



2004

Sentencing and Punishment - Cruel and Unusual Punishment: The United States Supreme Court Upholds California's Three Strikes Law, Ruling the Law Does Not Violate the Eighth Amendment's Prohibition on Cruel and Unusual Punishment - Ewing v. California

Sarah Maureen Reed

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Reed, Sarah Maureen (2004) "Sentencing and Punishment - Cruel and Unusual Punishment: The United States Supreme Court Upholds California's Three Strikes Law, Ruling the Law Does Not Violate the Eighth Amendment's Prohibition on Cruel and Unusual Punishment - Ewing v. California," *North Dakota Law Review*. Vol. 80 : No. 3 , Article 6.

Available at: <https://commons.und.edu/ndlr/vol80/iss3/6>

This Case Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.common@library.und.edu.

SENTENCING AND PUNISHMENT—CRUEL AND UNUSUAL
PUNISHMENT: THE UNITED STATES SUPREME COURT
UPHOLDS CALIFORNIA’S THREE STRIKES LAW,
RULING THE LAW DOES NOT VIOLATE THE EIGHTH
AMENDMENT’S PROHIBITION ON CRUEL AND
UNUSUAL PUNISHMENT
Ewing v. California, 538 U.S. 11 (2003)

I. FACTS

Gary Ewing, a four-time felon on parole, walked into the pro shop of the El Segundo Golf Course with the intent to commit another crime.¹ He walked out of the shop with three golf clubs, priced at \$399 each, concealed in the leg of his pants.² Realizing that Ewing looked “totally out of place,” an employee telephoned the police, and he was arrested in the parking lot.³ Ewing was convicted of grand theft.⁴ Since Ewing had committed four prior violent felonies, he was sentenced to twenty-five years to life under California’s three strikes law.⁵

1. *Ewing v. California*, No. 143745, 2001 WL 1840666, at *1 (Cal. Ct. App. Apr. 25, 2001).

2. *Id.*

3. *Id.* Ewing entered the shop, looked at the golf clubs, and purchased a small bucket of balls for use on the driving range. *Id.* He then asked for directions to the driving range and walked back to the golf clubs. *Id.* After looking at the golf clubs, the employee noticed Ewing limping as he proceeded to the parking lot instead of the driving range. *Id.* When the police arrived, the officer observed Ewing walking “stiff legged” between two parked cars. *Id.* He then observed Ewing pull three golf clubs out of his pants and arrested him. *Id.*

4. *Id.*

5. *Id.* California’s three strikes legislation states:

If a defendant has two or more prior felony convictions . . . that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, (ii) imprisonment in the state prison for 25 years, (iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5

CAL. PENAL CODE § 667(e)(2)(A) (West 1999). Under Section 1170.12, California’s three strikes law is codified a second time in almost identical language, as it states,

If a defendant has two or more prior felony convictions . . . that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or (ii) twenty-five years, or (iii) the term determined by the court pursuant to Section

Ewing had several prior criminal convictions.⁶ His criminal career began in 1984 when he was convicted of grand theft.⁷ Later, between 1988 and 1993, he was convicted of eight misdemeanors.⁸ These convictions resulted in several periods of incarceration and probation.⁹ In 1993, over a five-week period, he committed three burglaries and one robbery in a Long Beach apartment complex.¹⁰ Ewing was convicted and sentenced to nine years and eight months in prison, then paroled in 1999.¹¹ Ten months later, in 2000, he stole the golf clubs from the pro shop.¹² The jury found Ewing guilty of felony grand theft.¹³

At sentencing, the Defendant asked the court to reduce the grand theft conviction to a misdemeanor and to strike “an appropriate number” of his prior convictions to avoid a three strikes sentence.¹⁴ The Defendant’s counsel urged the court to give leniency during sentencing due to the

1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5

Id. § 1170.12(c)(2)(A).

6. *Ewing v. California*, 538 U.S. 11, 18-19 (2003).

7. *Id.* at 18. Ewing was twenty-two when he pled guilty to grand theft. *Id.* The court sentenced Ewing to six months in jail, three years probation, and a three hundred dollar fine. *Id.*

8. *Id.* In 1988, Ewing was convicted of felony grand theft auto, but the sentencing court reduced the crime to a misdemeanor after Ewing served a one-year sentence and completed probation. *Id.* at 19. In 1990, he was convicted of petty theft and sentenced to sixty days in jail and probation. *Id.* In 1992, he was convicted of battery and sentenced to thirty days in jail and probation. *Id.* Later in 1992, he was convicted of theft and sentenced to ten days in jail and probation. *Id.* In January 1993, Ewing was convicted of burglary and sentenced to sixty days in jail and probation. *Id.* In February 1993, he was convicted of possessing drug paraphernalia and sentenced to six months in jail and probation. *Id.* In July 1993, he was convicted of appropriating lost property and sentenced to ten days in jail and probation. *Id.* In September 1993, he was convicted of unlawfully possessing a firearm and trespassing and sentenced to thirty days in jail and probation. *Id.*

9. *Id.*

10. *Id.* One of the burglary victims was awakened by Ewing attempting to take her videocassette recorder and television. *Id.* Ewing ran out the front door after hearing the victim scream. *Id.* On another occasion, Ewing confronted a victim in the mailroom of the apartment complex. *Id.* Ewing claimed to have a gun and ordered the victim to hand over his wallet. *Id.* When the victim resisted, Ewing brandished a knife and forced the victim back to the victim’s apartment. *Id.* As Ewing rummaged through the victim’s apartment, the victim fled. *Id.* Ewing escaped with the victim’s money and credit cards. *Id.*

11. *Id.* Even though Ewing had committed four violent felonies in 1993, he was not sentenced under the three strikes law because the law had not come into existence until 1994. See *People v. Superior Court of San Diego County ex rel. Romero*, 917 P.2d 628, 630 (Cal. 1996) (discussing the background of California’s three strikes law while holding that the trial court has the discretion to strike a previous felony in cases arising under the three strikes law); CAL. PENAL CODE § 667(b) (West 1999); CAL. PENAL CODE § 1170.12 (West 2004).

12. *Ewing v. California*, 538 U.S. 11, 19 (2003).

13. *Ewing v. California*, No. 143745, 2001 WL 1840666, at *1 (Cal. Ct. App. Apr. 25, 2001). The state had charged Ewing with one count of felony burglary and one count of felony grand theft. *Id.* The jury acquitted Ewing on the burglary count but convicted him on the grand theft count. *Id.*

14. *Id.*

Defendant's age and poor health.¹⁵ The trial judge took into consideration the Defendant's entire criminal history and the fact that he was on parole when he committed his last offense.¹⁶ The judge decided the grand theft would remain a felony and the Defendant's four prior strikes would stand.¹⁷ Under California's three strikes law, Ewing was a felon with two or more "serious or violent" felonies and was sentenced to twenty-five years to life for stealing \$1,200 worth of merchandise.¹⁸

15. *Id.*; see also Brief for Petitioner at 5-6, *Ewing v. California*, 123 S. Ct. 1179 (2003) (No. 01-6978) (requesting leniency due to Ewing's age, he was thirty-eight at the time of sentencing, and his deteriorating physical health due to AIDS).

16. *Ewing*, 2001 WL 1840666, at *3.

17. *Id.* at 1. The trial court did not make an express ruling on the motion to reduce Ewing's felony to a misdemeanor. *Id.* at **1-2. However, the appellate court implied a denial when the trial court declined to strike his prior convictions. *Id.* at *2.

18. *Id.* at *1. California's three strikes law has defined serious felonies as offenses listed in section 1192.7. CAL. PENAL CODE § 667(d)(1) (West 1999). Section 1192.7 lists serious felonies as:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) any burglary of the first degree; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phenylcyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; (28) any felony offense, which would also constitute a felony violation of Section 186.22; (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220; (30) throwing acid or flammable substances, in violation of Section 244; (31) assault with a deadly weapon, firearm, machine gun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245; (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Sections 245.2, 245.3, or 245.5; (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246; (34) commission of rape or

Ewing appealed the trial court's decision, arguing his sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁹ Ewing argued that his property crime was one of the least serious on the spectrum of criminal behaviors.²⁰ However, the sentence he received was one of the most severe that California courts were authorized to impose.²¹ Ewing argued that a comparison of his crime in relation to his sentence raised an inference of "gross disproportionality."²²

The California Court of Appeals rejected Ewing's arguments and affirmed the trial court's decision, relying on *Rummel v. Estelle*²³ to determine that his sentence was not "grossly disproportionate" under the Eighth Amendment.²⁴ The court found that Ewing's sentence served the

sexual penetration in concert with another person, in violation of Section 264.1; (35) continuous sexual abuse of a child, in violation of Section 288.5; (36) shooting from a vehicle, in violation of subdivision (c) or (d) of Section 12034; (37) intimidation of victims or witnesses, in violation of Section 136.1; (38) criminal threats, in violation of Section 422; (39) any attempt to commit a crime listed in this subdivision other than an assault; (40) any violation of Section 12022.53; (41) a violation of subdivision (b) or (c) of Section 11418; and (42) any conspiracy to commit an offense described in this subdivision.

Id. at § 1192.7. Violent felonies are defined as offenses listed in section 667.5 of the penal code. *Id.* There are fewer violent felonies listed in comparison to serious felonies; however, the list of violent felonies have been included in the list of serious felonies under section 1192.7 of the penal code. *Id.* at § 667.5(c). The code states that "[t]he Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person." *Id.*

19. *Ewing*, 2001 WL 1840666, at *1. The Eighth Amendment of the United States Constitution states that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

20. Brief for Petitioner at 7, *Ewing v. California*, 538 U.S. 11 (2003) (No. 01-6978). Under California law, grand theft without any prior convictions authorizes a court to sentence an offender to a maximum of sixteen months. *Id.* at 8. Absent application of the three strikes law, grand theft with prior convictions carries a maximum sentence of three years. *Id.* at 8-9. Ewing argued that California's sentencing guidelines illustrates that grand theft is among the least significant in the spectrum of criminal conduct. *Id.* at 7.

21. *Id.* There are only two sentences that are more severe, death and life without parole, which are reserved for those who commit the most violent crimes. *Id.* at 8.

22. *Id.* at 20-21. Ewing argued that a finding of "gross disproportionality" is further confirmed when considering the sentences imposed in California and in other jurisdictions for the same offense. *Id.* at 10-11.

23. 445 U.S. 263 (1980).

