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Lockyer v. Andrade: California Three Strikes Law Survives Challenge Based on Federal Law That Is Anything but Clearly Established

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LOCKYER v. ANDRADE: CALIFORNIA THREE STRIKES LAW SURVIVES CHALLENGE BASED ON FEDERAL LAW THAT IS ANYTHING BUT "CLEARLY ESTABLISHED"

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

I. INTRODUCTION

In *Lockyer v. Andrade*, the United States Supreme Court held the California Court of Appeal did not err in its interpretation of Court precedent.[1] That court held that sentencing a convict under the California three strikes law to fifty years to life in prison for two counts of petty theft[2] was not "contrary to" or "an unreasonable application of" Supreme Court jurisprudence.[3] The defendant, Leandro Andrade, had challenged his sentence under the Eighth Amendment's prohibition against cruel and unusual punishment.[4]

This Note examines the opinions in *Lockyer* and concludes that the law of the Supreme Court in the area of the Eighth Amendment's application to a term-of-years sentence was ambiguous at best. This ambiguity led the Supreme Court to correctly conclude that the California Court of Appeal did not unreasonably apply Federal law when it reviewed Andrade's Eight Amendment claim. The majority opinion authored by Justice O'Connor provides clarity in this area by showing substantial deference to the laws of the States. *Lockyer* demonstrates the Court's reluctance to interfere with States' administration of their criminal justice systems. Additionally, the majority opinion comports with congressional goals of limiting the abuse of Federal habeas corpus to review by state prisoners. Justice Souter's dissenting opinion is mistaken because it relied entirely on only one case. Moreover, if applied, the dissent's analysis would result in a flood of

[1] 538 U.S. 63 (2003).
[2] *Id.* at 77.
[3] *See* 28 U.S.C. § 2254(d)(1) (2003).
[4] *Lockyer*, 538 U.S. at 68.

prisoner litigation aimed at rendering their sentences null under their respective State sentencing schemes, and thus does not respect the State's right to determine its own penological system. Finally, the dissent fails to recognize that the proper body for changing the California sentencing scheme is not the Supreme Court, but rather the legislature of the State of California.

II. BACKGROUND

A. CALIFORNIA'S THREE STRIKES LAW

In June 1992, eighteen-year-old Kimber Reynolds came home to Fresno for a friend's wedding.[5] Two parolees passed by her riding on a motorcycle and tried to grab her purse.[6] When Kimber fought back, the driver shot her in the head with a .357 caliber handgun.[7] She died two days later.[8] The driver was killed by police in a shootout.[9] The accomplice received a nine year sentence, and was eligible for parole again after he served half his term.[10] Kimber's death began a crusade by her father to strengthen criminal sentencing laws in California, and he authored the "three strikes" concept.[11] In April 1993, Reynold's idea received a cold reception from the California legislature, which killed his bill in committee.[12] He believed the only way to toughen sentencing was through submission of a proposition directly to the people of California.[13] He faced an uphill battle, with no political support and no money to finance a voter awareness campaign.[14]

Later that year twelve-year-old Polly Klaas was kidnapped from her bedroom in her Petaluma home.[15] The search for Polly garnered national media attention and ended with the discovery of her body in December.[16]

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[5] Dan Morain, *A Father's Bittersweet Crusade*, L.A. TIMES, Mar. 7, 1994, at A1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Polly Klaas Foundation History*, *at* http://www.pollyklaas.org/about/history.shtml (last visited Apr. 22, 2004).

[16] *Id.*

The kidnapper, Richard Allen Davis, led police to the body.[17] Davis's record showed chronic disrespect for the law, including multiple kidnappings, sexual assault, burglary, drug possession, and assault.[18] The media concentrated on Davis's despicable record as they covered the Klass story.[19] Public outrage erupted when Davis's record became known.[20] Reynolds was able to tap into that outrage, and a ground swell of public support for his "three strikes" campaign emerged.[21] The legislature passed the bill, and Governor Pete Wilson signed "three strikes" into law in March 1994.[22] Even though the state had enacted the bill, Reynolds continued to campaign for the ballot initiative, titled Proposition 184.[23] Reynolds pursued the ratification of Proposition 184 because he wanted to place the recidivist mechanism beyond legislative amending power.[24] The ballot initiative passed in November 1994 garnering seventy-two percent of the vote.[25]

Proposition 184 is codified in California Penal Code section 1170.12.[26] The sister provision passed by the legislature is California Penal Code section 667.[27] Two primary features to note exist in section 1170.12. First, subsection 1170.12(c)(1) mandates a sentence enhancement that doubles the punishment for a convicted felon's second felony conviction.[28] Second, subsection 1170.12(c)(2)(A) requires a felony sentencing court to sentence defendants that have two or more prior felony convictions to the greater of (i) three times the mandatory punishment, (ii) twenty-five years, or (iii) a court imposed term with other appropriate sentence enhancement.[29] Effectively, the provision sets a mandatory minimum twenty-five year sentence for third time felony offenders.[30]

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[17] *The Criminal Life of Richard Allen Davis*, *at* http://www.justicejunction.com/judicial_injustice_richard_allen_dean.htm (last visited Apr. 6, 2004).

[18] *Id.*

[19] *See* Morain, *supra* note 5; *see also id.* (cataloguing Davis's multiple offenses).

[20] *See* Morain, *supra* note 5.

[21] *See id.*

[22] *Id.*

[23] Dan Morain & Virginia Ellis, *California Elections*, L.A. TIMES, Nov. 10, 1994, at A3.

[24] *See* Morain, *supra* note 5.

[25] *Id.*

[26] CAL. PENAL CODE § 1170.12 (West 1999).

[27] *Id.* § 667.

[28] *Id.* § 1170.12.

[29] *Id.* §§ 1170.12(c)(2)(A)(i-iii).

[30] *Id.* For a comprehensive exposition on the reasoning behind three strikes, see James A. Andriaz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1 (2000) (outlining the drafters' reasoning in making the law operate).

The statute operates on past felonies that are "serious" or "violent" under California law.[31] Representative violent felonies include murder, rape, kidnapping, and felonies committed with a firearm.[32] Serious felonies include such offenses as selling illegal drugs to minors, first degree burglary, witness intimidation, and armed assault.[33] However, subsection 1170.12(c)(2)(A) does not limit the type of felony considered a third strike.[34] The statute specifies only that it governs the term for the current felony.[35] Thus, any felony conviction can trigger application of the three strike sentence enhancement.[36]

Other provisions in the statute are designed to ensure its intent to incarcerate multiple offenders is not frustrated.[37] Several such provisions are implicated in Andrade's case.[38] For instance, the statute allows all prior felonies to be counted against a defendant because it has no time limitation after which a felony could not be used as a potential strike.[39] Also, the statute mandates consecutive sentencing for felonies not committed on the same occasion that do not arise from the same operative facts.[40] In other words, a felon with two prior strikes and two current felony counts can face two separate invocations of the three strikes law at sentencing.[41] However, the statute does not completely remove all sentencing discretion. Indeed, the statute allows prosecutors to move to dismiss a prior felony conviction so that it will not be counted as a strike.[42] Additionally, the California Supreme Court granted trial courts the power to dismiss a prior felony from the strike count sua sponte if dismissal serves the interests of justice.[43]

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[31] *See* Andrade v. Att'y Gen. of California, 270 F.3d 743, 747 (9th Cir. 2001).

[32] *See generally* § 667.

[33] *See generally id.* § 1192.7. There is some general overlap between "serious" and "violent" felonies.

[34] *Id.* § 1192.7.

[35] *Id.*

[36] *See In re* Cervera, 16 P.3d 176, 177 (Cal. 2001).

[37] *See, e.g.*, § 1170.12(a)(1) (forbidding court limitations on aggregation of consecutive sentencing for later convictions); § 1170.12(e) (forbidding use of prior felonies in plea bargaining).

[38] *See generally* Andrade v. Att'y Gen., 270 F.3d 743 (9th Cir. 2001).

[39] *See* § 1170.12(a)(3).

[40] *Id.* § 1170.12(a)(6).

[41] *Id.*; *see also* People v. Ingram, 48 Cal. Rptr. 2d. 256 (Cal. Ct. App. 1995) (asserting each burglary count triggers an application of the three strikes provision).

[42] § 1170.12(d)(2).

[43] *See* People v. Superior Court (Romero), 917 P.2d 628, 647 (Cal. 1996).

Application of the California three strikes provision has generated much wailing and gnashing of academic teeth.[44] Many writers take exception to the application and overall merit of the three strikes law, and their arguments are not without virtue. For example, the validity of the statute would be questionable should it fail to reduce crime.[45] The law should be revamped if it catches and incarcerates criminals as they near the age when they cease criminal activity.[46] Disproportionate application based on race also implicates the basic fairness of the statute.[47] Economic costs of increased incarceration may threaten State budget vitality.[48]

Some statistics, however, demonstrate the success of the law.[49] According to a report published in 1999 by Bill Jones, the California Secretary of State at the time, the four year period following passage of three strikes saw a massive drop in crime.[50] For example, 1994 to 1998 comparisons showed a 51.5% drop in homicide, an 18.7% drop in rape, and a 48.6% drop in robbery.[51] The report pegs societal economic saving from crime reduction over the same period to be between $8.2 billion and $21.7 billion.[52] These statistics, while compelling, are not immune to criticism, primarily driven by the notion that the strong economy affected crime in that time period.[53]

B. THE EIGHTH AMENDMENT AND THE PROPORTIONALITY PRINCIPLE

The Eighth Amendment forbids the imposition of "cruel and unusual punishment."[54] Three areas of jurisprudence have evolved in cases dealing

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[44] *See, e.g.*, Keith C. Owens, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel the Criminal Justice System and Bring California to Its Knees*, 25 SW. U. L. REV. 129 (1995); Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997).

[45] *See* Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 66 (1999).

[46] *Id.* at 65.

[47] *See, e.g.*, Autumn McCullogh, Comment, *Three Strikes and You're In (For Life): An Analysis of the California Three Strikes Law as Applied to Convictions for Misdemeanor Conduct*, 24 T. JEFFERSON L. REV. 277, 278 (2002).

