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Construing the Outer Limits of Sentencing Authority: A Proposed Bright-Line Rule for Noncapital Proportionality Review

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I. INTRODUCTION

The Eighth Amendment to the Constitution declares that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1] The plain intent of this provision is to secure for individuals convicted of crimes a measure of protection from the government authority imposing punishment upon them. However, distinguishing which punishments are "cruel and unusual" from those that are not is sometimes a difficult task. Unfortunately, the language of the Amendment offers little guidance on whether a *particular* punishment is constitutionally precluded. Nonetheless, the Supreme Court's jurisprudence in this area has indicated that at least a basic feature of the prohibition on cruel and unusual punishments is that punishments should, in some relative sense, be proportionate to the crimes committed.[2] In other words, punishment should not be significantly more severe than the seriousness of the offense committed.[3]

Although the Court has formulated substantive rules to guide proportionality review in the context of capital crimes,[4] the Court's

1. U.S. CONST. amend. VIII. This Amendment became applicable to the states through the Fourteenth Amendment in 1962. *See* Robinson v. California, 370 U.S. 660, 666–67 (1962).

2. *See* Weems v. United States, 217 U.S. 349, 366–67 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

3. *See* Solem v. Helm, 463 U.S. 277, 285 (1983) ("Although the precise scope of [the Eigth Amendment] is uncertain, it at least incorporated 'longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.'" (quoting RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 236 (1959))).

4. *See* Kennedy v. Louisiana, 554 U.S. 407, 438 (2008) (prohibiting the imposition of the death penalty for non-homicidal crimes); Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting the imposition of the death penalty for convicts under eighteen years of age); Atkins v. Virginia, 536 U.S. 304 (2002) (prohibiting the imposition of the death penalty for offenders with low intellectual capacity); Coker v. Georgia, 433 U.S. 584, 593–96 (1977) (prohibiting the imposition of the death penalty for the rape of an adult woman).

jurisprudence in the noncapital-crimes context has been vague, inconsistent, and difficult to apply. This is because in applying proportionality review to the length of prison terms, the Court has been unable to articulate any bright-line rules.[5] As a result of the absence of concrete rules,[6] and perhaps as a contributing factor to it, the Supreme Court has given significant deference to Congress and state legislatures in determining the constitutionality of their own sentencing legislation. This deference has amounted to an almost unbridled discretion that renders the Eighth Amendment meaningless in the noncapital crimes context.[7] Consequently, both Congress and state legislatures have mandated increasingly severe sentencing requirements for criminal offenders,[8] whether first-time or recidivist.[9] One particular statute of this kind, 21 U.S.C. § 841, requires that individuals convicted under the statute who have already been convicted of two previous drug felonies must serve a mandatory term of life imprisonment without the possibility of parole.[10]

5. Recently, however, the Court articulated one rule for prison sentence proportionality. *See* Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (holding that the Eighth Amendment prohibits imposition of a life sentence without the possibility of parole for a juvenile offender who did not commit homicide).

6. Justice Stevens argues that, despite the absence of bright-line rules in the noncapital context, such an absence "does not disable judges from exercising their discretion in construing the outer limits on sentencing authority that the Eighth Amendment imposes." Ewing v. California, 538 U.S. 11, 33 (2003) (Stevens, J., dissenting).

7. James J. Brennan, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551, 552 (2004).

8. *See* 21 U.S.C. § 841(a)–(b) (2006) (mandating a life sentence without parole for drug offenders with two previous felony drug convictions); *Ewing*, 538 U.S. at 15–16 (discussing California's "three strikes" law imposing a mandatory minimum of twenty-five years for repeat offenders); Arizona v. Berger, 134 P.3d 378, 379–80 (2006) (discussing the Arizona legislature's statutory scheme mandating a 200-year prison sentence for a defendant convicted of possessing twenty images of child pornography).

9. Recidivism is a term used to refer to repeated criminal conduct by the same offender. Thus, recidivist statutes aim to punish repeat offenders more harshly than one-time offenders for the same crimes as a method of deterring those individuals from even further criminal conduct. *See* Rummel v. Estelle, 445 U.S. 263, 284 (1980) (arguing that states have a legitimate interest in placing upon repeat offenders "the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State").

10. 21 U.S.C. § 841(a)–(b).

This Comment provides a review, analysis, and critique of the Court's noncapital proportionality jurisprudence and proposes a bright-line rule that is specifically applicable to 21 U.S.C. § 841. Although the Court's legal precedent in this field is far from uniform, much of the Court's past language indicates that a bright-line rule can be derived from existing case law. This Comment argues that imposing a life sentence without any possibility of parole for nonviolent[11] criminal offenders is unconstitutionally disproportionate. Therefore, the rule proposed here would invalidate as unconstitutional the language in 21 U.S.C. § 841(b) that mandates life imprisonment without an opportunity for parole for nonviolent repeat offenders. Overall, this rule would provide needed clarity to a body of law that—because it has little, if any, substantive criteria for courts to apply—is highly vulnerable to constitutional violations by politically motivated legislatures.

Part II provides a foundational review of the Court's precedent dealing with noncapital proportionality challenges. Part III examines the effects of the Court's unsatisfactory approach by reviewing, as a case study, the Eight Circuit's approach to 21 U.S.C. § 841. Part IV provides an analysis of the Court's jurisprudence, primarily by demonstrating the Court's consistent use of the principles that form the basis for the proposed bright-line rule. This Part also shows, however, why the authoritative rationale from *Harmelin v. Michigan* is highly problematic.[12] Part V concludes by outlining the implications of the proposed rule for 21 U.S.C. § 841, as well as the likely benefits for noncapital proportionality jurisprudence.

II. SUPREME COURT NONCAPITAL PROPORTIONALITY JURISPRUDENCE

The current utility of the Court's precedent in noncapital proportionality review is severely limited due to the lack of

11. The characteristic of "nonviolence" is used in this Comment so as to exclude any offense involving physical contact or abuse of another person. Therefore, sex crimes against others involving physical contact with the victim would not merit application of the proposed rule. However, defining exactly what conduct qualifies as "violent" is indeed a broad question, and not fully addressed here. The following discussion only deals with conduct that *clearly* qualifies as violent or threatening behavior.

12. Harmelin v. Michigan, 501 U.S. 957 (1991); *see infra* Part IV.C (demonstrating Justice Kennedy's failure to adequately apply the critical principles).

substantive rules and clear principles.[13] Lower courts have consequently had great difficulty engaging in meaningful analysis of noncapital proportionality challenges.[14] However, the Court's line of precedent in this field, if read carefully, provides support for the bright-line rule of prohibiting life imprisonment without parole for nonviolent offenses. This rule would substantially guide courts in determining the validity of many noncapital proportionality challenges, at least for cases implicating the serious penalty of life imprisonment. This Part therefore provides a brief foundational review of each of the Court's major noncapital proportionality cases.[15]

A. Weems v. United States

The Court's first twentieth-century case dealing with noncapital proportionality review was *Weems v. United States*.[16] The *Weems* Court held that a fifteen-year prison sentence for the offense of falsifying a public document violated the Eighth Amendment's proportionality principle.[17] In that case, Weems was a disbursing officer of the Bureau of Coast Guard and Transportation stationed in the Philippine Islands.[18] While there, Weems had falsified a cash book by entering, as paid, wages for employees that had not actually been paid.[19] Weems was consequently convicted of falsifying a public document,[20] for which he was sentenced to a statutorily mandated fifteen years in prison.[21] In addition to its length, the prison sentence was to be served "cadena temporal," meaning that while Weems was

13. Most often, a factual comparison has been the only precedential value of the Court's opinions, which are void of any clear principles. No clear, articulable doctrines have emerged other than in the context of juvenile offenders. *See* Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

14. *See infra* Part III.A.

