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# THE SUPREME COURT'S EXCESSIVE DEFERENCE TO LEGISLATIVE BODIES UNDER EIGHTH AMENDMENT SENTENCING REVIEW

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

## I. INTRODUCTION

In *Ewing v. California*,<sup>1</sup> five Justices of the Supreme Court held that the Eighth Amendment does not prohibit the State of California from sentencing a repeat felon to life imprisonment without the possibility of parole for the first twenty-five years of the term for the theft of \$1,200 worth of golf clubs under the State's "Three Strikes and You're Out Laws."<sup>2</sup> Nonetheless, seven Justices restated that the Eighth Amendment forbids prison sentences that are grossly disproportionate to the crime.<sup>3</sup> The Court's plurality opinion applied the analytical framework introduced in Justice Kennedy's concurring opinion in *Harmelin v. Michigan*,<sup>4</sup> which counsels judges to consider four principles when assessing disproportionate sentencing claims.<sup>5</sup> First, criminal punishment determinations are normally the province of legislative bodies.<sup>6</sup> Second, the Eighth Amendment allows a variety of legitimate penological theories beyond retribution.<sup>7</sup> Third, the nature of our federal system allows diverse sentencing determinations among the States.<sup>8</sup> Finally, proportionality review should be guided by objective factors.<sup>9</sup> The Court held that California's policy decision to

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<sup>1</sup> 538 U.S. 11, 30-31 (2003) (plurality opinion).

<sup>2</sup> *Id.* (plurality opinion); *id.* at 32 (Scalia, J., concurring in the judgment); *id.* (Thomas, J., concurring in the judgment).

<sup>3</sup> *Id.* at 23 (plurality opinion); *id.* at 35 (Breyer, J., dissenting).

<sup>4</sup> 501 U.S. 957, 998-1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>5</sup> *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

<sup>6</sup> *Id.* at 998-99 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>7</sup> *Id.* at 999 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>8</sup> *Id.* at 999-1000 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>9</sup> *Id.* at 1000-01 (Kennedy, J., concurring in part and concurring in the judgment).

incapacitate criminals who have already been convicted of at least one serious or violent crime was constitutional.<sup>10</sup>

This Note argues that the Supreme Court's decision was wrong because it gives too much deference to legislative bodies. The Court needs to assert a more active role in protecting an individual's Eighth Amendment protection from excessive prison sentence. In addition, the Court needs to define the elements it considers under prison sentence review. This Note will examine: (1) the legal history and Supreme Court case law on the issue of proportionality in criminal sentencing; (2) the background and procedural history of Ewing's disproportionate sentencing claim; (3) the positions taken by the Justices in their final determination of the case; (4) the effect the Court's decision will have on sentence proportionality claims; and (5) the Court's sentence proportionality jurisprudence.

## II. BACKGROUND

### A. THE EIGHTH AMENDMENT

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>11</sup> The language of the Eighth Amendment can be traced back to the English Declaration of Rights of 1689.<sup>12</sup> However, commentators dispute what punishments were barred under the English Declaration of Rights.<sup>13</sup> In addition, commentators dispute how Americans interpreted the text of the Eighth Amendment when they adopted it in 1791.<sup>14</sup>

The English common law prohibited excessive punishments when the English Declaration of Rights was adopted in 1689.<sup>15</sup> Originally, English law punished criminal activity not with imprisonment but with financial fines called amercements.<sup>16</sup> The Magna Carta required that the amercement imposed on a criminal not to exceed the severity of his crime.<sup>17</sup> When prison sentences began replacing amercements during the 1400s as the

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<sup>10</sup> 538 U.S. at 31 (plurality opinion).

<sup>11</sup> U.S. CONST. amend. VIII.

<sup>12</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991); Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

<sup>13</sup> See *Harmelin*, 501 U.S. at 966-67.

<sup>14</sup> Compare *id.* at 979-86, with *Solem v. Helm*, 463 U.S. 277, 285-86 (1983).

<sup>15</sup> See Granucci, *supra* note 12, at 847.

<sup>16</sup> *Id.* at 845.

<sup>17</sup> *Id.* at 845-46.

common mode of criminal punishment in England, English courts extended the protection from excessive punishments to prison sentences.<sup>18</sup>

The English Declaration of Rights was adopted after the turbulent regime of King James II ended in 1688.<sup>19</sup> James II provoked the anger of Anglicans with his sympathy to English Catholics.<sup>20</sup> In 1685, the King's Anglican nephew attempted an unsuccessful overthrow of the King.<sup>21</sup> Afterwards, the King established a special commission to prosecute those who aided the rebellion.<sup>22</sup> Many of the rebels were executed by brutal means, such as disemboweling.<sup>23</sup> Thus, many commentators argue that the "Cruel and Unusual Punishments" Clause was meant to prohibit cruel *modes* of punishments like those imposed by the special commission.<sup>24</sup> Other commentators disagree, observing that the special commission was only mentioned once during the adoption of the Declaration of Rights.<sup>25</sup> Instead, Parliament was concerned about common law courts imposing punishments on religious matters that should have been decided by ecclesiastical courts.<sup>26</sup> Thus, these commentators argue that the Declaration of Rights affirmed the English common law prohibition against excessive punishment with the addition of the "Cruel and Unusual Punishments" Clause to forbid punishments not within a court's jurisdiction.<sup>27</sup>

The historical evidence surrounding the adoption of the Eighth Amendment indicates that people were mainly concerned about methods of punishments.<sup>28</sup> Historians only note two references to the Eighth Amendment during the proposal and adoption of the Federal Bill of Rights.<sup>29</sup> In both cases, the references refer to kinds of punishments, not proportionality.<sup>30</sup> Thus, most commentators believe the American Framers only meant to forbid cruel types of punishment under the Eighth

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<sup>18</sup> *Id.* at 845-47. However, English law did punish certain grave crimes with death. *Id.* at 846.

<sup>19</sup> *See id.* at 852-60.

<sup>20</sup> *Id.* at 852.

<sup>21</sup> *Id.* at 853.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 854 ("The penalty for treason at the time consisted of drawing the condemned man on a cart to the gallows, where he was hanged by the neck, cut down while still alive, disemboweled and his bowels burnt before him, and then beheaded and quartered.").

<sup>24</sup> *See Harmelin v. Michigan*, 501 U.S. 957, 970-74 (1991).

<sup>25</sup> *See Granucci*, *supra* note 12, at 854-56.

<sup>26</sup> *Id.* at 858-60.

<sup>27</sup> *Id.* at 859-60.

<sup>28</sup> *Id.* at 841-42.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Amendment.<sup>31</sup> However, some commentators note that Americans believed they retained the same rights as English citizens, including the English common law prohibition against excessive prison sentences.<sup>32</sup> They argue that these debates merely indicate that Americans wanted to extend the “Cruel and Unusual Punishments” Clause to include the harsh punishments they experienced under English rule.<sup>33</sup>

#### B. SUPREME COURT JURISPRUDENCE ON PROPORTIONALITY REQUIREMENTS TO SENTENCING

The Supreme Court first discussed a proportionality requirement in sentencing under the Eighth Amendment in 1892 in *O’Neil v. Vermont*.<sup>34</sup> In *O’Neil*, a county court sentenced the defendant to over fifty-four years of hard labor in the house of corrections for 307 offenses of selling liquor without authority.<sup>35</sup> The majority’s opinion declined to consider the question of whether the sentence violated the Eighth Amendment because the defendant had not raised the issue in his appeal, and because the Eighth Amendment did not apply to states at the time.<sup>36</sup> Justice Field dissented, arguing that the “Cruel and Unusual Punishments” Clause protects “against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.”<sup>37</sup> Justices Harlan and Brewer also contended that the sentence must be found cruel and unusual in view of the offense committed.<sup>38</sup>

Eighteen years later in *Weems v. United States*,<sup>39</sup> the Supreme Court indicated that the Eighth Amendment requires proportionality in sentencing.<sup>40</sup> A trial court sentenced Weems to the statutorily required fifteen years labor in prison with a chain attached to his ankle for falsifying a government document.<sup>41</sup> The sentence also subjected Weems to loss of

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<sup>31</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 979-86 (1991); *Granucci*, *supra* note 12, at 860-65.

<sup>32</sup> *Solem v. Helm*, 463 U.S. 277, 285-86 (1983).

<sup>33</sup> *Id.*

<sup>34</sup> 144 U.S. 323 (1892).

<sup>35</sup> *Id.* at 330.

<sup>36</sup> *Id.* at 331-32.

<sup>37</sup> *Id.* at 339-40 (Field, J., dissenting) (asserting that the “Cruel and Unusual Punishments” Clause is not only directed “to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which are attended with acute pain and suffering”).

<sup>38</sup> *Id.* at 371 (Harlan, J., dissenting).