[48] *See, e.g.*, J. Harry Jones, *Funds Asked for in Jail Construction*, SAN DIEGO UNION TRIB., Oct. 16, 1996, at A4.

[49] *See generally* Bill Jones, *Why the Three Strikes Law Is Working in California*, 11 STAN. L. & POL'Y REV. 23 (1999).

[50] *Id.*

[51] *Id.*

[52] Bill Jones, *Three Strikes and You're Out Five Years Later*, *available at* http://www.threestrikes.org/bjones98pgthree.html (last visited Feb. 26, 2003).

[53] *See, e.g.*, Vitiello, *supra* note 44.

[54] U.S. CONST. amend. VIII.

with what is cruel and unusual punishment. First, the Eighth Amendment forbids punishment in some instances.[55] Second, the Eighth Amendment restricts the use of certain kinds of punishment.[56] Finally, the Eighth Amendment contains a requirement that punishment imposed not be grossly disproportionate to the crime committed.[57]

The text of the Eighth Amendment comes verbatim from the English Bill of Rights.[58] The first Congress adopted the Eighth Amendment as part of the Bill of Rights, including the "cruel and unusual punishment" clause, in 1791.[59] Most of the early commentaries surrounding the clause, and state court decisions interpreting their constitutions' respective similar clauses, indicate it forbade the imposition of certain types of punishment.[60]

Much debate exists over whether the Eighth Amendment's prohibition against cruel and unusual punishment applies to prison terms.[61] The proportionality principle asserts that a term-of-years punishment may not be grossly disproportionate to the underlying offense.[62] In other words, the proportionality principle assesses "the relationship between the nature and number of offenses committed and the severity of the punishment imposed."[63] The concept of proportionality entered Eighth Amendment Supreme Court jurisprudence in a dissent by Justice Field in *O'Neil v. Vermont*.[64] Twelve years later, the Court overturned the conviction of an American coast guardsman that resulted in a sentence of fifteen years at hard labor in chains, and a fine.[65] Weems was convicted in a Philippine

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[55] *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (holding that incarcerating drug addicts violates the Eighth Amendment).

[56] *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (prohibiting capital punishment for rape).

[57] Lockyer v. Andrade, 538 U.S. 63, 72-73 (2003). *But see* Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (Scalia, J., concurring).

[58] *See* ROBERT RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 9 (1991).

[59] *Id.* at 215.

[60] *Harmelin*, 501 U.S. at 981-85 (Scalia, J., concurring).

[61] *See, e.g., id.*

[62] *See, e.g.*, Solem v. Helm, 463 U.S. 277, 290 (1983).

[63] Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting).

[64] 144 U.S. 323, 340 (1892). O'Neil, a New York liquor wholesaler, was convicted of numerous violations of Vermont's prohibition laws because he sent orders into the state C.O.D. *Id.* at 327. He was fined and sentenced to jail time. *Id.* at 330-31. If he could not pay his fine, his jail time would equal fifty-four years. *Id.* 331. The Court did not reach the question of proportionality of the sentence because O'Neil did not include that point in his assignment of errors or brief. *Id.* After comparing the punishment to that possible of other crimes committed in the jurisdiction, Justice Story took exception to the sentence and declared it inhumane because it sprang from aggregation of individual offenses. *Id.* at 339-40.

[65] Weems v. United States, 217 U.S. 349 (1910).

court of falsifying a document in the Philippine jurisdiction, which at the time was an American administered territory.[66] The Philippine court relied on Spanish law, which did not require a mens rea, when it convicted Weems.[67] It also based Weems' sentence on Spanish law.[68] The Court compared the sentence to those available under United States law for similar offenses, and then noted that more serious offenses in the Philippines carried the same punishment as imposed in the instant case, before holding the punishment was disproportionate to the crime.[69]

More recently, the Supreme Court has entertained challenges to state criminal laws that impose lengthy term-of-years punishment for nonviolent felonies. One of these statutes was held unconstitutional based on the theory that it violated the Eighth Amendment's proportionality principal.[70] The line of cases dealing with the proportionality of state recidivist sentencing requirements began in 1980 with *Rummel v. Estelle*.[71] In *Rummel*,[72] the Court held that a life sentence for a third nonviolent felony conviction mandated by a Texas recidivist statute did not violate the Eighth Amendment's prohibition of cruel and unusual punishment when applied to the defendant.[73] The defendant's third conviction was a theft offense for $120.75.[74] His two prior offenses were both theft related nonviolent felonies; the first for fraudulent use of a credit card for eighty dollars, and the second for writing a $28.36 bad check.[75] Writing for the majority, Justice Rehnquist noted that most of the successful proportionality challenges to state punishment schemes came to the court in the context of death penalty cases.[76] Rehnquist then divided proportionality challenges of death penalty statutes from challenges of statutes that impose a term-of-years punishment.[77] He differentiated *Weems* based on that Court's references to accompaniments (hard labor, chains) to the length of the sentence.[78] Finally, Rehnquist asserted that because the defendant's

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[66] *Id.* at 357.

[67] *Id.* at 363.

[68] *Id.* at 363-64.

[69] *Id.* at 380-81.

[70] *See* Solem v. Helm, 463 U.S. 277 (1983).

[71] 445 U.S. 263 (1980).

[72] Chief Justice Burger, Justices Blackmun, White, and Stewart joined Justice Rehnquist in the majority.

[73] *Rummel*, 445 U.S. at 265.

[74] *Id.* at 266.

[75] *Id.* at 265.

[76] *Id.* at 272.

[77] *Id.*

[78] *Id.* at 273-74.

convictions were for felonies, the state legislature had the power to determine the proper term-of-years sentence as punishment.[79] However, Rehnquist recognized the possibility of invalidating punishment based on a state statute if the statute mandated extreme punishment for a trivial offense, such as life in prison for overtime parking violations.[80]

Dissenting in *Rummel*,[81] Justice Powell argued that the Eighth Amendment's ban on cruel and unusual punishment commands proportionality analysis not only in the context of death penalty cases but also for sentences imposing a term-of-years punishment.[82] He understood the difficulty present in subjecting state sentencing schemes to the review of federal judges.[83] So Powell attempted to distill three criteria utilized in other Supreme Court cases.[84] The proffered criteria for judging state sentences under a proportionality analysis were: first, to examine the nature of the crime; second, to compare the punishment imposed with similar sentences imposed in other jurisdictions for the same crime; and third, compare the punishment with punishments for other crimes in the same jurisdiction.[85] Justice Powell applied this test and concluded that a sentence of life in prison for three theft felonies constituted cruel and unusual punishment.[86] Thus, Powell asserted, the sentence should be overturned.[87]

The Court reaffirmed its stance on subjecting state based sentences to proportionality analysis two years later in a per curiam decision.[88] The defendant in *Hutto v. Davis* was sentenced to twenty years incarceration for conviction in Virginia on two counts of possession of marijuana with intent to distribute.[89] The district court, using factors similar to those announced by Justice Powell in his dissent in *Rummel*, ignored the Court's majority opinion, and granted the respondent's habeas petition.[90] A panel of the Fourth Circuit overturned the ruling, but reaffirmed the district court after hearing the case en banc.[91] The Supreme Court vacated the decision and remanded it to the Fourth Circuit to be reconsidered because of the *Rummel*

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[79] *Id.* at 274.

[80] *Id.* at 274 n.11.

[81] Justices Stevens, Brennan, and Marshall joined Justice Powell in his dissent.

[82] *Rummel*, 445 U.S. at 288 (Powell, J., dissenting).

[83] *See id.* at 295 (Powell, J., dissenting).

[84] *See id.* at 295-302 (Powell, J., dissenting).

[85] *Id.* at 302 (Powell, J., dissenting).

[86] *Id.* (Powell, J., dissenting).

[87] *Id.* (Powell, J., dissenting).

[88] *See* Hutto v. Davis, 454 U.S. 370 (1982).

[89] *Id.* at 371.

[90] *See id.*

[91] *Id.*

decision, but the Fourth Circuit reaffirmed its prior ruling.[92] In its per curiam decision, the Court reiterated its reasoning from *Rummel*, and then lambasted the Fourth Circuit for ignoring the hierarchy of the federal courts.[93] Interestingly, Justice Powell concurred with the Court's judgment, based on its similarity to the facts of *Rummel*.[94]

One year later, in *Solem v. Helm*,[95] Justice Powell delivered an opinion that the defendant's sentence violated the proportionality principle.[96] The defendant had been sentenced to life in prison without possibility of parole in South Dakota for writing a bad check for less than one hundred dollars.[97] The defendant had previously been convicted of six nonviolent felonies, and qualified for sentencing under South Dakota's recidivist statute.[98] In distinguishing the instant case from *Rummel*, Powell emphasized that the petitioner in *Rummel* had the possibility of being paroled, whereas in South Dakota the recidivist statute forbade parole.[99] He then applied the three prong test laid out in his dissent in *Rummel*.[100] Based on the application of these criteria to the respondent's case, a five member majority affirmed the decision of the Eighth Circuit to overturn the sentence.[101] However, the Court did not expressly overrule *Rummel*. In fact, the majority stated that *Rummel* remained good law.[102]

Chief Justice Burger argued in dissent that the majority both disregarded *Rummel*[103] and states' rights, distorting the proportionality principle as applied to a term-of-years sentence.[104] He questioned the objectivity of the standards applied by the majority and asserted that the legislature is the proper arbiter of what constitutes fitting punishment for a crime.[105]

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[92] *Id.*

[93] *Id.* at 373-75.

[94] *Id.* at 375.

[95] Justices Blackmun, Brennan, Stevens, and Marshall joined Justice Powell in the majority.

[96] *See* 463 U.S. 277 (1983).

[97] *Id.* at 281.

[98] *Id.* at 280-81.

[99] *Id.* at 283-84.

[100] *Id.* at 296-300; *see supra* text accompanying note 83.

[101] *Id.* at 303.

[102] *Id.* at 288 n.13, 303 n.32.

[103] Justices White, Rehnquist, and O'Connor joined the Chief Justice in his dissent.

