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Ewing v. California: Upholding California's Three Strikes Law

Robert Clinton Peck

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Ewing v. California: Upholding California's Three Strikes Law

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I. INTRODUCTION

On October 1, 1993, twelve-year-old Polly Klaas was kidnapped from her home in California and murdered.¹ The murderer, Richard Allen Davis, had been twice convicted of kidnapping and was on parole at the time he abducted and murdered Polly Klaas.² Proposition 184—the “Three Strikes” law—was on the ballot at the time.³ Proposition 184 mandated life sentences for offenders with two prior felonies who are subsequently convicted of a third.⁴ The Proposition was California’s response to the many crimes perpetrated by repeat felons, like the murder of Polly Klaas.⁵ Voters in California lived in fear of rising crime rates and were angered by the penal system’s revolving door: short sentences and early paroles for violent offenders.⁶ Polly’s murder gave a face to these fears as voters went to the polls, and “Three Strikes” became law in California.⁷

Though widely supported by the public and by politicians of both major parties, many legal scholars immediately objected to the law.⁸ Academics characterized the law as extreme, a result of public panic and “populist,” “anti-offender” sentiments, and claimed that issues such as crime and punishment should be left to criminal justice experts, not the public.⁹ They raised concerns about possible life sentences for felons who had never committed violent crimes, arguing that such sentences would be disproportionate to their associated crimes, and thus are cruel and unusual punishment.¹⁰ Answering these concerns in *Ewing v. California*, the Supreme Court held that such sentences are not cruel and unusual

1. *Ewing v. California*, 538 U.S. 11, 14-15 (2003).

2. *Id.*

3. *Id.*

4. *Id.* at 15-16 (citing CAL. PENAL CODE § 667(e)(2) (West 2003)). Section 667(e)(2)(A) provides that defendants previously convicted of two or more felonies (as defined in subsection (d) of section 667) that have been pled and proved shall be sentenced to an indeterminate term of life in prison for the current felony, with a minimum term of the greater of: (i) three times the term otherwise provided for each current felony conviction; (ii) imprisonment for twenty-five years; or (iii) the term determined by the court pursuant to section 1170, which regards determinate sentencing, for the underlying conviction, including any applicable enhancement, or any period prescribed by section 190, which defines punishment for murder, or section 3046, which relates to the minimum term for life imprisonment. CAL. PENAL CODE § 667(e)(2)(A) (West 2003).

5. See *Ewing*, 538 U.S. at 15.

6. See Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California’s Three Strikes Law*, 39 DUQ. L. REV. 43, 50 (2000).

7. *Ewing*, 538 U.S. at 15.

8. Janiskee & Erler, *supra* note 6, at 54-60.

9. *Id.* at 54-55.

10. *Id.* at 56. Janiskee and Erler cite to Professor Lisa Cowart, who noted that eighty percent of those sentenced under the three strikes law are incarcerated for nonviolent crimes. *Id.*

punishment, so long as they are not “grossly disproportionate.”¹¹

This note will examine the Court’s decision in *Ewing* and discuss its implications. Part II traces the history of the Court’s decisions regarding disproportionate sentences.¹² Part III outlines the facts of *Ewing*.¹³ Part IV reports and analyzes the Court’s plurality, concurring, and dissenting opinions.¹⁴ Part V discusses the impact of the Court’s decision.¹⁵ And Part VI concludes.¹⁶

II. HISTORICAL BACKGROUND

A. Roots of the Eighth Amendment

The Eighth Amendment forbids cruel and unusual punishments.¹⁷ Although the exact meaning of that clause is widely disputed, its wording is likely taken from England’s 1689 Declaration of Rights.¹⁸ Whether the Framers of the Eighth Amendment intended to incorporate the meaning, as well as the language, of the 1689 Declaration’s cruel and unusual punishments clause, though, is not settled.¹⁹ Two opinions of the Court, eighteen years apart, express disagreement on that point.²⁰ Writing for the majority in *Solem v. Helm*, Justice Powell held that the Framers intended to incorporate at least the protections of the 1689 Declaration, and that the Declaration barred disproportionate punishments.²¹ In *Harmelin v. Michigan*, Justice Scalia, writing for himself and the Chief Justice, disagreed

11. See *Ewing*, 538 U.S. at 27-31.

12. See *infra* notes 17-91 and accompanying text.

13. See *infra* notes 92-96 and accompanying text.

14. See *infra* notes 97-208 and accompanying text.

15. See *infra* notes 209-332 and accompanying text.

16. See *infra* notes 333-36 and accompanying text.

17. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

18. See *Harmelin v. Michigan*, 501 U.S. 957, 966-67 (1991) (Scalia, J., concurring). Justice Scalia cites *Solem v. Helm*, 463 U.S. 277, 286 (1983), as concluding that the English Declaration of Rights of 1689 is the source of the phrase “cruel and unusual punishment.” *Harmelin*, 501 U.S. at 966 (Scalia, J., concurring). Justice Powell’s dissent in *Rummel v. Estelle*, 445 U.S. 263, 287 (1980), also supports this proposition. *Weems v. United States*, 217 U.S. 349, 371 (1910), also notes this, identifying Justice Story’s Commentaries on the Constitution as the source of the proposition.

19. Compare *Solem*, 463 U.S. at 285-86, with *Harmelin*, 501 U.S. at 966-76 (Scalia, J., concurring).

20. Compare *Solem*, 463 U.S. at 285-86, with *Harmelin*, 501 U.S. at 966-76 (Scalia, J., concurring).

21. *Solem*, 463 U.S. at 286. Justice Powell cited to William Blackstone’s Commentaries, holding that the 1689 Declaration of Rights barred disproportionate sentences. *Id.* at 285.

with Justice Powell on both points.²² First, Justice Scalia noted that a direct incorporation of the 1689 Declaration's meaning would have been impossible because "[t]here were no common-law punishments in the federal system . . ."²³ The Eighth Amendment was to apply to Congress, not the courts, and the meaning that "unusual" had to English Courts ("contrary to the law") would not make sense when applied to a body whose will is the law.²⁴ Thus, Justice Scalia concluded, the Eighth Amendment may have used the Declaration's language, but it did not incorporate its meaning.²⁵ Second, Justice Scalia stated that even if the Eighth Amendment incorporated the meaning of the 1689 Declaration, that meaning did not include a bar of disproportionate sentences.²⁶ He concluded that "cruel and unusual punishment" only applied to sentences that were greater in length or severity than allowed by law.²⁷ Accounts of the House of Commons' passage of the Declaration all point to illegal sentences handed down by a certain English court as the reason for the Declaration.²⁸ In fact, no source contemporaneous with the Declaration held it to bar disproportionate sentences that were allowed by law.²⁹

Further, little legislative history exists for the Eighth Amendment.³⁰ Those advocating its adoption, such as eminent revolutionary Patrick Henry, feared that without it, the U.S. Congress would do such things as use torture to induce confessions.³¹ The Court, adopting those fears as the intent of the Amendment, has held that the Framers intended the Eighth Amendment to proscribe "barbaric" methods of punishment.³² Some decisions of the Court, however, have interpreted the Eighth Amendment more broadly as also barring punishments that are grossly disproportionate to the crimes committed.³³

22. See *Harmelin*, 501 U.S. at 972-75 (Scalia, J., concurring).

23. *Id.* at 975 (Scalia, J., concurring).

24. *Id.* at 975-76 (Scalia, J., concurring).

25. *Id.* (Scalia, J., concurring).

26. *Id.* at 974 (Scalia, J., concurring).

27. *Id.* at 973-74 (Scalia, J., concurring).

28. *Id.* at 972-73 (Scalia, J., concurring).

29. See *id.* (Scalia, J., concurring).

30. See *id.* at 979 (Scalia, J., concurring); *Rummel v. Estelle*, 445 U.S. 263, 287 (1980) (Powell, J., dissenting) (stating that "[t]he legislative history of the Eighth Amendment is not extensive").

31. See *Rummel*, 445 U.S. at 287 (Powell, J., dissenting).

32. See *id.* (Powell, J., dissenting) (citing *Furman v. Georgia*, 408 U.S. 238, 319-22 (1972)).

33. *Ewing v. California*, 538 U.S. 11, 20 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97) (1991) (Kennedy, J., concurring) ("The Eighth Amendment . . . contains a 'narrow proportionality principle. . . .'); *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring) ("The Eighth Amendment prohibit[s] 'greatly disproportioned' sentences. . . .") (citations omitted); *Solem v. Helm*, 463 U.S. 277, 286 (1983) ("The constitutional principle of proportionality has been recognized explicitly in this Court. . . ."); *Rummel*, 445 U.S. at 271 (Powell, J., dissenting) ("[T]he Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime."); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) ("[T]he Eighth Amendment bars . . . punishments that are . . . 'excessive' in relation to the crime committed."); *Weems v. United States*, 217 U.S. 349, 367 (1910) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

B. Weems, Robinson, and Coker: The Genesis of Proportionality Review

The Court first held that the Eighth Amendment allows “proportionality review” in *Weems v. United States*.³⁴ There, the defendant was convicted of falsifying a public record, an offense completed merely upon the knowing entry of a single false item into a public document, even if no person was injured by that false entry.³⁵ For his offense, he received an unusual sentence known as the *cadena temporal*,³⁶ a punishment from Spanish law and entirely foreign to the American legal system.³⁷ It typically consisted of a twelve- to twenty year prison sentence involving hard, painful labor while chained at the ankle and wrist.³⁸ Further, it included several “accompaniments” to the main sentence: lack of assistance from friends or relatives, no marital authority, no parental rights, no property rights, and no participation in family council.³⁹ These penalties were to last through the term of imprisonment.⁴⁰ In addition, the *cadena temporal* included two permanent accompaniments: registration with and surveillance by the government, requiring the defendant to notify the government anytime he moved; and “perpetual absolute disqualification,” which was defined as deprivation of public office, even if obtained by popular election, deprivation of the right to vote or hold public office, loss of retirement pay, among other denied public privileges.⁴¹ Invalidating the sentence, the Court held that the punishment was both barbaric and disproportionate.⁴² It noted that grossly disproportionate sentences are cruel and unusual punishment,⁴³

34. See *Solem*, 463 U.S. at 286-87. The term “proportionality review” is taken from the opinions of a number of the Court’s decisions. See, e.g., *Ewing*, 538 U.S. at 33 (Stevens, J., dissenting).

35. *Weems*, 217 U.S. at 363.

36. *Id.* at 363-65.

37. *Id.* at 363-64. The *cadena temporal* was only before the Court because the petitioner had been sentenced in the Philippines. See *id.* at 357-58. The Philippines was an American colony, taken from its former ruler, Spain, in the Spanish-American War. PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 613 (1997).

38. *Weems*, 217 U.S. at 364. Weems’s sentence was for fifteen years. *Id.* at 358.

39. *Id.* at 364.

40. *Id.*

41. *Id.*

42. *Id.* at 377 (“[The *cadena temporal*’s] punishments come under the condemnation of the bill of rights, both on account of their degree and kind.”).

