Embargoed for release upon delivery
Wednesday, October 6, 2010, 9 p.m. E.D.T.

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Justice John Paul Stevens

National Legal Aid & Defender Association
Exemplar Award Dinner

JW Marriott Hotel
Washington, D.C.
Wednesday, October 6, 2010

What sort of jurist did Shakespeare employ to adjudicate the claim of the Merchant of Venice? Portia's comments about the quality of mercy not being strained seem to have been designed to appeal to empathy, but her decisive arguments first confirming Shylock's right to help himself to a pound of Antonio's flesh and then delineating the bloody and disastrous consequences that would follow were those of a strict constructionist. Notably absent from her eloquent appeal was any discussion of history.

The case that I plan to discuss tonight may not be as interesting as a Shakespeare play, but it does shed some light on the role of history in the judicial process. It was argued in November of 1990 and decided on June 27, 1991, the last day of the

Term. It was a five-to-four decision; the two opinions supporting the judgment and the three dissenting opinions occupy 73 pages in volume 501 of the U. S. Reports. The name of the case is *Harmelin* v. *Michigan*, 501 U. S. 957 (1991).

Harmelin, a first-time offender, was convicted of possession of over 650 grams of a mixture containing cocaine. As a cloistered appellate judge, I have never seen cocaine myself, but I understand that the quantity actually possessed by Harmelin - 672 grams, or a little less than a pound and a half - could have been carried in a brown paper bag or concealed in a glove compartment. Pursuant to Michigan law, he received a mandatory sentence of life imprisonment without the possibility of parole. Under the statute the same sentence would have been imposed regardless of whether he was a kingpin in a major drug cartel or merely a part-time messenger hired to make one delivery. The question presented to the Court was

whether that sentence constituted cruel and unusual punishment within the meaning of the federal constitution. The Court held that it did not.

Writing for himself and Chief Justice Rehnquist, Justice Scalia announced the judgment of the Court and delivered an opinion concluding that the Eighth Amendment prohibited specific kinds of punishments such as drawing and quartering or disembowelment but contained no requirement that the punishment fit the crime. Under his reasoning, since imprisonment is not categorically cruel or unusual, a life sentence for a parking violation would not have violated the Eighth Amendment.

Justice Kennedy, joined by Justices O'Connor and Souter, agreed with the dissenters that the Eighth Amendment includes a proportionality requirement. As he stated, "*stare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years." Unlike the dissenters,

however, he read those earlier cases as requiring the Court to uphold Harmelin's sentence.

In his explanation of why stare decisis should not foreclose the adoption of a categorical rule excluding proportionality entirely from the Eighth Amendment analysis, Justice Scalia relied on a different reason for rejecting each of three precedents, and a fourth reason for rejecting the application of the doctrine entirely.

The first precedent was Justice McKenna's opinion in *Weems* v. *United States*, in which - quoting from an earlier dissent by Justice Field - he had construed the Amendment as "directed, not only against punishments which inflict torture, 'but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" 217 U. S. 349, 371 (1910) (quoting *O'Neil* v. *Vermont*, 144 U. S. 323, 339-40 (1892)). Justice Scalia correctly pointed out that the statement may not have been necessary to the

decision because the sentence imposed on Weems was arguably a form of torture. Moreover, our cases did not thereafter endorse any proportionality principle until 1977 when we held in *Coker* v. *Georgia*, that death is an excessive penalty for the rape of an adult woman. 433 U. S. 584.

Justice Scalia did not question the fact that the Court had, and I here borrow Justice White's words from *Coker*, "firmly embraced the holdings and dicta from prior cases . . . to the effect that the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are excessive in relation to the crime committed." *Id.*, at 592. Justice Scalia distinguished such cases, however, on the ground that "death is different"; in his view the Court's death penalty jurisprudence had imposed protections that the Constitution nowhere else provides.

Justice Scalia made no attempt to distinguish the Court's then-recent application of

proportionality review in *Solem* v. *Helm*, 463 U. S. 277 (1983). Instead, relying primarily on historical analysis, he concluded "that *Solem* was simply wrong." Justice Powell's opinion for the Court in *Solem* contained two critical flaws: it included only two pages of discussion of the background of the Eighth Amendment, and no discussion at all of the understanding of the Amendment before the end of the 19th century.

Justice Scalia's extensive and interesting discussion of history was based on his own research - rather than the argument advanced by the State - and obviously played a major role in motivating his endorsement of a categorical rule denying proportionality any role in the cruel and unusual punishment inquiry. His opinion, however, also identifies another factor unrelated to history that may well have been equally important to him - the absence of adequate standards for determining when a judge should conclude that a particular sentence is

so severe that it violates the constitution. In his view the standards discussed by Justice Powell "seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values." 501 U. S., at 986.