24. *Ewing*, 2001 WL 1840666, at *1. The appellate court observed that the United States Supreme Court has rejected the contention that recidivism statutes are cruel and unusual punishment. *Id.* at *4. The appellate court noted from *Rummel* that a recidivist sentence is "based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." *Id.* (quoting *Rummel*, 445 U.S. at 284). Since the sentence in *Rummel* did not violate the Eighth Amendment, by analogy the appellate court determined that Ewing's sentence did not violate the Eighth Amendment. *Id.* Ewing's recidivism justified his twenty-five year sentence. *Id.*

legitimate goals of deterring and incapacitating repeat offenders.²⁵ The California Supreme Court denied Ewing's petition for review.²⁶

The United States Supreme Court granted *certiorari*.²⁷ The issue before the Court was whether California's three strikes legislation violated the Eighth Amendment by sentencing repeat felons to a prison term of twenty-five years to life.²⁸ The Court *held* that California's three strikes law does not violate the Eighth Amendment's prohibition on cruel and unusual punishments.²⁹

II. LEGAL BACKGROUND

The United States Constitution limits punishments on an offender through the Eighth Amendment's prohibition on cruel and unusual punishments.³⁰ The Eighth Amendment of the United States Constitution states, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."³¹ This amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.³²

25. *Id.* at *4. The appellate court recognized that California courts have upheld numerous severe sentences under the three strikes law for minor offenses committed after two or three prior strike convictions. *Id.* The court noted that under California's Constitution, a sentence is disproportionate only if it "shocks the conscience and offends fundamental notions of human dignity." *Id.* (quoting *In re Lynch*, 503 P.2d 921, 930 (Cal. 1972)). The court applied three factors: "(1) the nature of the offense and offender, (2) the sentence compared to sentences for more serious offenses in California, and (3) the sentence compared to sentences for the same offenses in other states." *Id.* (citing *Lynch*, 503 P.2d at 930-32). The court determined that Ewing's sentence was reasonably proportional to the offense and offender due to Ewing's recidivist history and the severity of Ewing's prior convictions. *Id.* The court also determined that Ewing's sentence conformed to other repeat offender sentences within California and in other states. *Id.* Therefore, the court concluded Ewing's sentence did not violate California's Constitution. *Id.*

26. *Ewing v. California*, 538 U.S. 11, 20 (2003).

27. *Ewing v. California*, 535 U.S. 969 (2002), *aff'd* 538 U.S. 11 (2003). The Court also granted *certiorari* in *Lockyer v. Andrade*, an appeal from the United States Court of Appeals for the Ninth Circuit. 538 U.S. 63, 70 (2003). In *Lockyer*, the issue before the Court was whether Andrade's two consecutive terms of twenty-five years to life in prison for a third strike was an unreasonable application of United States Supreme Court law. *Id.* at 66. The Court held, on habeas review, that state court's affirmance of consecutive twenty-five years to life sentence for petty theft under California's three strikes law was not an unreasonable application of federal law. *Id.* at 77.

28. *Ewing*, 538 U.S. at 14.

29. *Id.* at 30-31.

30. U.S. CONST. amend VIII.

31. *Id.*

32. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (applying the Eighth Amendment to the states through the Fourteenth Amendment). "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive . . . any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV. The defendant in *Robinson* had violated a California statute that stated the following:

"No person shall use, or be under the influence of, or be addicted to the use of narcotics . . . [a]ny person convicted of violating any provision of this section is guilty

A. PURPOSES OF THREE STRIKES LEGISLATION

The overall purpose of punishment within the criminal justice system is to prevent the commission of crimes and to deter recidivism.³³ In order for that objective to be successful, punishment must be effective in addressing the problems and solutions for the entire system, not just in individual cases.³⁴ There are many methods available to reduce crime, such as additional police, additional courts, mandatory sentencing, and increased prosecutorial resources.³⁵

Federal courts defer to state legislatures when enacting and implementing crime reduction methods.³⁶ California decided the most efficient way to reduce crime was through sentencing.³⁷ The legislation targeted career criminals.³⁸ To make punishment more effective and increase public safety, California passed the three strikes law.³⁹ The traditional penological theories of punishment serve four purposes: deterrence, incapacitation, retribution, and rehabilitation.⁴⁰

of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail.”

Robinson, 370 U.S. at 661. The court determined that a statute that makes the “status” of narcotic addiction a criminal offense inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. *Id.* at 666-67.

33. James A. Ardaiz, *Essay: California’s Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 3 (2000). Recidivism is “[a] tendency to relapse into a habit of criminal activity or behavior.” BLACK’S LAW DICTIONARY 1276 (7th ed. 1999).

34. Ardaiz, *supra* note 33, at 3.

35. *Id.*

36. *See In re Anderson*, 447 P.2d 117, 129 (Cal. 1968) (rejecting petitioner’s argument that the death penalty is cruel and unusual punishment).

37. Ardaiz, *supra* note 33, at 3.

38. *See People v. Leng*, 83 Cal. Rptr. 2d 433, 441 (Cal. Ct. App. 1999) (reversing the trial court’s decision to use juvenile’s non-serious and non-violent crime as a second strike under the three strikes law).

39. CAL. PENAL CODE § 667 (b)-(i) (West 1999). Section 667 reads in part, “It is the intent of the Legislature . . . to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.” *Id.* § 667(b). California’s three strikes law stated:

If a defendant has two or more prior felony convictions . . . that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, (ii) imprisonment in the state prison for 25 years, (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5

Id. § 667 (e)(2)(A).

40. *See Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) (upholding defendant’s mandatory life sentence for possessing cocaine).

Deterrence is punishment given to dissuade other potential offenders.⁴¹ The three strikes law seeks to use mandatory increased sentences to deter habitual offenders.⁴² In developing legislation to reduce crime, California focused on offenders who have previously committed serious or violent felonies but have not been deterred from further criminality by their prior imprisonment.⁴³

Incapacitation is the most direct means of preventing future offenses by either imprisoning or executing the offender.⁴⁴ The theory's primary purpose is to protect the public by incarcerating offenders and keeping them off the streets.⁴⁵ California's intent in passing the three strikes law was to ensure longer prison sentences by incapacitating the offender.⁴⁶ The length of time an offender should remain incapacitated is based on the offender's most recent offense and the offender's criminal tendencies.⁴⁷

Retribution focuses on punishing an offender, rather than preventing a crime from occurring.⁴⁸ Three strikes laws serve the retributive purpose because a repeat offender is more blameworthy due to repeated commission of crime and should serve harsher punishments.⁴⁹

41. See *People v. Juarez*, 26 Cal. Rptr. 2d 697, 699 (Cal. Ct. App. 1993) (upholding defendant's five year felony sentence enhancement under § 667 of the California Penal Code). There are two types of deterrence: general and specific. Markus Dirk Dubber, *Note, The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 210-13 (1990). Under a general deterrence theory, the threat of incarceration prevents individuals from engaging in criminal conduct. *Id.* Specific deterrence is punishment given to dissuade a specific group of offenders, such as recidivists in the three strikes legislation. *Id.*

42. *Leng*, 83 Cal. Rptr. 2d at 441.

43. *Id.*

44. See *Rummel v. Estelle*, 445 U.S. 263, 284-85 (1980) (upholding defendant's mandatory life sentence for a third felony under Texas' recidivist statute); Dubber, *supra* note 41, at 216.

45. *Rummel*, 445 U.S. at 284-85.

46. *Leng*, 83 Cal. Rptr. 2d at 441.

47. *Rummel*, 445 U.S. at 284-85.

48. See *People v. Kilborn*, 49 Cal. Rptr. 2d 152, 154 (Cal. Ct. App. 1996) (upholding defendant's sentence for a third felony under California's three strikes law); Dubber, *supra* note 41, at 202.

49. *Kilborn*, 49 Cal. Rptr. 2d at 154. However, it is argued that the three strikes law violates the retributive principles of uniformity and proportionality. Dubber, *supra* note 41, at 208. The law does not balance the seriousness of the violation or the offender's blameworthiness in determining the sentence. *Id.* Instead, the punishment is a mandatory sentence based on the category of the crime. *Id.* The law does not take into consideration specific characteristics of the offender that would result in either mitigation or elevation of an offender's blameworthiness. *Id.* Ignoring these characteristics would violate the foundations of criminal punishment as set forth by the California Supreme Court. *Id.* at 209. "The ethical principles that punishment should be proportionate to individual guilt, and that a less culpable offender should not be punished more severely than a more culpable offender, permeate the criminal law and underlie constitutional protections." *Id.* (quoting *Carlos v. Superior Court*, 672 P.2d 862, 864 (Cal. 1983), *overruled in part on other grounds* by *People v. Anderson*, 742 P.2d 1306 (Cal. 1987) (holding that intent to kill was not an element of the felony murder special circumstance)).

Rehabilitation focuses on reforming an offender by encouraging behavior that conforms to society.⁵⁰ Rehabilitation focuses on treatment and social rehabilitation for the offender instead of punishment.⁵¹ It is generally not effective with repeat offenders, which is evident through the offender's continued criminal behavior.⁵² California, like most states, has replaced or supplemented rehabilitation with retribution for their sentencing schemes.⁵³ Adopting the three strikes law illustrated California's abandonment of the rehabilitative theory in criminal sentencing.⁵⁴ Commonly, a rehabilitative sentencing system consists of an indeterminate sentence that can be shortened if the offender has been rehabilitated.⁵⁵ This individualized sentence provides an incentive to the offender to reform.⁵⁶ This aspect is absent in the three strikes law.⁵⁷ Instead, the law creates a determinate sentence that does not allow consideration of a specific offender's rehabilitative potential.⁵⁸

B. CALIFORNIA'S THREE STRIKES LAW

California's criminal justice system has shifted toward punishing repeat offenders.⁵⁹ California had previously maintained the rehabilitation theory for criminal sentencing for sixty years.⁶⁰ However, in 1976, the Determinate Sentencing Law was introduced, requiring offenders to serve

50. See *People v. Caddick*, 206 Cal. Rptr. 454, 457 (Cal. Ct. App. 1984) (affirming the trial court's calculation of the defendant's work credit toward his prison sentence).

51. *Id.*

52. *Id.*; Ardaiz, *supra* note 33, at 5.

53. *Caddick*, 206 Cal. Rptr. at 457.

54. *Id.*

55. *Id.* (citing *In re Lynch*, 503 P.2d 921, 924 (Cal. 1972)). An indeterminate sentence is "a sentence of an unspecified duration, such as one for a term of ten to twenty years." BLACK'S LAW DICTIONARY 1367 (7th ed. 1999).

56. *Caddick*, 206 Cal. Rptr. at 457 (citing *Lynch*, 503 P.2d at 924).

57. *Id.*

58. *Id.* A determinate sentence is "a sentence for a fixed length of time rather than for an unspecified duration." BLACK'S LAW DICTIONARY 1367 (7th ed. 1999).

59. *Caddick*, 206 Cal. Rptr. at 457.

60. *Id.* The California Legislature has outlined the purpose of the Determinate Sentencing Law as follows:

The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

CAL. PENAL CODE § 1170(a)(1) (West 1999).

longer sentences.⁶¹ The law was passed in order to ensure proportionate and uniform sentencing.⁶² The passage of the law “reversed the purpose of sentencing in California from rehabilitation to punishment”⁶³

In 1994, California enacted the three strikes law.⁶⁴ There are two versions of California’s three strikes law.⁶⁵ First, California Penal Code section 667, also known as Initiative 593, was enacted by the Legislature.⁶⁶ At the general election, California voters approved the second version, Proposition 184, California Penal Code section 1170.12.⁶⁷ The two statutes are virtually identical and operate in the same manner by increasing prison terms for repeat offenders.⁶⁸ Two murders committed in California roused the support of Proposition 184.⁶⁹ Both of the victims’ fathers became public advocates for the three strikes law in California.⁷⁰

California’s three strikes law states that if the defendant has one prior “serious or violent” felony conviction, as defined in the penal code,⁷¹ the sentence is “twice the term otherwise provided as punishment for the current felony conviction.”⁷² If the defendant has two or more prior

61. *Caddick*, 206 Cal. Rptr. at 457. The Determinate Sentencing Law states, In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council

CAL. PENAL CODE § 1170(a)(3) (West 2004).

62. *See* *People v. Simon*, 193 Cal. Rptr. 28, 31 (Cal. Ct. App. 1983) (upholding defendant’s prison sentence for forgery).