43. See *id.* at 371 (quoting *O’Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)). In *O’Neil*, the defendant had been convicted of 307 counts of selling liquor without a license, and was sentenced to a prison term of over fifty-four years. See *Solem v. Helm*, 463 U.S. 277, 286 n.11 (1983). As construed in *Solem*, the majority in *O’Neil* did not find the sentence unconstitutional because the defendant had not alleged it in his brief, and because the Eighth Amendment at the time was not held to apply to the states. *Id.* However, Justice Field’s dissent in *O’Neil* touched on the Eighth Amendment question, noting that the Eighth Amendment “is

and that “it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”⁴⁴

After *Weems*, the Court did not reverse a sentence as disproportionate for half-a-century.⁴⁵ When it did, in *Robinson v. California*, the Court not only found the defendant’s sentence to be disproportionate, but also held that the Eighth Amendment applies to the States through the Fourteenth Amendment.⁴⁶ In that case, the defendant had been convicted of being a drug addict.⁴⁷ The law he was convicted of violating provided that “[n]o person shall use, or be under the influence of, or be addicted to the use of narcotics. . . .”⁴⁸ To prove violation of the law by showing addiction, the State did not even need to prove that the defendant had used any narcotics within the State’s jurisdiction.⁴⁹ The Court reversed the conviction, reasoning that proportionality dictates that sentences can not be considered in the abstract, but must be considered in light of the crime, and that any punishment for a sickness or addiction is disproportionate.⁵⁰

The Court faced another proportionality challenge in *Coker v. Georgia*.⁵¹ There, the defendant kidnapped and raped a woman during an escape from prison after he had bound her husband and stolen the family’s car keys.⁵² He had previously been convicted of murder, rape, kidnapping, and aggravated assault, and was serving his sentence for those crimes when he escaped.⁵³ His penalty for this newest rape—execution—was only given for that crime because of the presence of aggravating circumstances – specifically the previous conviction of a capital felony and a rape committed during a capital felony.⁵⁴ Finding that both aggravating circumstances were present, the jury sentenced Coker to death.⁵⁵ The Court, relying on *Weems* and *Robinson*, held that the Eighth Amendment bars excessive punishments.⁵⁶ It stated that a punishment is excessive “if it (1) makes no

directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.” *Id.* (quoting *O’Neil*, 144 U.S. at 339-40 (Field, J., dissenting)).

44. *Weems*, 217 U.S. at 367.

45. See *Solem*, 463 U.S. at 287. *Robinson v. California*, 370 U.S. 660 (1962), was decided in 1962, fifty-two years after *Weems*.

46. See *Robinson*, 370 U.S. at 667. The Court in both *Ewing* and *Solem* has interpreted *Robinson*’s rationale that sentence length should not be considered in the abstract, but rather in relation to the offense, as an embrace of proportionality review. See *infra* note 50; *Ewing v. California*, 538 U.S. 11, 28 (2003); *Solem*, 463 U.S. at 287. Justice Scalia, in contrast, has noted that *Robinson* was not decided on proportionality grounds. *Harmelin v. Michigan*, 501 U.S. 957, 994 n.14 (1991) (Scalia, J., concurring).

47. *Robinson*, 370 U.S. at 660-64.

48. *Id.* at 660 n.1 (quoting the CAL. HEALTH & SAFETY CODE § 11721, which was repealed in 1972).

49. *Id.* at 663.

50. *Id.* at 667.

51. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

52. *Id.* at 587.

53. *Id.*

54. *Id.* at 587-91.

55. *Id.* at 591.

56. *Id.* at 592.

measurable contribution to acceptable goals of punishment . . . or (2) is grossly out of proportion to the severity of the crime,” and it held that a death sentence is grossly disproportionate to the crime of rape.⁵⁷

C. *The Three “Landmark Cases”*: Rummel, Hutto, and Solem

Following *Coker*, the Court decided three landmark cases in quick succession, all dealing with proportionality review of “term of year” sentences.⁵⁸ The first of these, *Rummel v. Estelle*, concerned a life sentence for a three-time felon.⁵⁹ That felon, Rummel, was convicted of obtaining \$120.75 under false pretenses and was sentenced under Texas’s recidivist statute to life in prison with a possibility of parole after ten or twelve years.⁶⁰ He had previously been convicted of credit-card fraud and check forging.⁶¹ The recidivist statute mandated life in prison for persons convicted of three or more non-capital felonies, and Rummel was sentenced accordingly.⁶² The Court there held that the life sentence was not disproportionate.⁶³ It noted that the gross disproportionality principle had been used most frequently in death penalty cases, and distinguished the death penalty from other punishments based on its finality and irrevocability.⁶⁴ It then noted that outside of death sentences, proportionality challenges are rarely successful.⁶⁵ In the strongest language, the Court stated that one could argue without fear of being contradicted by its decisions that sentence length is a matter of legislative prerogative, but then backtracked by acknowledging in a footnote that proportionality challenges to prison sentences could be successful in extreme cases.⁶⁶

57. *Id.*

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

59. *Rummel v. Estelle*, 445 U.S. 263, 264-68 (1980).

60. *Id.* at 293 (Powell, J., dissenting).

61. *Id.* at 265.

62. *Id.* at 266 (noting that with minor revisions, the statute was later codified as TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974)).

63. *Id.* at 285.

64. *Id.* at 272 (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)).

65. *Id.*

66. *Id.* at 274 n.11. The meaning of this statement has been a point of much contention in the Court’s opinions following *Rummel*. Justice Scalia, in his concurring opinion in *Harmelin*, interprets this statement as indicating that proportionality review only applies to death sentences. *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Scalia, J., concurring). In contrast, Justice Powell, in his *Solem* majority opinion, dismissed the statement because it only claims “one could argue,” and focused instead on the footnote to the statement that acknowledged that proportionality review could apply to extreme sentences, such as life in prison for a parking ticket. *Solem v. Helm*, 463 U.S. 277, 303 n.32 (1983).

The second of these cases, *Hutto v. Davis*, concerned the imposition of two consecutive twenty-year sentences for possession with intent to distribute nine ounces of marijuana and distribution of marijuana.⁶⁷ Affirming the sentences, the Court restated its holding in *Rummel* that “federal courts should be ‘reluctan[t] to review legislatively mandated terms of imprisonment,’ and that ‘successful challenges to the proportionality of particular sentences’ should be ‘exceedingly rare.’”⁶⁸ It held that comparisons of prison terms are invariably subjective and stated that there is no clear way to make any constitutional distinction between one prison sentence and another.⁶⁹ Also, the Court noted that it had “‘never found a sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual punishment.’”⁷⁰

In the last of the three landmark decisions, *Solem v. Helm*, the Court significantly reinterpreted *Rummel*.⁷¹ In *Solem*, the defendant, a repeat offender, was sentenced to life in prison without the possibility of parole for issuing a “no account” check.⁷² He had been previously convicted three times of third-degree burglary, and had also been convicted of obtaining money under false pretenses, grand larceny, and driving under the influence.⁷³ He received a stiff sentence because, under South Dakota’s recidivist statute, offenders with three or more previous felonies must be sentenced for a “Class One felony,” for which the maximum punishment is life in prison without parole.⁷⁴ The Court found the sentence disproportionate, factually distinguishing *Rummel* by noting that the life sentence there was *with* the possibility of parole.⁷⁵ Further, it implicitly disagreed with *Rummel* and *Hutto*, holding that courts are competent to objectively determine whether contested prison sentences are proportionate.⁷⁶ To aid in such judicial determinations, the Court formulated three objective criteria: (1) the gravity of the offense versus the harshness of

67. *Hutto v. Davis*, 454 U.S. 370, 371-72 (1982) (per curiam).

68. *Id.* at 374 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274, 272 (1980)).

69. *Id.* at 373.

70. *Id.* at 371-72 (quoting *Davis v. Davis*, 585 F.2d 1226, 1229 (4th Cir. 1978)).

71. *Harmelin*, 501 U.S. at 964-65 (Scalia, J., concurring). While “significantly reinterpreted” is admittedly a bit argumentative, it becomes clearly justified upon comparing the majority opinion in *Rummel* to that in *Solem*. *Id.* (Scalia, J., concurring). Further, comparison of *Solem*’s majority opinion, written by Justice Powell, to Justice Powell’s dissent in *Rummel* reveals striking similarities between those two opinions. Compare *Solem*, 463 U.S. at 284-96, with *Rummel*, 445 U.S. at 286-95 (Powell, J., dissenting). For example, the *Solem* Court’s objective criteria for conducting proportionality review, mentioned in this case note and cited in footnote 77, comes almost verbatim from Justice Powell’s *Rummel* dissent. See *Rummel*, 445 U.S. at 295 (Powell, J., dissenting); see *infra* note 77 and accompanying text.

72. *Solem*, 463 U.S. at 281.

73. *Id.* at 279-80.

74. *Id.* at 281-82 (citing S.D. CODIFIED LAWS § 22-7-8 (1979) (amended 1981)).

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

76. Compare *Solem*, 463 U.S. at 292 (“[C]ourts are competent to judge the gravity of an offense, at least on a relative scale.”), with *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (quoting *Rummel*, 445 U.S. at 275 and stating that “the excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make ‘any constitutional distinction between one term of years and a shorter or longer term of years’”).

the penalty; (2) the sentences imposed on criminals in the same jurisdiction; and (3) the sentence for the same crime in other jurisdictions.⁷⁷

D. *The Birth of the Current State of the Law: Harmelin*

Several years later, the Court again faced the proportionality issue in *Harmelin v. Michigan*.⁷⁸ There, five Justices in two opinions concurred in judgment to uphold a life sentence for possessing 672 grams of cocaine.⁷⁹ In Justice Scalia's opinion, he stated that proportionality review was limited to the Court's death penalty jurisprudence, and that it did not apply to prison sentences.⁸⁰ Justice Scalia recognized that the death penalty is subject to proportionality review because of the unique nature of that punishment and because *stare decisis* counseled him to recognize it.⁸¹ Otherwise, he argued, the Eighth Amendment contains no gross disproportionality principle and thus does not require proportionality review.⁸² According to Justice Scalia, the Framers of the Eighth Amendment never incorporated any gross disproportionality principle, nor intended one.⁸³ He also recommended that *Solem* not be given *stare decisis* because it misinterpreted precedent, and thus misstated the law.⁸⁴

Justice Kennedy, on the other hand, stated in his concurrence that proportionality review is a part of generalized Eighth Amendment jurisprudence.⁸⁵ While he conceded that *Solem* should be given *stare decisis*, he stated that courts need not always apply all three of its objective

77. *Solem*, 463 U.S. at 290-92. As authority for the first element, the Court cited the analyses of *Coker*, *Robinson*, and *Weems*. *Id.* at 291. All three decisions made some sort of comparison between the offense and the punishment. *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977) (considering the seriousness of rape and the seriousness of the death penalty); *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (emphasizing that the offense had no gravity, so any penalty would be too harsh); *Weems v. United States*, 217 U.S. 349, 363-67 (1910) (commenting twice on the pettiness of the offense); see *Solem*, 463 U.S. at 290-92. As authority for its second element, the Court cites *Weems*, 217 U.S. at 380-81 (identifying a list of more serious crimes that were subject to less serious penalties). *Solem*, 463 U.S. at 290-91. And as authority for its third element, the Court cites *Coker*, 433 U.S. at 593-97 (reviewing how rape was punished in other states), and *Weems*, 217 U.S. at 380 (noting that under federal law, the same offense was only punishable by two years in prison and a fine). *Solem*, 463 U.S. at 291-92.

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

79. *Id.* at 961-62, 994-96 (Scalia, J., concurring).

80. *Id.* at 994 (Scalia, J., concurring).

81. *Id.* (Scalia, J., concurring).

82. *Id.* (Scalia, J., concurring).

83. *Id.* at 975-85 (Scalia, J., concurring); see *supra* notes 18-29 and accompanying text.

84. *Id.* at 965 (Scalia, J., concurring).