In his dissent Justice White essentially assumed that Justice Scalia had correctly concluded that opposition to particular modes of punishment was among the reasons why the English Declaration of Rights in 1689 and the Eighth Amendment in our Bill of Rights included a prohibition against cruel and unusual punishments. But he quoted from an 1832 treatise pointing out that the Amendment also prohibits "excessive" bail and "excessive" fines, both of which obviously require a determination of proportionality; the treatise noted that in cases in which the judge had discretion both to fine and to imprison a defendant, it would "surely be absurd" to assume his discretion was limited with respect to the amount of the fine but unlimited with respect to

the term of imprisonment. I should also point out that the fact that the Amendment unquestionably imposes a proportionality requirement for bail and for fines without any further limiting standards demonstrates that the framers of the Amendment did not share Justice Scalia's concern about permitting judges to exercise discretion based on the facts of individual cases. After all, at a time when most rules of law were the product of common law adjudication, it was surely appropriate to assume that judges would exercise their discretion wisely.

Justice White's dissent contains a brief quotation from the *Weems* opinion that makes a fundamental point about the relevance of history in constitutional adjudication. Justice McKenna observed:

"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 peculiarly true of constitutions." 217 U. S., at 373, *quoted in part in Harmelin*, 501 U. S., at 1015.

Justice McKenna referred to cases construing the ex post facto clause and the Commerce Clause to illustrate his point. I think cases construing two other constitutional provisions even more effectively explain why a narrow focus on the precise evil that gave birth to a constitutional command, coupled with contemporary commentary, provides an unreliable guide to understanding the principles enshrined in the constitution. At the time of the adoption of the religion clauses in the First Amendment, it was generally believed that they merely prescribed the preference of one Christian faith over another, but would not require equal

respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. The commentaries written by Justice Story unambiguously described this narrow understanding. But as we held in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), "when the underlying principle [was] examined in the crucible of litigation, the Court . . . unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Id.*, at 52-53. And of course, if our construction of the government's duty to govern impartially enshrined in the Equal Protection Clause had been based on contemporary understandings at the time the Fourteenth Amendment was adopted, Thurgood Marshall would have been on the losing side in *Brown* v. *Board of Education*.

As these cases illustrate, reliance on history, even when the interpretation of past events is

completely accurate and undisputed, provides an insufficient guide to the meaning of our Constitution. We should also keep in mind the fact that even though we do, and we should, rely heavily on the wisdom of individual judges in making countless decisions interpreting and applying rules of law, judges are merely amateur historians; their interpretations of past events, like their interpretations of legislative history, are often debatable and sometimes simply wrong. Historical analysis is usually relevant and interesting, but it is only one of many guides to sound adjudication.

I cannot conclude my discussion of the *Harmelin* case without making these observations about Justice Kennedy's controlling opinion. Instead of reviewing why I think it abundantly clear that Justice White had the far better of the argument on the question whether the sentence was constitutionally excessive, I shall merely comment briefly on the historical setting of the opinion.

The Justices who joined it were all relatively new occupants of the seats formerly occupied by Justices Stewart, Powell, and Brennan. Based on their votes in earlier Eighth Amendment cases, I am persuaded that all three of these recently retired justices would have shared Justice White's views in *Harmelin*. Moreover, just as the meaning of the Eighth Amendment itself responds to evolving standards of decency in a maturing society, so also may the views of individual justices become more civilized after 20 years of service on the Court. One must take into account the recent decision holding that the imposition of a life sentence without the possiblity of parole outside of the homicide context on a juvenile defendant violates the Eighth Amendment before concluding that the fractured decision in *Harmelin* is good law. Of particular importance in making that inquiry is the thoughtful opinion delivered by Chief Justice Roberts who favored the application of individual

judgment in particular cases over the Court's adoption of a categorical rule. *Graham* v. *Florida*, 560 U. S. ___ (2010).

I shall conclude, as I began, with a reference to one of my favorite Shakespeare plays. In *Measure for Measure* Claudio was sentenced to death for having sex with his fiancé before they were officially married. Angelo believed execution of the sentence to be necessary to avoid making a scarecrow of the law. Justice Potter Stewart would surely have disagreed; his opinion explaining why the sentence was an act of manifest injustice might have read something like this: "I know it when I see it."

Thank you for your attention.