63. *Caddick*, 206 Cal. Rptr. at 457.

64. *See* *People v. Superior Court of San Diego County ex rel. Romero*, 917 P.2d 628, 630 (Cal. 1996) (holding the trial court has the discretion to strike a previous felony in cases arising under the three strikes law); CAL. PENAL CODE § 667(b) (West 1999); CAL. PENAL CODE § 1170.12 (West 2004).

65. *Romero*, 917 P.2d at 630.

66. *Id.*

67. *Id.* at 630-31.

68. *Id.* at 631.

69. *See* *State v. Oliver*, 745 A.2d 1165, 1167 (N.J. 2000) (discussing the origins of three strikes legislation while holding New Jersey’s three strikes law constitutional). In 1992, eighteen-year-old Kimber Reynolds had been murdered by a repeat offender in Fresno, California. *Id.* In 1993, Richard Allen Davis kidnapped twelve-year-old Polly Klaas from her home in Petaluma, California. *Id.* After kidnapping Polly, Davis raped and killed her. *Id.* Davis was a six-time offender who was on parole for his recent offense of sexual assault when he murdered Polly. *Id.*

70. *Id.* The fathers of Kimber Reynolds and Polly Klaas became involved in preventing the premature release of dangerous criminals from prison. *Id.* They focused primarily on California’s three strikes law. *Id.*

71. *See* CAL. PENAL CODE § 1192.7(c) (West 1999) (listing all “serious” felonies); *see also* CAL. PENAL CODE § 667.5(c) (West 1999) (listing all “violent” felonies).

72. *Id.* § 667(e)(1); *id.* § 1170.12(c)(1).

“serious or violent” felony convictions, the sentence is “an indeterminate term of life imprisonment.”⁷³

Certain offenses under California law can be classified as either misdemeanors or felonies.⁷⁴ These offenses are known as “wobblers.”⁷⁵ If the offense is treated as a felony, the offense is a triggering offense under the three strikes law.⁷⁶ Once an offense is treated as a felony, only the discretion of the prosecutor or the court can lower the offense to a misdemeanor.⁷⁷ The court will consider various factors in determining whether to treat the offense as a misdemeanor or felony.⁷⁸ Those factors include (1) the nature and circumstances of the offenses, (2) the defendant’s appreciation of and attitude toward the offense, and (3) the general objective of sentencing.⁷⁹ Besides reducing “wobblers” to misdemeanors, another way to avoid a three strikes sentence is by vacating allegations of prior “serious or violent” felony convictions.⁸⁰

73. *Id.* § 667(e)(2)(a); *id.* § 1170.12(c)(2)(a).

74. *See* *People v. Superior Court ex rel. Alvarez*, 928 P.2d 1171, 1174 (Cal. 1997) (holding the trial courts have the discretion to reduce “wobbler” offenses by granting probation or imposing a sentence other than prison). Section 17 of the California Penal Code states,

[w]hen a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: (1) After a judgment imposing a punishment other than imprisonment in the state prison . . . (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor

CAL. PENAL CODE § 17(b) (West 1999).

75. *Alvarez*, 928 P.2d at 1174. In *Alvarez*, the trial court reduced a charge of possession of controlled substance from a felony to a misdemeanor. *Id.* at 973-74. The defendant was in possession of drug paraphernalia and a baggie of .41 grams of methamphetamine, a felony violation of the Health and Safety Code. *Id.* at 973. In another California case, the court elevated a charge of petty theft from a misdemeanor to a felony. *People v. Bury*, 58 Cal. Rptr. 2d 682, 683 (Cal. Ct. App. 1996). Due to the defendant’s three prior convictions of “serious and violent” felonies, the court elevated the petty theft to a felony. *Id.* The felony conviction triggered the three strikes law and the defendant was sentenced to twenty-eight years to life. *Id.*

76. *Alvarez*, 928 P.2d at 1178. The crime remains a felony unless the trial court exercises its discretion in reducing the crime to a misdemeanor. *See* *People v. Williams*, 163 P.2d 692, 696 (1945) (affirming the trial court’s decision to admit evidence of defendant’s previous felony conviction).

77. *Alvarez*, 928 P.2d at 1176.

78. *Id.* at 1177.

79. *Id.*

80. *Williams*, 948 P.2d at 437. In determining whether to vacate allegations of prior felony convictions, the court in question must consider,

[W]hether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes,

C. CONSTITUTIONALITY OF THREE STRIKES LAWS

The Supreme Court has already determined that no sentence is constitutional *per se*.⁸¹ The Eighth Amendment specifically prohibits excessive bail, excessive fines, and cruel and unusual punishments.⁸² However, the Court has not clearly stated what the Eighth Amendment actually prohibits.⁸³ There is some debate whether the Eighth Amendment only applies to cruel and unusual modes of punishment and not to disproportional sentences.⁸⁴ Members of the Court have disagreed whether the Eighth Amendment contains a proportionality principle.⁸⁵ If it is agreed that the Eighth Amendment does contain a proportionality principle, the next step for the Court is to set forth a framework to determine if an offender's sentence violates that principle.⁸⁶

1. *Proportionality Implied in the Eighth Amendment*

The principle of proportionality in sentencing was founded in English law.⁸⁷ The idea dates back to the Magna Carta of 1215, which stated, "a free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity."⁸⁸ When drafting the United States Constitution,

and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth.

Id.

81. *Robinson v. California*, 370 U.S. 660, 667 (1962). The Court held a ninety-day sentence for narcotics addiction unconstitutional. *Id.* at 666. The Court noted that a sentence of one day in prison could be unconstitutional under certain circumstances. *Id.* at 667. However, in another case, the Court concluded that three strikes laws do not violate the constitutional prohibition of double jeopardy. See *Grygor v. Burke*, 334 U.S. 728, 732 (1948) (upholding a defendant's life sentence under Pennsylvania's Habitual Criminal Act). The court reasoned that the offender's sentence is not viewed as a new jeopardy or additional penalty for earlier crimes; rather, the sentence is stiffened due to the repetitive nature of the offenses. *Id.*

82. U.S. CONST. amend. VIII.

83. *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring).

84. *Id.* at 985; *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).

85. *Harmelin*, 501 U.S. at 985; *Ewing*, 538 U.S. at 31 (Scalia, J., concurring).

86. *Solem v. Helm*, 463 U.S. 277, 290-91 (1983). The California Supreme Court has determined that under California's Constitution, a sentence is disproportionate only if it "shocks the conscience and offends fundamental notions of human dignity." *In re Lynch*, 503 P.2d 921, 930 (Cal. 1972). The court applied a framework with three factors: (1) the nature of the offense and offender, (2) the sentence compared to sentences for more serious offenses in California, and (3) the sentence compared to sentences for the same offenses in other states. *Id.* at 930-32.

87. *Harmelin*, 501 U.S. at 1011 n.1 (White, J., dissenting); *Solem*, 463 U.S. at 284; *Rummel v. Estelle*, 445 U.S. 263, 288-89 (1980) (Powell, J., dissenting).

88. *Rummel*, 445 U.S. at 288-89 (quoting JAMES CLARKE HOLT, *MAGNA CARTA* 323 (Cambridge Univ. Press, 1965)).

the framers adopted the language of the English Bill of Rights and the English principle of proportionality.⁸⁹

The majority of precedent has applied a proportionality principle to the Eighth Amendment's prohibition on cruel and unusual punishments for over a century.⁹⁰ The Court has ruled that the only sentences that will violate this provision will be those sentences that are "grossly disproportionate" to the crime committed.⁹¹ Because courts will only consider "grossly disproportionate" sentences unconstitutional, successful constitutional challenges will be exceedingly rare in non-capital cases.⁹²

The most recent line of cases considering the constitutionality of an offender's sentence began with *Rummel*.⁹³ In *Rummel*, the defendant was sentenced to life in prison under a Texas recidivist statute.⁹⁴ Rummel's previous offenses had consisted of two felonies, fraudulent use of a credit card, and passing a forged check.⁹⁵ His third felony conviction consisted of obtaining \$120.75 by false pretenses, for which the trial court imposed a life sentence.⁹⁶ Rummel appealed his sentence, stating it was cruel and unusual punishment since the life sentence was so disproportionate to the crimes he had committed.⁹⁷ The Court held that Rummel's mandatory sentence was not cruel and unusual punishment under the Eighth Amendment.⁹⁸

89. *Solem*, 463 U.S. at 285-86. The English Bill of Rights contained a proportionality principle, which stated, "excessive [b]aile ought not to be required nor excessive [f]ines imposed nor cruel and unusual [p]unishments inflicted." *Id.* at 285 (quoting 1 W. & M., Sess. 2, ch. 2 (1689)). Also, common-law punishments were required to be proportional to the offense under the chapters of Magna Carta. *Id.* (citing *Hodges v. Humkin*, 80 Eng. Rep. 1015, 1016 (K.B. 1615)).

90. *See, e.g., Weems v. United States*, 217 U.S. 349, 372-73 (1910) (holding a prisoner's punishment improper because it was not proportionate to his offense; therefore, the prisoner's sentence violated the constitutional prohibition on cruel and unusual punishment).

91. *Id.*

92. *Rummel*, 445 U.S. at 272. A capital sentence is reviewed more closely because "it is unique in its total irrevocability." *Id.* Previous decisions in capital cases offer limited assistance due to the unique nature of the death penalty. *Id.*

93. *Id.* at 264.

94. *Id.* Texas passed a recidivist statute in 1973, stating that offenders that "have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." *Id.* (quoting TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974)).

95. *Id.* at 265-66.

96. *Id.* at 266.

97. *Id.* at 267. The Texas state court imposed Rummel's life sentence. *Id.* at 266. Rummel appealed and the Texas appellate courts rejected his appeal. *Id.* at 267. Rummel sought a writ of habeas corpus in Federal District Court. *Id.* The Fifth Circuit's District Court and Court of Appeals rejected Rummel's argument. *Id.* at 267-268. The United States Supreme Court granted *certiorari*. *Id.* at 265.

98. *Id.* at 285.

In deciding *Rummel*, the Court deferred to the state legislature to decide what societal interests were involved in sentencing offenders.⁹⁹ The Court held that it was up to the state to decide whether Rummel was capable of conforming to the norms of society.¹⁰⁰

The Court took into consideration Rummel's sentence triggering conduct and his criminal history when it determined the proportionality of his sentence.¹⁰¹ Another important factor for the Court was that Rummel's sentence was a non-capital sentence.¹⁰² Rummel was sentenced to life, but was eligible for parole after twelve years.¹⁰³ A capital sentence is reviewed more closely because "it is unique in its total irrevocability."¹⁰⁴ Capital sentences completely reject rehabilitation as a purpose for punishment.¹⁰⁵ Therefore, with the exception of capital punishment, successful constitutional challenges to the proportionality of sentences are very rare.¹⁰⁶ However, the Court had not set forth objective factors to determine the proportionality of a particular sentence.¹⁰⁷ Nor had the Court discussed how narrowly or broadly the Eighth Amendment's implied proportionality principle should be interpreted.¹⁰⁸

a. Framework for Determining Proportionality

In *Solem v. Helm*,¹⁰⁹ the Court created an objective framework to determine if an offender's sentence was proportional.¹¹⁰ The first step is to weigh the gravity of the offense with the severity of the punishment.¹¹¹ In weighing the crime with the punishment, several factors can be used, such as harm caused to victim or society, the culpability of the offender, length of prison term, triggering conduct, and the offender's criminal history.¹¹² Second, courts can perform an intra-jurisdictional comparison.¹¹³ Third,

99. *Id.* at 274.