<sup>39</sup> 217 U.S. 349, 359-66 (1910).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 362-66.

civil rights and surveillance after his release.<sup>42</sup> The Supreme Court found both the method of punishment and the relationship between the crime committed and the punishment imposed to offend the “Cruel and Unusual Punishments” Clause.<sup>43</sup> On proportionality, the Court stated, “it is a precept of justice that punishment for crime should be graduated and proportioned to offense.”<sup>44</sup> Justice McKenna refused to interpret the Eighth Amendment narrowly by only prohibiting certain modes of punishment used before the adoption of the Bill of Rights.<sup>45</sup> He argued that the Eighth Amendment should not “be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.”<sup>46</sup>

In 1962, the Supreme Court held in *Robinson v. California*<sup>47</sup> that the Eighth Amendment applied to states through the Fourteenth Amendment, and that imprisoning a defendant because he was addicted to drugs violated the “Cruel and Unusual Punishments” Clause.<sup>48</sup> The Court agreed that the state had a legitimate interest in combating narcotic traffic, but held that this was not a legitimate means for combating the problem.<sup>49</sup> Courts should determine whether a punishment violates the “Cruel and Unusual Punishments” Clause by a proportional comparison between the offense and sentence, and not on an abstract assessment of the punishment: “To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”<sup>50</sup>

In 1980, the Court in *Rummel v. Estelle*<sup>51</sup> held that the federal courts are not to apply proportionality review of prison sentences for felony crimes except in the most extreme situations imaginable.<sup>52</sup> The trial court sentenced Rummel to a mandated life sentence under a Texas recidivist statute for his third felony conviction with eligibility for parole in twelve

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 366-67.

<sup>44</sup> *Id.* at 367.

<sup>45</sup> *Id.* at 373.

<sup>46</sup> *Id.*

<sup>47</sup> 370 U.S. 660, 666-67 (1962).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 667-68.

<sup>50</sup> *Id.* at 667.

<sup>51</sup> 445 U.S. 263, 274-75 (1980).

<sup>52</sup> See *id.* at 274 n.11 (conceding the proportionality principle would come into play if a legislature made overtime parking a felony punishable by life imprisonment).

years.<sup>53</sup> Rummel's case was notable because his convictions were all property-related and involved modest sums: fraudulent use of a credit card to obtain \$80 worth of goods and services, passing a forged check for \$28.36, and obtaining \$120.75 by false pretenses.<sup>54</sup> In a five to four decision, Justice Rehnquist stressed that determining proportional prison sentences is a subjective determination best decided by legislative bodies.<sup>55</sup> The Court rejected Rummel's argument that his sentence was disproportionate because no other jurisdiction punished habitual offenders as harshly as Texas.<sup>56</sup> First, the Court was unconvinced that Texas's recidivist statute was clearly harsher than other jurisdictions.<sup>57</sup> Second, the Court noted that parole and prosecutorial discretion made comparative analysis of recidivist statutes across states too complex.<sup>58</sup> Finally, the Court noted that federalism naturally leads some states to have harsher penalties than other states due to differences in local interests, and courts should not forbid such states from protecting unique interests.<sup>59</sup>

The Court reaffirmed its holding in *Rummel* two years later in a six Justice per curiam opinion in *Hutto v. Davis*.<sup>60</sup> In *Hutto*, a Virginia state court sentenced the defendant to forty years imprisonment for both possession with intent to distribute and distribution of nine ounces of marijuana.<sup>61</sup> The majority opinion repeated "that federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment,' and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'"<sup>62</sup> The opinion also rejected the four-factor test used by the lower court to gauge proportionality: (1) the nature of the crime; (2) the legislative purpose behind the choice of punishment for the crime; (3) a comparison of sentences for the same crime in other jurisdictions; and (4) a comparison of the seriousness of crimes punished by the same sentence in the same jurisdiction.<sup>63</sup>

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<sup>53</sup> *Id.* at 264, 266, 267.

<sup>54</sup> *Id.* at 265-66.

<sup>55</sup> *Id.* at 283-84.

<sup>56</sup> *Id.* at 277-80.

<sup>57</sup> *Id.* at 279-80.

<sup>58</sup> *Id.* at 280-81.

<sup>59</sup> *Id.* at 281-82.

<sup>60</sup> 454 U.S. 370 (1982) (per curiam).

<sup>61</sup> *Id.* at 371.

<sup>62</sup> *Id.* at 374 (alteration in original) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274, 272 (1980)) (internal citations omitted).

<sup>63</sup> *Id.* at 373.

In 1983, the Supreme Court reversed its position on testing the proportionality of sentences. In *Solem v. Helm*,<sup>64</sup> a five Justice majority held that the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.<sup>65</sup> The majority distinguished *Rummel* because the defendant in *Rummel* had a possibility of parole.<sup>66</sup> The majority based its holding on the standards implicitly developed by the Court's opinions from *Weems* to *Rummel*.<sup>67</sup> The *Solem* Court advanced a three-part test: (1) whether the severity of the punishment was proportional to the offense; (2) a comparison of the punishment to other punishments in the same jurisdiction for more serious offenses; and (3) a comparison of the punishments for the same offense in other jurisdictions.<sup>68</sup> Applying these factors to the defendant's case, the Court held that the punishment violated the "Cruel and Unusual Punishments" Clause. In particular, the Court emphasized that *Solem* had no possibility of parole, while the defendant in *Rummel* was eligible for parole in twelve years.<sup>69</sup> Thus, the Court did not overrule *Rummel*.<sup>70</sup>

The Supreme Court did not address proportionality in sentencing again until 1991 in *Harmelin v. Michigan*.<sup>71</sup> A Michigan court sentenced Harmelin under a mandatory sentencing statute to life imprisonment without the possibility for parole for possession of more than 650 grams of cocaine.<sup>72</sup> Five Justices held that Harmelin's sentence did not violate the Eighth Amendment.<sup>73</sup> In a concurring opinion joined by two other Justices, Justice Kennedy recognized four proportionality principles in the Court's previous decisions: (1) the setting of the lengths of prison terms had its primacy in the legislative branch; (2) the Eighth Amendment does not mandate adoption of any one penological system; (3) the recognition of the benefits of a federal system of government; and (4) the requirement that proportionality review be guided by objective factors.<sup>74</sup> Considering these principles, Justice Kennedy concluded, "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids

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<sup>64</sup> 463 U.S. 277 (1983).

<sup>65</sup> *Id.* at 303.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 286-89.

<sup>68</sup> *Id.* at 290-92.

<sup>69</sup> *Id.* at 297.

<sup>70</sup> *Id.*

<sup>71</sup> 501 U.S. 957 (1991).

<sup>72</sup> *Id.* at 961.

<sup>73</sup> *Id.* at 994; *id.* at 1009 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>74</sup> *Id.* at 998-1001 (Kennedy, J., concurring in part and concurring in the judgment).



only extreme sentences that are ‘grossly disproportionate’ to the crime.”<sup>75</sup> Justice Kennedy stressed the severity of the defendant’s drug offense and Michigan’s legitimate interest in combating drugs to uphold the defendant’s sentence.<sup>76</sup> Finally, Justice Kennedy stated that the Court will not compare the defendant’s crime with other crimes punished in the jurisdiction by similar sentences, nor compare sentences imposed for the same crime in other jurisdictions, unless “a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”<sup>77</sup>

### C. CALIFORNIA’S “THREE STRIKES” LEGISLATION

California’s current three strikes law was designed to increase the prison terms of repeat felons.<sup>78</sup> The statute applies to a defendant convicted of a felony, who has previously been convicted of one or more prior felonies defined as “serious” or “violent” by the statute.<sup>79</sup> Prosecutors must allege prior convictions in the charging document.<sup>80</sup> The jury, or the judge if a jury trial is waived, must decide if the alleged prior convictions are true.<sup>81</sup>

If the prosecution proves a defendant has one prior “serious” or “violent” felony conviction, then the court must sentence him to “twice the term otherwise provided as punishment for the current felony conviction.”<sup>82</sup> If the prosecution proves a defendant has two or more prior “serious” or “violent” felony convictions, then the court must sentence him to “an indeterminate term of life imprisonment.”<sup>83</sup> Defendants sentenced to life under the three strikes law become eligible for parole on a date calculated by reference to a “minimum term,” which is the greater of: (a) three times the term otherwise required for the current conviction; (b) twenty-five years; or (c) the term determined by the court pursuant to § 1170 for the underlying conviction, including any enhancements.<sup>84</sup>

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<sup>75</sup> *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>76</sup> *Id.* at 1004 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>77</sup> *Id.* at 1004-05 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>78</sup> *Ewing*, 538 U.S. at 14 (plurality opinion).

<sup>79</sup> CAL. PENAL CODE § 667.5 (West 1999); CAL. PENAL CODE § 1192.7 (West 2002).