15. While a serious analysis of these cases demonstrating how the proposed rule is grounded in the Court's jurisprudence does not appear until Part IV, this Part provides a basic description of the Court's treatment of noncapital proportionality review.

16. 217 U.S. 349, 368 (1910).

17. *Id.* at 377 (holding that the punishment imposed was "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. . . . Its punishments come under the condemnation of the bill of rights.").

18. *Id.* at 357.

19. *Id.* at 357–58.

20. *Id.*

21. Actually, the statute mandated only twelve years cadena temporal, but Weems was given a fifteen-year sentence by the court. *Id.* at 358, 364.

imprisoned, he would be chained at his ankles and wrists and forced to perform hard labor.[22] The sentence also required that Weems be put on continuing supervision throughout his entire life.[23]

Weems claimed on appeal that the length of his prison sentence constituted cruel and unusual punishment for his rather minor offense.[24] In analyzing the "cruel and unusual" nature of the sentence, the Court looked to the principle of proportionality as its primary analytical tool. The Court acknowledged that this principle, which stands for the proposition that "punishment for crime should be graduated and proportioned to [the] offense,"[25] clearly prohibits certain modes of punishment, such as torture. However, the Court also argued that the principle held broader meaning in that it prohibits any sentence that "is cruel *in its excess of imprisonment* and that which accompanies and follows imprisonment."[26] Thus, the Court argued that not only may a particular method of punishment violate the Eighth Amendment, but the excessive length of a prison term may violate it as well.[27] Consequently, although Weems's sentence was deemed unconstitutional for reasons independent of its length, the Court clearly stated that an excessive length of imprisonment may alone violate the Eighth Amendment. Therefore, in this case, the Court gave its first indication that proportionality review could be applied to a term of imprisonment.

In determining that Weems's sentence violated the Eighth Amendment,[28] the Court reasoned that in addition to the nature of his imprisonment, the length of Weems's prison term constituted an Eighth Amendment violation because it was disproportionately excessive to the severity of his crime.[29] The Court came to this conclusion because Weems's crime involved only a single wrong,

22. *Id*. at 364. There were some other restrictions as well, but these were less crucial to the Court's analysis. *Id*. at 366.

23. *Id*. at 366.

24. *Id*. at 362. Interestingly, Weems did not raise his challenge based on the *conditions* of his imprisonment, but only upon the length of his sentence. *Id*.

25. *Id*. at 367.

26. *Id*. at 377 (emphasis added).

27. *Id*.

28. *Id*. at 382.

29. *See id*. at 377. Indeed, the Court stated that "[i]t is cruel in its excess of imprisonment *and* that which accompanies and follows imprisonment. . . . Its punishments come under condemnation of the bill of rights, both on account of their degree *and* kind." *Id*. (emphasis added).

which had not actually harmed anyone.[30] Additionally, the Court found that Weems's sentence was disproportionately more severe than sentences imposed on others for more serious offenses, such as homicide, treason, inciting rebellion, and conspiracy to destroy the government by force.[31]

Lastly, the Court noted that Weems's sentence amounted to a "perpetual limitation of his liberty" because of the additional penalty of lifetime supervision.[32] Together, these factors indicated that Weems's sentence was excessively disproportionate to his crime and therefore constituted a violation of the Eighth Amendment.

B. Rummel v. Estelle

Next, in *Rummel v. Estelle*, the Court upheld a life sentence with an opportunity for parole for a nonviolent recidivist offender.[33] In that case, Rummel, having previously been convicted of two other nonviolent felonies, was convicted of fraudulent use of a credit card.[34] Rummel received the sentence as a result of a Texas recidivist statute requiring that a mandatory life sentence[35] with the possibility of parole be imposed for a third felony offense.[36]

In upholding Rummel's sentence, the Court again referred to the proportionality principle utilized in *Weems*, noting that "[t]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime."[37] In referring to this principle, however, the Court stated that challenges to excessive noncapital sentences on proportionality grounds have only rarely succeeded.[38]

30. *Id*. at 365.

31. *Id*. at 380.

32. *Id*. at 366.

33. 445 U.S. 263, 280–81, 285 (1980).

34. *Id*. at 265–66. One of the prior felonies involved passing a forged check, and the other involved obtaining money by false pretenses. *Id*.

35. *Id*. at 266.

36. *Id*. at 268.

37. *Id*. at 271.

38. *Id*. at 272. In reality, the number of noncapital proportionality challenges that have been entertained by the Court has been quite small, which is likely the major reason why there have been few *successful* challenges. In fact, the entirety of the Court's noncapital proportionality jurisprudence in the twentieth-century consists of only five cases. *See* Harmelin v. Michigan, 501 U.S. 957 (1991); Solem v. Helm, 463 U.S. 277 (1983); Hutto v. Davis, 454 U.S. 370 (1982); *Rummel*, 445 U.S. 263; Weems v. United States, 217 U.S. 349 (1910).

The Court then attempted to distinguish the case from *Weems* by arguing that *Weems* rested primarily on the *nature* of Weems's imprisonment, rather than its excessive length.[39] The Court argued this despite the language in *Weems* noting that the sentence was unconstitutional in its length *and* in its kind, and despite the fact that Weems himself had only challenged the constitutionality of the length of his term.[40]

In upholding Rummel's sentence, the Court gave substantial weight to the strong likelihood that, given the statute and longtime Texas sentencing customs, Rummel would very likely receive parole in only twelve years.[41] Consequently, despite the fact that Rummel was formally sentenced to life in prison, the Court "could hardly ignore the possibility that he [would] not actually be imprisoned for the rest of his life."[42]

C. Solem v. Helm

After *Rummel*, the Court invalidated a mandatory life sentence without the possibility of parole for a nonviolent recidivist offender, concluding that the sentence was "significantly disproportionate to [the] crime."[43] In that case, Helm, who had previously been convicted of six nonviolent felonies,[44] was convicted of "uttering a 'no account' check for $100."[45] As a result of his conviction, Helm was subjected to a South Dakota sentencing statute requiring that defendants convicted of a felony, if previously convicted of three or more felonies, be subject to life imprisonment without the possibility of parole.[46]

39. *Rummel*, 445 U.S. at 273. The *Rummel* Court noted that the *Weems* decision was based on the totality of the circumstances; in *Weems* both the length of imprisonment and its accompanying punishment were potentially excessive. *Id.*

40. *Weems*, 217 U.S. at 362.

41. *Rummel*, 445 U.S. at 280. In fact, Rummel was released on parole within eight months of the Court's decision. *See Solem*, 463 U.S. at 297 n.25.

42. *Rummel*, 445 U.S. at 281. The Court then noted, "If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony." *Id.* This language indicates that the Court likely would have invalidated the Texas sentencing statute had there not been a possibility for parole, as in the Mississippi statute.

43. *Solem*, 463 U.S. at 303.