100. *Id.* at 276.

101. *Id.* at 276, 278.

102. *Id.* at 280.

103. *Id.*

104. *Id.* at 272 (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972)).

105. *Id.*

106. *Id.*

107. *Solem v. Helm*, 463 U.S. 277, 290-91 (1983).

108. *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring).

109. 463 U.S. 277 (1983).

110. *Solem*, 463 U.S. at 290-91.

111. *Id.*

112. *Id.* at 292-93.

113. *Id.* at 291.

courts can compare other jurisdictions' sentencing practices for the commission of the same crime.¹¹⁴

The Court did not mandate an inquiry into each factor.¹¹⁵ However, no one factor may be sufficient to determine the constitutionality of a particular sentence.¹¹⁶ Most importantly, when applying these objective factors, the reviewing courts should give substantial deference to the state's legislature and to the discretionary authority of trial court judges in sentencing offenders.¹¹⁷

In *Solem*, the defendant's life sentence for a seventh non-violent felony was held unconstitutional.¹¹⁸ When applying the objective criteria, the Court found that the defendant's sentence was the most severe for relatively minor conduct.¹¹⁹ He was treated more severely than other criminals within the state that had committed crimes that were more serious.¹²⁰ With the exception of one state, he was treated more harshly than any other jurisdiction would have treated a similar offender.¹²¹ The Court concluded that the defendant's sentence was significantly disproportionate to his crime, therefore violating the Eighth Amendment.¹²²

114. *Id.*

115. *Id.* at 290 n.17.

116. *Id.*

117. *Id.* at 290. More recently the Court has reasoned that due to the high rate of recidivism and the diversity of approaches dealing with recidivism, the Court will tolerate a spectrum of state procedures dealing with it. *Parke v. Raley*, 506 U.S. 20, 28 (1992) (quoting *Spencer v. Texas*, 385 U.S. 554, 566 (1967)). The Court upheld the defendant's sentence under the Kentucky statute that enhanced sentences for repeat felons. *Id.* at 34.

118. *Solem v. Helm*, 463 U.S. 277, 303 (1983). Helm had been convicted of six non-violent felonies in South Dakota prior to his life sentence. *Id.* at 279. His prior crimes consisted of three convictions of third-degree burglary, obtaining money under false pretenses, grand larceny, and driving while intoxicated. *Id.* at 279-80.

119. *Id.* at 297. In *Solem*, the defendant's seventh felony conviction was for writing a "no account" \$100 check. *Id.* at 281. The law in South Dakota states that,

"[A]ny person who, for himself or as an agent or representative of another for present consideration with intent to defraud, passes a check drawn on a financial institution knowing at the time of such passing that he or his principal does not have an account with such financial institution, is guilty of a Class 5 felony."

Id. at 281 n.5 (quoting S. D. CODIFIED LAWS § 22-41-1.2 (1979)).

120. *Id.* at 299.

121. *Id.* Nevada is the only state that would have authorized a life sentence without parole for Helm's offense. *Id.* The Court noted that Nevada merely authorizes a life sentence; however, it was not known to the Court whether a defendant had actually received this severe sentence for Helm's crime. *Id.* at 300.

122. *Id.* at 303.

b. Narrowing the Proportionality Principle

Eight years later, in *Harmelin v. Michigan*,¹²³ Justice Kennedy provided insight on how broad the Eighth Amendment's prohibition on cruel and unusual punishment spans.¹²⁴ He analyzed common ideas within previous decisions to support that the proportionality principle is very narrow when applied to non-capital cases.¹²⁵ The first principle Justice Kennedy argued was that sentencing guidelines should be left to the state legislatures.¹²⁶ Second, the Eighth Amendment does not require implementation of any specific penological theory.¹²⁷ Third, every jurisdiction has a different rationale for adopting a specific penological theory; therefore, there will be differences in sentencing between jurisdictions.¹²⁸ Finally, proportionality should be reviewed by objective factors.¹²⁹ Justice Kennedy concluded that all these principles support the fact that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence."¹³⁰ Rather, it prohibits only "grossly disproportionate" sentences.¹³¹

In *Harmelin*, the Court upheld the defendant's sentence of a mandatory term of life imprisonment without the possibility of parole for possessing more than 650 grams of cocaine.¹³² Justice Kennedy, when weighing the

123. 501 U.S. 957 (1991).

124. *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring). Justice Kennedy's concurrence in *Harmelin* has been accepted as law by the Court. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (holding that executions of mentally retarded criminals is cruel and unusual punishment when applying the proportionality principle to the Eighth Amendment). The majority of the *Harmelin* opinion was delivered by Justice Scalia and was joined by the Chief Justice Rehnquist for parts I, II, III, which concluded that the Eighth Amendment contains no proportionality principle. *Harmelin*, 501 U.S. at 961. The judgment of the court was delivered by Justice Scalia in part IV of the opinion. *Id.* The judgment was joined by Chief Justice Rehnquist and Justice O'Connor, Kennedy, and Souter. *Id.* at 996. Justice Kennedy wrote an opinion, concurring in part and concurring in the judgment, in which Justice O'Connor and Justice Souter joined. *Id.* Justice Kennedy's concurrence stated that the Eighth Amendment does contain a proportionality principle. *Id.*

125. *Id.* at 997-98.

126. *Id.* at 998.

127. *Id.* at 999.

128. *Id.* Penology is "the study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals, including the art of fitting the right treatment to an offender." BLACK'S LAW DICTIONARY 1155 (7th ed. 1999).

129. See *Harmelin*, 501 U.S. at 1000 (referring to the objective factors set forth in *Solem*). The objective factors set forth in *Solem* consisted of, (1) weighing the gravity of the offense with the harshness of the penalty, (2) comparing sentences imposed on other criminals within the same jurisdiction to the offender, and (3) comparing the sentences imposed on other criminals for commission of the same crime within other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 290-92 (1983).

130. *Harmelin*, 501 U.S. at 1001.

131. *Id.*

132. *Id.* at 1009.

crime with the punishment, concluded that the defendant's sentence was the second most severe penalty permitted by law; however, his crime threatened to cause grave harm to society.¹³³ Considering the severe nature of the defendant's crime, his sentence did not give an inference of gross disproportionality; therefore, no jurisdictional comparison was needed and the sentence was held constitutional.¹³⁴

2. *No Proportionality Implied in the Eighth Amendment*

An opposing interpretation of the Eighth Amendment is that there is no proportionality guarantee written into the amendment.¹³⁵ Rather, the belief is that the prohibition on cruel and unusual punishments refers only to the modes of punishment.¹³⁶ This view has only been accepted by a few Justices of the Court.¹³⁷ The majority opinion in *Harmelin* sets forth four reasons for concluding that there is no proportionality contained within the Eighth Amendment.¹³⁸

First, the *Solem* Court noted that the Eighth Amendment was derived from the English Declaration of Rights of 1689; however, Justice Scalia argued that the guarantee used by the King's Bench was a protection from illegal sentences rather than disproportional sentences.¹³⁹ Justice Scalia produced examples where the King's Bench allowed for discretion of the court as long as the sentence did not extend to life.¹⁴⁰ Like the American version, the English court had a "cruel and unusual" provision written into the Declaration of Rights.¹⁴¹ The decisions that were handed down during

133. *Id.* at 1002.

134. *Id.* at 1004.

135. *Id.* at 965.

136. *Id.* at 974.

137. *Id.* at 965; *Ewing v. California*, 538 U.S. 11, 31-32 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

138. *Harmelin v. Michigan*, 501 U.S. at 957, 962-94 (1991).

139. *Id.* at 967 (citing *Solem v. Helm*, 463 U.S. 277, 285 (1983)).

140. *Id.* at 970.

141. *Id.* at 966 (citing 1 W. & M., Sess. 2, ch. 2, (1689)). The preamble to the Declaration of Rights contained almost identical language to the Eighth Amendment; the document stated,

"By Prosecutions in the Court of Kings Bench for Matters and Causes cognizable onely in Parlyament and by diverse other Arbitrary and Illegal Courses. . . . Excessive Baile hath beene required of Persons committed in Criminal Cases to elude the Benefit of the Lawes made for the Liberty of the Subjects And excessive Fines have been imposed. . . . And illegal and cruell Punishments inflicted All which are utterly and directly contrary to the knowne Lawes and Statutes and Freedom of this Realme."

Id. at 969 (quoting 1 W. & M., Sess. 2, ch. 2 (1689)).

that time shed light on the interpretations of the phrase.¹⁴² The English courts interpreted cruel as barbarous or illegal punishments.¹⁴³ In England, the courts also required that punishment not be unusual, meaning that the sentence remain within the common-law traditions.¹⁴⁴ Therefore, it appears unlikely that the English provision required the sentences to be proportional.¹⁴⁵

Second, the Eighth Amendment intended to prohibit certain modes of punishment that are not regularly or customarily used.¹⁴⁶ Justice Scalia noted that proportionality provisions had been included in several state constitutions, therefore the framers were aware of such a concept.¹⁴⁷ If the framers intended the Eighth Amendment to include proportionality, they would have stated a proportionality principle directly.¹⁴⁸ Scalia also used nineteenth and early twentieth century cases to illustrate that, historically, the concept of a sentence being proportional was only an issue in extreme cases.¹⁴⁹

142. *Id.* at 969. The Court cited an example of the English court interpreting the “cruel and unusual” provision. *Id.* at 969-71. The Court noted that in 1685, a clerk falsely accused fifteen Catholics of conspiring to overthrow King Charles II. *Id.* at 969. The falsely accused men were tried and executed. *Id.* at 969-70. The clerk was convicted of bearing false witness against another. *Id.* at 970 (citing *Second Trial of Titus Oates*, 10 How. St. Tr. 1227, 1314 (K. B. 1685)). The English court agreed that the punishment would be decided by the discretion of the court, as long as the sentence did not extend to life. *Id.* (quoting *Second Trial of Titus Oates*, 10 How. St. Tr. at 1316). The English court sentenced the clerk to whipping and life imprisonment. *Id.* The dissenting judges of the English court concluded that “. . . Said Judgments are barbarous, inhuman, and unchristian; and there is no Precedent to warrant the Punishments of whipping and committing to Prison for Life, for the Crime of Perjury; which yet were but Part of the Punishments inflicted upon him” and “. . . that the said judgments were contrary to Law and ancient Practice, and therefore, erroneous, and ought to be reversed.” *Id.* at 971 (quoting *Second Trial of Oates*, 10 How. St. Tr. at 1325). The clerk sought to have his sentence annulled by the House of Commons, but was unsuccessful. *Id.* The House of Commons had stated that the “cruel and unusual” provision focused on illegality, not proportionality. *Id.*

143. *Id.* at 971.

144. *Id.* at 974. The majority noted that the common-law traditions allowed a death penalty for all felonies until 1826. *Id.* at 975 (citing 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 458, 471-72 (1883)). By 1830, the law allowed the death penalty for murder, attempted murder, administering poison to procure abortion, sodomy, rape, statutory rape, and certain classes of forgery. *Id.* (citing 1 J. STEPHEN at 473-74).

145. *Id.*

146. *Id.* at 976.

147. *See id.* at 977 (listing states that had included proportionality protections in their constitutions).