<sup>80</sup> § 1025 (West 2002).

<sup>81</sup> *Id.* § 1158.

<sup>82</sup> § 667(e)(1) (West 1999); § 1170.12(c)(1) (West 2002).

<sup>83</sup> § 667(e)(2)(A) (West 1999); § 1170.12(c)(2)(A) (West 2002).

<sup>84</sup> §§ 667(e)(2)(A)(i-iii) (West 1999); §§ 1170.12(c)(2)(A)(i-iii) (West 2002).

Under California law, courts can classify certain offenses as either felonies or misdemeanors.<sup>85</sup> These offenses are termed “wobblers.”<sup>86</sup> A “wobbler” can act as a triggering offense under California’s three strikes law if courts treat it as a felony.<sup>87</sup> A “wobbler” is “presumptively a felony and ‘remains a felony except when the discretion is actually exercised’ to make the crime a misdemeanor.”<sup>88</sup> Prosecutors may exercise their discretion to charge a “wobbler” as either a felony or a misdemeanor.<sup>89</sup> Similarly, California trial courts can reduce a “wobbler” charged as a felony to a misdemeanor, thus avoiding imposition of a three strikes sentence.<sup>90</sup> When exercising this discretion, a court should consider “those factors that direct similar sentencing decisions,” such as “the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, . . . [and] the general objectives of sentencing.”

California trial courts may also vacate allegations of prior “serious” or “violent” felony convictions.<sup>91</sup> This may be done either *sua sponte* or on motion by the prosecution.<sup>92</sup> In deciding whether to vacate allegations of prior felony convictions, a judge should consider whether, “in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes] scheme’s spirit, in whole or in part.”<sup>93</sup> Thus, the three strikes statute gives trial courts discretion to avoid imposing a three strikes sentence by either reducing a “wobbler” to a misdemeanor or by vacating allegations of prior “serious” or “violent” felony convictions.

### III. FACTS AND PROCEDURAL HISTORY

On the morning of March 12, 2000, Gary Ewing entered the pro shop of the El Segundo Golf Course in Los Angeles County, California.<sup>94</sup> He looked around the shop for ten to fifteen minutes, and then approached the employee of the shop and purchased a token redeemable for golf balls on

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<sup>85</sup> *Ewing*, 538 U.S. at 16 (2003) (plurality opinion).

<sup>86</sup> *Id.* (plurality opinion).

<sup>87</sup> *Id.* (plurality opinion).

<sup>88</sup> *Id.* (plurality opinion).

<sup>89</sup> *Id.* at 17 (plurality opinion).

<sup>90</sup> CAL. PENAL CODE §§ 17(b)(5), 17(b)(1) (West 1999); *Ewing*, 538 U.S. at 17 (plurality opinion).

<sup>91</sup> *Ewing*, 538 U.S. at 17 (plurality opinion).

<sup>92</sup> *Id.* (plurality opinion).

<sup>93</sup> *Id.* (plurality opinion).

<sup>94</sup> *Id.* at 17-18 (plurality opinion).

the driving range.<sup>95</sup> He looked around the shop once more, this time in the area of the golf clubs.<sup>96</sup> He again approached the employee, asking him where he could find the driving range.<sup>97</sup> He then exited with a noticeable limp through the door leading back to the parking lot, rather than the door leading to the driving range.<sup>98</sup> Suspicious of Ewing's behavior, the shop employee telephoned the police.<sup>99</sup> When the police officers arrived, they noticed Ewing removing three golf clubs from his pants beside his car in the parking lot.<sup>100</sup> The police then arrested Ewing and took possession of the golf clubs, each of which retailed at \$399.<sup>101</sup>

Prior to Ewing's arrest on March 12, 2000, Ewing had been convicted of eight misdemeanors and four felonies.<sup>102</sup> Between 1984 and 1993, he was convicted of felony grand theft auto (later reduced to a misdemeanor), petty theft with a prior theft conviction, battery, theft, burglary, possession of drug paraphernalia, appropriation of lost property, and unlawful possession of a firearm and trespassing.<sup>103</sup> These misdemeanor convictions resulted in several periods of incarceration in jail and terms of probation.<sup>104</sup> On three separate dates between October and November 1993, Ewing committed three burglaries and one robbery at an apartment complex in Long Beach, California.<sup>105</sup> In one incident, Ewing ordered the victim to hand over his wallet.<sup>106</sup> When the victim resisted, Ewing produced a knife and entered the victim's apartment.<sup>107</sup> In a single criminal proceeding, a California court found Ewing guilty of three burglaries and one robbery and sentenced him to a single term of imprisonment of nine years, eight months.<sup>108</sup> Ewing was released on parole after serving approximately five and a half years.<sup>109</sup> Ewing stole the golf clubs at issue here ten months later.<sup>110</sup>

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<sup>95</sup> Brief for Petitioner at 2, *Ewing v. California*, 538 U.S. 11 (2003) (No. 01-6978).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2-3.

<sup>99</sup> *Ewing*, 538 U.S. at 18 (plurality opinion).

<sup>100</sup> Brief for Petitioner at 3, *Ewing* (No. 01-6978).

<sup>101</sup> *Ewing*, 538 U.S. at 18 (plurality opinion).

<sup>102</sup> *Id.* at 18-19 (plurality opinion).

<sup>103</sup> *Id.* at 18 (plurality opinion).

<sup>104</sup> *Id.* (plurality opinion).

<sup>105</sup> *Id.* (plurality opinion).

<sup>106</sup> *Id.* at 19 (plurality opinion).

<sup>107</sup> *Id.* (plurality opinion).

<sup>108</sup> Brief for Petitioner at 5, *Ewing* (No. 01-6978).

<sup>109</sup> *Ewing*, 538 U.S. at 19 (plurality opinion).

<sup>110</sup> *Id.* (plurality opinion).

The state charged Ewing with one count of felony burglary and one count of felony grand theft of personal property in excess of \$400.<sup>111</sup> In accordance with California's three strikes law, the prosecutor formally alleged that Ewing had previously sustained four serious or violent felonies for the three burglaries and the robbery in the Long Beach apartment complex.<sup>112</sup> A jury found Ewing guilty of felony grand theft, and the judge found that Ewing had done the four previous felony convictions.<sup>113</sup>

At the sentencing hearing, Ewing asked the court to reduce the conviction for grand theft, a "wobbler" under California law, to a misdemeanor.<sup>114</sup> If the court granted Ewing's request, then the grand theft charge would not constitute a triggering offense for the three strikes law.<sup>115</sup> Ewing also moved, in the alternative, for the trial court to strike some or all of his prior serious or violent felony convictions.<sup>116</sup> Striking all of Ewing's prior convictions would have allowed the judge to impose an ordinary prison sentence of up to four years.<sup>117</sup> Striking three of Ewing's prior convictions would have resulted only in a doubled prison sentence for the grand theft.<sup>118</sup> Finally, Ewing asked the court to consider his age and health condition as a mitigating factor—he was thirty-eight and had AIDS, which had already caused blindness to one of his eyes.<sup>119</sup> Based on Ewing's criminal history and the fact that the theft of the golf clubs took place while he was on parole, the trial court denied Ewing's requests.<sup>120</sup> Thus, the trial court sentenced Ewing under the three strikes law to twenty-five years to life.<sup>121</sup>

The California Court of Appeal affirmed in an unpublished opinion.<sup>122</sup> The California Court of Appeal denied Ewing's claim that the trial court erred by not reducing the grand theft conviction to a misdemeanor or not

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<sup>111</sup> Respondent's Brief on the Merits at 3, *Ewing v. California*, 538 U.S. 11 (2003) (No. 01-6978); see CAL. PENAL CODE §§ 459-61, 484, 489 (West 2002).

<sup>112</sup> Respondent's Brief on the Merits at 3, *Ewing* (No. 01-6978); see § 667(g) (West 1999); § 1170.12(e) (West 2002).

<sup>113</sup> Respondent's Brief on the Merits at 3, *Ewing* (No. 01-6978).

<sup>114</sup> *Id.*; see § 17(b) (West 1999); § 667(d)(1) (West 1999); § 1170.12(b)(1) (West 2002).

<sup>115</sup> Respondent's Brief on the Merits at 3, *Ewing* (No. 01-6978).

<sup>116</sup> *Id.*; see § 1385 (West 1999).

<sup>117</sup> Respondent's Brief on the Merits at 3-4, *Ewing* (No. 01-6978); see §§ 17-18, 486-87, 667.5 (West 2002).

<sup>118</sup> Respondent's Brief on the Merits at 3, *Ewing* (No. 01-6978); see § 667(e)(1) (West 1999); § 1170.12(c)(1) (West 2002).

<sup>119</sup> Brief for Petitioner at 5-6, *Ewing* (No. 01-6978).