85. See *id.* at 996-97 (Kennedy, J., concurring).

criteria.⁸⁶ Courts must apply the first *Solem* factor, the threshold test,⁸⁷ but need only apply the second and third if the threshold test is met.⁸⁸ Further, Justice Kennedy found several principles in the Court's prior decisions that should guide proportionality review: "the primacy of the legislature, the variety of legitimate penological schemes, the nature of the federal system, and the requirement that proportionality review be guided by objective factors."⁸⁹ He then noted that although the *gross* disproportionality principle is part of the Eighth Amendment, there is no requirement of *strict* proportionality between sentence and crime.⁹⁰ Justice Kennedy considered this a final gross disproportionality principle, and maintained that his other four informed this one.⁹¹

III. FACTS

On March 12, 2000, Gary Ewing was arrested for stealing three golf clubs, valued at \$399 each, from the El Segundo Golf Course pro shop in Los Angeles County.⁹² He had previously been convicted of numerous crimes, including petty theft, theft, felony grand theft auto, battery, drug paraphernalia possession, appropriation of lost property, unlawful possession of a firearm, trespassing, burglary, and first-degree robbery, and was on parole at the time of his arrest.⁹³ He was charged with and convicted of felony grand theft, a crime consisting of illegally taking personal property in excess of \$400.⁹⁴ As was required by the Three Strikes law, his previous

86. *Id.* at 996, 1004-05 (Kennedy, J., concurring).

87. The threshold test consists of comparing the "'gravity of the offense [with] the harshness of the penalty.'" *Id.* at 1004 (Kennedy, J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 290-91 (1983)); see also *supra* note 77 and accompanying text.

88. *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring). The second and third factors, respectively, are: the sentences imposed on criminals in the same jurisdiction; and the sentence for the same crime in other jurisdictions. *Solem*, 463 U.S. at 291-92; see also *supra* note 77 and accompanying text.

89. *Harmelin*, 501 U.S. at 998-1001 (Kennedy, J., concurring). As authority for the first principle, the primacy of the legislature, Justice Kennedy cites several cases, including *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980) (holding that the fixing of prison sentences involves a penological judgment that is within the province of the legislature, not the courts). *Harmelin*, 501 U.S. at 998-99 (Kennedy, J., concurring). As authority for the second principle, the variety of legitimate penological schemes, Justice Kennedy cites several cases, including *Payne v. Tennessee*, 501 U.S. 808, 819 (1991) (holding that principles that have guided sentencing have changed with the times). *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring). As authority for the third principle, the nature of our federal system, Justice Kennedy quotes, among others, *Solem v. Helm*, 463 U.S. 277, 291 n.17 (1983) ("'The inherent nature of our federal system' may result in 'a wide range of constitutional sentences.'"). *Harmelin*, 501 U.S. at 999-1000 (Kennedy, J., concurring). And as authority for the fourth principle, the requirement that proportionality review be guided by objective factors, Justice Kennedy cites, among others, *Rummel*, 445 U.S. at 274-75 (holding that proportionality review by federal courts should be informed by "'objective factors to the maximum possible extent'" and quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)). *Harmelin*, 501 U.S. at 1000-01 (Kennedy, J., concurring).

90. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

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

92. *Ewing v. California*, 538 U.S. 11, 18 (2003).

93. *Id.* at 18-19.

94. *Id.* at 19 (citing CAL. PENAL CODE § 484 (West Supp. 2002)).

crimes were also alleged, and Ewing was sentenced to twenty-five years to life in prison.⁹⁵

After an unsuccessful appeal to the California Court of Appeals and a denial of a petition to review by the California Supreme Court, the U.S. Supreme Court granted certiorari, and affirmed the sentence.⁹⁶

IV. ANALYSIS OF THE COURT'S OPINION

A. Justice O'Connor's Plurality Opinion

After reviewing the facts of the case, Justice O'Connor briefly traced the Court's decisions involving the gross disproportionality principle.⁹⁷ She concluded that Justice Kennedy's concurrence in *Harmelin* represented the current state of the law, and declared that her opinion would be guided by its analytical framework.⁹⁸ Her decision to treat Justice Kennedy's *Harmelin* concurrence as the controlling precedent for proportionality review was probably the best possible representation of the Court's consensus.⁹⁹ In *Ewing*, as in *Harmelin*, the Court was divided into essentially three blocks. The first and largest block, consisting of four Justices, dissented in both cases.¹⁰⁰ Those Justices argued that *Solem* should be given *stare decisis*, and that proportionality review can be objectively applied to sentences.¹⁰¹ This block was far less reluctant than the other blocks to conduct proportionality review.¹⁰² The second block, adopting Justice Kennedy's concurrence in *Harmelin* and Justice O'Connor's opinion in *Ewing*, consisted of three Justices.¹⁰³ Those Justices stated that *Solem* should be given *stare decisis*,

95. *Id.* at 19-20. California's Three Strikes law requires the prosecutor to plead and prove all prior felony convictions. *Id.* at 19 (citing CAL. PENAL CODE § 667(g) (West 1999)). Because of the classification of Ewing's crime as a "wobbler," a felony that can be reduced to a misdemeanor at the sentencing judge's discretion, under the same penal code provision, section 17(b), the judge could have reduced the charge and Ewing could have avoided a three strikes sentence. *Id.* at 19-20. But in view of Ewing's record, the judge let Ewing's crime remain a felony. *Id.*

96. *Id.* at 20. The California Court of Appeals, in an unpublished opinion, relied on the U.S. Supreme Court's decision in *Rummel* in upholding Ewing's sentence. *Id.*

97. *Id.* at 20-24.

98. *Id.* at 23-24.

99. See generally *supra* Part II-D.

100. Justices Breyer, Stevens, Souter, and Ginsberg dissented in *Ewing*. See *Ewing*, 538 U.S. at 32. Justices White, Blackmun, Stevens, and Marshall dissented in *Harmelin*. See *Harmelin* 501 U.S. at 1009, 1027.

101. See *Ewing*, 538 U.S. at 32-53; *Harmelin*, 501 U.S. at 1009-29.

102. See *Ewing*, 538 U.S. at 32-53; *Harmelin*, 501 U.S. at 1009-29.

103. In her opinion in *Ewing*, Justice O'Connor was joined by Justice Kennedy and Chief Justice

but also expressed the opinion that it is difficult to find objective standards to guide proportionality review.¹⁰⁴ Consequently, they were much more reluctant than the dissent to conduct proportionality review.¹⁰⁵ The third block, endorsing Justice Scalia's concurrences in *Harmelin* and *Ewing* and Justice Thomas's concurrence in *Ewing*, consisted of two Justices.¹⁰⁶ Those Justices argued that *Solem* should not be afforded *stare decisis* and that proportionality review of term of year sentences inherently lacks objective standards.¹⁰⁷ As such, these Justices were not merely reluctant to conduct proportionality review of prison terms; they were outright opposed to doing so.¹⁰⁸

Adding the votes of these blocks, three consensuses emerged. First, there was a seven-vote majority for following *Solem* under *stare decisis*. Second, there was a five-vote majority that doubted the Court's ability to objectively conduct proportionality review. And third, there was a majority of five Justices either reluctant or altogether opposed to conducting proportionality review. Because these consensuses match the view of proportionality expressed in Justice Kennedy's *Harmelin* concurrence,¹⁰⁹ Justice O'Connor was correct to treat that opinion as the current state of the law.

1. Legislative Justifications

After holding that Justice Kennedy's *Harmelin* concurrence was controlling, Justice O'Connor examined the legislative reasons for and constitutionality of the Three Strikes law, and determined that its sentences were not *per se* unconstitutional.¹¹⁰ She began by noting the trend toward three strikes laws in many states.¹¹¹ She observed that although such laws are relatively new, most states have had heightened sentences for recidivists for many years.¹¹² Such sentences represent a deliberate policy choice to focus on incapacitation and deterrence rather than retribution or rehabilitation.¹¹³ Though these laws may be new, Justice O'Connor held that the first of Justice Kennedy's gross disproportionality principles, primacy of

Rehnquist. See *Ewing*, 538 U.S. at 14. In his concurrence in *Harmelin*, Justice Kennedy was joined by Justices O'Connor and Souter. *Harmelin*, 501 U.S. at 996.

104. See *Ewing*, 538 U.S. at 14-31; *Harmelin*, 501 U.S. at 996-1009.

105. See *Ewing*, 538 U.S. at 14-31; *Harmelin*, 501 U.S. at 996-1009.

106. Justices Scalia and Thomas wrote concurring opinions in *Ewing*. See *Ewing*, 538 U.S. at 31-33. In *Harmelin*, Justice Scalia's concurring opinion was joined by Chief Justice Rehnquist. *Harmelin*, 501 U.S. at 961.

107. See *Ewing*, 538 U.S. at 31-32; *Harmelin*, 501 U.S. at 961-96.

108. See *Ewing*, 538 U.S. at 31-32; *Harmelin*, 501 U.S. at 961-96.

109. See *supra* notes 85-91 and accompanying text for a description of Justice Kennedy's view.

110. See *Ewing*, 538 U.S. at 24-28. Although Justice O'Connor did not address the proportionality of *Ewing*'s sentence here, she did examine the Three Strikes law generally. See *id.* She found its legislative justification both compelling and analogous to other justifications for past recidivist laws. See *id.*

111. *Id.* at 24.

112. *Id.*

113. *Id.* at 24-25.

the legislature, requires deference to California's decision.¹¹⁴ She further noted that the Constitution "does not mandate adoption of any one penological theory," and that selecting the sentencing rationale is a policy choice to be made by legislatures, not courts.¹¹⁵

Justice O'Connor then examined California's rationales for its three strikes law: reducing serious and violent crime by segregating from society those who are unable to conform their conduct to its laws, and deterring other repeat felons.¹¹⁶ She held that "nothing in the Eighth Amendment prohibits California from making [such a] choice,"¹¹⁷ and discussed at length the reasonableness of three strikes sentences, citing many crime and recidivist statistics.¹¹⁸ While some may disagree with California's choice, Justice O'Connor held, it is not the Court's role to sit as a "superlegislature" that second-guesses state policy decisions.¹¹⁹

2. The Threshold Test¹²⁰

After considering the legislative justifications for Ewing's sentence, Justice O'Connor addressed whether Ewing's punishment was unconstitutionally disproportionate.¹²¹

First, she examined the effect of the "wobbler" status of Ewing's crime on proportionality analysis.¹²² Its classification as a "wobbler" merely allowed the judge discretion to reduce it from a felony to a misdemeanor.¹²³ Because the crime was a presumptive felony, and the judge acted within her discretion, Justice O'Connor held the "wobbler" classification to be irrelevant.¹²⁴

114. *Id.* at 24-25.

115. *Id.* at 25-28 (quoting *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring)).

116. *Id.* at 26-27.

117. *Id.* at 25-27. To show that nothing in the Eighth Amendment prohibits California from making the choice it did, O'Connor cited several cases. *Id.* at 25 (quoting *Parke v. Raley*, 506 U.S. 20, 27 (1992) ("States have a valid interest in deterring and segregating habitual criminals."), and (quoting *Oyler v. Boles*, 368 U.S. 448, 451 (1962) ("[T]he constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge.")).

118. *Id.* at 26-27. Though these statistics are certainly compelling, it is not clear that they are a basis for the constitutionality of a sentence or of a law's sentences, and, therefore, it is not clear what relevance they have.

119. *Id.* at 27-28.

120. See *supra* note 87 and accompanying text.

121. *Ewing*, 538 U.S. at 28-31.

122. *Id.* at 28-29.

123. *Id.*

124. *Id.* at 29.