[104] *Solem*, 463 U.S. at 304 (Burger, C.J., dissenting).

[105] *Id.* at 314 (Burger, C.J., dissenting).

Eight years later, the Court confronted a Michigan law that mandated sentencing a cocaine dealer to life in prison without possibility of parole.[106] The defendant challenged the imposition of a life sentence without possibility of parole for possession of 672 grams of cocaine as disproportionate to crime.[107] Five Justices agreed to uphold the validity of the sentence.[108] However, the majority disagreed as to whether the Eighth Amendment's proportionality rule could be used to strike down a term-of-years sentence.[109] Writing for the plurality, Justice Kennedy found precedential support for the proportionality principle in the previous line of cases, but determined that the structure of the principle was unclear.[110] Justice Kennedy derived four principles from precedent to provide some structure for the proportionality principle.[111]

First, Justice Kennedy asserted that legislatures are in a better position to judge the quality of penal law.[112] Therefore, any review process must provide substantial deference to legislative prerogative in deciding if a sentence violates the proportionality principle.[113] Second, he wrote that the Eighth Amendment does not require uniformity in sentencing, and that historically the schemes and goals of state penological systems have varied.[114] Third, he argued that changes and variety in penological theory are the result of our federal structure of government.[115] Since these systems are so varied, often reflecting societal needs and preferences, state by state comparison is exceedingly difficult.[116] Thus, simply because a single state has the harshest mandatory sentence for a crime, that state's status as an outlier on that issue does not necessarily invalidate that sentence. Finally, given the preceding principles, Justice Kennedy stated that any review must be based on objective factors, and prior cases failed to adequately provide an objective test for proportionality.[117]

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[106] Harmelin v. Michigan, 501 U.S. 957 (1991).

[107] *Id.* at 961.

[108] *Id.* (Chief Justice Rehnquist and Justices Scalia, O'Connor, Kennedy, and Souter agreed the sentence was not unconstitutional).

[109] *Id.* at 965, 996. Justice Scalia, joined by Chief Justice Rehnquist, advocated overturning *Solem*. *Id.* at 996. Justice Kennedy, joined by Justices O'Connor and Souter, counseled recognizing a proportionality principal based on stare decisis. *Id.*

[110] *Id.* at 998.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 999.

[115] *Id.*

[116] *Id.* at 1000.

[117] *Id.* at 1000-01.

Justice Kennedy then reshaped the test set out by Justice Powell in his dissent in *Rummel* and the opinion in *Solem*. First, he performed a threshold analysis by examining the severity of the crime underlying the sentence and comparing it to the sentence, and found the situation harmonious with *Hutto*.[118] Second, he folded Powell's inter- and intra-jurisdictional analysis together, and suggested that such comparisons should be utilized only after a threshold examination of the crime and sentence yielded an inference of disproportionality.[119] On the facts at hand, he saw no disproportionality and thus did not perform further inquiry.[120]

Justice Scalia, in his concurring opinion, examined Eighth Amendment history and concluded that proportionality analysis did not include an examination of a term-of-years sentence.[121] Justice White authored a dissent highly critical of both Scalia and Kennedy.[122] He asserted that Justice Scalia's historical analysis is inconclusive at best, and therefore the Court should use the lack of historical clarity to find a proportionality principal in the Eighth Amendment.[123] White also attacked Kennedy's opinion for eviscerating the *Solem* test.[124] He contended that comparative analysis is a cornerstone of Eighth Amendment decision-making, and that relegating comparative analysis to the second tier ensures an inherently subjective analysis of any sentence.[125] After performing the *Solem* test, White found the sentence, and therefore the Michigan law, unconstitutional.[126]

C. HABEAS CORPUS AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

The Founders viewed the write of habeas corpus, often termed the Great Writ, to be a cornerstone among the tools that secure citizens' liberty interests. The writ of habeas corpus, often termed the Great Writ, was viewed by the Founders as a cornerstone among the tools that secure the liberty of citizens.[127] The writ traces its roots in English history, where it

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[118] *Id.* at 1002-04.

[119] *Id.* at 1005.

[120] *Id.*

[121] *Id.* at 965.

[122] Justices Blackmun and Stevens joined Justice White in his dissent. Justice Marshall dissented separately.

[123] *Harmelin*, 501 U.S. at 1010 (White, J., dissenting).

[124] *Id.* at 1019 (White, J., dissenting).

[125] *Id.* at 1020-21 (White, J., dissenting).

[126] *Id.* at 1027 (White, J., dissenting).

[127] *See* RUTLAND, *supra* note 58, at 4-5.

was developed as an order to compel a person's appearance before a court.[128] The Founders saw fit to ensconce the writ in American law by protecting it from suspension except in extreme cases.[129] The Constitution provides that "[t]he Privilege of Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[130] The first Congress codified the right to the writ in the Judiciary Act of 1789. At the end of the Civil War, the power of the writ was extended to state courts to ensure protection of the rights of the newly freed slaves in the South.[131]

The next major development in habeas occurred almost a century later. In *Brown v. Allen*, the Supreme Court held that criminals in state custody who had been convicted of a state offense were permitted to allege that they were being held in violation of federal law.[132] The Court ruled habeas corpus could be used as the vehicle to have those claims heard in federal district court.[133] Previously, review of state prisoner claims had been limited to direct review by the Supreme Court.[134] Another seminal case, *Fay v. Noia*, held that federal issues did not have to be raised in state court in order to be cognizable in a federal habeas petition.[135] In *Townsend v. Sain*, the Court gave state prisoners a right to an evidentiary hearing on constitutional claims in federal court.[136] In *Sanders v. United States*, the Court ruled that a prisoner could submit successive petitions, as long as the petition raised a new claim unknown to the defendant's counsel at the time a prior petition was filed.[137] Little or no concern for state procedures, interests or comity between the systems entered into these decisions.[138]

The Court became more cognizant of states' interests in the criminal process as the configuration of the Court changed.[139] The Burger and

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[128] *Id.* at 5.

[129] *See* WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WAR TIME 36 (2000).

[130] U.S. CONST. art. I, § 9, cl. 2.

[131] *See id.*

[132] 344 U.S. 443 (1953); H.R. REP. NO. 103-470, at 2 (1994) (recognizing the *Brown* decision's role in formulating habeas as a vehicle to review State criminal proceedings for Federal constitutional violations).

[133] *See* Marshall Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Antiterrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 342 (1997).

[134] *See* H.R. REP. NO. 103-470, at 2.

[135] 372 U.S. 391 (1963).

[136] 372 U.S. 293 (1963).

[137] 373 U.S. 1 (1963).

[138] *See* Hartman & Nyden, *supra* note 133, at 340.

[139] *See id.* at 342-51.

Rehnquist courts sought to check the ease by which state prisoners could use the writ by imposing exhaustion requirements,[140] limiting a prisoner's ability to make successive claims,[141] and disallowing retroactive application of new constitutional rules.[142] These changes reflect the belief that the state and federal court systems should be utilized to generate synergies.[143] The Warren court era habeas jurisprudence had resulted in an inefficient use of judicial resources.[144] Additionally, the Court came to recognize the State interest in finality of adjudication of its criminal matters.[145] Finally, modern State courts could be trusted to respect the rights of unprotected minority groups.[146]

The twists and turns of forty years of habeas corpus rulings led to an inevitable result: a complicated morass of procedural rules threaded with exceptions that became unwieldy to exercise and adjudicate.[147] The costs arising from this convolution of law, including federal court time and effort, delay of claim resolution, and friction with state systems, did not escape Congressional notice.[148] Habeas reform became a major part of the political landscape during the 1994 Congressional races.[149] After the Republicans won control of the House and Senate in 1994, the legislative reforms moved forward. In Senate hearings, Senator Hatch enumerated the reasons for reform. First, delays between sentencing and resolution of the lawfulness of the sentence had detrimental effects by undermining public confidence in the criminal justice system, blurring the roles of the federal and state courts, and hampering the execution of justice without reciprocal improvements in

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[140] *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that state claimants must show cause as to why their federal claims were never raised in state court direct review and demonstrate actual prejudice from denial of that claim).

[141] *See* McClesky v. Zant, 499 U.S. 467 (1991) (holding that state claimants must show cause as to why the additional federal claims were never raised in the first petition and demonstrate actual prejudice from denial of those rights).

[142] *See* Teague v. Lane, 489 U.S. 288 (1989) (noting that new constitutional rules are not retroactive unless they involve a fundamental right).

[143] *See* William Rehnquist, *Welcoming Remarks: National Conference on State—Federal Judicial Relationships*, 78 VA. L. REV. 1657 (1992).

[144] *See id.*

[145] Coleman v. Thompson, 501 U.S. 722, 750 (1991) (noting that the *Fay* concept of federal/state relations undervalued state procedural rules).

[146] Steven Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1077 (2002).

[147] *See* Barry Freidman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 530 (1995).

[148] *See* H. R. REP. NO. 103-470, at 3 (1994).

[149] *See Taking Back Our Streets Act* in the *Contract with America*, *at* http://www.house.gov/house/Contract/safetyd.txt (last visited Nov. 30, 2003).

the quality of the adjudication.[150] Second, lawfully convicted prisoners abused the writ, undermining public confidence, draining state resources, and causing additional emotional damage to victims' families.[151] These political sentiments were a catalyzing force behind the development of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

The structure of the habeas reform codified in the AEDPA was birthed out of the recommendations of a committee of federal judges.[152] Chief Justice Rehnquist commissioned the Committee to make legislative recommendations to address delays faced by States in carrying out death penalty sentences.[153] The Committee, chaired by retired Justice Powell, concluded that delays that occurred under the present regime of habeas law did not add to the fairness of the process.[154] Prisoners were bounced between the state and federal court systems during their collateral reviews.[155] Moreover, because prisoners were not limited in the number of habeas claims they could bring, they were able to file claims piecemeal in order to stretch out the process.[156]

The Committee proposed a solution that would be optional for the states to participate in.[157] The states could receive the benefits of the statute if they decided to provide competent council to capital defendants throughout the appeals process.[158] The reform was fairly simple: federal habeas claims must be filed within six months of the conclusion of direct review,[159] the defendant must exhaust all state court appeals before applying for federal relief,[160] and the claimant receives an automatic stay while the habeas issues are being resolved.[161] Under this scheme, absent extraordinary circumstances, the defendant would only get one bite at the habeas apple.