44. *Id.* at 279.

45. *Id.* at 281.

46. *Id.* at 281–82.

In assessing the proportionality of Helm's sentence, the Court referred back to *Weems*, arguing that *Weems* had promulgated the principle that prison sentences could be unconstitutional merely because of excessive length.[47] In supporting this proposition, the Court argued that the text of the Eighth Amendment, which expressly prohibits excessive fines and bail, makes no distinction between what kinds of punishments may violate the Amendment.[48] To the contrary, the Court noted that "[i]t would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not."[49]

In analyzing Helm's sentence, however, the Court indicated the need for courts to look to objective factors in evaluating Eighth Amendment proportionality. It noted that courts should make an initial proportionality determination by comparing the "gravity of the offense [with] the harshness of the penalty."[50] While the Court recognized that this evaluation is inevitably subjective to some degree, it stated that courts are at least competent to measure the gravity of a crime "on a relative scale."[51] In demonstrating this competency, the Court provided an example, arguing that common perceptions justify the conclusion that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence."[52] By using common-sense determinations of this kind, courts could ensure that less serious crimes would not be punished more severely than more serious crimes.[53] After making this initial determination, the Court then noted that courts could compare the sentence in question with sentences of other crimes within the same jurisdiction.[54] If more serious crimes were subject to the same or lesser penalty, then the sentence in question would likely be

47. *See id.* at 287. This claim contradicted the majority's claim in *Rummel*, which argued that only certain *modes* of punishment may be reviewed under the proportionality principle. *See Rummel*, 445 U.S. at 273.

48. *Solem*, 463 U.S. at 289.

49. *Id.*

50. *Id.* at 290–91.

51. *Id.* at 292.

52. *Id.* at 292–93. The Court then stated that these examples "simply illustrate[] that there are generally accepted criteria for comparing the severity of different crimes on a broad scale." *Id.* at 294.

53. *Id.* at 293.

54. *Id.* at 291.

unconstitutionally excessive.[55] The Court also noted that it would be helpful for courts to compare the sentence in question to those imposed in other jurisdictions for the same offense.[56]

In applying these factors, the Court found Helm's sentence to be unconstitutionally disproportionate.[57] First, the Court concluded that the offense involved was relatively unserious.[58] While the majority acknowledged that states have a legitimate interest in punishing repeat offenders more harshly than first-time offenders, the Court reasoned that Helm's crime was simply too minor to warrant the extreme penalty of life imprisonment without parole.[59] In categorizing Helm's offense as unserious, the Court reasoned that not only was the amount of money taken an unsubstantial amount, but the offense did not involve violence or any threat of violence.[60] Additionally, none of Helm's prior offenses involved violent or threatening conduct.[61]

Second, in assessing the harshness of Helm's penalty, the Court noted the great severity of Helm's life sentence, even as opposed to the one imposed in *Rummel* since Helm's term carried no possibility for parole. It was the possibility and strong likelihood of parole,[62] the Court emphasized, which played such a significant influence in upholding the punishment in *Rummel*, and which served to distinguish that sentence from Helm's.[63]

Last, after finding an initial inference of disproportionality, the Court compared Helm's sentence to more serious offenses in the same jurisdiction, as well as to those in other jurisdictions. In comparing Helm's sentence to those imposed for more serious offenses, the Court noted that the only other crime mandating a life

55. *See id.*

56. *Id.*

57. *Id.* at 303.

58. *Id.* at 296.

59. *Id.* at 296–97.

60. *Id.* at 296.

61. *Id.* at 296–97. This is an interesting conclusion, since Helm's crimes included several third-degree burglaries, obtaining money under false pretenses, and grand larceny. *Id.* at 279–80. Obviously such crimes have victims, but the Court seemed to indicate that they were not considered "crimes against persons" because they were nonviolent, or rather, not *physical* crimes against persons.

62. In fact, the *Rummel* Court noted that the defendant would likely get parole in only twelve years. Rummel v. Estelle, 445 U.S. 263, 280 (1980).

63. *Solem*, 463 U.S. at 297.

sentence was murder.[64] However, first degree manslaughter, first degree arson, and kidnapping also required life imprisonment upon a second or third offense.[65] Furthermore, in comparing Helm's sentence to those in other jurisdictions, the Court found that no other state mandated a life sentence without parole for a repeat nonviolent crime.[66] As a result of these findings, the Court concluded that Helm's sentence was unconstitutionally disproportionate to his crime.[67]

D. Harmelin v. Michigan

Over a decade later, a plurality of the Court in *Harmelin v. Michigan* apparently diverged from the rationale in *Solem* by arguing that a mandatory life sentence without the possibility for parole was not unconstitutionally disproportionate for a single drug possession offense.[68] While the Court was able to form a majority rationale for why individualized sentencing considerations were not required in the noncapital context,[69] five Justices were unable to agree on why the defendant's proportionality challenge failed.

Joined by then-Chief Justice Rehnquist, Justice Scalia argued that no proportionality principle should apply outside the capital punishment context because the Founders did not intend it to.[70] Instead, he argued that proportionality only acted as a prohibition on certain modes of punishment, such as death or torture, rather

64. *Id.* at 298.

65. *Id.*

66. *Id.* at 299–300. While one other state would have permitted a life sentence without parole in similar circumstances, the Court noted that there was no evidence that such a sentence had actually ever been applied by the state in that way. *Id.*

67. *Id.* at 303.

68. *Compare* 501 U.S. 957, 994 (1991) (Scalia, J., plurality opinion), *with id.* at 1009 (Kennedy, J., concurring) (illustrating Scalia's argument that no proportionality principle should apply in the noncapital context, and Kennedy's contention that it should apply but was not violated in this case).

69. *Id.* at 996 (majority opinion).

70. *See id.* at 994 (Scalia, J., plurality opinion). Scalia's argument about the original intent of the Founders in applying proportionality in the noncapital context is not without controversy however. A majority of the Court previously adopted the opposing interpretation, arguing instead that the adoption of the language from the English Bill of Rights in the Eighth Amendment implied an adoption of the English practice of applying proportionality review in the context of prison terms. *See Solem*, 463 U.S. at 285–86. Additionally, *Solem* noted the anomalous result of Scalia's position in that it would require proportionality review for the lesser punishment of a fine and for the greater punishment of death, but not for the intermediate punishment of imprisonment. *Id.* at 289.

than on excessive lengths of already-accepted punishments, such as imprisonment.[71] As a result, he dismissed Harmelin's proportionality challenge outright, implying that a state may impose almost any prison term for any crime.[72]

Scalia's opinion, however, was not authoritative. As the Court stated in *Marks v. United States*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[73] As a result, Justice Kennedy's concurrence became the authoritative rationale from *Harmelin*.

Rather than arguing for a wholesale abandonment of proportionality review for prison terms, Kennedy argued that Harmelin's sentence was simply not unconstitutionally disproportionate.[74] In arriving at this conclusion, Kennedy addressed Scalia's claims by arguing that, regardless of the original intention of the Founders, stare decisis warranted the Court's continued acknowledgment of a narrow proportionality principle for noncapital sentences.[75] Kennedy thus conceded that application of proportionality review in the noncapital context had previously been very difficult because "its precise contours are unclear."[76] Furthermore, he explained, "our decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years."[77]

Despite this, Kennedy argued that there are common principles that can inform a court's determination of prison sentence proportionality.[78] First, "substantial deference" should be given to a

71. *Harmelin*, 501 U.S. at 994 (Scalia, J., plurality opinion).