Her decision to treat the “wobbler” classification as immaterial was sharply criticized by Justice Breyer in his dissent.¹²⁵ Justice Breyer argued that allowing “wobblers” to act as triggering offenses for the Three Strikes law will cause anomalies.¹²⁶ To illustrate this point he contrasted two offenders, one who committed a “wobbler” as his first offense, and another who committed it as his third.¹²⁷ The other crimes committed by both were non-“wobbler” felonies.¹²⁸ The offender who committed the “wobbler” as his first offense had the offense classified as a misdemeanor, because it was his first offense.¹²⁹ Thus, on his third crime, he has only committed two felonies, and will not receive a three strikes sentence.¹³⁰ The other offender will likely have his “wobbler” treated as a felony because it is his third crime, and thus will receive a three strikes sentence.¹³¹ The anomaly between these two is apparent.¹³² They have committed the same crimes, but only one of them receives a three strikes sentence.¹³³ Thus, argued Justice Breyer, the “wobbler” status of the crime should have import in conducting proportionality review, since the arbitrariness of such anomalies is undesirable and points to the less-than-serious nature of Ewing’s offense.¹³⁴ Justice O’Connor did not address these arguments.¹³⁵

Next, Justice O’Connor applied Justice Kennedy’s threshold test, comparing the gravity of the offense with the harshness of the penalty.¹³⁶ She held that in weighing the gravity of the offense, the Court must consider “not only [Ewing’s] current felony, but also his long history of felony recidivism.”¹³⁷ Any other approach would not properly recognize the primacy of the legislature in its choice to enact the Three Strikes law.¹³⁸ Again, she noted the reasonableness of the justification for Ewing’s sentence and held that the legislature is entitled to deference in its decision to sentence recidivists to life in prison.¹³⁹ Thus, because Ewing’s crime and criminal history were serious, and because his sentence was legitimate, she held that Ewing’s sentence was not a rare case that met the threshold test.¹⁴⁰

125. *Id.* at 48-50 (Breyer, J., dissenting).

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

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

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

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

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

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

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

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

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

135. *See id.* at 28-29.

136. *Id.* at 28-31. As mentioned above, *see supra* notes 97-108 and accompanying text for an explanation of Justice O’Connor’s holding that Justice Kennedy’s *Harmelin* concurrence represents the state of the law is sound. Even Justice Breyer in his dissent uses that concurrence and its threshold test to argue that Ewing’s sentence is disproportionate, although he states that he is only using it for “present purposes.” *Id.* at 36 (Breyer, J., dissenting).

137. *Id.* at 29.

138. *Id.*

139. *Id.* at 29-30.

140. *Id.* Because the threshold test was not met, Justice O’Connor did not reach *Solem’s*

B. Justice Scalia's Concurring Opinion

While concurring in judgment, Justice Scalia reiterated his opinion from *Harmelin*: The cruel and unusual punishments clause was only meant to exclude certain modes of punishment, like torture, and “was not a ‘guarantee against disproportionate sentences.’”¹⁴¹ Because Justice Scalia restated his holding from *Harmelin*, some discussion of his concurrence in that case is warranted. As mentioned above, Justice Scalia made a strong argument that the Eighth Amendment was not intended to require proportionality review when it was enacted.¹⁴² Although that analysis shows strong command of historical facts, the Justice is less than persuasive in his discussion of *Weems*.¹⁴³ He claimed that *Weems* did not create proportionality review and cannot be applied because of its peculiar facts.¹⁴⁴ While he admitted the ambiguity of *Weems*, and took his interpretation of it directly from *Rummel*, he did not explain statements in *Weems* that seem to establish proportionality review.¹⁴⁵ His best argument was that the Court did not conduct proportionality review again for many years afterward.¹⁴⁶ Also, while he did not wish to give *Solem stare decisis*, he was willing to give *stare decisis* to *Coker*.¹⁴⁷ But he claimed that prior to *Coker*, the Court did not ever really

comparative analysis. See *id.* In *Harmelin*, Justice Kennedy had concluded that the comparative analysis was only mandated if the threshold test was met. *Harmelin v. Michigan*, 501 U.S. 957, 996, 1004-05 (1991) (Kennedy, J., concurring); see also *supra* notes 86-87 and accompanying text.

Also, a final criticism of Justice O'Connor's opinion is that she makes no effort to rebut the contentions of Justice Scalia, see *infra* notes 140-51 and accompanying text, or Justice Breyer's application of the threshold test, see *infra* notes 169-211 and accompanying text.

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

142. See *Harmelin*, 501 U.S. at 966-76 (Scalia, J., concurring). See *supra* notes 18-29, 83, and accompanying text.

143. *Harmelin*, 501 U.S. at 990-92 (Scalia, J., concurring). Justice Scalia noted that the departure of the proportionality requirement in the Eighth Amendment has not departed to the extent that *Solem* suggests. *Id.* at 990 (Scalia, J., concurring). He further acknowledged the opinion's language as providing support for not only the Eighth Amendment's bar on excessive punishment, but for the bar on unique punishment as well. *Id.* at 992. (Scalia, J., concurring).

144. *Id.* at 991-92 (Scalia, J., concurring).

145. See *id.* (Scalia, J., concurring). Statements that seem to establish proportionality review in *Weems* are: “Such penalties for such offenses amaze those who . . . believe that it is precept of justice that punishment for crime should be graduated and proportional to offense,” *id.* at 991 (quoting *Weems*, 217 U.S. at 366-67); and “[T]he inhibition [of the Cruel and Unusual Punishments Clause] was directed, not only against punishments which inflict torture, ‘but against all punishments which by their excessive length or severity are greatly disproportioned to the offense charged.’” *Id.* (quoting *Weems*, 217 U.S. at 371 (citing *O’Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting))).

146. *Id.* at 991-92 (Scalia, J., concurring).

147. *Id.* at 994 (Scalia, J., concurring).

recognize proportionality review.¹⁴⁸ Why *Coker* should be allowed to defy precedent and *Solem* should not is only explained by restating the “death is different” doctrine.¹⁴⁹ Other than that, he gave no explanation. It seems inconsistent, however, to overrule *Solem* without also overruling *Coker* and other decisions that rely on a constitutional protection that Justice Scalia himself argued was never enacted by the Framers.

Justice Scalia then went on to contend that proportionality is a concept inherently “tied to the penological goal of retribution” and is irrelevant to the analysis when the goal of the Three Strikes law is incapacitation.¹⁵⁰ Justice Scalia makes a good point here. If the Eighth Amendment contains a proportionality protection, then the Court is required to view punishment as a function of offense. Such a protection would logically mandate that legislatures make retribution an express penological goal, or at least consider whether their sentences would be considered grossly disproportionate in light of that goal. This would naturally conflict with the Court’s repeated holdings that the Constitution does not mandate any penological scheme.¹⁵¹ Thus, if states are free to pursue penological goals that do not include retribution, a guarantee against gross disproportionality does not make sense.¹⁵²

C. Justice Thomas’s Concurring Opinion

Justice Thomas stated his belief that the Eighth Amendment contained no gross disproportionality principle and agreed with Justice Scalia that *Solem* should not be given *stare decisis*.¹⁵³ He gave no justification, though, for his views.¹⁵⁴ Also, in stating that he believed the Eighth Amendment contains no gross disproportionality principle, he possibly indicated that he even views *Coker* and death penalty application of proportionality review as illegitimate.¹⁵⁵ However, because he provided no further explanation, the extent of the Justice’s view is unknown.

D. Justice Stevens’s Dissent

Justice Stevens’s dissent criticized the concurring opinions, stating that proportionality review is “capable of judicial application [and is] required by the Eighth Amendment.”¹⁵⁶

148. *Id.* at 992-93 (Scalia, J., concurring).

149. *Id.* at 994 (Scalia, J., concurring).

150. *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).

151. *Id.* at 25.

152. *Id.* at 31-32 (Scalia, J., concurring). Justice Scalia notes in *Harmelin* that “it becomes difficult even to speak intelligently of ‘proportionality,’ once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept. . . .” *Harmelin*, 501 U.S. at 989 (Scalia, J., concurring).

153. *Ewing*, 538 U.S. at 32 (Thomas, J., concurring).

154. *See id.* (Thomas, J., concurring).

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

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

1. Proportionality Review Is Required

To show that proportionality review is required, Justice Stevens listed decisions requiring proportionality for fines, prison sentences, and death sentences, and noted that it would be anomalous to require such review for fines, but not for prison terms.¹⁵⁷ Seeking to avoid this apparent anomaly, he concluded that the Eighth Amendment broadly prohibits excessive sanctions.¹⁵⁸

His argument, however, must fail. The Eighth Amendment explicitly prohibits “excessive,” thus disproportionate, fines.¹⁵⁹ It makes no similar use of the word “excessive” for punishments.¹⁶⁰ Instead, it bars “cruel and unusual” punishments.¹⁶¹ Thus, because the Constitution treats fines and punishments differently, it is not at all anomalous that proportionality review would be required for the one and not the other.¹⁶² In fact, had the Founding Fathers intended the Eighth Amendment to bar disproportionate punishments, they certainly knew how to state it specifically.¹⁶³ Eight years before the ratification of the Eighth Amendment, New Hampshire adopted two separate provisions in its constitution, one barring “cruel or unusual punishments,” the other stating that “all penalties ought to be proportioned to the nature of the offense.”¹⁶⁴ As Justice Scalia argued in his *Harmelin* concurrence, “to use the phrase ‘cruel and unusual punishment’ to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly.”¹⁶⁵

157. *Id.* at 33 (Stevens, J., dissenting). Justice Stevens cited *United States v. Bajakajian*, 524 U.S. 321 (1998), as prohibiting disproportionate or excessive fines; *Stack v. Boyle*, 342 U.S. 1 (1951), as prohibiting disproportionate or excessive bail; and *Coker v. Georgia*, 433 U.S. 584 (1977), as prohibiting death sentences when they are disproportionate to the coordinate crimes. *Ewing*, 538 U.S. at 33 (Stevens, J., dissenting).

158. *Ewing*, 538 U.S. at 33 (Stevens, J., dissenting).

159. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

160. *Id.*

161. *Id.*

162. See *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (Scalia, J., concurring) (stating that *Solem* wrongly assumed that “proportionality” and “cruel and unusual” mean the same thing).

163. *Id.* at 977 (Scalia, J., concurring).

164. *Id.* 977-78 (Scalia, J., concurring) (quoting N.H. BILL OF RIGHTS, arts. XVIII, XXXIII (1784) (internal citations omitted)).

165. *Id.* at 977 (Scalia, J., concurring).

2. Ability of the Judiciary to Conduct Proportionality Review

Next, Justice Stevens argued that judges are called on to draw lines in many contexts and to exercise their judgment to give meaning to the Constitution's protections.¹⁶⁶ He observed that judges have historically been given a large amount of discretion in sentencing criminals.¹⁶⁷ In using that discretion, judges commonly applied the gross disproportionality principle.¹⁶⁸ Thus, judges have been and will continue to be able to draw lines between proportionate and disproportionate sentences.¹⁶⁹

E. Justice Breyer's Dissenting Opinion

Justice Breyer dissented from the Court's judgment and held that Ewing's sentence was grossly disproportionate.¹⁷⁰ To demonstrate this, he claimed to use the plurality's analytical framework to show that even under their interpretation of the law, Ewing's sentence was disproportionate.¹⁷¹

Although Justice Breyer maintained that he was applying Justice Kennedy's analytical framework, he did not discuss Ewing's sentence in terms of the four gross disproportionality principles.¹⁷² He did not mention how the Court's practice of deference to the legislature should affect the outcome of his proportionality review; nor did he review the sentence in terms of the nature of the American federal system.¹⁷³ In fact, in his comparative analysis, he noted that Ewing's sentence would only be possible in nine other states, implying that sentences in those states are dubious merely because forty other states disagree with them, an implication clearly at odds with the setup of our federal system.¹⁷⁴ While he claimed to use objective factors in applying the threshold test,¹⁷⁵ he did not acknowledge the limits of the Court's ability to find such objective factors, nor did he show any reluctance in reviewing Ewing's sentence due to the lack of objective factors.¹⁷⁶ Also, while he acknowledged the variety of penological choices California could make,¹⁷⁷ he showed no deference to its actual choice.¹⁷⁸ Thus, Justice Breyer's claim that he was applying Justice Kennedy's analytical framework is dubious, at best.

166. *Ewing v. California*, 538 U.S. 11, 33 (2003) (Stevens, J., dissenting).

167. *Id.* at 34-35 (Stevens, J., dissenting).

168. *Id.* at 35 (Stevens, J., dissenting).