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[150] *Federal Habeas Corpus Reform: Eliminating Prisoner's Abuse of the Judicial Process: Hearing Before the Comm. on the Judiciary*, 104th Cong. 1 (1995) [hereinafter *Senate Habeas Hearing*] (statement of Sen. Orrin Hatch, Chair, Comm. on the Judiciary).

[151] *Id.* at 2.

[152] *See, e.g.*, H.R. REP. NO. 103-470.

[153] *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. 3239 (1989) [hereinafter *Powell Committee Report*].

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 3240.

[158] *Id.*

[159] *Id.*

[160] *Id.* at 3241.

[161] *Id.*

The suggestions of the Powell Committee became the bedrock of the reform efforts after the Republicans gained majorities in both the House and Senate in the 1994 election cycle.[162] A few changes had been made to the original suggestion. First, the statute of limitations for filing a claim had been extended from six months to one year.[163] Second, and more important to the substance of the reform, the new effort had decided to codify the standard of review to be applied by the federal courts when reviewing habeas petitions.[164] Congress was poised to require federal courts to defer to state court unless their judgments were "contrary to" or an "unreasonable application of" Supreme Court precedent, instead of making a de novo assessment of a habeas petitioner's claims.[165] The addition of this language marks congressional codification of deference accorded to states as co-interpreters of constitutional law.[166]

Consideration of the bill began in earnest in the wake of the Oklahoma City bombing.[167] The terrorist attack, combined with the Republican majority and a President anxious to be seen fighting terrorism, formed a "perfect storm" for passage of provisions significantly altering, and tightening up, federal habeas relief.[168] President Clinton signed the AEDPA into law on April 24, 1996.[169] He insisted that the standard of review language was not an abrogation of the responsibility of federal courts to apply their own analysis to state criminal cases.[170] The President was partly correct in his assessment of the Act's requirements of federal judges. Federal judges still review state court decisions, but now the focus shifted to the state court's opinion rather than the claims of the habeas petitioner.[171]

Commentators were initially unsure of the extent of the AEDPA's reach.[172] In *Williams v. Taylor*, the Court interpreted the new standard of

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[162] *See, e.g.*, H.R. REP. NO. 104-23 (1995).

[163] H.R. REP. NO 104-23, at 5.

[164] *See Senate Habeas Hearing*, *supra* note 150, at 32 (statement of Daniel Lungren, Cal. Att'y Gen.). The new standard of review limited a federal court's habeas inquiry to whether the state court "unreasonably applied" Supreme Court precedent. *Id.* at 123.

[165] *Panel Discussion: Dead Man Walking without Due Process? A Discussion of the Antiterrorism and Effective Death Penalty Act of 1996*, 23 N.Y.U. REV. L. & SOC. CHANGE 163, 171 (1997) [hereinafter *A.B.A. Panel*] (remarks of Professor Leon Friedman).

[166] *See Senate Habeas Hearing*, *supra* note 150, at 59 (statement of Gail Norton, Col. Att'y Gen.); *see generally* Rehnquist, *supra* note 143.

[167] *See* Bryan Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 701 (2002).

[168] *See id.*

[169] *U.S. Code Congressional & Admin. News* 961-1 (1996).

[170] *Id.* at 961-3.

[171] *See generally A.B.A Panel*, *supra* note 165.

[172] *See generally id.*

review codified in the AEDPA.[173] Writing for the majority on the issue of the statutory interpretation of the standard of review, Justice O'Conner defined both the "contrary to" and the "unreasonable application of" components of the new standard.[174] First, she defined "contrary to" as a state court decision that is "substantially different" from Supreme Court precedent.[175] Two instances appear in which a state court may run afoul of the "contrary to" provision of the Act.[176] The state court could apply a rule of law that conflicts with Supreme Court precedent, or the state court could apply the correct rule to a set of facts that are materially indistinguishable from a Supreme Court decision and get a result opposite the Court's ruling.[177]

Second, O'Conner laid out the process for determining when a state court decision could be an "unreasonable application of" the appropriate Supreme Court precedent.[178] She conclusively rejected the "reasonable jurist" standard as too subjective, and opted instead to direct the federal inquiry to determine if the application of precedent was "objectively unreasonable."[179] She specifically forbade the federal jurist from applying his or her own independent judgment to the habeas claim, and then turning to the state court judge's application of the law and simply saying the state court judge was wrong.[180] The federal judge must determine that in getting the application wrong, the state court judge's application of that law was "objectively unreasonable."[181] Thus, federal judges must now assess state court judgments as co-equal in their interpretation and application of federal constitutional law when deciding a habeas case.[182]

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[173] 529 U.S. 362 (2000).

[174] *Id.* at 405-11.

[175] *Id.* at 405.

[176] *Id.*

[177] *Id.*

[178] *Id.* at 409.

[179] *Id.*

[180] *Id.* at 411.

[181] *Id.*

[182] *See id.*; Jordan Steiker, *Did the Oklahoma City Bombers Succeed?*, 574 ANNALS 185, 186 (2001); *see generally* Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1 (1984-85); Rehnquist, *supra* note 143.

III. FACTS AND PROCEDURAL HISTORY

A. FACTS

On November 4, 1995, Leandro Andrade entered a Kmart in Ontario, California.[183] He walked over to the electronics section, looked around, picked up some videotapes, and put them in his pants.[184] The videotapes he had selected were children's movies (*Snow White*, *Casper*, *The Fox and the Hound*, *The Pebble and the Penguin*, and *Batman Forever*) with a total value of $84.70.[185] Andrade left the Kmart without paying for the videotapes and loss prevention personnel from the store apprehended him in the store parking lot, took the videotapes away, and had Andrade arrested for shoplifting.[186]

Exactly two weeks later, on November 18, 1995, Andrade entered a Kmart in Montclair, California.[187] After walking over to the electronics section, he selected some videotapes and put them down his pants.[188] Once again, Andrade selected children's movies (Free Willy 2, Cinderella, Santa Clause, and Little Women) with a total value of $68.84.[189] He left the store without paying for the videotapes; loss prevention stopped him in the parking lot, recovered the merchandise, and held him until the police arrived to arrest him for shoplifting.[190] Andrade, in his statement to authorities, admitted to stealing the videos and asserted his theft was motivated by a heroin addiction that had plagued him since 1977.[191]

Leandro Andrade is a U.S. Army veteran and father of three children.[192] At the time these shoplifting incidents occurred, Andrade was addicted to heroin, unmarried, unemployed, and did not help support his children.[193] His criminal career had spanned more than a decade. Andrade's first conviction came in January 1982, when he was sentenced to six days in jail with twelve months probation for misdemeanor theft.[194] A little more than a year later, he pled guilty to three counts of residential

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[183] Lockyer v. Andrade, 538 U.S. 63, 66 (2003).

[184] Petitioner's Brief on the Merits at 2, *Lockyer* (No. 01-1127).

[185] Brief of Respondent at 1, *Lockyer* (No. 01-1127).

[186] *Id.*; Petitioner's Brief on the Merits at 2, *Lockyer* (No. 01-1127).

[187] Brief of Respondent at 1, *Lockyer* (No. 01-1127).

[188] Petitioner's Brief on the Merits at 2-3, *Lockyer* (No. 01-1127).

[189] Brief of Respondent at 1, *Lockyer* (No. 01-1127).

[190] Joint Appendix at 25, *Lockyer* (No. 01-1127).

[191] *Id.*

[192] *Id.* at 27, 32.

[193] *Id.*

[194] *Lockyer*, 538 U.S. at 66.

burglary, and was sentenced to 120 months in prison.[195] These charges are viewed as "serious or violent" felonies under California law.[196] In 1988, Andrade was convicted in Federal court for transporting marijuana, a felony charge that earned him an eight year sentence.[197] In March 1990, he was convicted of petty theft in California state court and sentenced to six months in jail.[198] Later that year he was again convicted of transportation of marijuana in Federal court where he remained until September 1991—when he violated his state parole by attempting to escape from prison.[199] Andrade was paroled from the state prison system in February 1993.[200]

The San Bernardino County District Attorney filed an information on January 19, 1996, charging Andrade with petty theft with a prior conviction, bringing the charge under the purview of California Penal Code section 666.[201] The charge included allegations about the first shoplifting incident and Andrade's prior convictions for residential burglary.[202] On March 13, 1996, the court granted the prosecutor's motion to consolidate the case with the second shoplifting offense, tacking on a second charge of petty theft with a prior conviction.[203]

On March 27, 1996 a jury convicted Andrade of two unrelated counts of petty theft with a prior conviction.[204] His 1990 conviction for petty theft operated to place the two shoplifting charges under section 666 of the California Penal Code.[205] That statute provides that a subsequent conviction for petty theft following a prior like conviction can be charged as a felony, making the new charges "wobble" between misdemeanor and felony status.[206] The prosecutor chose to charge these "wobblers," the two new shoplifting offenses, as felonies.[207] Once the thefts were charged as felonies, the probation officer was bound by law to recommend the harshest possible punishment allowed by the law—twenty-five years to life for each

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[195] *Id.*

[196] Joint Appendix at 4, *Lockyer* (No. 01-1127); *see* CAL. PENAL CODE § 1192.7 (West Supp. 2004) (burglary of a residence defined as a "serious" felony).

[197] Joint Appendix at 4, *Lockyer* (No. 01-1127).

[198] *Id.*

[199] *Id.* at 24-25.

[200] *Id.* at 25.

[201] Brief of Respondent at 2, *Lockyer* (No. 01-1127).

[202] *Id.*

[203] *Id.*

[204] Joint Appendix at 34, *Lockyer* (No. 01-1127); *see* CAL. PENAL CODE § 1170.12(a)(6) (West 1999).

[205] Joint Appendix at 34, *Lockyer* (No. 01-1127).