<sup>120</sup> *People v. Ewing*, No. B143745, 2001 WL 1840666, at \*1 (Cal. Ct. App. 2d Dist. Apr. 25, 2001).

<sup>121</sup> *Id.*; see CAL. PENAL CODE § 667.5 (West 2002).

<sup>122</sup> *Ewing*, 2001 WL 1840666, at \*5.

striking any of his prior felony convictions.<sup>123</sup> Also, the trial court sufficiently reached its factual conclusions to deny Ewing's requests.<sup>124</sup> The California Court of Appeal also denied Ewing's claim that his sentence was grossly disproportionate under the Eighth Amendment based on the Supreme Court's holding in *Rummel*.<sup>125</sup> The Supreme Court of California denied Ewing's petition for review.<sup>126</sup> The United States Supreme Court granted certiorari<sup>127</sup> to decide whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of twenty five years to life under the State's "Three Strikes and You're Out" law.<sup>128</sup>

#### IV. SUMMARY OF OPINIONS

##### A. JUSTICE O'CONNOR'S PLURALITY OPINION

Justice O'Connor's plurality opinion, joined by the Chief Justice and Justice Kennedy, reiterated that the Eighth Amendment contains a narrow proportionality principle for prison sentences.<sup>129</sup> The opinion adopted the proportionality principles established in Justice Kennedy's concurrence in *Harmelin*.<sup>130</sup> First, courts should defer to legislative bodies in determining criminal policy.<sup>131</sup> Second, the Eighth Amendment allows a variety of legitimate penological theories.<sup>132</sup> Third, the nature of our federal system allows diverse sentencing determinations among the states.<sup>133</sup> Finally, proportionality review should be guided by objective factors.<sup>134</sup> These principles of proportionality review are factors to consider in a proportionality claim, not the test for a proportionality claim.<sup>135</sup>

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<sup>123</sup> *Id.* at \*2-3.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*4.

<sup>126</sup> *Ewing v. California*, 538 U.S. 11, 20 (2003) (plurality opinion).

<sup>127</sup> *Ewing v. California*, 535 U.S. 969 (2002).

<sup>128</sup> *Ewing*, 538 U.S. at 14 (plurality opinion).

<sup>129</sup> *Id.* at 20 (plurality opinion).

<sup>130</sup> *Id.* at 20-24 (plurality opinion) ("The proportionality principles in our cases distilled in Justice Kennedy's concurrence [in *Harmelin*] guide our application of the Eighth Amendment . . .").

<sup>131</sup> *Harmelin v. Michigan*, 501 U.S. 957, 998-99 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>132</sup> *Id.* at 999 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>133</sup> *Id.* at 999-1000 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>134</sup> *Id.* at 1000-01 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>135</sup> A proportionality claim begins with a threshold comparison of the crime committed and the criminal's sentence. If the comparison leads to an inference of gross disproportionality, then courts should conduct a comparative analysis between defendant's sentence and sentences imposed for other crimes in the same state and sentences imposed for

The Court first reviewed California's purposes in enacting its three strikes statute.<sup>136</sup> The California Legislature made the deliberate choice to enact the three strikes law to address the severe problem of crime by repeat felons.<sup>137</sup> Accordingly, California decided incapacitation of individuals who repeatedly engaged in serious or violent criminal behavior was necessary in order to protect the public safety.<sup>138</sup> Indeed, many other states enacted similar three strikes laws between 1993 and 1995.<sup>139</sup> The Eighth Amendment does not forbid California from choosing to incapacitate repeat felons.<sup>140</sup> Courts should defer to legislative policy choices on punishment.<sup>141</sup> Studies indicate that past felons are a serious public safety concern in California and throughout the Nation.<sup>142</sup> Thus, California had a legitimate interest in incapacitating repeat criminals.<sup>143</sup> Though many critics have doubted the principles, effectiveness, and cost-efficiency of the three strikes laws, the Supreme Court does not sit as "superlegislature" to "second-guess" the legislature.<sup>144</sup> The legislature has the responsibility of making the difficult policy choices in constructing a criminal sentencing scheme.<sup>145</sup>

The Court then assessed Ewing's specific claim that his sentence of twenty-five years to life was disproportionate to his offense.<sup>146</sup> The Court addressed the threshold question of whether an inference of gross disproportionality resulted from a comparison of Ewing's offense to the harshness of his punishment.<sup>147</sup> In assessing the severity of Ewing's offense, the Court did not just consider Ewing's offense for felony grand theft, but also his long history of felony recidivism.<sup>148</sup> Otherwise, the Court would not properly defer to the legislature's choice of punishments for repeat felons.<sup>149</sup> Ewing's severe sentence was justified by California's

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the same crime in other jurisdictions. *Id.* at 1001-05 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>136</sup> *Ewing*, 538 U.S. at 24-28 (plurality opinion).

<sup>137</sup> *Id.* at 25-28 (plurality opinion).

<sup>138</sup> *Id.* (plurality opinion).

<sup>139</sup> *Id.* at 24 (plurality opinion).

<sup>140</sup> *Id.* at 25 (plurality opinion).

<sup>141</sup> *Id.* (plurality opinion).

<sup>142</sup> *Id.* at 26 (plurality opinion) (noting several studies indicating that felony offenders had high recidivism rates).

<sup>143</sup> *Id.* (plurality opinion).

<sup>144</sup> *Id.* at 27-28 (plurality opinion).

<sup>145</sup> *Id.* at 28 (plurality opinion).

<sup>146</sup> *Id.* (plurality opinion).

<sup>147</sup> *Id.* (plurality opinion).

<sup>148</sup> *Id.* at 29 (plurality opinion).

<sup>149</sup> *Id.* (plurality opinion).

“public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record.”<sup>150</sup> Therefore, the plurality rejected Ewing’s Eighth Amendment claim.<sup>151</sup>

#### B. JUSTICE SCALIA’S CONCURRING OPINION

In Justice Scalia’s concurrence, he argued that the Eighth Amendment does not require proportionality review of prison sentences.<sup>152</sup> Justice Scalia first reiterated his position that the Eighth Amendment’s prohibition of “cruel and unusual punishments” only proscribed certain modes of punishment and was not a guarantee against disproportionate sentences.<sup>153</sup>

Justice Scalia would accept a narrow proportionality principle out of respect for *stare decisis*, but does not believe courts could apply it intelligently.<sup>154</sup> In particular, Justice Scalia argued that proportionality review is inapplicable given the Court’s acceptance of a variety of penological theories.<sup>155</sup> The concept of proportionality between offense and punishment is “inherently a concept tied to the penological goal of retribution.”<sup>156</sup> However, proportionality is not related to other accepted penological theories, such as deterrence, rehabilitation, and incapacitation.<sup>157</sup> Thus, the proportionality assessment comparing the gravity of the offense against the harshness of punishment does not help settle whether the punishment is justified by the “State’s public-safety interest in incapacitating and deterring recidivist felons.”<sup>158</sup> Courts could demand that punishments reasonably pursue the penological goal of a statute.<sup>159</sup> However, this would require courts to evaluate policy decisions, rather than apply the law.<sup>160</sup>

#### C. JUSTICE THOMAS’S CONCURRING OPINION

Justice Thomas’s brief concurrence concluded that the Eighth Amendment contains no proportionality principle.<sup>161</sup> Instead, the Eighth

<sup>150</sup> *Id.* at 29-30 (plurality opinion).

<sup>151</sup> *Id.* at 30-31 (plurality opinion).

<sup>152</sup> *Id.* at 31-32 (Scalia, J., concurring in the judgment).

<sup>153</sup> *Id.* at 31 (Scalia, J., concurring in the judgment).

<sup>154</sup> *Id.* (Scalia, J., concurring in the judgment).

<sup>155</sup> *Id.* (Scalia, J., concurring in the judgment).

<sup>156</sup> *Id.* (Scalia, J., concurring in the judgment).

<sup>157</sup> *Id.* (Scalia, J., concurring in the judgment).

<sup>158</sup> *Id.* at 32 (Scalia, J., concurring in the judgment).

<sup>159</sup> *Id.* (Scalia, J., concurring in the judgment).

<sup>160</sup> *Id.* (Scalia, J., concurring in the judgment).

<sup>161</sup> *Id.* (Thomas, J., concurring in the judgment).