148. *Id.*

149. *Id.* at 984-85. The Court cited a past decision finding that a sentence is disproportional to an offense when it will “shock public sentiment and violate the judgment of reasonable people [would be] cruel and unusual.” *Id.* at 985 (quoting *Jackson v. United States*, 102 F. 473, 488 (9th Cir. 1900)).

Third, there are no textual or historical standards to assist judges in determining disproportionality.¹⁵⁰ The lack of standards is due to the changing needs of the legislature.¹⁵¹ Proportionality of a sentence is dependent on the current needs of the state.¹⁵² As a result, there can be differences between jurisdictions because federalism allows states to treat similar situations differently due to local needs, concerns, and social conditions.¹⁵³

Finally, Justice Scalia argued that one of the earliest proportionality cases held a sentence unconstitutional because the punishment was unusual, not because the sentence was disproportional.¹⁵⁴ He argued that the defendant's sentence was unknown to Anglo-American tradition, which made the punishment unusual, violating the Eighth Amendment.¹⁵⁵ Sentences for a term-of-years that are severe and mandatory might be cruel, but they are not unusual.¹⁵⁶ These sentences have been used throughout this country's history and are not "unusual" under the proportionality principle set forth by earlier cases.¹⁵⁷

D. SUMMARY OF LEGAL BACKGROUND

There are four theories of punishment within the criminal justice system: deterrence, incapacitation, retribution, and rehabilitation.¹⁵⁸ State legislatures are responsible for making the policy decisions of what theories support the state's sentencing scheme.¹⁵⁹ California sought to increase public safety by deterring and incapacitating repeat offenders.¹⁶⁰ The state legislature enacted "Three Strikes You're Out," which sentenced repeat

150. *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991).

151. *Id.*

152. *Id.*

153. *Id.* at 990.

154. *Id.* at 990-91. In *Weems v. United States*, the defendant was convicted of falsifying a public document. *Weems v. United States*, 217 U.S. 349, 360 (1910). He was sentenced to *cadena temporal*, which consisted of the defendant having to carry chains around his wrists and ankles for the rest of his life, employed at hard and painful labor, fifteen years imprisonment, civil interdiction, surveillance during life, and perpetual absolute disqualification from activities including the loss of the right to vote, acquire honors, and retirement pay. *Id.* at 364. The Court held the prisoner's sentence was disproportional and cruel and unusual punishment, therefore unconstitutional. *Id.* at 381.

155. *Harmelin*, 501 U.S. at 991.

156. *Id.* at 994-95

157. *Id.*

158. *Id.* at 999 (Kennedy, J., concurring).

159. *In re Anderson*, 447 P.2d 117, 129 (Cal. 1968).

160. *People v. Leng*, 83 Cal. Rptr. 2d 433, 441 (Cal. Ct. App. 1999).

offenders to increased mandatory prison sentences.¹⁶¹ However, the law brought a constitutional question to the Court: whether the three strikes law violated the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁶²

In previous cases, the Court has implied a proportionality principle within the Eighth Amendment,¹⁶³ but has not been consistent.¹⁶⁴ In *Rummel*, the Court held a mandatory life sentence was not cruel and unusual punishment since the sentence was not "grossly disproportionate" to the crime.¹⁶⁵ In *Solem*, while finding a defendant's sentence unconstitutional, the Court arrived at an objective framework in determining proportionality.¹⁶⁶ The objective criteria consisted of weighing the offense against the penalty and comparing sentences of offenders within the same jurisdiction and within other jurisdictions.¹⁶⁷ Eight years later in *Harmelin*, the Court upheld a defendant's life sentence using the framework.¹⁶⁸ However, the Court disagreed on whether the Eighth Amendment contained a proportionality principle for non-capital sentences.¹⁶⁹

III. ANALYSIS

In *Ewing v. California*,¹⁷⁰ Justice O'Connor delivered the majority opinion in which Chief Justice Rehnquist and Justice Kennedy joined.¹⁷¹ The majority held that Ewing's sentence of twenty-five years to life for a repeat felony conviction was not grossly disproportionate, and therefore it did not violate the Eighth Amendment.¹⁷² Justice Scalia and Justice Thomas wrote separate concurring opinions.¹⁷³ Justice Stevens wrote a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined.¹⁷⁴

161. CAL. PENAL CODE § 667(e)(2)(A) (West 1999); CAL. PENAL CODE § 1170.12(c)(2)(A) (West Supp. 2004).

162. *Ewing v. California*, 538 U.S. 11, 14 (2003).

163. *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring); *Solem v. Helm*, 463 U.S. 277, 284 (1983); *Rummel v. Estelle*, 445 U.S. 263, 271 (1980).

164. *Harmelin*, 501 U.S. at 996-97.

165. *Rummel*, 445 U.S. at 271-72, 285.

166. *Solem*, 463 U.S. at 290-95.

167. *Id.* at 290-92.

168. *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring).

169. *Id.* at 996.

170. 538 U.S. 11 (2003).

171. *Ewing*, 538 U.S. at 14.

172. *Id.* at 29-30.

173. *Id.* at 31-32 (Scalia, J., and Thomas, J., separately concurring).

174. *Id.* at 32 (Stevens, J., dissenting).

Justice Breyer wrote a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined.¹⁷⁵

A. MAJORITY OPINION

The Court's precedent on interpreting the Eighth Amendment has not been clear and well-accepted.¹⁷⁶ The Court interpreted the Eighth Amendment to contain a narrow proportionality principle when applying to non-capital sentences.¹⁷⁷ The Court also gave great deference to state legislatures in selecting sentencing guidelines.¹⁷⁸ In evaluating Ewing's claim, the Court weighed the gravity of his offense against the harshness of the penalty to determine if the sentence was "grossly disproportionate."¹⁷⁹ The Court concluded that Ewing's twenty-five years to life sentence was not "grossly disproportionate" and did not violate the Eighth Amendment's prohibition on cruel and unusual punishments.¹⁸⁰

1. *The Court Interprets a Narrow Proportionality Principle Contained in the Eighth Amendment*

The Court relied on prior decisions to conclude that the Eighth Amendment contained a narrow proportionality principle when applied to non-capital sentences.¹⁸¹ The Court held that the Eighth Amendment does not contain a strict proportionality requirement between the crime and the sentence; the Court only forbade those sentences that were "grossly disproportionate" to the crime.¹⁸²

The Court stated that successful challenges to the proportionality principle to the Eighth Amendment would be exceedingly rare for non-capital sentences.¹⁸³ As in *Rummel*, the Court found that the proportionality principle would only be applied "in the extreme example, . . . if a legislature made overtime parking a felony punishable by life imprisonment."¹⁸⁴

The Court applied the framework, set forth by Justice Kennedy's concurring opinion in *Harmelin*, to review the proportionality of an

175. *Id.* at 35 (Breyer, J., dissenting).

176. *Id.* at 20 (citing *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991)).

177. *Id.*

178. *Id.*

179. *Id.* at 12.

180. *Id.* at 30-31.

181. *Id.* at 20; see *Harmelin*, 501 U.S. at 996-97 (holding the defendant's sentence constitutional because the sentence was not significantly disproportional to the crimes committed).

182. *Ewing v. California*, 538 U.S. 11, 23 (2003) (citing *Harmelin*, 501 U.S. at 1001).

183. *Id.* at 22 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

184. *Id.* at 21 (quoting *Rummel*, 445 U.S. at 274 n.11).

offender's sentence.¹⁸⁵ These principles consisted of "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors."¹⁸⁶ The Court, persuaded by Justice Kennedy's concurrence in *Harmelin*, concluded that the Eighth Amendment has a narrow proportionality principle that applies to non-capital cases.¹⁸⁷

2. *The Court Defers to California's Legislature*

The Court noted that states, like California, have made a deliberate policy choice by implementing recidivist legislation to address public safety concerns.¹⁸⁸ The Court found that the greatest threat to public safety appears to be career criminals, individuals who are not deterred by conventional approaches to punishment and who have repeatedly engaged in "serious or violent" criminal behavior.¹⁸⁹ The Court concluded that the individual states should be left to drafting and implementing these policy decisions.¹⁹⁰

The Court stated that our Constitution "does not mandate adoption of any one penological theory."¹⁹¹ The Court stated that a state can adopt any of the theories of punishment, such as incapacitation, deterrence, retribution, or rehabilitation.¹⁹² It found that selecting and designing a sentencing scheme has been left for the legislatures, not federal courts.¹⁹³

The Court noted that California implemented three strikes legislation in order to increase public safety.¹⁹⁴ The Court focused on the legislature's decision to increase public safety by incapacitating all repeat felons.¹⁹⁵ It stated there was nothing in the Eighth Amendment that prohibited California from making such a policy decision.¹⁹⁶ In fact, the Court noted "states have a valid interest in deterring and segregating habitual criminals."¹⁹⁷

185. *Id.* at 23 (citing *Harmelin*, 501 U.S. at 1001).

186. *Id.* (citing *Harmelin*, 501 U.S. at 1001).

187. *Id.* at 20 (citing *Harmelin*, 501 U.S. at 996-97).

188. *Id.* at 24.

189. *Id.*

190. *Id.*

191. *Id.* at 25 (quoting *Harmelin*, 501 U.S. at 999).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 25 (quoting *Parke v. Raley*, 506 U.S. 20, 27 (1992)).

The Court found that incapacitating repeat offenders has been a legitimate basis for reducing rising recidivism rates.¹⁹⁸ It cited a report that stated sixty-seven percent of former inmates released from state prisons were charged with at least one serious new crime within three years of their release.¹⁹⁹ The Court determined that California was no different.²⁰⁰ It noted that a study conducted in 1996 revealed that 233 three-strike offenders in California had a combined 1,165 prior felony convictions, an average of five convictions apiece, which consisted of 322 robberies and 262 burglaries.²⁰¹

The Court determined that deterring crime was also a legitimate basis for recidivist statutes.²⁰² It agreed with the reasoning in *Rummel*, that the primary goals for recidivist statutes were to “deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.”²⁰³ The Court found that within California there had been a drop in the recidivism rate of parolees, illustrating that the law has a deterrent effect.²⁰⁴ It noted that the recidivism rate had dropped by twenty-five percent since the passage of California’s three strikes law.²⁰⁵ Another important effect the Court based its holding on was parolees leaving the state.²⁰⁶ Out of fear of getting a second or third strike, the Court stated that more California parolees were leaving the state than parolees from other states entering California.²⁰⁷ The Court

198. *Id.* at 25-26. The Court noted that previous double jeopardy challenges have been rejected because the stiffened penalty is given for the latest crime but enhanced due to the criminal’s repetition of criminal activity. *Id.* (quoting *Grygor v. Burke*, 334 U.S. 728, 732 (1948)).

199. *Id.* (citing P. LANGAN & D. LEVIN, U.S. DEPT. OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (June 2002)).

200. *Id.* at 26.

201. *Id.* (citing Andy Furillo, *Three Strikes—The Verdict’s In: Most Offenders have Long Criminal Histories*, SACRAMENTO BEE, Mar. 31, 1996, at A1).

202. *Id.*

203. *Id.* at 27 (quoting *Rummel v. Estelle*, 445 U.S. 263, 284 (1980)).

204. *Id.*

205. *Id.* (citing OFFICE OF THE ATTORNEY GEN., CAL. DEP’T. OF JUSTICE, “THREE STRIKES AND YOU’RE OUT”—ITS IMPACT ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM AFTER FOUR YEARS, 10 (1998)).