[206] CAL. PENAL CODE § 666 (West Supp. 2004).

[207] *See* Joint Appendix at 34, *Lockyer* (No. 01-1127); § 666.

count—because it was Andrade's third and fourth offenses.[208] The jury made the required special finding that Andrade had been convicted of two or more serious felonies in California (the 1982 burglary convictions), which opened the way for application of the three strikes law.[209] Because each of the felony theft counts triggered separate application of the three strikes law, the judge was allowed to sentence Andrade to fifty years to life.[210]

On May 13, 1997, the California Court of Appeal affirmed Andrade's conviction on direct appeal, rejecting Andrade's claim that his sentence violated the proportionality provision of the Eighth Amendment.[211] The Court of Appeal found the validity of *Solem's* proportionality analysis doubtful in light of *Harmelin*, the most recent pronouncement of the Court on the subject of proportionality.[212] The Court of Appeal then assessed Andrade's case in light of the ruling in *Rummel*.[213] The state court concluded that Andrade's criminal history was no less serious than those committed by the defendant in *Rummel*, and thus his sentence was not disproportionate.[214] Finally, the Court of Appeal applied the California version of proportionality analysis that mirrors the *Solem* test.[215] Even under the state version of the *Solem* proportionality analysis, the state court concluded Andrade's sentence was proportional to the underlying crime.[216] The California Supreme Court denied petition for certiorari.[217]

B. THE NINTH CIRCUIT DECISION

On August 19, 1998, Andrade filed for federal habeas relief in the Central District of California.[218] The petition was dismissed by the district court on February 18, 1999.[219] In August 1999, the Ninth Circuit granted Andrade leave to appeal.[220] On November 2, 2001, the Ninth Circuit reversed the judgment of the district court, granted a writ of habeas corpus

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[208] Joint Appendix at 27-28, *Lockyer* (No. 01-1127).

[209] *Lockyer*, 583 U.S. at 68; *see* § 1170.12(a).

[210] *Lockyer*, 538 U.S. at 68.

[211] *Id.* at 68-69.

[212] *Id.* at 69-70.

[213] People v. Andrade, No. FWV08781 (Cal. App. 1997), *available at* Joint Appendix at 76, *Lockyer* (No. 01-1127).

[214] *Id.* at 77.

[215] *See id.* at 77-78.

[216] *See id.* at 78.

[217] Joint Appendix at 1, *Lockyer* (No. 01-1127).

[218] *Id.*

[219] *Id.*

[220] Andrade v. Att'y Gen. of California, 270 F.3d 743 (9th Cir. 2001).

on behalf of Andrade, and remanded the case to state court for re-sentencing.[221]

The Ninth Circuit adopted the proportionality reasoning proffered by Justice Kennedy in *Harmelin* at the beginning of its analysis of the habeas petition.[222] The court concluded that *Harmelin* meant that *Solem's* second and third factors, intra-jurisdictional and inter-jurisdictional comparisons, need not be applied unless a defendant's sentence raises an inference of gross disproportionality.[223] First, the court examined the harshness of the penalty and the gravity of the theft offense.[224] The court found that Andrade's mandatory minimum fifty year sentence will result in him spending most of his life in prison, and thus the case comported more with the facts of *Solem* than those of *Rummel*.[225] Next, the court noted under California law petty theft is usually a misdemeanor, and a construction of California law accelerated the misdemeanor petty theft charges to felonies eligible for strike count.[226] Additionally, the court observed the prior felony strikes and concluded the absence of violence likened the case to *Solem*.[227] Finally, the court ruled that the length of the sentence coupled with the lack of seriousness of the crimes created an inference of gross disproportionality.[228]

After determining the threshold from *Harmelin* had been met, the court applied the second and third prongs of the *Solem* test.[229] The court found Andrade's sentence to be disproportionate when compared to mandatory minimum sentences for a two-time petty theft offender and a violent first time offender.[230] Next, the court found Andrade's sentence to be disproportionate to possible punishment in other jurisdictions that have similar recidivist statutes.[231] On these grounds, the court concluded Andrade's sentence was grossly disproportionate in violation of the Eighth Amendment.[232]

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[221] *Id.* at 767.

[222] *Andrade*, 270 F.3d at 754 (recognizing that this Circuit and others have adopted "the rule of *Harmelin*").

[223] *Id.* at 758.

[224] *Id.* at 758-61.

[225] *Id.* at 758-59.

[226] *Id.* at 759-60.

[227] *Id.* at 760-61.

[228] *Id.* at 761.

[229] *Id.* at 761-66.

[230] *Id.* at 761-62.

[231] *Id.* at 762-66.

[232] *Id.* at 766.

The Court then asserted the California Court of Appeal unreasonably applied Supreme Court law when it determined *Harmelin* created a question about *Solem's* validity and relied exclusively on *Rummel* for its proportionality analysis.[233] The court admitted Andrade's case is similar to both *Rummel* and *Solem*, but found that *Solem* should have been controlling.[234] Equating Andrade's minimum fifty year sentence to the life sentence overturned in *Solem*, the court granted Andrade's habeas petition.[235] The Supreme Court granted cert to the State of California in 2002 to decide whether the Ninth Circuit's grant of Andrade's habeas petition was proper.[236]

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,[237] Justice O'Connor held Andrade's sentence did not violate the Eighth Amendment's proportionality principle.[238] The State argued that the California Court of Appeal's reliance on *Rummel* was neither contrary to nor an unreasonable application of federal law.[239] Andrade argued his consecutive sentences of twenty-five years to life for shoplifting violated the Eighth Amendment.[240] The majority rejected Andrade's habeas claim.[241] In doing so, the Court then overruled the Ninth Circuit's review of the state court and its application of Eighth Amendment proportionality analysis to Leandro Andrade's sentence.[242]

The Court refused to reach the merits of the state court decision, and instead evaluated the state court's decision under the AEDPA's standard of review.[243] First, the Court determined the appropriate law to apply to a term-of-years inquiry.[244] The court stated that "clearly established" law

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[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] Lockyer v. Andrade, 538 U.S 63 (2003).

[237] Chief Justice Rehnquist, Justices Scalia, Thomas, and Kennedy joined O'Connor.

[238] *Lockyer*, 538 U.S. at 70.

[239] *Id.*

[240] *Id.* at 70-72.

[241] *Id.* at 71.

[242] *Id.*

[243] *Id.* at 71. When entertaining a habeas petition, the reviewing federal court only determines if the state court ruling was "contrary to, or an involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2003).

[244] *Lockyer*, 538 U.S. at 72.

refers to Supreme Court holdings, and not dicta, in effect at the time the state court makes its decision.[245] The Court's Eighth Amendment cases do hold that a proportionality principle is applicable to a term-of-years sentence.[246] But the holdings that derive a proportionality principle from the Eighth Amendment are unclear in their application of that principle.[247] Indeed, the Court has not established a consistent path for courts to follow on when to apply the proportionality principle.[248] While the contours of the principle are unclear, precedent dictates that application of the principle will be rare; it will only be applied in extreme cases.[249]

Next, the Court proceeded to recite situations in which a state court ruling is "contrary to" federal law, and evaluated whether the California court's ruling was contrary to the law.[250] The Court explained that a state court ruling is "contrary to" precedent if the state court applies a legal rule opposite to governing precedent, or a state court confronts a fact pattern that is indistinguishable from a precedent case yet yields a result different from the precedent.[251] In Andrade's case, the factual situation implicated factors present in both *Rummel* and *Solem*,[252] yet was distinguishable from both those cases.[253] Because both cases remain good law, the California court could not reach a result "contrary to" Supreme Court precedent in following either one.[254] Additionally, because Andrade's facts were sufficiently distinguishable from both cases, the California court was not bound to one specific precedent case.[255] Thus, the California court ruling was not "contrary to" precedent because it chose to rely on the Court's holding in *Rummel*.[256]

Finally, the Court evaluated the conditions under which a state court makes an "unreasonable application of" a precedential rule to a new factual situation.[257] The Court stated that in order to overturn a state court application of a federal rule, that court's application of the rule must have

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[245] *Id.* at 71-72.
[246] *Id.* at 72.
[247] *Id.*
[248] *Id.*
[249] *Id.* at 73.
[250] *Id.*
[251] *Id.* at 74.
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.* at 73-74.
[257] *Id.* at 75.

been "objectively unreasonable."[258] Thus, the Ninth Circuit erred when it applied a "clear error" standard to its evaluation of the state court decision, because clear error fails to give proper deference to the state decision.[259] The Court said that the proper standard to apply is the "objectively unreasonable" standard.[260] This standard allows a federal habeas court to grant relief if the state court misapplies federal law to a new set of facts.[261] But the rule for applying the Eighth Amendment's proportionality principle is unclear.[262] This lack of clarity provides for substantial deference to legislatures as they attempt to fashion sentences that fit within the rubric of the proportionality principle.[263] Therefore, the California court's affirmation of Andrade's sentence was not "objectively unreasonably" because the Supreme Court had not substantially defined the proportionality rule.[264] Instead, the California court reasonably assumed that the Supreme Court had crafted a rule that granted substantial deference to the state sovereignty in the development of their penological systems.[265]

B. JUSTICE SOUTER'S DISSENTING OPINION

Writing in dissent,[266] Justice Souter proffered two reasons why the California Court of Appeal holding was unreasonable.[267] First, Souter contended that because *Solem* was the Court's most recent decision dealing with recidivist statutes, it was controlling.[268] He argued that *Solem* established the benchmark for applying the proportionality principle and distinguished it from *Rummel* because the defendant in *Rummel* had been available for parole after only twelve years of his life sentence.[269] Souter asserted that Andrade's facts resembled the facts from *Solem*, specifically the non-violent nature of their respective felonies.[270] Souter found additionally that the consecutive sentences of twenty-five years to life amounted to a life sentence, similar to the one held to be disproportionate in

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[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.* at 76.
[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] Justices Stevens, Ginsburg, and Breyer joined Justice Souter.
[267] *Lockyer*, 538 U.S. at 78 (Souter, J., dissenting).
[268] *Id.* (Souter, J., dissenting).
[269] *Id.* (Souter, J., dissenting).
[270] *Id.* (Souter, J., dissenting).