169. *See id.* (Stevens, J., dissenting).

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

171. *Id.* at 36-37 (Breyer, J., dissenting).

172. *See id.* at 35-53 (Breyer, J., dissenting).

173. *See id.* (Breyer, J., dissenting).

174. *See id.* at 42-47 (Breyer, J., dissenting).

175. *See id.* at 37-38 (Breyer, J., dissenting).

176. *See id.* at 37-42 (Breyer, J., dissenting).

177. *See id.* at 50-52 (Breyer, J., dissenting).

178. *Id.* at 30 n.2 (disagreeing with Justice Breyer's statement that Ewing's sentence cannot be justified on "property-crime-related incapacitation grounds" and holding that California is not so limited in its application of its chosen penological scheme).

1. The Threshold Test

Justice Breyer began by comparing the harshness of Ewing's punishment to the gravity of his offense.¹⁷⁹ Rather than using the four proportionality principles for the threshold test, as Justice Kennedy's *Harmelin* opinion called for, he contrasted the facts of *Ewing* with *Rummel* and *Solem*, and found that Ewing's claim falls between those cases.¹⁸⁰ He asserted that what distinguishes *Rummel* from *Solem* is the length of the sentence.¹⁸¹ While he also noted that the sentence-triggering behavior and the offender's criminal history are objective factors to be considered, he argued that those factors are substantially similar in *Rummel*, *Solem*, and *Ewing*, and thus it is the other factor, length of the sentence, that is the determining objective factor.¹⁸² The proportionate sentence in *Rummel* was for life with the possibility of parole after ten or twelve years, while the disproportionate sentence in *Solem* was for life without parole.¹⁸³ Ewing's sentence for twenty-five years to life fell between these, but since Ewing was thirty-eight years old, twenty-five years may be the remaining span of his life.¹⁸⁴ Therefore, Justice Breyer held, Ewing's sentence was closer to *Solem*.¹⁸⁵

Analytically speaking, Justice Breyer's age-based proportionality comparison relies on prophetic ability that the Court lacks, or at least has yet to demonstrate. It could well have been that ten years was the remainder of the defendant's life in *Rummel*, and that Ewing could live and be productive for fifty more years. Further, the assumption that the closeness of a fixed term of years to a sentence of life in prison determines the constitutionality of a sentence is riddled with problems. It creates a system of proportionality review dependant on the age of the defendant.¹⁸⁶ For example, if Ewing had been fifty-five, and the sentence he received would have been exactly the same as that in *Rummel*, the logic of the Justice's comparison would still hold that the sentence is closer to *Solem* than *Rummel*, because it would consume the remainder of the offender's life.¹⁸⁷ Further, if Ewing were twenty, his sentence would be arguably constitutional and closer to *Rummel*

179. *Id.* at 37-42 (Breyer, J., dissenting).

180. *See id.* at 37-40 (Breyer, J., dissenting).

181. *Id.* at 39-40 (Breyer, J., dissenting).

182. *Id.* at 38-39 (Breyer, J., dissenting).

183. *Id.* at 38 (Breyer, J., dissenting).

184. *Id.* at 39-40 (Breyer, J., dissenting).

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

186. *See id.* (Breyer, J., dissenting).

187. *See id.* (Breyer, J., dissenting).

because he might not be likely to serve the remainder of his life. Thus, this system of comparison creates a degree of arbitrariness based on age and is hardly the sort of “objective factor” that proportionality analysis ought to hinge on.

Also, while Justice Breyer claimed that Ewing’s sentence is closer to *Solem*, he argued that merely being between *Rummel* and *Solem* creates a substantial argument for unconstitutionality.¹⁸⁸ This argument has the effect of transforming *Rummel* into a sort of outer limit of what is allowed, something the Court has never actually held.

In a last effort to meet the threshold test, Justice Breyer also noted that Ewing’s punishment is among the most serious available, and that his conduct is among the least serious crimes.¹⁸⁹ Thus, he concluded, Ewing’s sentence meets the disproportionality threshold.¹⁹⁰

2. Comparative Analysis

Finding the threshold met, Justice Breyer looked at how other jurisdictions punish the same conduct, and at what other crimes California punishes with life in prison.¹⁹¹ He noted that prior to the enactment of the Three Strikes law, no one in California would have served more than ten years for Ewing’s offense, and that in thirty-three other states, it would be legally impossible for Ewing to serve more than ten years.¹⁹² Only in nine other states would it be possible for Ewing to receive the same sentence.¹⁹³ Further, California usually reserves Ewing’s sentence for very serious, violent crimes, such as first-degree murder.¹⁹⁴ Thus, Justice Breyer concluded that both of these comparisons validate the threshold test and lead to the conclusion that Ewing’s sentence is disproportionate.¹⁹⁵

Justice Breyer’s comparative analysis is problematic for several reasons. First, comparison between states inherently conflicts with the nature of the federal system, the third of Justice Kennedy’s proportionality principles.¹⁹⁶ Though Justice Kennedy did not acknowledge it in his *Harmelin* concurrence,¹⁹⁷ Justice Scalia convincingly demonstrated the problem in his

188. *Id.* at 40-42 (Breyer, J., dissenting).

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

190. *Id.* at 42 (Breyer, J., dissenting). After holding that Ewing’s crime was not serious and that his punishment was, Justice Breyer made a last “objective” comparison to U.S. sentencing guidelines. *Id.* at 41-42 (Breyer, J., dissenting). The very consideration of these seems at odds with the gross disproportionality principles of acknowledging the nature of the federal system and of giving deference to the legislature. Justice Breyer cited no constitutional requirement that sentences be similar to these guidelines. *See id.* (Breyer, J., dissenting). Why these guidelines are relevant as an objective factor, then, is not explained. *Id.*

191. *Id.* at 42-47 (Breyer, J., dissenting).

192. *Id.* at 43-44 (Breyer, J., dissenting) (citing CAL. PENAL CODE ANN §§ 484, 489 (West 1970)).

193. *Id.* at 46 (Breyer, J., dissenting).

194. *Id.* at 44-45 (Breyer, J., dissenting).

195. *See id.* at 47 (Breyer, J., dissenting).

196. *Harmelin v. Michigan*, 501 U.S. 957, 989-90 (1991) (Scalia, J., concurring).

197. *See id.* at 996-1009 (Kennedy, J., concurring).

concurrence.¹⁹⁸ Justice Scalia noted that in some states a particular act is a crime; while in others it is not, leading to disparities in punishment.¹⁹⁹ He further noted that some state must, by the nature of the federal system, be the harshest in its punishment.²⁰⁰ Thus, unless a requirement of uniformity is imposed that is antithetical to the nature of the federal system, sentences will vary.²⁰¹ All this comparison does, then, is call into doubt the harshest state's penal scheme, in effect forcing states to adopt identical sentences if they wish to avoid having their sentences declared unconstitutional.

Second, Justice Breyer's comparison to California's sentencing scheme before the Three Strikes law strongly conflicts with the idea of legislative deference. Public anger at the previous sentences was among the very reasons for the law.²⁰²

Third, the Justice's contention that property-related crimes are being punished the same as murder is only problematic if retribution is the penological goal.²⁰³ A state may have a strong interest in incapacitating repeat offenders, no matter what crimes they commit for their triggering offenses.²⁰⁴ Since the only two ways of permanently incapacitating an offender are death and life in prison, some crimes of lesser gravity must necessarily be punished the same as crimes of higher gravity. Such a scheme naturally conflicts with the goal of retribution, which punishes offenses differently based on their gravity.²⁰⁵ Thus, a scheme of permanent incapacitation for repeat serious offenders guarantees comparatively "disproportionate" sentences. But yet, the Court maintained, nothing in the Constitution prevents the legislature from adopting such a scheme.²⁰⁶ Therefore, requiring such a comparison violates the right of states to choose the penological schemes they wish.

3. Overriding Legislative Justifications

Lastly, Justice Breyer considered whether California might have any special criminal justice concerns that would justify Ewing's sentence despite

198. *Id.* at 989-90 (Scalia, J., concurring).

199. *Id.* (Scalia, J., concurring).

200. *Id.* (Scalia, J., concurring).

201. *Id.* (Scalia, J., concurring).

202. *See Ewing v. California*, 538 U.S. 11, 24 n.1 (2003).

203. *Harmelin*, 501 U.S. at 989 (Scalia, J., concurring).

204. *Ewing*, 538 U.S. at 23-27.

205. *Harmelin*, 501 U.S. at 989 (Scalia, J., concurring).

206. *Ewing*, 538 U.S. at 25.

its disproportionality.²⁰⁷ He concluded that there are no such concerns, save administrative ones.²⁰⁸ These administrative concerns come from California's need to draw some sort of workable line for offenses that will trigger the Three Strikes law.²⁰⁹ Justice Breyer concluded that the line selected, between felonies and misdemeanors, can cause sentencing anomalies.²¹⁰ For example, in some cases, if an offender's least serious crime is committed first, it will be considered a misdemeanor and the Three Strikes law will not apply.²¹¹ But if the same offense is instead the last, the law will apply.²¹² Justice Breyer then argued that the state could easily list triggering offenses instead, avoiding the anomalies without great administrative difficulty.²¹³ Listing every triggering offense, however, would not necessarily have avoided the anomalies mentioned. The legislature could well have listed every single felony, including those treated as "wobblers," as a triggering offense. Had it done so, the continued classification of some of those crimes as "wobblers" would give rise to the same anomalies mentioned.

Finally, citing several California Penal Code provisions defining serious and violent crimes, the targets of the Three Strikes law,²¹⁴ Justice Breyer concludes that Ewing's sentence is not justified because his crime does not fall within this definition.²¹⁵

207. *Id.* at 47-52 (Breyer, J., dissenting).

208. *Id.* at 48 (Breyer, J., dissenting).

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

210. *Id.* at 49 (Breyer, J., dissenting). The first of the anomalies Breyer mentions consists of variations in the seriousness of the triggering behavior, ranging from assault with a deadly weapon to stealing chicken, nuts, or avocados worth more than \$100.00. *Id.* at 49-50 (Breyer, J., dissenting) (citing CAL. PENAL CODE §§ 245 (West Supp. 2002), 487(b)(1)(A) (West Supp. 2003)). The second concerns the offender's criminal record. *Id.* at 50 (Breyer, J., dissenting). Under California's "petty theft with a prior statute," petty theft is classified as a felony only if the offender has previously committed a theft-related offense. *Id.* (Breyer, J., dissenting) (citing CAL. PENAL CODE § 666 (West Supp. 2002)). Thus, an offender with two prior violent, non-theft felonies who commits petty theft will not receive a three strikes sentence, but an offender with one prior violent, non-theft felony and one prior petty theft who commits another petty theft will receive a three strikes sentence. *Id.* (Breyer, J., dissenting).

211. *Ewing*, 538 U.S. at 50 (Breyer, J., dissenting). See *supra* notes 124-34 and accompanying text.

212. *Ewing*, 538 U.S. at 50 (Breyer, J., dissenting). See *supra* notes 124-34 and accompanying text.

213. *Ewing*, 538 U.S. at 51 (Breyer, J., dissenting).

214. *Id.* (Breyer, J., dissenting) (citing Ardiaz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1 (2000)).

215. *Id.* at 51-52 (Breyer, J., dissenting). The definitions of serious and violent crimes to which Justice Breyer cites "include crimes against the person, crimes that create danger of physical harm, and drug crimes." *Id.* at 51 (citing CAL. PENAL CODE ANN § 667.5(c)(1) (West Supp. 2002), § 1192.7(c)(1) (West Supp. 2003), § 667.5(c)(21) (West Supp. 2002), § 1192.7(c)(18) (West Supp. 2003), and § 1192.7(c)(24) (West Supp. 2003)).