206. *Id.* (citing OFFICE OF THE ATTORNEY GEN., CAL. DEP’T. OF JUSTICE, THREE STRIKES AND YOU’RE OUT”—ITS IMPACT ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM AFTER FOUR YEARS, 10 (1998)).

207. *Id.* (quoting OFFICE OF THE ATTORNEY GEN., CAL. DEP’T. OF JUSTICE, THREE STRIKES AND YOU’RE OUT”—ITS IMPACT ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM AFTER FOUR YEARS, 10 (1998)).

determined that it was the first time more parolees left the state than entered since 1976.²⁰⁸

Based on the statute's effect in California, the Court reasoned that the legislature had a reasonable basis for believing the three strikes law advanced the goals of its criminal justice system.²⁰⁹ The Court stated it would "not sit as a 'super legislature' to second-guess these policy choices."²¹⁰

3. *The Court Determines "Grossly Disproportionate"*

After the Court determined that the Eighth Amendment contained a narrow proportionality principle and that the three strikes law furthered California's legitimate interests, the Court turned to Ewing's sentence to determine if it was "grossly disproportional."²¹¹ In order to determine whether Ewing's sentence was grossly disproportionate, the Court weighed the gravity of the offense against the harshness of the penalty.²¹²

The Court noted that Ewing's crime, grand theft, was a serious crime that was a felony under federal law and under most state law.²¹³ Under California law, the crime would be classified as a "wobbler."²¹⁴ The Court determined that felony grand theft could be reduced to a misdemeanor by the discretion of the courts; however, it remains a felony unless the court decides otherwise.²¹⁵ The Court noted that the purpose of the court's discretion of reducing felonies was to impose a misdemeanor sentence in cases where incarceration would obstruct a defendant's rehabilitation process.²¹⁶ The Court determined that the trial court properly exercised discretion in refusing to reduce Ewing's felony conviction down to a misdemeanor due to the number and severity of his previous convictions.²¹⁷

By weighing the gravity of Ewing's offense, the Court not only analyzed Ewing's current felony conviction, but also took into consideration his previous felony convictions.²¹⁸ The Court noted that weighing

208. *Id.*

209. *Id.* at 28.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* The Court noted that under federal law, theft of \$1,200 in property is a felony under 18 U.S.C. § 641 (2004). *Id.* Also, the Supreme Court of California has viewed grand theft as a "serious" crime when reviewing proportionality of sentences. *Id.* (citing *In re Lynch*, 503 P.2d 921, 936 n.20 (Cal. 1972)).

214. *Id.*

215. *Id.* at 28-29 (citing *In re Anderson*, 447 P.2d 117, 126 (Cal. 1968) (Tobriner, J., concurring)).

216. *Id.* (quoting *Anderson*, 447 P.2d at 152).

217. *Id.* at 29-30.

218. *Id.*

Ewing's previous convictions was required in order to defer to California's goal of penalizing repeat offenders who cannot conform to the norms of society.²¹⁹ The Court reasoned that if the Court ignored Ewing's prior convictions, the Court would be ignoring California's interest in incapacitating and deterring habitual felons.²²⁰

Due to Ewing's habitual criminality, the Court determined that his sentence was justified by California's interest in public safety through incapacitating and deterring repeat felons.²²¹ The Court took into consideration Ewing's numerous convictions, his nine prison terms, that he committed his crimes while on probation or parole, and that his prior strikes were serious felonies.²²² These considerations supported the Court's conclusion that Ewing's twenty-five year sentence was not "grossly disproportionate."²²³ The Court concluded 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.'"²²⁴ The Court held that since Ewing's sentence of twenty-five years to life for felony grand theft was not "grossly disproportionate," his sentence did not violate the Eighth Amendment's prohibition on cruel and unusual punishments.²²⁵

B. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia's concurring opinion stated the Eighth Amendment prohibited only certain modes of punishment and does not contain a proportionality principle.²²⁶ He stated that he would be willing to accept the holding of *Solem*, out of respect for the principle of *stare decisis*.²²⁷ However, he argued that he could not accept the holding because it could not be intelligently applied to Ewing's case.²²⁸

219. *Id.* at 29.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 30 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring)). Because Ewing's sentence did not pass the threshold test, the Court did not continue within the objective framework by performing the jurisdictional analysis. *Id.*; see also *Solem v. Helm*, 463 U.S. 277, 291 n.17 (1983) (noting no single factor may be sufficient in determining whether a sentence is disproportionate).

225. *Ewing v. California*, 538 U.S. 11, 30-31(2003).

226. *Id.* at 31 (Scalia, J., concurring).

227. *Id.* (citing *Solem*, 463 U.S. at 303).

228. *Id.*

Justice Scalia reasoned that the Constitution does not require adopting any one penological theory.²²⁹ He noted that sentencing structures could have different justifications, such as incapacitation, deterrence, retribution, or rehabilitation.²³⁰

Justice Scalia tested the majority's two step process of first, weighing the gravity of the offense against the harshness of the penalty, then determining if Ewing's sentence justified California's interests of incapacitating and deterring repeat felons.²³¹ Justice Scalia argued that the first part of the inquiry, in determining the proportionality of Ewing's twenty-five years to life sentence for stealing three golf clubs, was not convincingly established by the Court.²³² He reasoned that this would lead the majority opinion to read that the sentence should reasonably reflect the goals and purposes of the state, not that the punishment should be proportional to the offense.²³³ He concluded that evaluating the goals and purposes would be evaluating the state's policy instead of applying law.²³⁴

C. JUSTICE THOMAS'S CONCURRENCE

Justice Thomas reasoned that the proportionality test in *Solem* could not be applied because the test lacks clarity.²³⁵ However, even if the test in *Solem* was clear, he stated he would not be compelled by *stare decisis* to apply it.²³⁶ He reasoned that he would not apply the test because the Eighth Amendment does not contain a proportionality principle.²³⁷ However, Justice Thomas followed the majority's conclusion that Ewing's sentence did not violate the Eighth Amendment's prohibition on cruel and unusual punishments.²³⁸

D. JUSTICE STEVENS' DISSENT

Justice Stevens argued that the Eighth Amendment contained a narrow proportionality principle and that Ewing's sentence was not "grossly disproportionate."²³⁹ He argued that case law allowed for judges to have

229. *Id.*

230. *Id.* at 31-32.

231. *Id.* at 32.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* (Thomas, J., concurring).

236. *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 303 (1983)).

237. *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 967-85 (1991)).

238. *Id.*

239. *Id.* at 32-33 (Stevens, J., dissenting).

discretion to determine the proportionality of fines²⁴⁰ and capital sentences.²⁴¹ Justice Stevens concluded that sentences, for a term of years, fell in between fines and capital sentences and were protected under the Eighth Amendment.²⁴²

Justice Stevens' dissent argued that the absence of a "black letter rule" does not disable judges from using their discretion in interpreting the limits of the Eighth Amendment.²⁴³ Justice Stevens argued that the Court has used its discretion in other parts of the Constitution.²⁴⁴ He cited as an example that "the Sixth Amendment guarantees criminal defendants the right to a speedy trial;" the courts must determine through their discretion whether a particular delay is constitutionally permissible.²⁴⁵

Justice Stevens stressed that history has shown that before sentencing guidelines were employed, judges were given the authority to sentence defendants within a broad range.²⁴⁶ He noted sentencing judges would take into account justifications of the punishment, for example, incapacitation, deterrence, retribution, or rehabilitation.²⁴⁷ Justice Stevens interpreted the Eighth Amendment to include a "broad and basic proportionality principle" that took into consideration all sentencing justifications.²⁴⁸ He reasoned that the "broad and basic proportionality principle" prevented states from justifying "a life sentence for overtime parking."²⁴⁹

E. JUSTICE BREYER'S DISSENT

Justice Breyer disagreed with the majority opinion.²⁵⁰ He reasoned that under the framework set forth by *Solem*, Ewing's punishment was "grossly disproportionate."²⁵¹ Justice Breyer argued that Ewing's sentence passed the first step, the threshold test, finding that the punishment outweighed the crime.²⁵² In the second part of the test, an intra-jurisdictional analysis, Justice Breyer concluded that Ewing's sentence was "unique" when

240. *Id.* at 33 (citing *United States v. Bajakajian*, 524 U.S. 321, 334-36 (1998)).

241. *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

242. *Id.*

243. *Id.* at 33. Blackletter law refers to "[o]ne or more legal principles that are old, fundamental, and well settled." *BLACK'S LAW DICTIONARY* 163 (7th ed. 1999).

244. *Ewing v. California*, 538 U.S. 11, 34 (2003) (Stevens, J., dissenting).

245. *Id.* (citing *Doggett v. United States*, 505 U.S. 647, 648 (1992)).

246. *Id.*

247. *Id.* at 35.

248. *Id.*

249. *Id.*

250. *Id.* (Breyer, J., dissenting).

251. *Id.* at 35-37 (citing *Solem v. Helm*, 463 U.S. 277, 303 (1983)).

252. *Id.* at 37.

compared to other sentences in California.²⁵³ He concluded that the third part of the test, an inter-jurisdictional analysis, had the same result when compared with other jurisdictions.²⁵⁴

1. *Threshold Comparison of the Crime*

First, Justice Breyer reasoned that Ewing's sentence was disproportional by applying precedent.²⁵⁵ He focused on *Rummel* and *Solem* to show where on the spectrum Ewing's sentence fell.²⁵⁶ Justice Breyer argued that Ewing's sentence fell in between *Rummel's* constitutional sentence²⁵⁷ and *Solem's* unconstitutional sentence.²⁵⁸

In weighing the gravity of the offense with the severity of the punishment in these cases, Justice Breyer determined that courts have looked at sentence-related characteristics, such as the length of time the offender is likely to spend in prison, the sentence triggering conduct, and the offender's criminal history.²⁵⁹ He concluded that the difference between holding *Rummel's* claim constitutional and *Solem's* claim unconstitutional was the difference in the length of the real prison term.²⁶⁰ He noted that *Rummel's* term amounted to ten to twelve years, whereas *Solem* would have spent the rest of his life in prison.²⁶¹ Justice Breyer concluded that Ewing's sentence, once again, lies in between these two cases.²⁶² Ewing must spend at least twenty-five years in prison.²⁶³ Justice Breyer argued this comparison raised questions of unconstitutionality.²⁶⁴

Second, Justice Breyer argued that Ewing's sentence imposed one of the most severe punishments for one of the less serious forms of criminal conduct.²⁶⁵ He reasoned that a crime committed by a recidivist is serious; however, courts have stated that the sentence must be for the triggering offense, with the prior offenses being relevant.²⁶⁶ Justice Breyer concluded

253. *Id.* at 47.

254. *Id.*

255. *Id.* at 35-37.

256. *Id.* at 37 (citing *Rummel v. Estelle*, 445 U.S. 263, 265-66, 269, 276, 278, 280-81 (1980); *Solem v. Helm*, 463 U.S. 277, 290-303 (1983)).

257. *Id.* at 38 (citing *Rummel*, 445 U.S. at 265).

258. *Id.* (citing *Solem*, 463 U.S. at 303).

259. *Id.* (citing *Rummel*, 445 U.S. at 265-66, 269, 276, 278, 280-81).

260. *Id.* at 38.

261. *Id.*

262. *Id.*

263. *Id.* at 39.

264. *Id.* at 40.