Solem.[271] He noted that the only way to distinguish between Andrade's facts and the facts in *Solem* was that Andrade faced a possibility of parole in his fifty year sentence, while the respondent in *Solem* faced a mandatory life sentence.[272]

Next, Souter contended that the challenge in the instant case was not to the sentence as a whole, but only to the second sentence of twenty-five years to life for the second shoplifting incident.[273] Souter reasoned that since the legislature's goal was essentially to incarcerate a repeat offender because of the danger he posed to society, and the state had chosen twenty-five years to life as the appropriate sentence to accomplish that goal, double-counting the second offense violated the state's own penalogical theory.[274] Moreover, the California Court of Appeal offered no justification for allowing the double counting of Andrade's second shoplifting offense when it reviewed his gross disporportionality claim.[275] Souter assumed that the theory underlying double-counting Andrade's second offense would be the same as the first: continued danger to the public.[276] He rejected this notion, asserting that basing two consecutive sentences of twenty-five years to life on that penalogical theory is not seriously debatable among reasonable minds.[277] Thus, the second sentence was unreasonable under the federal statute.[278]

V. ANALYSIS

The Court correctly held that the California Court of Appeal decision affirming Andrade's term-of-years sentence did not violate the Eighth Amendment's ban on cruel and unusual punishment. First, while a proportionality principle exists in the Supreme Court's Eighth Amendment jurisprudence, its application has been disjointed and ambiguous, leaving much room for states to exercise discretion. Given the ambiguity in this area of constitutional law, any question about its application should be resolved in favor of the states. Since the California Court of Appeal was within the auspices of precedent in upholding Andrade's sentence, the Court's opinion was correct.

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[271] *Id.* at 79 (Souter, J., dissenting).
[272] *Id.* (Souter, J., dissenting).
[273] *Id.* at 79-80 (Souter, J., dissenting).
[274] *Id.* at 80-82 (Souter, J., dissenting).
[275] *Id.* at 82 (Souter, J., dissenting).
[276] *Id.* (Souter, J., dissenting).
[277] *Id.* (Souter, J., dissenting).
[278] *Id.* (Souter, J., dissenting).

Second, though a proportionality principle operating on a term-of-years sentence is recognized in the Eighth Amendment, that principle should in no way be utilized as a vehicle to undermine the rights of States to develop penalogical systems that fit the needs of the day. A beneficial aspect of federalism is the ability of States to experiment with their criminal justice systems to find an efficient pattern. California's three strikes law has faced much criticism, and Andrade's sentence may not seem to make good sense, but some evidence indicates the law is having a beneficial effect. Further, the people of California are capable of adjusting the statutory scheme.

Finally, modern Supreme Court jurisprudence has moved toward recognizing state courts as co-equal interpreters of constitutional criminal law. Moreover, the framers of the AEDPA's habeas provision constructed the reform to curtail federal intrusion into State criminal systems. The Court correctly followed modern constitutional doctrine and congressional intent when it directed the Ninth Circuit to grant substantial deference to the State of California. Thus the Rehnquist Court, with the statutory authority granted by Congress, has fully come to realize its ideological prerogative that state courts are co-equal with their federal counterparts in constitutional interpretation.

A. THE AMBIGUITY OF THE SUPREME COURT'S JURISPRUDENCE IN PROPORTIONALITY ANALYSIS GRANTED LEEWAY TO THE CALIFORNIA COURT OF APPEAL TO UPHOLD ANDRADE'S SENTENCE

The *Lockyer* Court faced a situation in which a federal court reversed a state court's decision about a state mandated criminal sentence.[279] The state court based its decision to uphold Andrade's sentence on viable Supreme Court precedent by analyzing it under *Rummel*.[280] Then the state court's effort was supplanted by two judges on the Ninth Circuit who wanted the state court to follow *Solem*, the other case that could have governed the analysis.[281] However, the Court had already announced a principle that state court decisions deserve respect when they are based on existing law and made in good faith.[282] Additionally, Justice Kennedy's attempt in *Harmelin* to reconcile the two different analytic structures in *Rummel* and *Solem* had significantly weakened *Solem's* efficacy, leaving state courts

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[279] *See id.* at 70.

[280] *See* People v. Andrade, No. FWV08781 (Cal. App. 1997), *available at* Joint Appendix at 76, *Lockyer* (No. 01-1127).

[281] *See* Andrade v. Att'y Gen. of California, 270 F.3d 743, 758 (9th Cir. 2001).

[282] *See* Butler v. McKeller, 494 U.S. 407, 414 (1990).

with a possibly dubious analytical structure to apply to proportionality cases.[283] Further, the state court demonstrated good faith when it applied the state's equivalent of the *Solem* test yet still found Andrade's sentence to be viable.[284] Finally, the AEPDA mandated that the state court's decision must be unreasonable before a reviewing federal court could overturn it.[285] The state court reasonably relied on *Rummel*, which was good law, when it analyzed Andrade's sentence.[286] Therefore, the Supreme Court's decision to reverse the Ninth Circuit was proper.

A close reading of *Rummel* and *Solem* underscores the difficult task faced by the state court trying to apply the proportionality principle to Andrade's sentence. As the previous cases have shown, the area of law governing Eighth Amendment proportionality is anything but clear.[287] In *Solem*, the Court emphasized that it did not overrule *Rummel*.[288] Because the *Solem* Court went out of its way to affirm *Rummel* as good law,[289] the majority opinion in *Solem* can be viewed as merely offering a framework under which a court could review a sentence, should it determine the instant sentence was one that merited proportionality review.[290] Interpreting *Rummel* in his dissent in *Solem*, Chief Justice Burger asserted that *Rummel* stood for the proposition that when developing sentencing schemes for felonies, state legislatures were established in their primacy.[291] Thus, *Solem* can be read as an attempt to standardize proportionality review, with a dissent that re-emphasizes importance of legislative prerogatives. But this conclusion is inconsistent with the *Solem* majority's assertion that "no penalty is per se constitutional."[292] Therefore, distinguishing between *Rummel* and *Solem* operationally as legal principles is almost impossible.

To better understand the difficulty of distinguishing between *Rummel* and *Solem*, one must reject the notion that applying proportionality analysis to a term-of-years sentence was a practice agreed on by both majorities.[293]

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[283] *See generally* Barton C. Legum, Note, *"Down the Road Toward Human Decency": Eighth Amendment Proportionality Analysis and* Solem v. Helm, 18 GA. L. REV. 109 (1983).

[284] *See* Joint Appendix at 77-78, Andrade v. Att'y Gen. of California, 270 F.3d 743 (9th Cir. 2001) (No. 99-55691).

[285] *See* 28 U.S.C. § 2254(d)(1) (2003).

[286] *Contra Andrade*, 270 F.3d at 766. The Ninth Circuit declared that the state court's decision to follow *Rummel* was unreasonable. *Id.*

[287] *See Lockyer*, 538 U.S. at 72-73.

[288] Solem v. Helm, 463 U.S. 277, 288 n.13, 303 n.32 (1983).

[289] *See id.*

[290] *Id.* at 290-92 (reviewing courts should be guided by objective factors).

[291] *Id.* at 307.

[292] *Id.* at 290.

[293] *See* Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (Scalia, J., concurring).

The majority in *Rummel* made one allowance for proportionality analysis outside the death penalty context—parking tickets that carried a life sentence as punishment—obviously an ad absurdum argument.[294] The majority based most of its reasoning on a utilitarian states rights argument—states can deal in a harsher manner with those who chose not to conform to societal norms.[295] Further, courts applying *Rummel* thought it eliminated proportionality analysis except in the absurd.[296] Such cases indicate that the *Rummel* decision removed state sentencing decisions from federal court review.[297] Moreover, the *Rummel* dissent rejected utilitarian analysis in favor of a fairness assessment encompassed in the proportionality principle.[298] Powell maintained that the Eight Amendment should be used to ensure fairness in state sentencing.[299] Finally, Justice Powell's dissent went through an extensive historical analysis to justify proportionality review of non-capital sentences in Anglo-American law.[300] He engaged in this cataloging to show how the proportionality principle should be applied.[301] Therefore, the Supreme Court decision in *Rummel* was understood to remove state imposed criminal sentences from federal court review.

On the other hand, the majority opinion in *Solem* was written in a way to debilitate the reasoning expressed in *Rummel*.[302] Powell subjected all sentences to proportionality review when he announced that no state sentence carries a presumption of constitutionality.[303] Additionally, the analytic structure Powell used to evaluate the sentence in *Solem* was rejected by *Rummel* as too subjective.[304] Moreover, the dissent in *Solem* categorically rejects Powell's interpretation that *Rummel* announced an acceptance of proportionality analysis applied to a term-of-years sentence.[305] For the dissent in *Solem*, *Rummel* had actually dispelled the

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[294] Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980).

[295] *See id.* at 276.

[296] *See, e.g.*, Terrebonne v. Blackburn, 646 F.2d 997, 1001 (5th Cir. 1981) (en banc) (plurality opinion).

[297] *See id.*

[298] *Rummel*, 445 U.S. at 288 (Powell, J., dissenting).

[299] *See id.* (Powell, J., dissenting).

[300] *Id.* at 288-93 (Powell, J., dissenting).

[301] *See id.* at 293 (Powell, J., dissenting).

[302] *See, e.g.*, Solem v. Helm, 463 U.S. 277, 289 n.14 (1983) (asserting that unquestioned legislative deference was not the standard adopted by the Court in *Rummel*).

[303] *See id.* at 290.

[304] *Id.* at 308.

