of this Court unqualifiedly applying a requirement of proportionality to criminal penalties was issued 185 years after the Eighth Amendment was adopted."¹³¹ He then cited *Robinson* as that case.¹³² Clearly, the latter of these references to *Robinson* by Justice Scalia is inconsistent with his assertion that "there is no reason to believe that the decision was an application of the principle of proportionality."¹³³ Given the lack of support for Justice Scalia's assertion, the logical inconsistency of his statements, and the plain language of the *Robinson* opinion,

127. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2718 (1991).

128. *Robinson v. California*, 370 U.S. 660, 676 (1962).

129. *Harmelin*, 111 S. Ct. at 2701 n.14.

130. *Robinson*, 370 U.S. 660.

131. *Harmelin*, 111 S. Ct. 2700-01.

132. *Id.* at n.14.

133. *Id.*

there is no question that the *Robinson* Court recognized the propriety of invalidating a prison sentence because it is disproportionate to the crime committed.

B. Proportionality is Consistent with the Text and Structure of the Constitution

Perhaps the most significant weakness in the Court's and concurring Justices' opinions is the implicit assertion that the Constitution generally, or the Eighth Amendment specifically, differentiates between capital and non-capital cases. Ironically, even if this is true, the distinction favors the consideration of proportionality in non-capital cases regardless of the mode of punishment involved. The second fundamental and fallacious premise is that whatever the Eighth Amendment meant in 1791, is what it should mean today. This contention is insupportable historically, structurally, and textually. In fact, commentators and the Court itself, have forcefully argued that the meaning of the Eighth Amendment evolves with society to reflect contemporary social mores and conceptions of justice.

1. The Eighth Amendment Text does not Distinguish between Modes of Punishment, or Capital and Non-capital Cases

Contrary to the Court's implication, the Eighth Amendment does not distinguish between types of punishment or types of cases. Hence, such distinctions cannot justify the application of the proportionality principle to some cases or modes of punishment, but not to others. Proportionality analysis within the Eighth Amendment is an all or nothing proposition. If it is justified in one case, or relative to one mode of punishment, it must always be considered. The Supreme Court explicitly affirmed this rationale in *Robinson*.

A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishments." . . . So may the cruelty of punishment, as, for example, disemboweling a person alive But the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.¹³⁴

134. *Robinson v. California*, 370 U.S. 660, 676 (1962).

Hence, given Justice Scalia's concession that proportionality must be considered in capital cases, there is no justification for not applying the proportionality principle to non-capital cases involving sentences for terms of years.

2. *The Structure of the Constitution Requires Consideration of Proportionality*

There is little dispute that the Eighth Amendment proscribes disproportionate fines and bail. This requirement stems from the word "excessive" in the Clause itself. Thus, there has been considerable debate about whether the Framers would have prohibited the imposition of disproportionate fines or bail, without intending that the same prohibition apply to other available criminal sanctions. This paradox is particularly revealing when applied to *Harmelin*. Justice Scalia persuasively argued that it was not inconsistent for the Framers to apply this prohibition to fines and bail, but not to other modes of punishment.

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.¹³⁵

However, Justice Scalia's rationale is logically deficient in two ways. First, his argument is valid only if proportionality analysis is not extended to any mode of punishment that does not have the potential to create revenue for the state. On the other hand, Justice Scalia conceded that the proportionality principle should be applied to capital punishment, which he admits costs the state money, rather than producing income.¹³⁶ On this level, even under Justice Scalia's analysis, there is no distinction between imprisonment and capital punishment. Therefore, if the structure of the Eighth Amendment supports extension of the proportionality princi-

135. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2693 n.9 (1991).

136. *Id.*

ple to capital cases, it applies with equal force in all non-capital cases.

The second flaw in Justice Scalia's analysis is that he assumes the economic benefits of imprisonment never exceed its cost. However, *Harmelin* is a good illustration of an exception to this generalization. If, as in the case of drug distribution, the societal costs exceed the costs of imprisonment, a state legislature may be economically motivated to impose excessive prison terms to eliminate these drains on its state's economy.

In short, the spectrum of available criminal sanctions ranges from fines to capital punishment. The Court implicitly argued that the structure of the Eighth Amendment supports proportionality analysis in both of those situations, but does not justify application of the principle to imprisonment. The logical inconsistency of, and lack of support for, that view leads to the conclusion that the structure of the Amendment mandates application of the proportionality principle in all non-capital cases regardless of the mode of punishment imposed.

3. *The Eighth Amendment Must be Allowed to Evolve*

All laws must be applied in light of their intended effects. Thus, the formulation of a judicious Eighth Amendment theory must begin with an examination of the philosophical underpinnings of the Amendment. The Court has, on several occasions, advanced its view of the Amendment's purpose. In *Robinson*, Justice Douglas observed, "[t]he Eighth Amendment expressed the revulsion of civilized man against barbarous acts — the 'cry of horror' against man's inhumanity to his fellow man."¹³⁷ This view was echoed by the majority in *Trop*.

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that

137. *Robinson*, 370 U.S. at 676.

this power be exercised within the limits of civilized standards.¹³⁸

Thus, as society's conceptions of humanity and justice evolve, so must the Eighth Amendment's prohibition of "cruel and unusual punishments."

V. CONCLUSION

As is so often true, the outcome of this case was largely determined by the philosophical predilections of the Supreme Court Justices. Justice Scalia and Chief Justice Rehnquist argued persuasively that the Eighth Amendment should be strictly construed within the parameters of the text and structure of the document, and that such a construction precludes recognition of proportionality in non-capital cases. The concurring Justices, on the other hand, grudgingly acknowledge the Court's precedent in this area, and were willing to concede that *stare decisis* mandates recognition of a minimal proportionality guarantee in all cases. However, one should not be deceived by the apparent difference in these opinions. In practice, the results are virtually identical. If possible the Court would eliminate the proportionality component of the Eighth Amendment, while the concurring Justices would choose instead, to leave the Eighth Amendment a hollow shell.

Given the similarity in their outcomes, it is understandable that both approaches suffer from the same infirmities. Both the court and the concurring Justices want to have their cake and eat it too. The Justices emphasized the narrowness of the text and structure of the Eighth Amendment, but willingly recognize an exception for capital cases. Yet neither opinion justified this exception in terms of either the text or structure. Similarly, both opinions emphasized the intent of the Framers, and the importance of being bound by history. Yet, both opinions disregard the substantial body of Eighth Amendment jurisprudence that has recognized the proportionality principle and the evolving nature of the proportionality principle.

There was no majority in this case, thus the Court will eventually be called upon to revisit this issue. When this

138. *Trop*, 356 U.S. 86, 99-100 (1958).

occurs, the Court should carefully consider not only the text and structure of the Amendment, but should examine with equal care and respect its own precedent. Moreover, the Court should be guided by the need for a consistent body of Eighth Amendment law. Finally, the Court must remember that it is the Constitution which they have been called upon to interpret, and that as such it cannot survive static interpretations such as *Harmelin*.

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it."¹³⁹

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