265. *Id.*

266. *Id.* at 41 (citing *Solem v. Helm*, 463 U.S. 277, 296 n.21 (1983)).

that Ewing's sentence was one of the most severe for a lower ranking offense.²⁶⁷

Third, Justice Breyer argued judges in other jurisdictions would find Ewing's sentence "disproportionately harsh."²⁶⁸ Justice Breyer noted that the United States Sentencing Commission does not even include theft related offenses with the crimes that would receive especially long sentences for recidivists.²⁶⁹

Justice Breyer determined that the three factors discussed above strongly supported Ewing's argument that his sentence was "grossly disproportionate;" therefore, his claim passed the threshold test.²⁷⁰ Since Justice Breyer concluded that Ewing's sentence passed the threshold test, Justice Breyer proceeded within the *Solem* framework by comparing Ewing's sentence with California and other jurisdictions.²⁷¹

2. *Intra-Jurisdictional Comparison*

Justice Breyer reasoned that an intra-jurisdictional comparative analysis would answer the question of how other offenders within California would be sentenced for the same offense without the three strikes law.²⁷² Another question that he reasoned would be answered under this analysis was what conduct would cause California to impose the same prison term.²⁷³ However, Justice Breyer noted that sentencing statutes usually do not reflect the actual time served.²⁷⁴

First, Justice Breyer reasoned that before 1994, when the three strikes law was enacted, no one like Ewing could have served over ten years in

267. *Id.* In order to determine the gravity of the offense, Justice Breyer applied the test used in *Solem* by looking at the harm caused or threatened to the victim or society, the absolute magnitude of the crime, and the offender's culpability. *Id.* at 40 (citing *Solem*, 463 U.S. at 292-93). Justice Breyer concluded, after considering all three criteria, Ewing's sentence "ranks well toward the bottom of the criminal conduct scale." *Id.*

268. *Id.* at 41.

269. *Id.* (citing United States Sentencing Guidelines § 4B1.1, 18 U.S.C.S. app. § 4B1.1 (2002)).

270. *Id.* at 42. Justice Breyer stated that arguably unconstitutional sentences, not only actually unconstitutional sentences, must pass the threshold test. *Id.* He argued that if only actually unconstitutional sentences passed, then the test would be a determinative test, not a threshold test. *Id.* A determinative test would not take into account comparisons with other sentences. *Id.* He reasoned that sentencing comparisons are important because they provide objective content in determining proportionality. *Id.* Justice Breyer noted that in *Harmelin*, the Court stated that proportionality should only be reviewed by objective factors. *See id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 1000, 1005 (1991) (Kennedy, J., concurring)).

271. *Id.* at 42-43 (citing *Solem*, 463 U.S. at 291-92).

272. *Id.*

273. *Id.*

274. *Id.* Justice Breyer stated due to good-time credits, parole, and broad discretion given to judges in sentencing, offenders usually do not serve the statutory maximum for the crime. *Id.*

prison since California's habitual offender laws did not apply to grand theft.²⁷⁵ He then reasoned that statistics showed that recidivists convicted during that same time in California served only a fraction of Ewing's real time sentence.²⁷⁶ Finally, Breyer concluded that Ewing's sentence, at least twenty-five real years in prison, should be reserved for criminals convicted of crimes far worse than Ewing's.²⁷⁷

3. *Inter-Jurisdictional Comparison*

Justice Breyer determined that the next step required the comparative analysis with other jurisdictions.²⁷⁸ He noted that the Federal Sentencing Guidelines would sentence a recidivist, like Ewing, to eighteen months in prison.²⁷⁹ He also noted that the Federal Sentencing Guidelines would only impose Ewing's sentence on a recidivist whose current offense is murder,²⁸⁰ robbery,²⁸¹ or aggravated theft of more than \$100 million.²⁸²

Justice Breyer determined that thirty-three jurisdictions' laws would make it impossible to sentence Ewing to more than ten years in prison.²⁸³ He determined that in four other states, Ewing could not have received a sentence of more than fifteen years.²⁸⁴ In addition, he noted four states could not have sentenced Ewing to more than twenty years in prison.²⁸⁵ Justice Breyer used these statistics to illustrate that Ewing's sentence was rare.²⁸⁶ He concluded that the length of time Ewing would have to spend in prison exceeded the time most jurisdictions would incarcerate offenders with similar convictions.²⁸⁷

275. *Id.* at 43-44.

276. *Id.* at 44.

277. *Id.* California reserved the same sentence for Ewing's theft as for a nonrecidivist, first-degree murderer. *Id.*

278. *Id.* at 45.

279. *Id.* (citing United States Sentencing Guidelines § 2B1.1(a), 18 U.S.C.S. app. § 2B1.1(a) (1999)).

280. *Id.* (citing 18 U.S.C.S. app. § 2A1.2).

281. *Id.* (citing 18 U.S.C.S. app. § 2B3.1 (stating robbery involving the discharge of a firearm, serious bodily injury, and an amount about one million dollars)).

282. *Id.* (citing 18 U.S.C.S. app. § 2B1.1).

283. *Id.* at app. 46. These jurisdictions included Alaska, Arizona, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Washington, and Wyoming. *Id.* app. at 53-57.

284. *Id.* app. at 46. These states included Colorado, Maryland, New Hampshire, and Wisconsin. *Id.* app. at 57-58.

285. *Id.* These states included Arkansas, Missouri, Texas, and Virginia. *Id.* app. at 58-59.

286. *Id.* at 45-47.

287. *Id.* at 46.

However, Justice Breyer determined that nine other states make it legally possible to impose a sentence of twenty-five years or more for Ewing's offenses.²⁸⁸ He noted that five of those nine states would allow the offender eligibility for parole before twenty-five years.²⁸⁹

After comparing the sentencing guidelines of other jurisdictions, Justice Breyer concluded that Ewing's sentence, outside California's three strikes law, was "virtually unique in its harshness for his offense of conviction and by a considerable degree."²⁹⁰

4. *Examining Policy Considerations*

Justice Breyer noted that the last part of the framework required an examination of Ewing's sentence by determining if the law justifies California's policy concerns.²⁹¹ However, Justice Breyer argued that Ewing's sentence does not further any criminal justice objective.²⁹²

Justice Breyer argued that the statute did not effectively separate triggering offenses from non-triggering offenses.²⁹³ He reasoned that the statute clearly delineated felonies as triggering offenses; however, the classification was based on the characteristics of the offender, not the specific offense.²⁹⁴ Justice Breyer concluded that their sort of classification produced inconsistencies within the three strikes law.²⁹⁵

Justice Breyer argued that the first inconsistency concerned the seriousness of the triggering offense.²⁹⁶ He noted that the "wobbler" statutes included many levels of offenses.²⁹⁷ The seriousness of the offenses ranged from assault with a deadly weapon to stealing more than \$100 worth of chickens, nuts, or avocados.²⁹⁸ The second inconsistency concerned the temporal order of the offenses.²⁹⁹ Justice Breyer determined that if an offender whose first crime was a "wobbler" and then graduated to more serious crimes, the offender's sentence would not fall under the three strikes

288. *Id.* These states included Alabama, Louisiana, Michigan, Montana, Nevada, Oklahoma, South Dakota, Vermont, and West Virginia. *Id.* app. at 59-62.

289. *Id.* app. at 59 n.2. These states included Alabama, Montana, Nevada, Vermont, and West Virginia. *Id.* app. at 59-62.

290. *Id.* at 47.

291. *Id.*

292. *Id.* at 47-48.

293. *Id.* at 48.

294. *Id.* at 49.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 50.

law.³⁰⁰ Justice Breyer argued that the reason for this inconsistency is that the “wobbler” will most likely be reduced down to a misdemeanor because it was the offender’s first offense.³⁰¹ However, Justice Breyer reasoned that a similar offender would fall under the three strikes law if the “wobbler” was the offender’s third offense, since the “wobbler” will most likely be treated as a felony.³⁰² The third inconsistency Justice Breyer noted concerned the offender’s criminal record.³⁰³ This occurs when an offender’s crime is elevated based on the offender’s previous crimes.³⁰⁴ Justice Breyer cited an example of a petty theft, a misdemeanor.³⁰⁵ However, he noted that an offender’s second conviction of petty theft is a felony and therefore a triggering offense.³⁰⁶ As a result, an offender with two prior violent felonies and the third offense is petty theft, will not fall under the three strikes law since the criminal history does not have any similar property crimes.³⁰⁷ However, Justice Breyer stated that an offender who has committed one violent crime, one petty theft, and the third offense was another petty theft, would fall under the three strikes law.³⁰⁸

Due to these inconsistencies within the three strikes law, Justice Breyer recommended that the California Legislature enumerate the triggering offenses.³⁰⁹ By enumerating the triggering offenses, he reasoned that California would eliminate the seriously disproportional sentences that were being handed down.³¹⁰ Justice Breyer noted that California’s statute was passed in order to reduce “serious and violent” crime, which includes crimes against the person, physical crimes, and drug crimes.³¹¹ He concluded that Ewing’s triggering crime did not fall under any of these categories.³¹²

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 51.

310. *Id.* at 52-53.

311. *Id.* at 51.

312. *Id.*

IV. IMPACT

A. EFFECTS OF THE DECISION

The Court's previous opinions have been unclear as to what constitutes "gross disproportionality."³¹³ However, the Supreme Court's decision in *Ewing* clarified the test for non-capital sentences.³¹⁴ As a result, proportionality will be narrowly applied to non-capital cases, and "gross disproportionality" will only be used for the extraordinary case.³¹⁵ Despite the Court's five to four decision, and even though the members of the Court could not agree on how to treat Ewing's sentence, it would be extremely difficult to successfully challenge any punishment as "grossly disproportionate."³¹⁶ In *Lockyer v. Andrade*,³¹⁷ the Court made challenges even more difficult by narrowing the federal court's ability to grant habeas corpus relief to state prisoners.³¹⁸ As a result, the decisions in *Ewing* and *Lockyer* will have an impact beyond California.³¹⁹

In California, the appellate courts have affirmed a number of three strikes sentences.³²⁰ In *People v. Pabriaga*,³²¹ the court held that the defendant's twenty-six year sentence under California's three strikes law did not violate the Eighth Amendment.³²² The defendant was convicted of being a violent felon in possession of a firearm.³²³ Two prior felony convictions,

313. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

314. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (weighing the seriousness of Ewing's current and prior offenses compared to the harshness of the penalty while taking into consideration the state's interests).

315. *Id.* at 29-30.

316. Erwin Chemerinsky, *Is Any Sentence Cruel and Unusual Punishment?*, 39 TRIAL 78, 78 (May 2003).

317. 538 U.S. 63 (2003).

318. *Lockyer*, 538 U.S. at 75.

319. *Id.* at 76.

320. *See People v. Pabriaga*, No. A098633, 2003 WL 2222209, at *1 (Cal. Ct. App. Sept. 26, 2003) (upholding the defendant's twenty-six year sentence for possession of a firearm, under California's three strikes law); *see also People v. Jackson*, No. C040556, 2003 WL 21791251, at *5 (Cal. Ct. App. Aug. 5, 2003) (upholding defendant's sentence of twenty-five years for possession of marijuana, under California's three strikes law); *People v. Brown*, No. B157865, 2003 WL 21733529, at *1 (Cal. Ct. App. Jul. 28, 2003) (upholding defendant's sentence of twenty-five years to life plus six years for burglary and assault, under California's three strikes law); *People v. Hurtado*, No. E032306, 2003 WL 21480994, at *7 (Cal. Ct. App. Jun. 27, 2003) (upholding defendant's sentence of fifty years for vehicle theft and receiving stolen property, under California's three strikes law); *People v. Atkerson*, No. F040626, 2003 WL 22183935, at *1 (Cal. Ct. App. Sept. 23, 2003) (upholding defendant's sentence of twenty-five years for battery, under California's three strikes law).