V. IMPACT OF THE COURT'S DECISION

A. *Proportionality Review After Ewing v. California*1. *Lockyer v. Andrade*

In *Lockyer v. Andrade*, a companion case to *Ewing* decided on the same day, the Court reversed a Ninth Circuit holding that the habeas petitioner, Andrade, had received an unconstitutionally disproportionate sentence under California's three strikes law.²¹⁶ Andrade had been found guilty of committing two petty thefts with a prior conviction, and for those crimes Andrade received two three strikes sentences.²¹⁷ In Andrade's initial appeal, the California Court of Appeal rejected his claim of disproportionality.²¹⁸ The court based its decision on Justice Kennedy's *Harmelin* principles, and held that Andrade's case was highly similar to *Rummel v. Estelle*.²¹⁹ The Ninth Circuit, hearing Andrade's subsequent habeas appeal, held that the California Court of Appeal had committed clear error in its interpretation of the gross disproportionality principle.²²⁰

Dividing into the same five-to-four split as in *Ewing*, the Supreme Court reversed the Ninth Circuit.²²¹ Writing for the majority, Justice O'Connor claimed that the Court's gross disproportionality jurisprudence is so confused as to make clear error on the part of the California Court of Appeal almost impossible.²²² The majority held that there are only two clearly established principles of federal law regarding sentence proportionality: first, there is a gross disproportionality principle; and second, the "gross disproportionality principle reserves a constitutional violation for only the

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

217. *Id.* at 68. Guided by California law, the jury found that the two petty thefts with a prior conviction equated to three counts of first-degree residential burglary. *Id.* Since first-degree residential burglary is considered a violent felony under the Three Strikes law, "the judge sentenced Andrade to two consecutive terms of 25 years to life in prison." *Id.*

218. *Id.* at 68-69.

219. *Id.* The California Court of Appeals compared Andrade's crimes with those of the defendant in *Rummel v. Estelle*. *Id.* at 69. Based on this evaluation, the court held that the sentence imposed on Andrade was neither disproportionate nor cruel and unusual under the Eighth Amendment. *Id.*

220. *Id.* at 69-70. The Ninth Circuit's decision was based on the California Court of Appeals's disregard of *Solem v. Helm*. *Id.* at 70. By not comparing the facts of Andrade's case to the facts of *Solem*, the Ninth Circuit held that the California Court of Appeals incorrectly applied constitutional law. *Id.*

221. *Id.* at 77.

222. *See id.* at 72.

extraordinary case.”²²³ Justice O’Connor and the majority found that the California Court of Appeal did not unreasonably apply either of these principles, and thus reversed the Ninth Circuit.²²⁴

Subsequent courts have applied *Ewing* in tandem with *Lockyer*.²²⁵ While holding Justice Kennedy’s *Harmelin* principles to be the state of the law for proportionality review, courts often merely take those principles to mean nothing more than *Lockyer*’s “extraordinary case” test.²²⁶ Showing how several Federal and State courts have applied *Ewing* and *Lockyer* is illustrative of *Ewing*’s legal impact.

2. Federal and State Cases After *Ewing*

Several of the Circuit Courts of Appeals have confronted proportionality challenges after *Ewing*.²²⁷ In the Fifth Circuit case of *Austin v. Johnson*,²²⁸ the court reversed a district court opinion striking down a sentence as grossly disproportionate.²²⁹ The case concerned the sentence of a minor to

223. *Id.* at 73, 77.

224. *Id.* at 77. See *supra* note 219 and accompanying text.

225. See, e.g., *Gonzales v. Terhune*, No. 01-56450, 2003 U.S. App. LEXIS 26352, at *3 (9th Cir. Dec. 23, 2003); *State v. Clifton*, 580 S.E.2d 40, 43-45 (N.C. Ct. App. 2003).

226. See, e.g., *Gonzales*, 2003 U.S. App. LEXIS 26352, at *3; *Clifton*, 580 S.E.2d at 43-45.

227. See *Bryant v. Adams*, No. 01-55835, 2003 U.S. App. LEXIS 25652, at *1 (9th Cir. Dec. 17, 2003) (holding that a three strikes sentence of twenty-five years to life for petty theft with a prior was not grossly disproportionate); *Quinones v. Garcia*, No. 02-15825, 2003 U.S. App. LEXIS 25403, at *1 (9th Cir. Dec. 16, 2003) (finding that the imposition of three three strikes sentences for two narcotics and one firearm offense, each of which could have served as the triggering offense, was not grossly disproportionate); *Butler v. Hernandez*, No. 02-56683, 2003 U.S. App. LEXIS 25353, at *1 (9th Cir. Dec. 15, 2003) (holding that a three strikes sentence of twenty-five years to life for petty theft with a prior was not grossly disproportionate); *Duenas v. Galaza*, No. 00-57032, 2003 U.S. App. LEXIS 24824, at *1 (9th Cir. Dec. 9, 2003) (holding that the imposition of a three strikes sentence was not grossly disproportionate); *United States v. Olan-Navarro*, 350 F.3d 551 (6th Cir. 2003) (finding that a fifty-seven month sentence for illegally reentering the United States was not grossly disproportionate); *Anderson v. Lamarque*, No. 02-57150, 2003 U.S. App. LEXIS 23615, at *1 (9th Cir. Nov. 18, 2003) (finding that a three strikes sentence of twenty-five years to life for petty theft with a prior was not grossly disproportionate); *Garcia v. Moore*, No. 02-35233, 2003 U.S. App. LEXIS 23370, at *1 (9th Cir. Nov. 14, 2003) (finding that a sentence to life in prison under Washington’s recidivist statute was not grossly disproportionate); *Brown v. Lamarque*, No. 02-56196, 2003 U.S. App. LEXIS 23156, at *1 (9th Cir. Nov. 10, 2003) (holding that a three strikes sentence of twenty-six years to life was not grossly disproportionate); *Clark v. Lamarque*, No. 02-16955, 2003 U.S. App. LEXIS 23154, at *1 (9th Cir. Nov. 10, 2003) (finding that a three strikes sentence of twenty-six years to life for indecent exposure was not grossly disproportionate); *Reed v. Roe*, No. 00-56398, 2003 U.S. App. LEXIS 22756, at *1 (9th Cir. Nov. 4, 2003) (finding that a three strikes sentence given to a recidivist whose past crimes include robbery and assault with intent to commit rape was not grossly disproportionate); *Prince v. Adams*, No. 02-15578, 2003 U.S. App. LEXIS 22547, at *1 (9th Cir. Oct. 31, 2003) (holding that a three strikes sentence of twenty-six years to life for statutory rape was not grossly disproportionate); *United States v. Bautista-Villanueva*, No. 02-3976, 2003 U.S. App. LEXIS 12691, at *1 (8th Cir. June 23, 2003) (holding that seventy months imprisonment for possession of cocaine with intent to distribute was not grossly disproportionate); *United States v. Lopez*, No. 02-4018, 2003 U.S. App. LEXIS 12285, at *1 (8th Cir. June 18, 2003) (finding that seventy months imprisonment for possession of methamphetamine with intent to distribute was not grossly disproportionate).

228. 328 F.3d 204, 209-10 (5th Cir. 2003).

229. *Id.*

boot camp for taking candy from his high school concession stand.²³⁰ The plaintiff-minor contended that, among other things, the sentence was disproportionate and violated his Eighth Amendment rights.²³¹ Disagreeing with the plaintiff and district court, the Fifth Circuit held that under *Ewing*, the sentence was constitutionally permissible.²³² It cited Justice Kennedy's *Harmelin* principles, reiterated in *Ewing*, as the controlling law as to whether a sentence is grossly disproportionate.²³³ Contrasting the plaintiff's sentence to *Ewing*'s, the court found it impossible to declare the plaintiff's comparatively short sentence unconstitutional, reasoning that if a sentence such as *Ewing*'s was constitutional, the plaintiff's sentence here must also be.²³⁴

The Sixth Circuit, in the case of *Galloway v. Howes*,²³⁵ also found that *Ewing* represented the state of the law for proportionality review.²³⁶ In *Galloway*, the habeas petitioner had been found to be a "fourth-felony habitual offender," with three armed robberies as prior crimes.²³⁷ The Sixth Circuit cited *Ewing* for the proposition that the Eighth Amendment contains a narrow proportionality principle, but found that the petitioner's sentence was not grossly disproportionate.²³⁸ In defense of its conclusion, it cited *Ewing* as affording states deference in their choices of penological schemes, and held that the state here had a legitimate interest in giving the petitioner a long sentence.²³⁹

In addition to the Fifth and Sixth Circuits, the Ninth Circuit has also confronted proportionality challenges. In *Gonzales v. Terhune*, the habeas petitioner alleged that his California three strikes sentence for the crime of residential burglary was unconstitutional.²⁴⁰ The Ninth Circuit rejected the contention, noting that the argument had recently failed to carry the day in *Ewing*.²⁴¹ It interpreted *Ewing* as holding that California's Three Strikes law does not "run afoul" of the Eighth Amendment, and that the petitioner's

230. *Id.* at 206.

231. *Id.* at 207.

232. *Id.* at 209-10.

233. *Id.*

234. *Id.*

235. No. 02-1661, 2003 U.S. App. LEXIS 16575, at *3-4 (6th Cir. Aug. 11, 2003).

236. *Id.*

237. *Id.* at *2.

238. *Id.* at *3-5.

239. *Id.* at *5.

240. *Gonzales v. Terhune*, No. 01-56450, 2003 U.S. App. LEXIS 26352, at *2 (9th Cir. Dec. 23, 2003).

241. *Id.* at *3.

habeas action was thus foreclosed.²⁴²

Many state courts have also confronted proportionality challenges since the *Ewing* decision.²⁴³ While all hold *Ewing* to be the state of the law, there seems to be considerable confusion in how broad or narrow its gross disproportionality principle is when applied.²⁴⁴ For example, in *State v. Davis*,²⁴⁵ the Arizona Supreme Court struck down a recidivist's sentence to life in prison for statutory rape as grossly disproportionate.²⁴⁶ Both the majority and the dissent in that case held that *Ewing* provided the applicable standard—Justice Kennedy's *Harmelin* principles—and both concluded that “applying the *Harmelin* principles allows [them] to consider the facts of the crime involved.”²⁴⁷ But at that point the dissent departed from the majority.²⁴⁸ The majority hinged its decision in large part on the consensual nature of the sexual activity.²⁴⁹ The dissent held that victim consent was not an objective factor, as required by *Ewing*, and accused the majority of applying *Solem* rather than *Ewing* in selecting which facts to analyze.²⁵⁰

The Delaware Supreme Court departed even further from the sort of analysis called for by *Ewing*.²⁵¹ In *Crosby v. State*, the court struck down a defendant's sentence as grossly disproportionate.²⁵² Crosby was sentenced to life in prison under the Delaware recidivist statute for his fourth nonviolent felony.²⁵³ While the court stated its deference to *Ewing* by holding it to be the state of the law, it proceeded to act as if Justice Breyer's

242. *Id.* at *4.

243. For additional decisions, see *State v. Higgins*, 826 A.2d 1126 (Conn. 2003) (holding that a sentence of life without parole for the killing of a thirteen-year-old boy was not grossly disproportionate); *Van Dyke v. State*, 70 P.3d 1217 (Kan. Ct. App. 2003) (finding that a sentence of fifty-five months for the defendant's attempted rape of his granddaughter was not grossly disproportionate); *State v. Hurbenca*, 669 N.W.2d 668 (Neb. 2003) (holding that a sentence of ten years in prison under Nebraska's recidivist statute for attempted prison escape was not grossly disproportionate); *People v. Lopez*, 759 N.Y.S.2d 320 (N.Y. App. Div. 2003) (finding a sentence of seventeen years to life under New York's habitual offender statute was not grossly disproportionate); *State v. Dammons*, 583 S.E.2d 606 (N.C. Ct. App. 2003) (finding that a sentence for two consecutive terms of 95 to 123 months in prison under North Carolina's recidivist statute for failure to appear, financial identity fraud, and habitual felon status was not grossly disproportionate); *State v. Clifton*, 580 S.E.2d 40 (N.C. Ct. App. 2003) (holding that a sentence of 168 to 211 months in prison under North Carolina's recidivist statute for obtaining property under false pretenses was not grossly disproportionate); *State v. Guthmiller*, 667 N.W.2d 295 (S.D. 2003) (holding that a sentence of life in prison without the possibility of parole under South Dakota's three strikes law for criminal pedophilia was not grossly disproportionate); *Daniel v. State*, 78 P.3d 205 (Wyo. 2003) (finding that the imposition of two consecutive life sentences without possibility of parole under Wyoming's habitual criminal statute for two counts of first-degree sexual assault was not grossly disproportionate).