[305] *Id.* at 304-05.

purported myth of proportionality.[306] Ultimately, *Rummel* and *Solem* reflect a fundamental difference in judicial philosophy. The *Rummel* Court favored the view that state courts are co-equal with the federal court when interpreting constitutional law, at least in the criminal realm.[307] The *Solem* Court harkens back to the mistrust of state courts from the Warren era decisions.[308] Therefore, these two cases must be read as mutually exclusive in their reasoning yet occurring within three terms of each other. This left lower courts with the difficult task of interpreting and applying both because *Solem* did not overrule *Rummel*.[309]

Two competing interpretative theories emerged in academia in an attempt to reconcile the cases.[310] First, the cases could be read as setting lines of demarcation that require a two tier analysis.[311] Initially, a court must determine whether the sentence is disproportionate (i.e., does it better match the facts of *Rummel* or *Solem*).[312] If *Rummel* governs on the facts, then the sentence is constitutional and no further inquiry is needed.[313] On the other hand, if a case matched *Solem* on the facts, then a court must employ the subjective factors announced in that decision to determine the sentence's constitutional viability.[314] Unfortunately, this theory leaves a gap where neither *Rummel* (life sentence with parole available in twelve years) nor *Solem* (life sentence without parole) give clear instruction.[315] This gap occurs where the sentence amounts to something less than life in prison, or where the past crimes that caused application of the recidivist statute carried a greater threat of violence than the instant crime (e.g., a recidivist statute's application triggered by a car theft when the offender had two previous convictions for armed robbery).[316]

Also, the cases could be read so that *Solem* eviscerated *Rummel*.[317] After all, *Solem* rejected the idea that any sentence is per se constitutionally

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[306] *See id.*

[307] *See generally* Rehnquist, *supra* note 143.

[308] *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953); *see* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren & Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 185 n.88 (1983).

[309] *Solem*, 463 U.S. at 303 n.32, 298 n.13.

[310] *See generally* Legum, *supra* note 283.

[311] *See id.* at 134.

[312] *See id.* at 130-31.

[313] *See id.* at 130.

[314] *See id.*; *see also* Ewing v. California, 538 U.S. 11, 40 (2003) (Breyer, J., dissenting) (recognizing a twilight zone between *Solem* and *Rummel*).

[315] *See* Legum, *supra* note 283, at 131.

[316] *See Ewing*, 538 U.S. at 40 (Breyer, J., dissenting).

[317] *See* Legum, *supra* note 283, at 132-33.

valid.[318] Moreover, Justice Powell took great pains to show how proportionality was accepted under Anglo American law and as part of the Eighth Amendment's jurisprudence.[319] He wanted to justify diverging from the principle of legislative primacy that the Court had announced in *Rummel*.[320] Finally, *Solem* asserted that judges can serve as good arbiters of whether a sentence is disproportional.[321] Powell dismissed *Rummel's* assertion that proportionality was too subjective to be applied by the judiciary.[322] Therefore, reconciling these two cases, while yielding one applicable legal principle, was exceedingly difficult.

Justice Kennedy's opinion in *Harmelin* attempted to harmonize the two cases by distilling the fundamental principles underlying proportionality analysis.[323] He concluded that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[324] His analysis focused on the severity of the crime in relation to the sentence imposed.[325] Kennedy then said that interjurisdictional and intrajurisdictional comparisons should only be made on those rare occasions in which the judge infers gross disproportionality between crime and sentence.[326] Thus, he adopted a two-tiered approach similar to the one described at footnote 310 above.[327] His approach was viewed as weakening *Solem*.[328] Therefore, a state court applying proportionality analysis after *Harmelin* could reasonably have thought that *Solem's* test was questionable.[329]

The Ninth Circuit tried to ascertain an employable distinction between *Rummel* and *Solem* while entertaining Andrade's habeas petition.[330] The court adopted Kennedy's *Harmelin* decision as the governing law.[331] It

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[318] *See* Solem v. Helm, 463 U.S. 277, 290 (1983).

[319] *See id.* at 284-88.

[320] *See* Rummel v. Estelle, 445 U.S. 263, 274 (1980).

[321] *See Solem*, 463 U.S. at 292.

[322] *See Rummel*, 445 U.S. at 281-82.

[323] *See* Harmelin v. Michigan, 501 U.S. 957, 998-1001 (1991) (Kennedy, J., plurality opinion). Kennedy's four principles are: (i) primacy of the state legislature; (ii) legitimacy of variety in penalogical schemes; (iii) federalism; and (iv) the need for objectivity when reviewing courts are assessing sentences. *Id.*

[324] *Id.* at 1001 (quoting *Solem*, 463 U.S. at 288, 303).

[325] *Id.* at 1002-04.

[326] *Id.* at 1005.

[327] *Id.* at 1004-05.

[328] *See id.* at 1018 (White, J., dissenting).

[329] *Contra* Andrade v. Att'y Gen. of California, 270 F.3d 743, 766-67 (9th Cir. 2001).

[330] *Id.* at 754-58.

[331] *Id.* at 754.

concluded that aspects of the Texas recidivist statute reviewed by the *Rummel* Court informed as to why *Solem* had not overruled *Rummel*.[332] It recognized that three factors in the Texas law had saved it from the proportionality principle: (i) the requirement of separate convictions and imprisonment for each felony; (ii) Texas's liberal parole policy; and (iii) prosecutorial discretion in charging defendants under the statute.[333] In order to make a distinction between the cases based on these factors, the discussion has to be ripped out of its context. A review of *Rummel* shows that the factors of the Texas statute were not discussed at length to inform as to constitutionally positive factors present in a recidivist statute. Instead, the statute's factors were part of a larger discussion of how the petitioner's argument that the Texas law was disproportionate when compared to other jurisdictions erupted in an unending variable analysis.[334] Even if these factors are employed to discern a distinction between *Rummel* and Andrade's case, the Ninth Circuit ignores the fact that both the prosecutor and the judge could dismiss the counts against Andrade.[335] Additionally, the dissent in *Rummel* categorically rejected using probability of parole as a validating instrument for proportionality analysis because a prisoner has no constitutionally enforceable right to an early release from a legally imposed sentence.[336] Thus, the Ninth Circuit gave no reason why the California court should have followed *Solem* rather than *Rummel*.

Therefore, the Supreme Court properly reversed the Ninth Circuit. In choosing to analyze Andrade's sentence under *Rummel*, the California Court of Appeal had acted in good faith.[337] By following *Rummel*, the state court adopted the deferential doctrine announced by that decision.[338] Because *Rummel* remained good law, and the *Harmelin* decision had weakened *Solem*, the state court's reliance on *Rummel* was reasonable.[339] Further, the Ninth Circuit was unable to show anything unreasonable about the state court's adoption of *Rummel*.[340] Hence, the *Lockyer* decision comports with AEDPA's reasonableness requirement.

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[332] *Id.*

[333] *Id.* at 755 (citing Rummel v. Estelle, 445 U.S. 263, 278-81 (1980)).

[334] *See Rummel*, 445 U.S. at 281.

[335] *See supra* notes 42-43.

[336] *See Rummel*, 445 U.S. at 294 (Powell J., dissenting). Justice Powell looks at parole on a different basis in his majority opinion in *Solem*. *See* Solem v. Helm, 463 U.S. 277, 300 (1983) (noting parole is part of the rehabilitation process).

[337] *See* Butler v. McKeller, 494 U.S. 407, 414 (1990).

[338] *See Rummel*, 445 U.S. at 276.

[339] People v. Andrade, No. FWV08781 (Cal. App. 1997), *available at* Joint Appendix at 76, *Lockyer* (No. 01-1127).

[340] *See supra* text accompanying notes 330-36.

Perhaps the most overlooked part of this ruling is what did not happen. It bears mentioning that no one offered a concurrence to Justice O'Conner's assertion that the proportionality principle is established in Eighth Amendment jurisprudence. Even so, *Lockyer* affirms that the AEDPA's limits on habeas review extend to the proportionality principle so that the principle's application to state imposed sentences during federal court review is limited to instances that are factually identical to *Solem* or so absurd that they shock the conscience.[341] After *Lockyer*, a state court performing proportionality analysis is free to compare a case to the facts of *Rummel* when deciding it meets the threshold of gross disproportionality set out in *Harmelin*.[342] Therefore, the ruling in *Lockyer* guarantees that federal court invocation of the proportionality principle is limited to absurd instances, such as the example given in *Rummel*.[343]

B. THE COURT CORRECTLY UNDERSTOOD THAT PROPORTIONALITY REVIEW REQUIRES SUBSTANTIAL DEFERENCE TO THE STATES

The *Lockyer* Court properly found California's application of its own law to be valid. The Court has traditionally recognized that dual sovereignty in federalism results in experimentation by States.[344] The Court has also acknowledged that its actions should not inhibit such experimentation in the States.[345] California's three strikes law was a prototype crafted to deal with recidivist criminals in that state.[346] The law's result was a sentence imposed on Andrade, a recidivist offender.[347] Thus, Andrade's sentence, because it is based on a law enacted by a state to deal with crime in that state, deserves deference from a federal reviewing court.[348]

Indeed, one of the benefits of our federal system is diversity among the States in deciding how to deal with social problems.[349] Admittedly, states have purposed recidivist statutes to deter potential repeat offenders, and

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[341] *See, e.g.*, *Rummel*, 445 U.S. at 274 n.11.

[342] *See* Erwin Chemerinsky, *October Term 2002*, 6 GREEN BAG 2D 367, 372 (2003).

[343] *See Rummel*, 445 U.S. at 274 n.11 (allowing for invalidation of a hypothetical state law that would commit an offender to life in prison for a parking ticket).

[344] *See, e.g.*, Ker v. California 374 U.S. 23, 34 (1963) (holding that states may develop workable rules governing searches, seizures, and arrests as long as they do not run afoul of the Fourth Amendment); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[345] *See, e.g.*, *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

[346] *See* Andriaz, *supra* note 30.

[347] *See supra* text accompanying notes 204-10.

[348] *See* Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).

[349] *See id.*

segregate from society those who will not conform to societal expectations.[350] California's treatment of petty theft as a "wobbler" subject to progressively harsher treatment is no less rational than Texas treating horse thieves more stringently than Rhode Island.[351] In terms of comparative review, a sentence resulting from a statutory scheme that punishes an offender more harshly than would any of the other forty-nine states does not necessarily mean the punishment is disproportionate to the crime.[352] Thus, because "our constitution 'is made for people of fundamentally different views,'"[353] and three time offenders have demonstrated their unwillingness to conform to societal norms,[354] California has the right as a sovereign to segregate Andrade from the rest of society.