Amendment only forbids modes of punishment.<sup>162</sup> Since the Supreme Court accepts imprisonment as a constitutional mode of punishment, then Ewing's sentence is constitutional under the "Cruel and Unusual Punishments" Clause.<sup>163</sup>

#### D. JUSTICE BREYER'S DISSENTING OPINION

Justice Breyer's dissent, joined by Justices Stevens, Souter, and Ginsberg, reiterated that the Eighth Amendment forbids prison terms that are "grossly disproportionate."<sup>164</sup> Justice Breyer accepted, "for present purposes," the analytical framework used by the plurality.<sup>165</sup> Thus, a court must compare whether the crime committed and the sentence imposed lead to an inference of gross disproportionality.<sup>166</sup> If a claim meets this threshold requirement, then courts should conduct a comparative analysis between the defendant's sentence and sentences imposed for other crimes in the state and sentences imposed for the same crime in other jurisdictions.<sup>167</sup> This analysis would confirm whether the sentence is grossly disproportionate to a crime.<sup>168</sup>

Justice Breyer then considered the threshold question of whether Ewing's punishment was grossly disproportionate to his offense. First, Justice Breyer compared Ewing's punishment with the punishments presented in the Supreme Court's two previous disproportionality claims concerning recidivist sentencing in *Rummel* and *Solem*.<sup>169</sup> Three different sentence-related characteristics define the relevant spectrum: (1) "the length of the prison term in real time, i.e., the time that the offender is likely actually to spend in prison;" (2) the sentence-triggering criminal offense; and (3) the offender's criminal history.<sup>170</sup> Analyzing these factors among the defendants in *Rummel* and *Solem*, Justice Breyer concluded that the one critical factor that explained the difference in outcomes in the two cases was the length of the likely prison term in real time.<sup>171</sup> Justice Breyer found that Ewing's sentence-triggering criminal offense and criminal history differed

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<sup>162</sup> See *id.* (Thomas, J., concurring in the judgment) (citing *Harmelin v. Michigan*, 501 U.S. 957, 966-85 (1991)).

<sup>163</sup> See *id.* (Thomas, J., concurring in the judgment) (citing *Harmelin*, 501 U.S. at 966-85).

<sup>164</sup> *Id.* at 35-36 (Breyer, J., dissenting).

<sup>165</sup> *Id.* at 36 (Breyer, J., dissenting).

<sup>166</sup> *Id.* (Breyer, J., dissenting).

<sup>167</sup> *Id.* (Breyer, J., dissenting).

<sup>168</sup> *Id.* at 37 (Breyer, J., dissenting).

<sup>169</sup> *Id.* (Breyer, J., dissenting).

<sup>170</sup> *Id.* (Breyer, J., dissenting).

<sup>171</sup> *Id.* at 38 (Breyer, J., dissenting).



little from the claimants in *Rummel* and *Solem*.<sup>172</sup> However, the length of Ewing's prison term in real time fell in between Rummel's and Helm's (the claimant in *Solem*).<sup>173</sup> Thus, Ewing's claim fell within the "twilight zone" between *Solem* and *Rummel*.<sup>174</sup>

Justice Breyer then turned to the seriousness of Ewing's offense.<sup>175</sup> Ewing's sentence-triggering behavior ranked "well toward the bottom of the criminal conduct scale" considering the harm caused to society, the magnitude of the offense, and the offender's culpability.<sup>176</sup> Ewing's past criminal conduct should not be included in an assessment of the seriousness of his offense, because the proper analysis is to consider "the offense that triggers the life sentence."<sup>177</sup> Finally, many judges would consider Ewing's sentence disproportionate based on The United States Sentencing Commission Guidelines.<sup>178</sup> Factoring these three considerations together, Justice Breyer concluded that Ewing's claim must pass the threshold test as appearing to be grossly disproportionate.<sup>179</sup>

After Ewing's claim passed the threshold test, Justice Breyer first conducted a comparative analysis between the defendant's sentence and sentences imposed for other crimes in the state.<sup>180</sup> Recidivists in California rarely received sentences as long as Ewing, especially those who were also convicted of grand theft. In addition, criminals convicted of far worse crimes than Ewing receive sentences equal or less than Ewing.<sup>181</sup> Justice Breyer then conducted a comparative analysis between the defendant's sentence and sentences imposed for the same crime in other jurisdictions. First, the United States would impose a sentence not to exceed eighteen months under the Federal Sentencing Guidelines on a recidivist like Ewing.<sup>182</sup> Second, courts could not sentence a Ewing-type offender to more

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<sup>172</sup> *Id.* at 38-39 (Breyer, J., dissenting).

<sup>173</sup> *Id.* at 39 (Breyer, J., dissenting).

<sup>174</sup> *Id.* at 40 (Breyer, J., dissenting).

<sup>175</sup> *Id.* at 40-41 (Breyer, J., dissenting).

<sup>176</sup> *Id.* at 40 (Breyer, J., dissenting). Justice Breyer maintained that Ewing's offense "ranks toward the bottom of the scale," when he considered three other factors suggested by the Solicitor General: the frequency of the crime's commission, the difficulty in detecting the crime, and the degree with which the crime may be deterred by differing amounts of punishment. *Id.* (Breyer, J., dissenting).

<sup>177</sup> *Id.* at 41 (Breyer, J., dissenting). Courts are to consider the defendant's criminal history when considering the severity of the sentence. *Id.*

<sup>178</sup> *Ewing*, 538 U.S. at 41 (Breyer, J., dissenting).

<sup>179</sup> *Id.* at 42 (Breyer, J., dissenting).

<sup>180</sup> *Id.* at 42-45 (Breyer, J., dissenting).

<sup>181</sup> *Id.* at 44-45 (Breyer, J., dissenting).

<sup>182</sup> *Id.* at 44 (Breyer, J., dissenting).

than ten years in prison in thirty-three other jurisdictions.<sup>183</sup> In nine other jurisdictions, however, courts possibly could sentence a Ewing-type offender to a sentence of twenty-five years or more.<sup>184</sup> Nonetheless, Justice Breyer concluded that a comparison of other sentencing practices, both in California and in other jurisdictions, validated his initial threshold determination that Ewing's sentence was grossly disproportionate to his crime.<sup>185</sup>

Finally, Justice Breyer assessed California's penological goals that might justify Ewing's disproportionately harsh sentence.<sup>186</sup> First, ease in administering California's three strike law sentencing is not a valid justification for sentencing Ewing to such a severe sentence.<sup>187</sup> Second, a temporal order anomaly existed in California's three strikes statute.<sup>188</sup> That is, California had lower qualifications for a third strike than the other strikes.<sup>189</sup> Thus, a criminal who graduated from two serious crimes to a lesser crime could be subject to the three strikes statute while a criminal who graduated from a less serious crime to two crimes that are more serious would not be subject to the three strikes statute.<sup>190</sup> Third, California's statute classifies petty theft as a felony only when a defendant has a previous property-related felony offense, not when the defendant has been only convicted of violent felony offenses unrelated to property.<sup>191</sup> Justice Breyer concluded that these anomalies were unnecessary to promote California's criminal law objectives.<sup>192</sup> Therefore, Ewing's sentence was grossly disproportionate to his triggering conduct.<sup>193</sup>

#### E. JUSTICE STEVENS'S DISSENTING OPINION

Justice Stevens's dissent, joined by Justices Souter, Ginsberg, and Breyer, countered the conclusions of Justice Scalia and Justice Thomas that proportionality review is not capable of judicial application.<sup>194</sup> First, Supreme Court case law confirmed a proportionality doctrine in the Eighth

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<sup>183</sup> *Id.* (Breyer, J., dissenting).

<sup>184</sup> *Id.* (Breyer, J., dissenting).

<sup>185</sup> *Id.* at 47 (Breyer, J., dissenting).

<sup>186</sup> *Id.* at 47-52 (Breyer, J., dissenting).

<sup>187</sup> *Id.* at 48 (Breyer, J., dissenting).

<sup>188</sup> *Id.* at 50 (Breyer, J., dissenting).

<sup>189</sup> *Id.* (Breyer, J., dissenting).

<sup>190</sup> *Id.* (Breyer, J., dissenting).

<sup>191</sup> *Id.* (Breyer, J., dissenting).

<sup>192</sup> *Id.* (Breyer, J., dissenting).

<sup>193</sup> *Id.* at 50 (Breyer, J., dissenting).

<sup>194</sup> *Id.* at 31-35 (Stevens, J., dissenting).