244. See *infra* notes 242-57 and accompanying text.

245. 79 P.3d 64, 78 (Ariz. 2003).

246. *Id.*

247. *Id.* at 78-79 (McGregor, V.C.J., dissenting).

248. *Id.* at 79 (McGregor, V.C.J., dissenting).

249. *Id.* (McGregor, V.C.J., dissenting).

250. *Id.* (McGregor, V.C.J., dissenting).

251. Compare *Crosby v. State*, 824 A.2d 894 (Del. 2003), with *Ewing v. California*, 538 U.S. 11 (2003).

252. *Crosby*, 824 A.2d at 912.

253. *Id.* at 897.

dissent, not the majority, had carried the day.²⁵⁴ The court showed entirely no deference to its own legislature, criticizing it for allowing nonviolent felonies to merit life sentences,²⁵⁵ mimicking Justice Breyer's criticism of California's Three Strikes law.²⁵⁶ Going even further than Justice Breyer, the court severely criticized the trial judge for "giving up" on Crosby, apparently finding incapacitation, the act of society giving up on a criminal, to be constitutionally suspect, despite *Ewing's* holding to the contrary.²⁵⁷ Relying on the *Ewing* dissent's rationale, the court found that Crosby's sentence was unconstitutionally disproportionate.

In a decision entirely opposite from *Crosby*, the Mississippi Court of Appeals upheld a life sentence without parole under Mississippi's recidivist statute for uttering a forged check.²⁵⁸ Despite the stunning similarity of the facts there to those in *Solem*, where the sentence was struck down as disproportionate, the court in *Miles v. State* had no problem in upholding the sentence.²⁵⁹ In a tersely analyzed opinion, it concluded that *Ewing* allows for deference to be given to the legislature's penological choices, and that in this case, the Mississippi legislature's penological scheme was justified by public safety concerns.²⁶⁰ Thus a sentence determined under it, such as *Miles's*, was not disproportionate.²⁶¹

3. Conclusions About the State of the Law

As the above cases show, the Court's decision in *Ewing* has been interpreted as making two important clarifications to its proportionality review jurisprudence. First, the Eighth Amendment allows proportionality review of term of year sentences.²⁶² Both in *Ewing* and in *Harmelin*, seven Justices agreed that *Solem* and its affirmation of proportionality review should be given *stare decisis*.²⁶³ While Justice Scalia argued against giving

254. *See id.* at 908-09.

255. *See id.* at 907.

256. *Ewing*, 538 U.S. at 48-51 (Breyer, J., dissenting).

257. *Crosby*, 824 A.2d at 907-08; *Ewing*, 538 U.S. at 20.

258. *Miles v. State*, 864 So. 2d 963, 969 (Miss. Ct. App. 2003).

259. *Compare Solem v. Helm*, 463 U.S. 277, 281 (1983), with *Miles*, 864 So. 2d at 964.

260. *Miles*, 864 So. 2d at 969.

261. *See id.*

262. *Ewing*, 538 U.S. at 20.

263. *See id.* at 23-24 (implicitly holding that *Solem* should be given *stare decisis* by stating the Court would be guided by Justice Kennedy's concurrence in *Harmelin*); *id.* at 33 (Stevens, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring); *Harmelin*, 501 U.S. at 1009 (White, J., dissenting). In *Harmelin*, Justices White, Marshall, Blackmun, Stevens, O'Connor, Kennedy, and Souter all authored or joined opinions giving *stare decisis* to *Solem*. *See*

Solem stare decisis in both of these cases, each time only one other Justice agreed with him.²⁶⁴

Second, the Court is reluctant to throw out prison sentences on proportionality grounds.²⁶⁵ As Justice Kennedy concluded in his *Harmelin* concurrence, the Court's traditional deference to legislative decisions and its relative lack of objective standards to distinguish between prison sentences will result in successful challenges to term of year sentences being exceedingly rare.²⁶⁶ Three Justices agreed with this conclusion in *Harmelin* and *Ewing*, and two held that proportionality review of prison sentences is so subjective that it should never be done.²⁶⁷ Thus, there is a majority consensus that is very reluctant to throw out prison sentences.²⁶⁸

These two clarifications lead to one final important conclusion: Justice O'Connor's plurality opinion in *Ewing* and Justice Kennedy's concurring opinion in *Harmelin* represent the current state of the law for proportionality review of term of year sentences.²⁶⁹ Those opinions express the holdings of the majority of the Court on the two above points.²⁷⁰ The Court adheres to *Solem*, but is reluctant to throw out term of year sentences.²⁷¹ Because Justices O'Connor and Kennedy represent the consensus of the Court on

Harmelin, 501 U.S. at 996 (Kennedy, J., concurring); *id.* at 1009 (White, J., dissenting); *id.* at 1027 (Marshall, J., dissenting); *id.* at 1028 (Stevens, J., dissenting). In *Ewing*, Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer all authored or joined opinions giving *stare decisis* to *Solem*. See *Ewing*, 538 U.S. at 14; *id.* at 32 (Stevens, J., dissenting); *id.* at 35 (Breyer, J. dissenting). Thus, in both cases, seven justices favored giving *Solem stare decisis*.

264. See *Ewing*, 538 U.S. at 31-32 (Scalia, J., concurring); *Harmelin*, 501 U.S. at 965 (Scalia, J., concurring). In *Harmelin*, Justice Scalia was joined by Chief Justice Rehnquist. *Id.* at 961 (Scalia, J., concurring). In *Ewing*, Justice Scalia was not joined by Justice Thomas, but Justice Thomas authored a concurrence agreeing with Justice Scalia on that holding. See *Ewing*, 538 U.S. at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

265. See *Ewing*, 538 U.S. at 30-31 (holding "Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality'" (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring))). In holding that successful proportionality challenges are rare, Justices O'Connor and Kennedy thus express the Court's reluctance to throw out sentences for proportionality reasons. *Id.*

266. *Harmelin*, 501 U.S. at 998-1001 (Kennedy, J., concurring). See also *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) ("[G]ross disproportionality principle reserves a constitutional violation for only the extraordinary case.").

267. In *Ewing*, Justices O'Connor and Kennedy and Chief Justice Rehnquist agreed that successful challenges to term of year sentences will be exceedingly rare, 538 U.S. at 14, and in *Harmelin*, Justices O'Connor and Souter joined with and agreed with that conclusion, which was expressed in the concurrence of Justice Kennedy, 501 U.S. at 996 (Kennedy, J., concurring). Two justices, however, went further in both cases, holding that proportionality review is so inherently subjective that it should never be conducted. In *Ewing*, Justices Scalia and Thomas were of that opinion. See *Ewing*, 538 U.S. at 31-32 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring). And, in *Harmelin*, Chief Justice Rehnquist and Justice Scalia were of that opinion. *Harmelin*, 501 U.S. at 961 (Scalia, J., concurring).

268. Though that majority disagrees as to why the sentences should not be thrown out, their opinions nonetheless form a consensus of five justices that are unlikely to throw out sentences: three because of reluctance, two because of opposition to throwing out such sentences. See *supra* note 263.

269. See *supra* notes 97-109 and accompanying text for a more thorough exploration of this point.

270. See *supra* notes 262-68 and accompanying text.

271. See *supra* notes 262-64, 266-68 and accompanying text.

both of these issues, their opinions represent the current state of the law.²⁷²

The import of *Ewing* on sentencing law should also be clear from the cases discussed above.²⁷³ All of the cases acknowledged that a gross disproportionality principle existed, and only two, both state court cases, actually applied it.²⁷⁴ One of the two, Arizona, seemed to only apply the gross disproportionality principle because of the unique nature of the triggering offense: statutory rape.²⁷⁵ The victim had consented to the act, and the court found this to be an objective factor that could be considered under Justice Kennedy's *Harmelin* framework.²⁷⁶ The other state, Delaware, applied the gross disproportionality principle because all of the recidivist's offenses in that case had been non-violent, despite the *Ewing* Court's implicit rejection of any requirement of violence.²⁷⁷ But because not a single federal court mentioned above was able to find the petitioner's sentence grossly disproportionate, and because the two state cases seem out of step with the other state decisions mentioned above, *Davis* and *Crosby* seem to be more of anomalies rather than glosses on *Ewing*.²⁷⁸ Thus, while a defendant may have some remote hope of having his or her sentence found unconstitutional, the rule of the day is judicial reluctance, striking down legislative judgments only in the "extraordinary" case.

B. Three Strikes Laws

The Court in *Ewing* continued to recognize the constitutionality of three strikes laws.²⁷⁹ It cited multiple precedents holding that enhanced sentences due to previous convictions are not cruel and unusual punishment.²⁸⁰ It also acknowledged, however, that no punishment is *per se* constitutional, and thus all punishments are subject to proportionality review.²⁸¹ In upholding

272. See *supra* notes 97-109 and accompanying text.

273. See *supra* notes 216-61 and accompanying text.

274. See *id.*

275. See *supra* notes 242-49 and accompanying text.

276. See *id.*

277. See *supra* notes 251-57 and accompanying text.

278. See *supra* notes 243-61 and accompanying text.

279. *Ewing v. California*, 538 U.S. 11, 25-26 (2003).

280. *Id.* at 25 ("Recidivism has long been recognized as a legitimate basis for increased punishment.") (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998); *Witte v. United States*, 515 U.S. 389, 399 (1995)).

281. Although *Ewing* did not explicitly make this holding, it did not call it into question either. See *Ewing*, 538 U.S. at 14-31. Further, by applying Justice Kennedy's gross disproportionality principles from *Harmelin* as the current state of the law, *id.* at 20, it implicitly embraced his holding there that no punishment is *per se* constitutional. See *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

the validity of proportionality review, the Court left open the possibility that some three strikes sentences might be considered cruel and unusual punishment.²⁸² For example, the Court cited with approval an example given by *Rummel* – the example being that a life sentence for overtime parking would be thrown out by proportionality review.²⁸³ Should a legislature give three strikes sentences for similarly trivial offenses, it could well expect to have those sentences thrown out. A majority of the Court, though, found no proportionality problems with California’s Three Strikes law.²⁸⁴ Justice O’Connor found its legislative justifications to be reasonable and constitutionally permissible.²⁸⁵ Thus, three strikes laws can continue to impose the same sort of penalties as California’s law but must be careful in exceeding them.²⁸⁶

C. Societal Impact

The societal impact of *Ewing* is significant. By confining the gross disproportionality principle to only “extraordinary” cases and giving deference to state legislatures, the Court allowed a popular sentencing scheme for recidivist offenders – the three strikes law – to continue to do its work.²⁸⁷ And numerous statistics show that three strikes laws are in fact working.²⁸⁸ Currently, twenty-six states have three strikes laws.²⁸⁹ A review of the results of two of these laws, California’s and Washington State’s, is illustrative of their crime-reducing effects.