72. Scalia's objection to noncapital proportionality review is not entirely absolute. Even he qualifies his objection for the "extreme" case, such as where a state imposes life imprisonment for overtime parking. *Id.* at 962. Consequently, Scalia's argument altogether dismissing Harmelin's challenge seems to obscure the critical question of whether it constitutes an "extreme" case.

73. Marks v. United States, 430 U.S. 188, 193 (1977).

74. *Harmelin*, 501 U.S. at 1009 (Kennedy, J., concurring).

75. *Id.* at 996–97.

76. *Id.* at 998.

77. *Id.* at 1000.

78. *Id.* Notably, Kennedy seemed to push the factors listed in *Solem* to the background of his analysis, choosing instead to formulate an approach that was extreme in its deference to legislatures.

legislature's choice of sentence, because formulating and assigning criminal sanctions is the province of the legislature.[79] Second, Kennedy noted that the Constitution does not require adherence to any particular penological theory.[80] Third, Kennedy argued that the differences in penological theories are an inevitable result of federalism, leading to the result that various states will undoubtedly impose unequal sentences for similar crimes.[81] Last, Kennedy stated that proportionality review should be informed by objective factors.[82] Together, these considerations work to inform the overarching principle that only "gross disproportionality" between crime and punishment is prohibited by the Eighth Amendment.[83]

Applying these principles to Harmelin's sentence, Kennedy concluded that the defendant's term was not grossly disproportionate because his crime was so serious. In arriving at this assertion, Kennedy stated that drug possession and distribution constitutes "one of the greatest problems affecting the health and welfare of our population."[84] Most notably, Kennedy rejected as "false to the point of absurdity"[85] Harmelin's claim that his private drug possession was nonviolent and victimless. In rejecting this argument, Kennedy hypothesized about the many ways in which drug offenses could lead to violence against others. First, he argued that drug criminals *may* commit crimes against others as a result of the physiological effects of the drugs on the individual.[86] Second, such criminals may victimize others in order to obtain money for the

79. *Id*. at 999.

80. *Id*. This statement was intended to indicate that the goals of incapacitation and deterrence are as valid as retribution. Therefore, Kennedy argues that harsher sentences, which tend to serve deterrence and incapacitation values at the expense of retributive principles of justice, are nonetheless valid. However, this point tends to obscure the critical issue, since certainly Kennedy's point is not true in all circumstances. This is because the Eighth Amendment's purpose is to act as a prohibition on at least *some* punishments that might be imposed by a legislature. In other words, the mere use or application of proportionality review in the noncapital context illustrates that there are at least some instances in which harsh sentences, legitimately serving deterrence and incapacitation values, will nonetheless violate the Eighth Amendment because they are grossly disproportionate to the offense committed.

81. *Id*.

82. *Id*. at 1000.

83. *Id*. at 1001.

84. *Id*. at 1002 (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989)).

85. *Id*.

86. *See id*.

drugs, even to the point of committing violent acts.[87] Last, Kennedy noted statistical correlations between drug offenders and other crimes.[88] All of these arguments, combined with the heavy deference given to legislative judgments, worked to support the conclusions that Harmelin's one-time offense of drug possession was serious enough to warrant a life sentence without parole, and that the sentence was not grossly disproportionate.[89]

E. Ewing v. California *and* Lockyer v. Andrade

In March 2003, the Court decided two noncapital proportionality cases that, although not involving mandatory life sentences without parole, further illustrated the Court's unclear and inconsistent approach to noncapital proportionality review. In *Ewing*, the Court upheld a prison term of twenty-five years to life for a recidivist offender convicted of one count of felony grand theft of personal property in excess of $400.[90] Ewing, who had a long history of mostly nonviolent crimes,[91] had stolen three golf clubs priced at $399 each from a golf pro shop.[92] As a result of his prior criminal history, California charged him under its three-strikes law, which stated that recidivist offenders already having two or more "serious" or "violent" felonies could receive an indeterminate term of life imprisonment with an opportunity for parole.[93]

In upholding the constitutionality of Ewing's sentence, the Court referred back to the rationale of *Rummel*, which had upheld a life sentence with the possibility of parole for a recidivist offender.[94] The Court reiterated the observation that a "recidivism statute 'is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the

87. *See id.*

88. *Id.* at 1003.

89. Because no initial inference of gross disproportionality was found, the Court did not proceed to compare the sentence in question to those imposed in other jurisdictions or for other crimes. This was because Kennedy argued that such comparisons, utilized in *Solem*, are only required when an initial inference of gross disproportionality arises. *Id.* at 1004–05.

90. Ewing v. California, 538 U.S. 11, 30–31 (2003).

91. The Court recounted that, although most of the past crimes were nonviolent, there were a few incidents in which Ewing's crimes involved violent or threatening conduct. *Id.* at 18–19.

92. *See id.*

93. *Id.* at 16.

94. *Id.* at 21.

admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole.'"[95]

In addition, however, the Court analyzed the sentence by looking to the critical factor emphasized in *Rummel* and *Solem*—the possibility of parole[96]—in conjunction with Kennedy's "common principles" from *Harmelin*.[97] In weighing the initial proportionality of the crime, the Court considered the gravity of Ewing's offense compared to the harshness of his penalty.[98] In performing this comparison, however, the Court noted that it would consider not only the nature of his triggering offense, but also of Ewing's past offenses as well—some of which were violent in nature.[99] As a result of weighing all of Ewing's crimes, the Court asserted, without explanation, that Ewing's sentence was "not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'"[100]

In *Lockyer v. Andrade*, the Court similarly upheld a sentence of two consecutive terms of twenty-five years to life, with the possibility of parole, for a recidivist offender punished under California's three-strikes law.[101] Andrade was convicted of two counts of petty theft[102] after previously being convicted of three counts of first-degree residential burglary.[103] As a result of the previous convictions, Andrade was sentenced to twenty-five years to life for each of his

95. *Id.* (quoting Rummel v. Estelle, 445 U.S. 263, 278 (1980)).

96. *See id.* at 22 (citing Solem v. Helm, 463 U.S. 277, 297 (1983)).

97. *Id.* at 23–24 (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

98. *Id.* at 28.

99. *See id.* at 29. The Court noted in its initial description of Ewing's burglary and robbery offenses that some violent interactions had taken place between Ewing and others. This resulted in the Court's consideration of Ewing's crimes as violent. *See id.* at 18–19.

100. *Id.* at 30 (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)). The Court failed to explicitly detail *why* it concluded that Ewing's crime was serious enough to warrant the sentence he received, but the Court's consideration of his past crimes, in addition to his triggering one, might indicate that the violent nature of some of his crimes was highly relevant to upholding his harsh sentence. This inference exists because the Court made a visible effort to explicitly describe the violent and threatening nature of some of his crimes. *See id.* at 18–19.