Amendment.<sup>195</sup> Second, it would be anomalous if the Eighth Amendment protected against excessive fines and bail, but not against other excessive punishments.<sup>196</sup> Third, the absence of a black letter rule for proportionality review does not “disable judges from exercising their discretion in construing the outer limits on sentencing authority that the Eighth Amendment imposes.”<sup>197</sup> Fourth, judges have always employed proportionality principles when determining sentences absent legislatively mandated sentences.<sup>198</sup> Thus, Justice Stevens concluded that proportionality review is not only capable of judicial application but also required by the Eighth Amendment.<sup>199</sup>

#### V. THE EFFECT OF *EWING V. CALIFORNIA* ON SENTENCE PROPORTIONALITY JURISPRUDENCE

##### A. *HARMELIN* AND LOWER COURT TREATMENT OF SENTENCE DISPROPORTIONALITY CLAIMS BEFORE *EWING*

*Harmelin v. Michigan*<sup>200</sup> was the Supreme Court’s last statement on Eighth Amendment sentence proportionality before *Ewing*. Justice Kennedy’s concurrence stated that courts should not conduct a comparative analysis of sentences within and outside a state as specified in *Solem*, unless a threshold comparison of the sentence imposed and the crime committed leads to an inference of gross disproportionality.<sup>201</sup> However, Justice Kennedy did not explicitly state what criteria should be used to determine if a sentence was grossly disproportionate to the crime.<sup>202</sup> Instead, Justice Kennedy counseled judges to consider four principles when assessing disproportionate sentencing claims.<sup>203</sup> Most lower courts accepted Justice

<sup>195</sup> See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982) (holding it violated the Eighth Amendment, because of disproportionality, to impose the death penalty upon a participant in a felony that results in murder, without any inquiry into the participant’s intent to kill).

<sup>196</sup> *Ewing*, 538 U.S. at 33 (Stevens, J., dissenting).

<sup>197</sup> *Id.* (Stevens, J., dissenting) (noting that judges do similar proportionality review in assessing the constitutionality of punitive damages).

<sup>198</sup> *Id.* (Stevens, J., dissenting).

<sup>199</sup> *Id.* (Stevens, J., dissenting).

<sup>200</sup> 501 U.S. 957 (1991).

<sup>201</sup> *Id.* at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>202</sup> See *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999) (“[Justice Kennedy] did not outline specific criteria for courts to consider in making this threshold determination of gross disproportionality.”).

<sup>203</sup> *Harmelin*, 501 U.S. at 998-1001 (Kennedy, J., concurring in part and concurring in the judgment).

Kennedy's concurrence in *Harmelin* as the controlling rule of law even though it was only joined by two other Justices.<sup>204</sup>

After *Harmelin*, lower court decisions assessing sentence disproportionality claims were typically organized into two sections. First, the court would reiterate the principles of proportionality, emphasizing that criminal punishment determinations are normally the province of legislative bodies.<sup>205</sup> This set the tone for the court's analysis of the defendant's disproportionality claim. That is, a court should err towards finding a sentence constitutional when it does not clearly contradict Supreme Court precedent.<sup>206</sup> Second, the court would apply the Supreme Court's disproportionality test by first determining whether an inference of gross disproportionality existed.<sup>207</sup> Lacking definite factors to consider in this determination, most lower courts would make this determination by comparing the facts of the case with the facts in Supreme Court cases.<sup>208</sup> For example, the Court of Appeals for the District of Columbia held that a life sentence for a recidivist drug offender convicted of selling 486 grams of cocaine base was constitutional based on a comparison with the constitutional sentence of life imprisonment without parole for a first-time offender convicted of selling 672 grams of cocaine in *Harmelin*.<sup>209</sup> If a court found an inference of gross disproportionality between the sentence and the crime, the court would then conduct a comparative analysis of

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<sup>204</sup> See, e.g., *Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001) ("Since *Harmelin*, our court and others have applied the principles outlined in Mr. Justice Kennedy's opinion to cases like the present one."). But see *United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995) ("[T]he continuing applicability of the *Solem* test is indicated by the fact that a majority of the *Harmelin* Court either declined expressly to overrule *Solem* or explicitly approved of *Solem*"). Although conforming to Supreme Court precedent, it is somewhat odd that Justice Kennedy's concurrence became the accepted rule of law considering that four Justices believed *Solem* should control, three Justices accepted Justice Kennedy's concurrence, and two Justices argued that the Eighth Amendment had no sentence proportionality requirement. *Harmelin*, 501 U.S. 957. One court explained the result by noting that a majority of the Court (the five Justices that either joined the opinion of the Court or Justice Kennedy's concurrence) rejected the continued application of *Solem*. *Hawkins*, 200 F.3d at 1282. However, a majority of the Court (the six Justices that joined the opinion of the Court or dissented) did not accept Justice Kennedy's reasoning either.

<sup>205</sup> See, e.g., *United States v. Gonzales*, 121 F.3d 928, 942 (5th Cir. 1997).

<sup>206</sup> See, e.g., *id.*

<sup>207</sup> See, e.g., *Henderson*, 258 F.3d at 709-12; *Gonzales*, 121 F.3d at 942-44.

<sup>208</sup> See, e.g., *Henderson*, 258 F.3d at 709-12; *Gonzales*, 121 F.3d at 943-44 ("[T]he severity of the punishment is not excessive, as evidenced by a comparison to the *Rummel* benchmark.").

<sup>209</sup> *United States v. Walls*, 70 F.3d 1323, 1328 (D.C. Cir. 1995).

sentences within and outside a state.<sup>210</sup> The prison sentence would be unconstitutional if other states did not have similar sentencing schemes.<sup>211</sup>

Since Supreme Court precedent had “not been a model of clarity,”<sup>212</sup> lower courts split on crucial aspects of sentence disproportionality claims. The most significant split among lower courts was whether individualized facts (sometimes referred to as mitigating factors) should be considered in the disproportionality analysis.<sup>213</sup> For example, should a court consider the offense of felony drug possession with intent to distribute the same when the offender was caught with a dozen doses compared to 50,000 doses?<sup>214</sup> In *Solem v. Helm*, the Supreme Court stated that the defendant’s status “cannot be considered in the abstract” and considered the defendant’s age, battles with alcohol, non-violent criminal past, and problems holding a job to reach its conclusion that his sentence was disproportionate to his crime.<sup>215</sup> But in *Harmelin v. Michigan*, five Justices held that courts should not consider mitigating factors, such as the offender’s age, unless the criminal statute identifies the factor as significant.<sup>216</sup> Nonetheless, lower courts have disagreed whether the age of the defendant,<sup>217</sup> the culpability of the defendant,<sup>218</sup> or the availability of parole<sup>219</sup> should be considered in the threshold assessment of gross disproportionality between sentence and

<sup>210</sup> See, e.g., *Henderson*, 258 F.3d at 712-14.

<sup>211</sup> See, e.g., *id.*

<sup>212</sup> *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

<sup>213</sup> Compare *Henderson*, 258 F.3d at 709-10 (considering the relative small amount of drugs found on the offender, the offender’s minimum culpability, and the offender’s lack of a criminal past to find a sentence unconstitutional), with *Torres v. United States*, 140 F.3d 392, 406 (2d Cir. 1998) (“The Supreme Court has drawn the line of required individualized sentencing at *capital cases*.”).

<sup>214</sup> See *Henderson*, 258 F.3d at 709-12 (finding that the number of doses is a relevant factor in assessing disproportionality).

<sup>215</sup> 463 U.S. 277, 296, 297 n.22 (1983).

<sup>216</sup> 501 U.S. 957, 994-96 (1991).

<sup>217</sup> Compare *Bocian v. Godinez*, 101 F.3d 465, 472 (7th Cir. 1996) (refraining to consider the defendant’s age, sixty-six, in its proportionality analysis), with *Hawkins v. Hargett*, 200 F.3d 1279, 1283 (10th Cir. 1999) (“The chronological age of a defendant is a factor that can be considered in determining whether a punishment is grossly disproportionate to the crime inasmuch as it relates to his culpability.”).

<sup>218</sup> Compare *Henderson*, 258 F.3d at 710 (“In assessing the proportionality of the punishment, we also consider the culpability of the defendant.”), with *United States v. Walls*, 215 F.3d 1210, 1214 (10th Cir. 2000) (refusing to consider the offender’s motive or purpose in its disproportionality assessment).

<sup>219</sup> See, e.g., *Hawkins*, 200 F.3d at 1284 (recognizing parole as a relevant consideration in proportionality review).

crime. Most courts did agree that sentences for violent crimes were less likely to be found disproportionate.<sup>220</sup>

#### B. EWING AND SUBSEQUENT LOWER COURT TREATMENT OF SENTENCE DISPROPORTIONALITY CLAIMS

The plurality opinion in *Ewing* implemented Justice Kennedy's analytical framework from *Harmelin* without any explicit changes.<sup>221</sup> Thus, facially at least, the plurality opinion does not seem to significantly alter the Court's sentence proportionality doctrine. However, the plurality opinion repeatedly stressed California's legitimate right to determine criminal policy, suggesting that courts should be even more deferential to state criminal policy decisions.<sup>222</sup> In particular, Justice O'Connor stated that incapacitation of repeat criminals, including property offenders, is a constitutional criminal policy decision.<sup>223</sup> Perhaps most significantly, though, the Court's holding gives lower courts another factual benchmark for assessing sentence disproportionality claims. A key fact in the case was that Ewing was eligible for parole in twenty-five years, thus closing the gap between the unconstitutional sentence in *Solem* where no parole was available and the constitutional sentence in *Rummel* where the offender was eligible for parole in twelve years.<sup>224</sup>

Subtleties in the plurality opinion, however, indicate a change in the Court's sentence disproportionality doctrine. First, the plurality opinion found support for California's criminal policy by repeatedly noting that most other states had similar criminal statutes.<sup>225</sup> This analysis seems similar to the interjurisdictional comparison advocated in *Solem*, but denied in *Harmelin*. Perhaps the Court is conceding that interjurisdictional analysis is one of the few objective criteria available for assessing if a punishment is unusual. Second, the plurality opinion framed the facts generally, rather than individually.<sup>226</sup> Thus, the opinion paralleled the five

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<sup>220</sup> See, e.g., *United States v. Gonzales*, 121 F.3d 928, 944, n.14 (5th Cir. 1997) (noting that Supreme Court precedent directs courts to consider violent crimes more seriously than non-violent crimes).