In *Solem*, the Court recognized the proposition that state legislatures have broad authority to design punishments for crime in their jurisdictions.[355] California's three strikes law falls within that broad discretion.[356] Additionally, state courts that are imposing sentences under authority granted by the legislature must be accorded substantial deference.[357] The deference accorded legislatures is transmitted to the state judiciary.[358] Further, the fact that the Court has acknowledged invalidating a twenty-five year sentence but not a fifteen year sentence shows how difficult the proportionality principle is to operate.[359] Because of the difficulty that courts face when making these subjective judgments, the legislature is the best place for these decisions to be made.[360] Hence, reviewing courts should grant substantial deference to States when assessing whether a sentence is grossly disproportional.[361]

Instances of the Supreme Court overruling legislatively sanctioned sentences, outside the death penalty context, are "exceedingly rare."[362] Indeed, only two such instances have occurred in Supreme Court jurisprudence. The first was *Robinson v. California*,[363] where the Court

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[350] *See* Rummel v. Estelle, 445 U.S. 263, 284 (1980).

[351] *See Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring).

[352] *See Rummel*, 445 U.S. at 281-82.

[353] *Id.* at 282 (citing Lochner v. New York, 198 U.S. 45, 76 (1905)).

[354] *Id.* at 282 n.27.

[355] Solem v. Helm, 463 U.S. 277, 290 (1983).

[356] *See* Andriaz, *supra* note 30.

[357] *Solem*, 463 U.S. at 290.

[358] *See* Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).

[359] *Solem*, 463 U.S. at 294.

[360] *See* Rummel v. Estelle, 445 U.S. 263, 275-76 (1980).

[361] *See Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring).

[362] *See Solem*, 463 U.S. at 289-90 (quoting *Rummel*, 445 U.S. at 272).

[363] 370 U.S. 660 (1962).

invalidated a California sentence of ninety days for the offense of being a drug addict.[364] The other was *Solem*. Moreover, legislatures are especially equipped to deal with the subjective nature of the line drawing in this area of proportionality,[365] whereas judicial action that overturns sentences sanctioned by statute undermines public confidence in constitutional order and the rule of law.[366] Passage of recidivist statutes such as the California three strikes law seems to indicate a lack of public confidence in the judiciary's ability, or perhaps willingness, to see to its protection.[367] As much as such laws, and the sentences they impose, may be contrary to a sitting judge's views on the goals of the criminal justice system, the determination of those goals belongs to the legislative body.[368] In other words, the Eighth Amendment's proportionality principle cannot be employed to enforce contemporary views of crime and appropriate punishment, denying States the ability to constitute a penalogical scheme that fits the needs of the day.[369] Therefore, use of the proportionality principle should be limited to those rare situations in which reasonable minds cannot differ about the sentence imposed.[370] Any other use of the proportionality principle would be inimical to our federal order.[371]

Finally, the California three strikes law carries an even heavier presumption of validity because it passed both the legislature and a ballot initiative that went directly to the people.[372] Proposition 184 garnered seventy-two percent of the vote: a supermajority.[373] The ramifications of implementing the law, such as imprisoning offenders like Andrade, had been voiced to the public in the debate over Proposition 184.[374] Thus, the public knew what the likely results of the law were when they voted for it. Moreover, the people of California are capable of correcting any perceived

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[364] *Id.* at 667.

[365] *Rummel*, 445 U.S. at 275-76.

[366] *See Solem*, 463 U.S. at 317-18 (Burger, C.J., dissenting) (quoting Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting)).

[367] *See generally* Mark Owens, Note, *California's Three Strikes Law: Desperate Times Require Desperate Measures—But Will It Work?*, 26 PAC. L.J. 881 (1995)

[368] *See* Harmelin v. Michigan, 501 U.S. 957, 998-99 (1991) (Kennedy, J., concurring) (citing Gore v. United States, 357 U.S. 386, 393 (1958)).

[369] *See id.* at 990 (Scalia, J.).

[370] *See Solem*, 463 U.S. at 311 n.3 (Burger, C.J., dissenting).

[371] *See* Rummel v. Estelle, 445 U.S. 263, 282 (1980).

[372] *See* Morain & Ellis, *supra* note 23.

[373] *See id.*

[374] *See, e.g.*, John Balzer, *The Target: Repeat Offenders*, L.A. TIMES, Mar. 24, 1994, at A5 (noting the sentence of a petty thief under another state's three strikes law).

inequity created by situations like Andrade's.[375] Discussions to recalibrate the three strikes provision are under way.[376] Thus, California, and not the United States Supreme Court, is capable of reforming its own penal law to fit its needs. Therefore, the Supreme Court should defer to the State, and allow its experimentation to wind its course.[377]

C. THE COURT FOLLOWED CONGRESSIONAL INTENT WHEN IT ASSESSED THE STATE COURT UNDER A DEFERENTIAL STANDARD OF REVIEW

The *Lockyer* Court upheld the California court ruling because AEDPA required deference to the state court.[378] The majority in Congress intended to radically reshape habeas review.[379] The testimony heard by congressional committees alerted members to how the new standard of review would substantially alter habeas proceedings in federal courts.[380] Moreover, the reasonableness language was inserted into the AEDPA specifically to "respect[] the coordinate role of the States in our constitutional structure."[381] Since the drastic changes the AEPDA would bring about for habeas proceedings were part of the open debate in Congress,[382] the Court properly deferred to the California Court of Appeal when it applied precedent and found Andrade's sentence to be within constitutional strictures.[383] Indeed, the Court anticipated the unsuccessful

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[375] *See, e.g.*, Carl Ingram, *Two Campaigns Bid to Ease Three Strikes*, L.A. TIMES, Jan. 16, 2002, at B1.

[376] *See id.*

[377] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[378] *See* Lockyer v. Andrade, 538 U.S. 63, 72-77 (2003).

[379] *See generally* 141 CONG. REC. H4086-4121 (daily ed. Feb. 8, 1995) (debating the need for habeas reform).

[380] *See, e.g.*, *Senate Habeas Hearing*, *supra* note 150, at 196 (statement of Prof. Larry Wackle on behalf of the American Bar Association).

[381] 141 CONG. REC. H4112 (daily ed. Feb. 8, 1995) (statement of Rep. Cox) (discussing his reasons for changing the standard of review that federal courts must accord to state court decisions).

[382] *See, e.g.*, 142 CONG. REC. H7965 (daily ed. April 18, 1996) (statement of Rep. Berman) (discussing the preexisting standard of review in habeas proceedings and recognizing that the AEDPA would significantly alter that standard).

[383] *See Lockyer*, 538 U.S. at 75 (affirming Andrade's sentence was not an unreasonable application of clearly established Supreme Court precedent).

result of applying the proportionality principle under the AEDPA before the *Lockyer* case was ever decided.[384]

Important ideas about our constitutional structure underlay passage of the AEDPA. One such notion is efficient allocation of limited judicial resources, which was the cornerstone of this reform.[385] Federal judges have increasingly full dockets, and should not serve as courts that retry criminal cases.[386] Additionally, the lion's share of the cost of federal habeas review is born by the State.[387] Among these costs are the extended litigation a State must face at the Federal level, the uncertainty or delay in enforcement of its laws against criminal defendants, costs of retrial if a sentence is overturned, and the comity among dual sovereigns that does not honor good faith effort by State courts to enforce constitutional norms.[388] The reasonableness language in the AEDPA strikes a proper balance between states' interests in protecting their citizenry, allocating their judicial resources, and maintaining a baseline of constitutional rights accorded to all convicts.[389] Additionally, the AEDPA codified reforms set in motion by the Burger and Rehnquist Courts.[390] The Act is a major turn away from the Warren court era use of habeas to enforce new criminal procedure rights on state judges.[391] Therefore, the AEDPA's history and language ensures *Lockyer* was decided in line with congressional intent to limit habeas.[392]

VI. CONCLUSION

The Supreme Court ruling in *Lockyer* clarifies application of the Eighth Amendment's proportionality principle in post-AEDPA habeas review. A narrow proportionality principle exists, and should only be employed to overturn a State imposed sentence permitted by a statutory

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[384] *See id.* (noting several justices' requests that the Court accept a direct challenge of California's three strikes provision because of the uncertain implications of AEDPA standard of review).

[385] *See Powell Committee Report*, *supra* note 153; *see generally* Rehnquist, *supra* note 143.

[386] *See generally supra* note 149.

[387] *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 738-39 (1991).

[388] *See id.* at 738-39, 748.

[389] *See* 141 CONG. REC. H4112 (daily ed. Feb. 8, 1995) (statement of Rep. Cox); *see also* Williams v. Taylor, 529 U.S. 362, 399 (2000) (holding that petitioner's ineffective assistance of counsel claim was cognizable as a federal habeas claim because the Virginia Supreme Court had unreasonably applied *Strickland v. Washington*, the governing precedent).

[390] *See* Smith, *supra* note 146, at 1069-77.

[391] *See id.* at 1065-69.

[392] *Cf.* Friedman, *supra* note 147 (cataloging the Burger and Rehnquist Courts' attempts at habeas reform based on notions of states rights and federalism).

scheme in extreme circumstances. Many reasons for such a high level of deference to states underlay the Court's ruling. Chief among those is congressional intent, expressed in the standard of review for federal habeas proceedings, ensconced in the AEDPA. Because of the ambiguity in Supreme Court precedent regarding the proportionality principle and the language of the AEDPA, the California Court of Appeal was free to choose among the competing doctrines about the role of proportionality in sentencing. Additionally, judicial economy and ideas of federalism require deference to state court decisions. The California three strikes law is a legitimate exercise of state sovereignty, and sentences meted out according to its provisions deserve respect, despite judges' feelings about the outcome of the statute. Finally, the *Lockyer* decision reflects a broader notion that state courts, after a half century of tutoring by federal courts on the proper application of criminal constitutional rights, have sufficiently matured to become coequal interpreters of constitutional law.

Doyle Horn