101. Lockyer v. Andrade, 538 U.S. 63, 77 (2003).

102. Andrade engaged in theft from two Kmart stores and absconded with roughly $150 worth of videotapes. *Id.* at 66.

103. *Id.* at 68. Andrade was also previously convicted twice for misdemeanor theft, twice for transportation of marijuana, and once for escape from federal prison. *Id.* at 66–67.

counts, but was given the possibility of parole.[104] In applying its "gross disproportionality" analysis, the Court relied primarily on a comparison of the facts to those in *Rummel* and *Solem*.[105] The Court noted that Andrade's sentence, like Rummel's, held open a possibility for parole. Consequently, the Court did not find Andrade's sentence inconsistent with *Rummel* or *Solem*, and it held that the punishment was not "grossly disproportionate" to the crime.[106]

Since *Ewing* and *Lockyer*, the Court's Eighth Amendment proportionality cases have primarily involved capital sentences in which the Court has relied on its separate death penalty jurisprudence.[107] As a result, the Court's approach to proportionality in the noncapital context has remained substantially the same since *Ewing* and *Lockyer*, relying only on vague rationales that lack any bright-line rules to help courts determine when a *particular* sentence violates the Eighth Amendment.

III. EFFECTS OF THE COURT'S JURISPRUDENCE: 21 U.S.C. § 841

As a result of the Court's vague and sometimes inconsistent approach to proportionality review in the noncapital context, lower courts have granted heavy deference to legislatures in their determinations about the constitutionality of noncapital criminal penalties.[108] Indeed, as Justice Kennedy's concurrence in *Harmelin* implied, the Court's decisions in these cases have often been influenced by a near-absolute presumption of validity—in practice, if not in theory.[109] This deference has essentially resulted in courts bypassing any meaningful constitutional analysis for challenged sentencing statutes. Consequently, some rather questionable sentencing statutes have been widely implemented by Congress and state legislatures.

104. *Id*.

105. *Id*. at 74.

106. *Id*. at 77.

107. *See* Graham v. Florida, 130 S. Ct. 2011, 2021 (2010); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

108. Brennan, *supra* note 7, at 552.

109. *See* Harmelin v. Michigan, 501 U.S. 957, 998–1001 (1991) (Kennedy, J., concurring) (explaining the various principles of legislative deference that should inform a court's proportionality review).

One such statute is 21 U.S.C § 841, which makes it unlawful for anyone to knowingly or intentionally possess, with intent to distribute, a controlled substance of a specified amount.[110] The statute indicates that "[i]f any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release . . . ."[111] The statute further requires that "[n]o person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein."[112] This statute therefore punishes individuals convicted of repeated but nonviolent drug activity with a mandatory life sentence with no possibility of parole, the most severe prison sentence possible.

A. Eighth Circuit Cases Reviewing Proportionality of 21 U.S.C. § 841

Because of the *Harmelin* Court's deferential approach toward legislative determinations, proportionality review of 21 U.S.C. § 841 has been meager at best. The Eighth Circuit's precedent reviewing the proportionality of this statute is particularly illustrative of this trend.

In 2003, the Eighth Circuit first addressed proportionality of the life sentence provision of 21 U.S.C § 841 in *United States v. Collins.* In *Collins*, the court held that the mandatory life term was constitutional. The court reasoned that a comparison of the statute to the facts in *Harmelin*, in which the Supreme Court upheld a life sentence without parole for a one-time conviction of cocaine possession, indicates that the statute must be valid.[113] Furthermore, the court highlighted the significant deference given to legislatures in punishing drug offenses, noting that "such a sentence that falls within the range prescribed by statute has never been found to be an Eighth Amendment violation."[114] In stating this, the court appeared to argue that as long as a sentence is authorized by statute, no constitutional violation likely occurs. As a result, the court did not find any threshold inference of gross disproportionality between the

110. 21 U.S.C. § 841(a)(1) (2006).

111. *Id.* § 841(b)(1)(A).

112. *Id.*

113. United States v. Collins, 340 F.3d 672, 679 (8th Cir. 2003).

114. *Id.* at 680.

crime and sentence, leading to a dismissal of the defendant's proportionality challenge.[115]

In *United States v. Scott*, the Eighth Circuit again failed to take seriously the defendant's claim that the statute was unconstitutionally disproportionate.[116] In *Scott*, the defendant, after having had two prior felony drug possession convictions as a minor, was sentenced to a mandatory term of life in prison with no possibility of parole following his violation of the statute.[117] Scott was found guilty of "conspiracy to distribute more than fifty grams of crack cocaine,"[118] after which the government showed that Scott had been convicted of possessing heroin at sixteen years of age and possessing crack cocaine a year afterward. Because of the requirements of 21 U.S.C. § 841(b), Scott was sentenced to a mandatory term of life in prison without the possibility of parole.[119]

In addressing Scott's proportionality challenge to the sentence, the court dismissed his claim by merely referring to the circuit's precedent foreclosing findings that the statute was grossly disproportionate.[120] In this, the court again relied on *Harmelin*, arguing that "[p]ossession, use and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our population' . . . . [The defendant's] crime threatened to cause grave harm to society."[121] Consequently, the court stated in conclusory fashion—without analysis or explanation—that Scott's sentence was not one in which an inference of gross disproportionality between crime and sentence existed.[122]

115. *Id.*; *see also* United States v. Williams, 534 F.3d 980, 986 (8th Cir. 2008) (offering only a brief paragraph analyzing the proportionality of 21 U.S.C. § 841, with the court making the conclusory assertion that, despite the trial court's reservations about the excessiveness of the sentence, its precedent forecloses any proportionality challenge to the statute); United States v. Whiting, 528 F.3d 595, 597 (8th Cir. 2008) (relying only on the facts of *Harmelin* to uphold its own determination that the life sentence imposed in 21 U.S.C. § 841 was not grossly disproportionate); United States v. Whitehead, 487 F.3d 1068, 1070–71 (8th Cir. 2007) (offering only a conclusory assertion that the life sentence for repeat drug offenders does not lead to an inference of gross disproportionality).

116. United States v. Scott, 610 F.3d 1009, 1018 (2010). The court devoted merely one short paragraph of its eight-page opinion to a proportionality analysis of 21 U.S.C. § 841. *Id.*

117. *Id.* at 1012.

118. *Id.*

119. *Id.* at 1012–13.

120. *Id.* at 1018.

121. *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring)).

122. *Id.* at 1018.

Though few, these cases are prime examples of how lower courts have dealt with the Supreme Court's vague line of jurisprudence for noncapital proportionality review. Due to the Supreme Court's lack of clear rules or principled criteria in noncapital proportionality review, lower courts are prompted to engage in little or no analysis as to why a particular statutory sentence does not lead to an inference of gross disproportionality. Instead, the most that can be gleaned from the Court's precedents are the mere facts. Most worrisome, unjust outcomes are more likely to result as politically pressured legislatures attempt to formulate increasingly harsh sentences, perhaps at the expense of constitutionally prescribed protections.

IV. UTILIZING THE COURT'S PRECEDENT: FORMULATING A BRIGHT-LINE RULE

In the face of the Court's vague approach, this Comment argues that a bright-line rule can and should be extracted from the Court's noncapital proportionality precedents. This rule would not only provide lower courts with substantive principles to work from in evaluating the constitutionality of particular sentences, but it may also better serve conceptions of justice and retribution by preventing less serious crimes from being punished significantly more severely than more serious crimes.