<sup>221</sup> *Ewing*, 538 U.S. at 24 (plurality opinion).

<sup>222</sup> *Id.* at 24-29 (plurality opinion).

<sup>223</sup> *Id.* at 24 (plurality opinion).

<sup>224</sup> See *id.* at 37-39 (Breyer, J., dissenting) (noting that the critical difference between *Solem* and *Rummel* was the availability of parole).

<sup>225</sup> *Id.* at 24 (plurality opinion) (“[M]ost States have had laws providing for enhanced sentencing of repeat offenders.”); *Id.* at 28 (plurality opinion) (“Theft of \$1,200 in property is a felony under federal law and in the vast majority of States.”) (internal citations omitted).

<sup>226</sup> *Id.* at 28 (plurality opinion) (describing Ewing's crime as felony grand theft rather than Ewing's description of his crime as “shoplifting three golf clubs”).

Justice holding in *Harmelin* that individual facts, such as offender's age and culpability, should not be considered in a disproportionality claim.<sup>227</sup> Third, the plurality opinion stated that proportionality analysis should consider "not only [the offender's] current felony, but also his long history of felony recidivism."<sup>228</sup> This seems to weaken the holding in *Solem*, where the Court held that proportionality review must "focus on the principle felony," though prior convictions were also relevant.<sup>229</sup>

Nonetheless, lower court opinions have not interpreted *Ewing* as a major change in sentence proportionality jurisprudence.<sup>230</sup> As one court succinctly stated, "*Ewing* does not significantly clarify the 'grossly disproportionate' standard."<sup>231</sup> Lower courts still primarily determine if a sentence is grossly disproportionate by comparing the facts of the challenged sentence with those in Supreme Court cases.<sup>232</sup> However, two courts have already found a sentence unconstitutional since *Ewing*, suggesting *Ewing* has not greatly limited sentence proportionality review.<sup>233</sup> It is not surprising that lower courts remain confused on certain aspects of proportionality review given the plurality opinion's failure to establish clear criteria for disproportionality assessment. For instance, justices of the Supreme Court of Arizona disagreed about whether *Ewing* directed courts to consider the culpability of the defendant.<sup>234</sup> Thus, *Ewing* has not clarified sentence proportionality jurisprudence.

<sup>227</sup> However, the plurality opinion cited a footnote in *Solem* where the Court considered individual facts, such as the offender's age and culpability. *Id.* at 28 (plurality opinion).

<sup>228</sup> *Id.* at 28-30 (plurality opinion).

<sup>229</sup> *Solem v. Helm*, 463 U.S. 277, 297 n.21 (1983).

<sup>230</sup> Lower courts accept the three Justice plurality opinion as the controlling rule of law. *See, e.g.*, *Crosby v. State*, 824 A.2d 894, 906-07 (Del. 2003). *But see State v. Clifton*, 580 S.E.2d 40, 44 (N.C. Ct. App. 2003) ("Due to the failure of a majority of Justices to reach a consensus on the basis for the result, *Ewing* does not significantly clarify the 'grossly disproportionate' standard other than to reaffirm it will be violated only in the 'rare' case."). For practical reasons, the lower courts should consider Justice O'Connor's plurality opinion as the controlling law, since the plurality's sentence proportionality determination controls whether the Court would find a sentence constitutional or not. That is, Justice Scalia and Justice Thomas would always find a sentence constitutional. The dissenters would never find a sentence constitutional that the plurality did not find constitutional. Thus, the three Justice plurality determination forms a majority with either Justice Scalia and Justice Thomas or the dissenters.

<sup>231</sup> *Clifton*, 580 S.E.2d at 44.

<sup>232</sup> *See, e.g.*, *Crosby*, 824 A.2d at 909-11 (finding inference of gross disproportionality based on comparison with facts in *Solem*, *Rummel*, and *Ewing*).

<sup>233</sup> *Id.* at 912-13; *State v. Davis*, 79 P.3d 64, 75 (Ariz. 2003).

<sup>234</sup> *Compare Davis*, 79 P.3d at 71 (finding that the *Ewing* Court "examined the specific facts and circumstances of the defendant's crime" to justify considering the defendant's

## VI. ANALYSIS

In *Ewing v. California*, the Supreme Court again failed to clarify a standard for constitutional review of prison sentences.<sup>235</sup> The plurality opinion employed the analytical framework developed by Justice Kennedy in his concurrence in *Harmelin*.<sup>236</sup> This framework was an attempt by Justice Kennedy to reconcile the Supreme Court's conflicting proportionality jurisprudence<sup>237</sup> by extracting common principles from the Court's opinions.<sup>238</sup> Regrettably, these principles appear to have the practical effect of allowing state legislative bodies to decide the bounds of the Eighth Amendment.<sup>239</sup> In *Lockyer v. Andrade*, decided on the same day as *Ewing* and also concerning an Eighth Amendment challenge to California's three strikes statute, the Court narrowed when federal courts should review a state court's sentence proportionality decision.<sup>240</sup> Both decisions significantly reduce the role of the federal judiciary in determining the contours of the Eighth Amendment's forbiddance of grossly disproportionate sentences.<sup>241</sup> In doing so, the Supreme Court is avoiding its duty to determine what sentences are forbidden by the

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culpability), *with id.* at 80 (McGregor, Vice C.J., concurring in part and dissenting in part) (arguing that an appeals court should not consider culpability in its sentencing review).

<sup>235</sup> See *Clifton*, 580 S.E.2d at 44.

<sup>236</sup> *Ewing*, 538 U.S. 11, at 23 (plurality opinion).

<sup>237</sup> The Supreme Court has only twice ruled a prison sentence was unconstitutional because it was grossly disproportionate to the offense. *Solem v. Helm*, 463 U.S. 277, 303 (1983); *Weems v. United States*, 217 U.S. 349, 359 (1910). However, *Weems* involved an unusual punishment scheme—including permanent loss of civil rights to the defendant—perhaps influenced the Court's decision to find the sentence unconstitutional. *Weems*, 217 U.S. at 362-66; see *Rummel v. Estelle*, 445 U.S. 263, 273 (1980) (noting that the *Weems* Court's "finding of disproportionality cannot be wrenched from the extreme facts of the case"). Thus, the Supreme Court's five to four decision in *Solem v. Helm* marks the only unambiguous holding by the Court that a grossly disproportionate prison sentence was unconstitutional. *Solem*, 463 U.S. at 303. However, in other narrow decisions the Court has denied proportionality claims similar to *Solem's*. See *Rummel*, 445 U.S. 263 (holding the mandatory life sentence imposed under a Texas recidivist statute following defendant's third felony conviction in obtaining \$120.75 by false pretenses did not violate the Eighth Amendment); *Harmelin v. Michigan*, 501 U.S. 957, 1009 (1991) ("[P]etitioner's sentence of life imprisonment without parole for his crime of possession of more than 650 grams of cocaine does not violate the Eighth Amendment.").

<sup>238</sup> *Harmelin*, 501 U.S. at 998-1001.

<sup>239</sup> See *Ewing*, 538 U.S. at 28 (plurality opinion) (A habitual felon statute does not offend the Eighth Amendment when the state has a "reasonable basis" for believing that the statute will "advance the goals of its criminal justice system in any substantial way.").

<sup>240</sup> 538 U.S. 63, 72-75 (2003).

<sup>241</sup> Of course, state courts also can determine that a sentence offends the Eighth Amendment. See U.S. CONST. art. VI, cl. 2.



Constitution of the United States.<sup>242</sup> The Court needs to assert a more active role in protecting an individual's Eighth Amendment guarantee from excessive prison sentence. In addition, the Court needs to clearly define the criteria it considers under prison sentence review.