321. No. A098633, 2003 WL 2222209, at *1 (Cal. Ct. App. Sept. 26, 2003).

322. *Pabriaga*, 2003 WL 2222209, at *1.

323. *Id.* The defendant had also been charged with murder; however, the jury was unable to reach a verdict on this count. *Id.*

forcible rape, and oral copulation by force, triggered the three strikes law.³²⁴ The court relied on the recent decision in *Ewing* to uphold the defendant's sentence.³²⁵ The court applied the objective framework used in *Ewing*, weighing the gravity of the offense with the punishment.³²⁶ The court noted that the defendant had committed a violent felony, unlike *Ewing* whose current conviction was a "wobbler."³²⁷ The court concluded that the defendant posed a serious threat to society by carrying a loaded weapon on a public street while he was still on parole.³²⁸ The court also considered the defendant's recidivism when determining the harshness of the penalty.³²⁹ The court found that the gravity of the defendant's current conviction, combined with his prior offenses, was proportionate to his sentence.³³⁰ The court concluded that the defendant's sentence was not one of the rare situations in which a sentence is so grossly disproportionate that it violated the Eighth Amendment's prohibition on cruel and unusual punishment.³³¹

In contrast, a recent case decided by the Supreme Court of Delaware held a defendant's sentence unconstitutional.³³² In *Crosby v. State*,³³³ the court held that the defendant's sentence violated the Eighth Amendment's prohibition on cruel and unusual punishments.³³⁴ Crosby was a habitual criminal who had committed five prior felonies, which included two burglaries, forgery, possession of a deadly weapon, and possession with intent to deliver.³³⁵ Crosby was sentenced to forty-five years under Delaware's habitual offender statute for his sixth felony, forgery.³³⁶ Delaware's statute authorized trial courts to sentence any person who had been convicted of

324. *Id.*

325. *Id.* at *2.

326. *Id.* at *3.

327. *Id.*

328. *Id.* The court noted that the State of California considers the defendant's crime to be a "grave offense." *Id.*

329. *Id.* The court noted that the defendant's two prior felonies involved violence or threats of violence. *Id.* In these attacks, he had used a baseball bat as a deadly weapon. *Id.* The court reasoned that since his release in 1998, he has continued to commit crimes. *Id.* He absconded from his parole in 1999 and committed his current offense in 2000. *Id.*

330. *Id.* at *4. Since the defendant's sentence was proportional, the court found it unnecessary to perform the intrajurisdictional and interjurisdictional comparisons. *Id.* (citing Harmelin v. Michigan, 501 U.S. 957, 1005-07 (1991)).

331. *Id.*

332. *Crosby v. State*, 824 A.2d 894, 913 (Del. 2003).

333. 824 A.2d 894 (2003).

334. *Crosby*, 824 A.2d at 913.

335. *Id.* at 896-97.

336. *Id.* at 897.

three felonies and committed a fourth felony to life in prison without the possibility of parole.³³⁷

Despite the United States Supreme Court's holding in *Ewing*, the Supreme Court of Delaware found Crosby's sentence to be "grossly disproportional."³³⁸ The court concluded *Crosby* was the rare case where a defendant was convicted of a non-violent felony, and his criminal record did not involve repeated violent crimes, but was sentenced to a life term.³³⁹ The court compared Crosby's sentence to Ewing's, holding that Ewing's sentence imposed far less prison time.³⁴⁰ Ewing's triggering crime was more serious than Crosby's, and Ewing's prior criminal history was more serious than Crosby's.³⁴¹ The court noted that Crosby's combination of factors were unprecedented, which led to the court's conclusion that Crosby's sentence was "grossly disproportional."³⁴²

With California's three strikes law passing constitutional scrutiny, the prison populations are likely to increase since offenders will be serving longer sentences.³⁴³ The law has been criticized for its slight decrease in criminal activity and its large increase in prison population.³⁴⁴ According to the California Department of Corrections, the average yearly cost to house an inmate is \$28,502.³⁴⁵ Recidivist legislation, like the three strikes law, has become tremendously expensive for states to maintain.³⁴⁶ The

337. *Id.* at 907. Section 3911 of the Delaware statute reads,

"Any person who has been three times convicted of a felony, other than those which are specifically mentioned in subsection (b) hereunder, under the laws of this State, and/or any other State, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent felony of this State is declared to be a habitual criminal, and the Court in which such fourth or subsequent conviction is had, in imposing sentence, may, in its discretion, impose a life sentence upon the person so convicted."

Id. at 898 (quoting DEL. CODE ANN. tit. 11, § 3911 (1974) (current version at DEL. CODE ANN. tit. 11, § 4214 (2004))).

338. *Id.* at 912.

339. *Id.* at 913.

340. *Id.* at 910.

341. *Id.* at 910-11.

342. *Id.* at 913.

343. See *Reyes v. Woodford*, No. 00-57130, 2003 WL 23095939, at *1 (9th Cir. Sept. 26, 2003) (affirming the defendant's twenty-six year sentence for perjury under the three strikes law). The dissent in *Reyes* noted that the defendant would have been sentenced to a maximum of eight years without the three strikes law being triggered. *Id.* at n.1 (Pregerson, J., dissenting).

344. Dubber, *supra* note 41, at 222.

345. CAL. DEP'T OF CORR., FACTS AND FIGURES, at <http://www.corr.ca.gov> (2003) (last visited Sept. 19, 2004).

346. Adam A. Liptak, *Ideas & Trends: Crime and Punishment; Sentences are Too Long or Too Short. Rarely, Just Right*, N.Y. TIMES, Aug. 24, 2003, § 4, at 3.

result has caused states to relax their sentencing laws due to decreased budgets.³⁴⁷

However, tougher sentences can lead to lower crime rates for states.³⁴⁸ Professor Levitt, an economist from the University of Chicago, has posited that there is overwhelming evidence that mandatory minimums and three strikes laws have the effect of reducing crime.³⁴⁹ Professor Levitt's study suggests that three strikes laws may be a cost-effective approach to fighting crime because the small number of criminals that commit a large number of crimes are off the streets.³⁵⁰ Critics of three strikes legislation warn that such a sentencing system, by focusing on the wrong class of offenders, violates society's fundamental sense of justice and unreasonably burdens the public resources.³⁵¹

B. APPLICATION TO NORTH DAKOTA

The Court's opinion in *Ewing* will affect how judges in North Dakota sentence defendants.³⁵² The legislature in North Dakota can be assured that the current habitual offender statute and newly enacted sentencing statutes will not violate the Eighth Amendment unless the laws produce "grossly disproportionate" sentences.³⁵³

A defendant sentenced under North Dakota's habitual offender statute challenged its constitutionality.³⁵⁴ The Supreme Court of North Dakota held that the statute did not violate the state or federal constitutions.³⁵⁵ Although the court only addressed the Due Process and Equal Protection Clauses, under *Ewing* the statute would pass the constitutionality requirements under the Eighth Amendment.³⁵⁶ The court recognized the state's

347. *Id.* The author noted that states, including Kansas, Texas, and Washington, have eased their sentencing laws in the past year. *Id.* In response to rising incarceration costs, Michigan has eliminated mandatory minimum sentences for drug offenses. *Id.* Other states, including Kansas and California, have passed laws requiring drug treatment rather than prison sentences for nonviolent drug offenses. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. Nicholas N. Kittrie & Mark H. Allenbaugh, *Jean Valjean Lives: Petty Criminals Face Harsh Future after Three-Strikes Cases*, LEGAL TIMES, Apr. 14, 2003, at 60.

352. See generally N.D. CENT. CODE § 12.1-32-09 (2003 Supp.) (setting forth North Dakota's sentencing scheme for habitual offenders).

353. See *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (stating an offender's sentence is cruel and unusual punishment only if the sentence is "grossly disproportionate").

354. *State v. Termes*, 259 N.W.2d 296, 298 (N.D. 1977).

355. *Id.* at 300-01.

356. *Id.* at 299-301; see also *Ewing*, 538 U.S. at 24-25 (deferring to the states' interest in punishing and incapacitating repeat offenders).

interest of providing lengthy sentences for particular offenders in order to protect the public from further criminal conduct.³⁵⁷

Since the Supreme Court's decision in *Ewing* clarified that there is a narrow proportionality principle contained within the Eighth Amendment, the North Dakota habitual offender statute needs no revisions.³⁵⁸ The North Dakota habitual offender statute increases sentences for offenders who have committed two felonies at different times.³⁵⁹ As long as the offender's sentence is not the rare case that leads to an inference of "gross disproportionality," the offender's sentence will not be considered cruel and unusual punishment.³⁶⁰

V. CONCLUSION

In *Ewing*, the Court ruled that Ewing's sentence of twenty-five years to life for felony grand theft, under California's three strikes law, was not "grossly disproportionate."³⁶¹ Therefore, Ewing's sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment.³⁶² The Court interpreted a narrow proportionality principle contained within the Eighth Amendment when applied to non-capital sentences, like Ewing's.³⁶³ Due to Ewing's lengthy and serious criminal record, the Court determined his sentence was justified by California's public safety interest of incapacitating and deterring habitual felons.³⁶⁴ In another attempt to clarify whether a particular sentence for a term of years can violate the Eighth Amendment, the Court still has "not established a clear or consistent

357. *Ternes*, 259 N.W.2d at 299.

358. *See generally* N.D. CENT. CODE § 12.1-32-09 (2003 Supp.) (setting forth North Dakota's sentencing scheme for habitual offenders).

359. *Id.* The North Dakota habitual offender statute states,

A court may sentence a convicted offender to an extended sentence as a dangerous special offender or a habitual offender in accordance with this section upon a finding of . . . [t]he convicted offender is a habitual offender. The court may not make such a finding unless the offender is an adult and has previously been convicted in any state or states or by the United States of two felonies of class C or above committed at different times when the offender was an adult. For the purposes of this subdivision, a felony conviction in another state or under the laws of the United States is considered a felony of class C or above if it is punishable by a maximum term of imprisonment of five years or more.

Id. § 12.1-32-09(1)(c). The statute states that an extended sentence of life imprisonment may be imposed for offenders convicted of a class A felony, twenty years for a class B felony, and ten years for a class C felony. *Id.* § 12.1-32-09(2)(a)-(c).

360. *Ewing*, 538 U.S. at 30 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)).

361. *Id.*

362. *Id.* at 30-31.

363. *Id.* at 20 (quoting *Hamelin*, 501 U.S. at 996-97).

364. *Id.* at 29.

path for courts to follow.”³⁶⁵ However, under the particular facts set forth in *Ewing*, the Court held that the Constitution does not prohibit California from sentencing a repeat felon to twenty-five years to life for theft under the state’s three strikes law.³⁶⁶

*Sarah Maureen Reed**

365. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (citing *Ewing*, 538 U.S. at 18-26).

366. *Ewing*, 538 U.S. at 30-31.

* I wish to thank Greg for his love, support, and understanding during the writing of this comment. I also wish to thank my family for their love and encouragement.