This rule would dictate that nonviolent crimes, because they are less serious than violent crimes, should not be punished with the extreme penalty of life imprisonment without the possibility of parole, even for repeat nonviolent offenders. While such recidivist offenders are no doubt legitimately subject to harsher sentences than first-time offenders, the Court's jurisprudence supports the assertion that a limit to such penalties should preclude life imprisonment without parole.

A. Nonviolent Offenses

Throughout the Court's noncapital proportionality jurisprudence, one common thread that emerges from the Court's rationale is that nonviolent crimes are inherently less serious than violent crimes. Therefore, nonviolent crimes should not be punished with criminal law's most severe noncapital sentence. In other words, because nonviolent crimes are less serious than violent crimes, it violates the Eighth Amendment to punish such offenses with the law's harshest prison sentence. As indicated previously, the Court

utilizes this principle in all of the cases previously reviewed, although *Harmelin*'s approach to this principle is highly problematic.[123]

First, the *Weems* Court impliedly relied on the assertion that Weems's sentence was excessively harsh because his crime was nonviolent and victimless.[124] The Court noted that the fifteen-year prison sentence was imposed merely for "'perverting the truth' in a single item of a public record," despite the fact that "there [was] no one injured."[125] Consequently, the Court recognized that Weems's crime was not as serious as one would expect it to be to be punished with such a harsh penalty. In recognizing this, the Court relied on the premise that nobody was physically injured or even threatened, impliedly acknowledging that because Weems's crime was nonviolent, he should not have been punished so severely.[126]

Additionally, the Court compared Weems's offense to other crimes considered to be more serious, including certain degrees of homicide, "treason, inciting rebellion, conspiracy to destroy the Government by force, [and] recruiting soldiers in the United States to fight against the United States," all of which are violent in nature.[127] In comparing Weems's crime to these violent offenses, the Court again impliedly acknowledged that Weems's crime was less serious because it was nonviolent.

Second, while the *Rummel* Court rejected the defendant's claim that his life sentence was disproportionate because his offense was nonviolent, it did so with the understanding that the defendant's sentence included the possibility for parole.[128] As a result, it indicated that while nonviolent crimes may nonetheless warrant substantial penalties,[129] it would likely be unwilling to impose a life term *without*

123. *See infra* Part IV.C.

124. *See* Weems v. United States, 217 U.S. 349, 377 (1910).

125. *Id*. at 365.

126. While it could be argued that the Court's focus on a lack of injury was intended to refer to nonphysical injury or loss as well as to physical injury, the Court's later comparison of Weems's crime to violent crimes lends support to the inference that the lack of *physical* injury to anyone was the critical consideration. *See id*. at 380.

127. *Id*. The Court also lists several nonviolent crimes, but seemingly only to show that such crimes, *similar* to Weems's crime, were not punished so severely, and therefore indicate an inference of disproportionality. "The offense described has similarity to the offense for which Weems was convicted, but the punishment provided for it is in great contrast to [Weems's sentence] . . . ." *Id*.

128. Rummel v. Estelle, 445 U.S. 263, 280–81 (1980).

129. *Id*. at 275 (arguing that the absence of violence "does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal").

parole for the nonviolent recidivist offender.[130] Indeed, the Court repeatedly referred to the strong likelihood of parole as a major factor that influenced its upholding of Rummel's sentence.[131] Consequently, the Court once again impliedly recognized that nonviolent recidivist crimes are at least not serious enough to be punished with the extreme sentence of life imprisonment without parole.

Third, in *Solem v. Helm*, the Court explicitly drew upon the claim that nonviolent crimes are less serious than violent crimes. The *Solem* Court held that the defendant's life sentence without parole was unconstitutionally disproportionate because it was imposed for a nonviolent crime.[132] In articulating its three-pronged analysis, the Court referred to this "nonviolence" factor while demonstrating the requirement that courts judge the "gravity" of an offense on a relative scale.[133] In that demonstration, the Court stated that commonly shared beliefs support the notion that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence."[134] In applying this to Helm's circumstances, the Court concluded that the crime of passing a forged check was "'one of the most passive felonies a person could commit,'"[135] not only because of the amount taken, but because "[i]t involved neither violence nor threat of violence to any person."[136] Additionally, the Court noted that relevant to the analysis was the fact that while Helm was a repeat offender, all of his crimes were nonviolent.[137] As a result, in holding Helm's sentence unconstitutional, the Court expressly confirmed the proposition that nonviolent crimes are less serious than violent ones and should therefore not be punished with a life sentence without parole, even for repeated offenses.[138]

130. *See id.* at 280.

131. *Id.* at 280–81.

132. *See* Solem v. Helm, 463 U.S. 277, 303 (1983).

133. *Id.* at 290–91.

134. *Id.* at 292–93. Interestingly, the Court also included a reference to the general policy that the criminal law aims to protect the physical well-being of people more than property. *Id.* at 293.

135. *Id.* at 296 (quoting State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting)).

136. *Id.*

137. *Id.* at 296–97.

138. In its analysis comparing Helm's offense to other crimes, the Court did imply that "a third offense of heroin dealing" constituted a more serious crime, even though it was nonviolent. *Id.* at 299. However, in referring to that offense, the Court merely seemed to

Last, while *Ewing* and *Lockyer* did not deal explicitly with the "nonviolence" principle, the *Ewing* Court did implicitly utilize that distinction in its analysis.[139] In that case, while weighing the gravity of the crime against the harshness of the sentence, the Court considered not only the defendant's nonviolent triggering crime, but also his past crimes, some of which were violent.[140] Indeed, the Court made a point to include the violent or threatening nature of some of Ewing's past crimes in its recitation of the facts.[141] In recognizing the violent nature of those crimes, the Court upheld the defendant's sentence because it recognized that Ewing's crimes, some of which were violent, were deserving of especially harsh penalties. Consequently, the Court impliedly recognized that because at least some of Ewing's crimes were violent, Ewing was more deserving of particularly severe punishment.

Overall, although the Court has weighed the gravity of offenses somewhat differently throughout its cases (which, perhaps, is explained by the differing ideologies of the Justices who formed the majorities in those cases), the fundamental distinction of whether an offense is nonviolent or violent has constituted a significant factor, if not the most significant factor, in the Court's assessment of the gravity of crimes. With the exception of *Harmelin* (which will be addressed below),[142] even in the cases where the Court upheld the challenged sentences, the Court was unwilling to state that nonviolent offenses could be subject to a life term without parole.

B. Exclusion of the Possibility of Parole

Another common thread evident throughout the Court's precedent has been the suspect nature of life sentences that carry no possibility of parole. Thus, while the previous Section noted the less serious nature of nonviolent offenses, this Section emphasizes the

argue that such a crime was more serious *than the defendant's*, but was punished less severely. *See id*. The Court did not actually indicate whether it would have upheld a life term without parole for a third offense of heroin dealing.

139. Like *Rummel*, *Ewing* argues that some nonviolent crimes may be considered serious, but the case's analytic approach is less relevant because it does not deal directly with a life sentence without parole, or an offender whose triggering or previous offense did not involve violence. Ewing v. California, 538 U.S. 11, 29 (2003).

140. *Id*.

141. *Id*. at 18–19.

142. *See infra* Part IV.C.

more suspect nature of life sentences without parole. Indeed, in *Weems*, *Rummel*, and *Solem*, this factor was highly relevant to the holdings that the nonviolent offenses in question could or could not be punished with life imprisonment.