1. California

California’s Three Strikes law, as mentioned above, was enacted by California voters in 1994.²⁹⁰ Alarmed and angered at the many crimes committed by recidivists, Californians wanted to lock them up for good.²⁹¹ Whether such a desire was motivated by “populist” or “anti-offender sentiments” as the law’s detractors allege,²⁹² or by an honest belief that the Three Strikes law would incapacitate and deter crime, the law has worked.

Numerous statistics show evidence of decline in criminal activity.²⁹³

282. See *Ewing*, 538 U.S. at 20-21.

283. *Id.*

284. See *id.* at 24-28. Since the least serious offenses are typically considered “wobblers” in California, see *id.* at 48-49 (Breyer, J., dissenting), and the Court found the “wobbler” status of *Ewing*’s offense to be of no moment to its seriousness, *id.* at 28-29, the Court arguably found all the sentences imposed by California’s three strikes law to be constitutional.

285. See *id.* at 24-28.

286. See *supra* notes 284-85 and accompanying text.

287. See *supra* notes 279-86 and accompanying text.

288. Janiskee & Erler, *supra* note 6, at 45-46.

289. Connie Skipitares, *Three Strikes Law Appears to Have Met Goal*, MERCURY NEWS, Apr. 2, 2002, at A1.

290. *Ewing*, 538 U.S. at 15.

291. *Id.*

292. Janiskee & Erler, *supra* note 6, at 54-55. See also *supra* note 9 and accompanying text.

293. Janiskee & Erler, *supra* note 6, at 52-54.

For example, “the pre-Three Strikes rate of decline for 1992-1993 in the Total Crime Index was 2.35 percent,” but after the passage of the Three Strikes law, from 1995-1998, the rate of decline in the same index was 8.39 percent.²⁹⁴ Also, in the same pre-Three Strikes period, the rate of decline in the Violent Crime Index was .5 percent, while in the same post-Three Strikes period, the rate of decline in the Violent Crime Index was 8.66 percent.²⁹⁵ Further, the homicide rate in those same periods before and after the Three Strikes law shows a dramatic change.²⁹⁶ From 1992-1993, it increased 1.57 percent, but from 1995-1998, it decreased 13.36 percent.²⁹⁷ In fact, a RAND Corporation study estimated that the Three Strikes law reduced serious felonies to between 22 and 34 percent below the level of crime that would have occurred had the law not been enacted.²⁹⁸

Also, anecdotal evidence shows that the law has a deterrent effect on repeat criminals who have not yet received their third strike.²⁹⁹ Two-strike parolee Gregory Gaines claimed that as a result of the Three Strikes law, he’s “flipped 100 percent.”³⁰⁰ He stated that the law has scared him into being a “brand new [him],” and that it will keep him working hard and keep his attitude adjusted.³⁰¹ Sacramento police officer Lieutenant Joe Enroe is convinced of the law’s deterrent effect.³⁰² According to Enroe, “You hear them [the criminals] talking about [the Three Strikes law] all the time. It’s swift and sure, not like the death penalty. These guys are really squirming. They know what’s going on.”³⁰³

Prosecutors also claim that the law is working.³⁰⁴ Stanislaus County District Attorney Don Staahl claimed, “The people we’re getting are heavy hitters. The current offense may not be serious, but they have a criminal history that really spells danger. We’re saving a lot of risk for the future, and we’re making them pay for their past. That’s what ‘three strikes’ is all

294. *Id.* at 52.

295. *Id.* at 53.

296. *Id.*

297. *Id.* Janiskee and Erler cite these and the above statistics, not as evidence of a mere steady decline, but rather of a “precipitous and dramatic decline.” *Id.* at 54.

298. Dan Lungren, *Three Cheers for Three Strikes: California Enjoys a Record Drop in Crime*, 80 POL’Y REV. 36 (1996).

299. See Janiskee & Erler, *supra* note 6, at 45; Andy Furillo, ‘Three Strikes’ Hinges on Issue of Deterrence, SACRAMENTO BEE, Apr. 1, 1996, at A1.

300. Furillo, *supra* note 299, at A1.

301. *Id.*

302. *Id.*

303. *Id.*

304. See Andy Furillo, *Most Offenders Have Long Criminal Histories*, SACRAMENTO BEE, Mar. 31, 1996, at A1.

about.³⁰⁵ Agreeing, Ventura County Deputy District Attorney Don Janes stated, “We’re getting some very bad people, and instead of them doing life on the installment plan, they’re just going away.”³⁰⁶ Statistics validate prosecutorial observations: Eighty-four percent of three-strikers in a survey conducted by the *Sacramento Bee* had been convicted at least once for a violent crime.³⁰⁷

Stories of offenders sent away by the Three Strikes law also confirm its value to many. One such criminal, Arthur Gonzalez, bit into his girlfriend’s face when she took too much time getting him some methamphetamine.³⁰⁸ Another, Herbert Mahaffey, who complained at his sentencing that children have “no respect toward adults,” was convicted of fourteen counts of rape and attempted rape of his fourteen-year-old daughter.³⁰⁹ A third, Leonard Henderson, broke into the home of an eighty-two-year-old woman; slugged her in the face, opening a gash that required twenty-two stitches to shut; and then raped her.³¹⁰ Henderson had been on parole for six months.³¹¹ His previous offense was sexually assaulting a woman during a burglary.³¹²

In perhaps the strongest indicator of Three Strikes’ deterrent effect, criminals voted with their feet; after the passage of the law, California went from being a net importer of felons to being a net exporter.³¹³ According to former California Attorney General Dan Lungren, in the last year before Three Strikes took effect, 1994, 226 more paroled felons chose to move to California than move away from it.³¹⁴ After the law took effect, in 1995, 1,335 more paroled felons chose to move away from California than move to it.³¹⁵ Thus, by incapacitating those individuals who have repeatedly shown their willingness to break the law, and by deterring others, the Three Strikes law appears to have reduced serious and violent crime.

2. Washington State

Washington State passed the first three strikes law in the country, Initiative 593, in November 1993.³¹⁶ Initiative 593 was passed by a three-to-one margin, largely for the same reason as California’s Proposition 184: Voters were fed up with violent crime.³¹⁷ Unlike California’s broad strike-triggering category, encompassing all felonies, Washington chose to list

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. See Lungren, *supra* note 298, at 36.

314. *Id.*

315. *Id.*

316. Richard Seven, *Three Strikes Law Casting Wide Net*, SEATTLE TIMES, Nov. 9, 1997, at A1.

317. *Id.*; see *supra* note 6 and accompanying text.

strike-triggering offenses.³¹⁸ In Washington, almost fifty separate felonies are considered strikes, ranging from vehicular assault to aggravated murder.³¹⁹ Although Washington has not seen quite the dramatic reduction in crime that California has, three strikes sentences seem to be at work reducing crime there as well.³²⁰

Numerous statistics show reduction in criminal activity following the passage of the Three Strikes law.³²¹ The violent crime rate has steadily dropped since the law was passed. From 1993 to 1995, violent crime plummeted 8.1 percent;³²² in 1996, violent crime dropped 9.5 percent;³²³ and in 1998 and 1999, violent crime fell 7.1 percent.³²⁴ The results for property crime, however, have been more mixed. Property crime increased by 4.4 percent from 1993 to 1995,³²⁵ but in the next year fell by 2.7 percent.³²⁶

Anecdotal evidence also indicates that the Three Strikes law has been a success.³²⁷ Police and corrections officers have observed criminals modifying their behavior, acting out of fear of the law.³²⁸ In the immediate aftermath of the law's passage, a Seattle Police Detective, Bob Shilling, met with three sex offenders, each of whom already had two strikes.³²⁹ Two of the offenders were interested in treatment for the first time in their lives and sought the detective's help in finding a program.³³⁰ Both offenders stated that they were seeking treatment out of fear of receiving a life-without-parole sentence under the Three Strikes law.³³¹

Yakima County Prosecutor Jeff Sullivan has also noted the importance of the law: "The police tell me, and I believe them, that 10 percent of the criminals commit 80 percent of the crimes. . . . When they get [their third

318. Seven, *supra* note 316, at A1.

319. *Id.*

320. *See infra* notes 317-36 and accompanying text.

321. *Three Strikes You're Out: A Reform that Worked*, WASH. POL'Y CTR. (1997) at <http://www.washingtonpolicycenter.org/CriminalJustice/PN3StrikesReformThatWorked97-03.html> [hereinafter "WPC"].

322. *Id.* (noting that percentage was adjusted based on Washington's population growth).

323. *State's Crime Rate Falls*, SEATTLE TIMES, June 14, 1997, at A5 [hereinafter "Crime Rate Falls"].

324. Nicole Brodeur, *Crime Numbers Reassuring, Unless It's Your Number That's Up*, SEATTLE TIMES, Sept. 10, 2000, at B1.

325. WPC, *supra* note 321 (noting that percentage was adjusted based on Washington's population growth).

326. *Crime Rate Falls*, *supra* note 323, at A5.

327. WPC, *supra* note 321.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

strike], they've earned their way to prison."³³²

Stories of offenders sent away by Washington's three strikes law also confirm its value.³³³ One criminal, a sexual psychopath named Johnny Eggers, murdered a seventeen-year-old girl.³³⁴ Another, Kris Howe, killed an eighty-nine-year-old woman who had hired him to do yard work.³³⁵ And a third, David Conyers, robbed six convenience stores in forty-eight hours in a concerted effort to stay high on crack.³³⁶ Conyers had only been out of prison three days, and at age twenty, is Washington's youngest three-striker.³³⁷

Lastly, although Washington still imports more criminals than it exports, the passage of the Three Strikes law has led to a decrease in the number of criminals coming to Washington.³³⁸ A Seattle television station recently investigated the impact of the law on out-of-state criminals.³³⁹ It noted that many criminals were requesting information on the law, and many, upon receiving the information, changed their minds and chose not to come.³⁴⁰ Thus, although Washington has not witnessed quite the stunning success California has, it has seen a steady and encouraging decline in criminal activity following the passage of its three strikes law.

3. Conclusions

As prime promoter of Washington's three strikes law, John Carlson noted, "The leading cause of crime in this country is letting criminals out of prison."³⁴¹ The Court in *Ewing* wisely chose to allow states to keep their criminals locked up.³⁴² As a result, states can continue to use three strikes laws to combat crime, resulting in continued deterrence and incapacitation. Such a large societal impact is clearly significant.

VI. CONCLUSION

The Court's decision in *Ewing* upheld California's Three Strikes law and lends support to other states hoping to enact similar laws. Legislatures will be able to continue incapacitating repeat felons through life sentences.³⁴³ Also, giving some hope to opponents of three strikes laws, the Court upheld

332. Seven, *supra* note 316, at A1.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. WPC, *supra* note 321.

339. *Id.*

340. *Id.*

341. Tom Brown, *Theories Abound on Drop in Crime – Better Police Work, Tougher Laws Cited*, SEATTLE TIMES, June 5, 1997, at A1.

342. See *supra* notes 279-86 and accompanying text.

343. *Ewing v. California*, 538 U.S. 11, 25-26 (2003) (holding that incapacitation is a legitimate penological goal).

the constitutionality of proportionality review.³⁴⁴ Sentences must still pass constitutional muster, and it is possible that the Court might find some future three strikes law grossly disproportionate.³⁴⁵ A majority of the current Court, however, is reluctant to engage in proportionality review,³⁴⁶ and thus it is likely that laws like California's will be on the books incapacitating felons for some time to come.

Robert Clinton Peck³⁴⁷

344. *Id.* at 20.

345. *See supra* note 282 and accompanying text.

346. *See supra* notes 267-68 and accompanying text.

347. J.D. Pepperdine University School of Law, May 2005. For her love, support, and devotion, I dedicate this note to my fiancée, Tenley. I would also like to thank my parents and brother, my grandmother, Tenley's family, my extended family, my friends, and fellow members of the Law Review, past and present. I truly appreciate all the support I have received during these busy but exciting years of law school.