First, the *Weems* Court demonstrated an increased level of concern for sentences whose penalties are imposed for a life term. While that case did not deal with a term of life imprisonment, one of the factors that the Court considered relevant to its decision was that the sentence called for lifetime probation.[143] After reviewing the nature and length of the defendant's term of imprisonment, the Court also noted the excessive length of his probation, stating that "[h]is prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is . . . forever kept within voice and view of the criminal magistrate . . . ."[144] Consequently, relevant to the Court's analysis was the assumption that sentences *mandating* lifelong punishment are more constitutionally suspect under the Eighth Amendment than other sentences.

Second, the *Rummel* Court repeatedly expressed, as critical to its holding, the fact that the defendant's sentence in that case was constitutional *because* it carried the possibility of parole.[145] In addressing the defendant's challenges to the sentence, the Court stated that "Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life."[146] Additionally, the Court distinguished a life term with the possibility of parole from life terms not carrying a chance for parole, impliedly indicating that the latter sentence, if imposed in a similar context, might be unconstitutional.[147] The Court also recognized that Rummel's possibility for parole was substantial in that, given Texas parole customs, Rummel had a strong likelihood of receiving parole.[148] Thus, the Court explicitly noted that the possibility of parole played a crucial part in its decision to uphold a life sentence for nonviolent

143. Weems v. United States, 217 U.S. 349, 366 (1910).

144. *Id*. at 366.

145. In fact, the defendant in *Rummel* was paroled after only eight months. *See* Solem v. Helm, 463 U.S. 277, 297 n.25 (1983).

146. Rummel v. Estelle, 445 U.S. 263, 281 (1980).

147. *See id*. (distinguishing Rummel's sentence from a Mississippi statute requiring life imprisonment without parole).

148. *Id*. at 280–81.

conduct.

Third, the *Solem* Court expressly argued that the possibility of parole constituted a crucial factor in its determination that a life sentence for repeated nonviolent offenses was unconstitutional. In analyzing the sentence, the Court argued that the sentence was unconstitutionally disproportionate, in part because "[the] sentence [wa]s far more severe than the life sentence we considered in *Rummel v. Estelle*" because Rummel had a strong likelihood of receiving parole.[149] This fact, the Court argued, was one "on which the Court [in *Rummel*] relied heavily."[150] Consequently, the Court again reiterated the significant influence that the possibility of parole carried in evaluating the constitutionality of a life term imposed for nonviolent conduct.

Last in *Lockyer*, the Court again argued that the possibility of parole played a critical role in approving a statute punishing nonviolent recidivist offenders with life imprisonment.[151] Additionally, while the Court in *Ewing* did not explicitly discuss the relevance of the possibility of parole in upholding Ewing's sentence, it relied heavily on the facts and reasoning of *Rummel*,[152] which indicated the substantial role that parole plays in proportionality review.[153] Overall, the Court has continuously utilized the possibility of parole as a critical factor in determining the constitutionality of a life term for nonviolent offenses, whether recidivist or not. Additionally, the Court indicated in *Rummel* that the weight of this factor is most meaningful when there is a substantial likelihood that parole will be granted, rather than being offered as a mere formal possibility.

C. Analyzing Harmelin v. Michigan

Perhaps the clearest obstacle to the proposed rule, and the most inconsistent decision rendered in this line of jurisprudence, was the

149. *Solem*, 463 U.S. at 297.

150. *Id.*

151. *See* Lockyer v. Andrade, 538 U.S. 63, 74 (2003) (arguing that since Andrade retained the possibility of parole, the case was not "materially indistinguishable" from either *Rummel* or *Solem*).

152. *See* Ewing v. California, 538 U.S. 11, 29 (2003) (relying on *Rummel*'s arguments justifying increased punishment for recidivist offenders).

153. *Solem*, 463 U.S. at 297 (illustrating *Solem*'s assessment that the possibility of parole played a substantial role in the *Rummel* decision).

Court's decision in *Harmelin*. As previously stated,[154] the *Harmelin* Court held that a life sentence without the possibility for parole did not violate the Eighth Amendment for a first-time offender convicted of possessing 672 grams of cocaine.[155] However, the merit and authority of that decision is highly questionable for several important reasons. First, the decision was fractured because the Court was unable to form even a five-Justice majority as to why the defendant's sentence was not grossly disproportionate.[156] Second, Justice Kennedy's concurrence, which is the authoritative rationale from the case, suggested a mode of analysis that unfortunately did nothing to actually inform courts about how to substantively apply proportionality review in specific cases. Third, and most significantly, Justice Kennedy's concurrence blatantly misapplied principles from the Court's earlier decisions, resulting in an erroneous outcome.

1. Fractured decision

First, the authority of *Harmelin* is questionable because no majority rationale existed as to the proportionality issue. While five Justices were able to agree regarding the individualized sentencing issue, there was not a majority rationale explaining why the defendant's sentence was not unconstitutionally disproportionate. As previously noted,[157] Justice Scalia and Chief Justice Rehnquist argued that because the Eighth Amendment was not originally intended to apply to prison terms, the proportionality principle should not be applied at all.[158] On the other hand, Justice Kennedy and two other Justices argued that proportionality review did apply in the noncapital context, but that Harmelin's sentence did not violate that doctrine.[159] While the fractured nature of a decision may not totally negate its authority, the lack of a majority rationale does serve to undermine its weight.

154. *See supra* Part II.D.

155. Harmelin v. Michigan, 501 U.S. 957, 1009 (1991) (Kennedy, J., concurring).

156. The decision was a plurality, with two Justices supporting Scalia's position and three supporting Kennedy's. *Id.* at 961, 996.

157. *See supra* Part II.D.

158. *See Harmelin*, 501 U.S. at 994 (Scalia, J., plurality opinion).

159. *Id.* at 1009 (Kennedy, J., concurring).

2. Kennedy's emphasis on legislative deference obscures the critical issue

Second, Kennedy's authoritative concurrence obscured the critical issue in noncapital proportionality review. As noted previously,[160] Kennedy's first three "common principles" essentially all stand for the proposition that substantial deference should be given to legislatures in defining the severity of their sentencing schemes.[161] Essentially, Kennedy argued that because few bright-line principles or rules exist from which a court can make a determination about the constitutionality of a particular sentence, practical considerations require that courts simply accept those sentences as constitutional.

Unfortunately, while this approach is useful in reminding courts about the legislature's role in formulating criminal sentences, it tends to obscure the critical issue. While it is no doubt the prerogative of state legislatures to formulate their own criminal sentencing schemes, the Constitution, as interpreted by the Court throughout the last century, requires that a prohibition on "'grossly disproportionate'"[162] sentences be applied in the noncapital context. This requirement acts as a restriction on the outer limits of a legislature's sentencing authority. As a result, while some level of deference to a legislative determination of punishment is desirable, the critical question in noncapital proportionality review is *when* the scope of that deference is exceeded, resulting in a grossly disproportionate sentence. Thus, because it is possible that in at least *some* instances a sentence will be grossly disproportionate to an offense, Kennedy's general declaration informing courts that legislatures are entitled to deference does little to help courts understand *when* that deference should be set aside or when a particular sentence actually becomes grossly disproportionate. Consequently, Kennedy's three principles granting deference to legislatures do little by themselves to inform courts as to how to apply proportionality review to prison terms.

160. *See supra* Part II.D.

161. *See Harmelin*, 501 U.S. at 998–99 (Kennedy, J., concurring).

162. *Id.* at 1001 (quoting Solem v. Helm, 463 U.S. 277, 288, 303 (1983)).

3. Kennedy erroneously measured the gravity of Harmelin's drug offense

Last, Kennedy's application of the "objective factor" prong miscalculates the gravity of drug offenses generally, thus resulting in an erroneous outcome. This is partly because Kennedy's "objective factor" analysis only required the Court to consider the threshold question of whether a given crime and sentence give rise to an inference of gross disproportionality.[163] Unfortunately, Kennedy's reasoning of this issue was substantially lacking. As noted previously,[164] in deciding whether or not an inference of disproportionality exists, the Court looks to the "gravity of the offense" compared to the "harshness of the penalty."[165] Applying objective factors to this assessment, Harmelin's sentence should have aroused increased suspicion from the Court because it was the most severe sentence possible for a noncapital crime. Because of the severity of such a sentence, an inference of gross disproportionality would necessarily arise unless Harmelin's crime was itself equally serious.

In assessing the gravity of the offense, Kennedy drew upon the nonviolent/violent crime distinction, as raised by the petitioner.[166] In his challenge, the defendant argued that his sentence was unconstitutionally disproportionate because his crime was nonviolent and victimless.[167] In response to this, Kennedy stated that this claim was "false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society."[168] In supporting this claim, Kennedy hypothesized about all the ways in which drug offenders, as a result of their drug-related conduct, *could* become involved in violent crimes against society,[169] even identifying a statistical correlation between drug crimes and violent crimes.[170] Unfortunately, Kennedy's reasoning relied merely on a hypothetical relationship of drugs to violence, instead of considering whether Harmelin himself had been involved in violent conduct.

163. *Id*. at 1005.
164. *See supra* note 50 and accompanying text.
165. *Harmelin*, 501 U.S. at 1001 (Kennedy, J. concurring).
166. *Id*. at 1002.
167. *Id*.
168. *Id*.
169. *Id*.
170. *Id*. at 1002–03.

Following Kennedy's rationale to its logical end, any kind of crime *could* be considered a "violent" crime, even if nonviolent in reality. If the method for identifying a violent crime is to identify a *probability* that the particular crime will lead to subsequent violent behavior, then almost any illegal conduct could be considered violent, since committing any illegal act carries at least some increased likelihood that an individual may engage in violence or threatening behavior to avoid detection and punishment. As a result, Kennedy's analysis could be said to result in the conclusion that all illegal behavior has, as part of its "culture,"[171] the attribute of violence.

Even more problematic is Kennedy's assessment of the serious or violent nature of drug crimes, which was based upon a *hypothetical possibility* that a particular drug offender would engage in violent conduct instead of whether the sentence at issue *actually involved* violent conduct. As a result, Kennedy's analysis ascribing violence to all drug crimes reaches too broadly. If a particular drug offender actually engages in violent behavior, then a particular sentence may take that conduct into account by increasing the severity of the sentence. However, to make a broad conclusory assertion attributing violence to all drug crimes, even when particular offenders never actually engaged in any violent conduct at all, is to paint too broad a stroke. In other words, Kennedy's analysis should have looked only at Harmelin's *actual* criminal conduct, which was nonviolent, rather than abstractly ascribing violence to it.

As a result of this error, Kennedy's concern about the violent nature of drug offenses results in an exaggeration of the gravity of those crimes because violent conduct constitutes a *separate* offense for which offenders may be charged. Consequently, Kennedy's conclusion that Harmelin's sentence did not carry an inference of gross disproportionality was highly suspect. Kennedy should have concluded that drug crimes alone, although more serious than many other nonviolent crimes, are generally less serious than violent crimes such as assault, rape, kidnapping, manslaughter, or murder. Furthermore, Kennedy's conclusion that a mandatory life sentence without parole for a nonviolent drug offense does not give rise to an inference of gross disproportionality was erroneous. This is because

171. *See id.* at 1002 ("A violent crime may occur as part of the drug business or culture").

such a conclusion permits nonviolent or less serious conduct to be punished with the law's *most severe* noncapital punishment. Therefore, given the significant problems with the Court's decision in *Harmelin v. Michigan*, the rule that Eighth Amendment proportionality prohibits the imposition of a life sentence without parole for nonviolent crimes should be accepted.

V. CONCLUSION

One obvious implication of the proposed bright-line rule would be invalidation of the mandatory life sentencing provision of 21 U.S.C. § 841(b) for repeat nonviolent offenders. However, some might find such a result objectionable, at least in the context of recidivist offenders, since legislatures have a strong interest in punishing repeat offenders more severely. Nevertheless, that interest cannot extend absolutely to the imposition of *any* penalty because the purpose of the Eighth Amendment is to act as an outer limit on the government's sentencing authority. Thus, while government has a strong interest in punishing repeat offenders more severely, the Eighth Amendment does not allow legislatures to exercise absolute or unlimited discretion in punishing criminal offenders. Instead, the Eight Amendment's prohibition on "cruel and unusual punishments" was intended to act as a check on governmental authority and to secure a certain measure of protection for criminal defendants.

Additionally, although legislatures are justified in punishing recidivism more harshly than non-recidivism, this fact does not negate the principle that nonviolent crimes are generally less serious than violent crimes. In other words, repeated nonviolent crimes are still nonviolent, and should therefore be punished less harshly than more serious, violent crimes. This bright-line rule would therefore not only act as a limit on legislative discretion, but it would also ensure proportionality between nonviolent and violent crimes while still allowing legislatures to impose harsh sentences upon recidivist offenders.[172] Additionally, it should be noted that this rule would likely not prevent a legislature from imposing a life sentence without

172. Again, it is important to recognize that the proposed rule does not interfere with the broad sentencing authority of Congress or state legislatures, but acts only to impose an outer limit on that authority, which protects the general intent that the Eighth Amendment was intended to serve.

parole for a repeat offender whose triggering offense is nonviolent, but whose previous offenses include one or more violent crimes. Indeed, the approach that the Court has taken throughout its jurisprudence in this area indicates that past violent crimes are taken into consideration when determining whether a harsher sentence is permissible.[173] Thus, repeat offenders whose triggering offense is nonviolent, but who have been convicted previously of a violent crime, might not benefit from the proposed rule.

In all, the Court's precedent supports the adoption of a bright-line rule prohibiting nonviolent offenders from being sentenced to life imprisonment without the possibility of parole. Because the plain premise of proportionality is that less serious crimes should be punished less severely than more serious crimes, nonviolent crimes as a general class should not be punished as severely as violent crimes. Furthermore, adopting the bright-line rule distinguishing nonviolent from violent conduct would serve to highlight a concrete principle from the Court's precedent, which would give both lower courts and lawmakers a clearer understanding of how to approach sentencing issues in the noncapital context.

Kevin White[*]

173. In *Ewing*, the Court reasoned that recidivist statutes are based on the rational judgment that "offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." Ewing v. California, 538 U.S. 11, 30 (2003). Thus, the Court did not qualify its use of those "who continue to commit felonies" with any requirement that the triggering felony be violent, resulting in the inclusion of the defendant's past crimes in its proportionality analysis.

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