#### A. ANALYSIS OF THE SUPREME COURT'S SENTENCE DISPROPORTIONALITY JURISPRUDENCE

##### 1. *The Validity of Judicial Review of Disproportionate Prison Sentences*

In *Ewing*, seven Justices held that the Eighth Amendment forbids excessive sentences in extreme cases.<sup>243</sup> Justice Scalia and Justice Thomas argued that the Eighth Amendment does not forbid disproportionate sentences, but only forbids cruel and unusual modes of punishments.<sup>244</sup> The plurality opinion gives great deference to legislative bodies to determine the bounds of constitutional sentences.<sup>245</sup> However, if the Eighth Amendment does forbid disproportionate sentences, then the Court—not legislative bodies—must determine what sentences are unconstitutional.<sup>246</sup> A textual analysis of the Eighth Amendment and a review of its history indicate that the Eighth Amendment forbids disproportionate sentences. In addition, Supreme Court precedent demands that criminal punishments be in proportion to the crime.

Obviously, the best way of understanding a law is by looking at its text—that is why we write them down. The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>247</sup> A punishment is cruel if it is “disposed to inflict pain” or “bitterly conducted: devoid of mildness” or “severe: distressing.”<sup>248</sup> A punishment is unusual by “being out of the ordinary” or “deviating from the normal.”<sup>249</sup> A textual interpretation of the “Cruel and Unusual Punishments” Clause would be that it forbids a punishment that deviates from the normal and causes pain. Thus, the “Cruel and Unusual Punishments” Clause should at least forbid the

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<sup>242</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”) (emphasis added).

<sup>243</sup> *Ewing*, 538 U.S. at 22 (plurality opinion); *id.* at 35 (Breyer, J., dissenting).

<sup>244</sup> *Id.* at 31 (Scalia, J. concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment).

<sup>245</sup> *Id.* at 28 (plurality opinion).

<sup>246</sup> See *Marbury*, 5 U.S. (1 Cranch) at 177.

<sup>247</sup> U.S. CONST. amend. VIII.

<sup>248</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 546 (1976).

<sup>249</sup> *Id.* at 2514.

hypothetical case of a life sentence for overtime parking since it is out of the ordinary and would cause pain.<sup>250</sup>

Furthermore, it would be odd for the Eighth Amendment to forbid the lesser punishment of an excessive fine, but allow the harsher penalty of an excessive prison sentence.<sup>251</sup> Justice Scalia suggests one reason the American Framers might have been concerned about excessive fines but not excessive prison terms, is that fines are a source of revenue for the state while imprisonment costs the state money.<sup>252</sup> Thus, a legislature would have an incentive to exact excessive fines and a disincentive to exact excessive prison sentences because that would be a burden to the legislature's constituency.<sup>253</sup> However, this economic analysis does not properly emphasize the Constitution's protection to an *individual* to be free from improper government interference.<sup>254</sup> Furthermore, legislative bodies often fail to estimate the costs of criminal imprisonment when creating sentencing laws, so this does not properly regulate the state from applying excessive sentences.<sup>255</sup>

Justice Scalia also argues that the historical evidence surrounding the adoption of the Eighth Amendment only indicates concern over cruel and unusual modes of punishment.<sup>256</sup> It is not surprising that the few historical references surrounding the adoption of the Eighth Amendment indicate a concern only with certain types of punishments.<sup>257</sup> The use of "racks and gibbets" by the English government would still be fresh in the minds of the Americans forming a government with the potential to punish.<sup>258</sup> However, the broad wording of the "Cruel and Unusual Punishments" Clause was likely an intentional choice by the framers to allow future generations to define cruel and unusual punishments.<sup>259</sup> The Framers could easily have

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<sup>250</sup> *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

<sup>251</sup> *See Solem v. Helm*, 463 U.S. 277, 289 (1983).

<sup>252</sup> *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991).

<sup>253</sup> *Id.*

<sup>254</sup> The Bill of Rights primarily protects individuals against intrusion from a powerful government. *See* U.S. CONST. amend. I-VII.

<sup>255</sup> *See* PETER W. GREENWOOD ET AL., *THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS OF CALIFORNIA'S NEW MANDATORY SENTENCING LAW 34* (1994).

<sup>256</sup> *See Harmelin*, 501 U.S. at 979-82.

<sup>257</sup> *See Granucci, supra* note 12, at 841-42.

<sup>258</sup> *Id.*

<sup>259</sup> Thomas Jefferson wrote to Madison during the debates on the Constitution, "the earth belongs always to the living generations." JOSEPH J. ELLIS, *AMERICAN SPHINX* 131 (1998). *Cf. Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

worded the Eighth Amendment to forbid the use of “racks and gibbets,” but that would limit the Amendment’s protection in the future.<sup>260</sup>

Moreover, Americans believed they retained all the rights of English citizens when they separated from England.<sup>261</sup> Indeed, the language of the Eighth Amendment was derived from the English Declaration of Rights of 1689.<sup>262</sup> The prohibition of excessive fines in the English Declaration of Rights came from the Magna Carta’s prohibition of excessive fines.<sup>263</sup> English common law courts extended the Magna Carta’s proportionality requirement to prison sentences when they replaced criminal fines as the common mode of punishment in England during the 1400s.<sup>264</sup> Presumably, the English Declaration of Rights maintained this prohibition against disproportionate prison sentences. Thus, Americans likely believed they retained this protection from disproportionate sentences when they adopted the Eighth Amendment.

Supreme Court precedent also demands proportionality review under the Eighth Amendment. For instance, the Supreme Court reviews capital punishment cases based on proportionality. In *Coker v. Georgia*, the Court held that, because of disproportionality, it was a violation of the “Cruel and Unusual Punishments” Clause to impose capital punishment for rape of an adult woman.<sup>265</sup> In *Enmund v. Florida*, the Court held that it violated the Eighth Amendment, because of disproportionality, to impose the death penalty upon a participant in a felony that results in murder, without any inquiry into the participant’s intent to kill.<sup>266</sup> The Supreme Court has also recently held that the execution of a mentally retarded criminal is a disproportionate punishment.<sup>267</sup> Justice Scalia tried to distinguish these cases as “an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law” because “death is different.”<sup>268</sup> As Justice White points out in his dissent in *Harmelin*, however, this would reject the notion that the Clause only forbids modes or methods of punishment.<sup>269</sup> Presumably, the death penalty is a cruel and

<sup>260</sup> See Granucci, *supra* note 12 at 841-42.

<sup>261</sup> *Solem v. Helm*, 463 U.S. 277, 286 (1983).

<sup>262</sup> See Granucci, *supra* note 12, at 840.

<sup>263</sup> *Cf. id.* at 844-45.

<sup>264</sup> See *id.* at 846-47.

<sup>265</sup> 433 U.S. 584 (1977).

<sup>266</sup> 458 U.S. 782 (1982).

<sup>267</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (concluding that the death penalty is not suitable for mentally retarded criminals because they lack the culpability required for such an extreme punishment).

<sup>268</sup> *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991).

<sup>269</sup> *Id.* at 1013-15 (White, J., dissenting).

unusual mode of punishment or it is not.<sup>270</sup> Moreover, the Supreme Court requires punishments to be proportional to the offense for criminal fines<sup>271</sup> and civil damages.<sup>272</sup>

Most important, the Supreme Court has long accepted a proportionality requirement for prison sentences. The first disproportionate sentencing claim was made to the Supreme Court in 1892 in *O'Neil v. Vermont*.<sup>273</sup> The majority opinion of the Court did not consider the Eighth Amendment claim since the Eighth Amendment did not apply to states at the time.<sup>274</sup> However, all three dissenting Justices agreed that the Eighth Amendment forbids disproportionate sentences.<sup>275</sup> In *Rummel*, the Court stated that it is a matter of legislative prerogative to determine the prison sentences for crimes classified as felonies.<sup>276</sup> In a fateful footnote, however, the Court conceded that proportionality review could come into play in the extreme case where a legislature made overtime parking a felony punishable by life imprisonment.<sup>277</sup> In *Solem*, the Court held that the Eighth Amendment includes the right to be free from excessive punishments.<sup>278</sup> Since *Solem*, a majority of the Court has since upheld the notion that the Eighth Amendment at least forbids grossly disproportionate sentences.<sup>279</sup> Thus, Supreme Court precedent recognizes a proportionality requirement under the Eighth Amendment between a criminal's punishment and his offense.

## 2. *The Proportionality Principles Give too Much Deference to State Legislative Bodies and Provide Little Guidance to Lower Courts*

### a. Criminal Punishment Determinations are Normally the Province of Legislative Bodies

The Court's first proportionality principle cautions that criminal punishment determinations are normally the province of legislative

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<sup>270</sup> *Id.* (White, J., dissenting).

<sup>271</sup> *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1997).

<sup>272</sup> *State Farm v. Campbell*, 538 U.S. 408 (2003) (finding the Fifth Amendment prohibits disproportionate civil damages).

<sup>273</sup> 144 U.S. 323 (1892).

<sup>274</sup> *Id.* at 331-32.

<sup>275</sup> *Id.* at 339-40 (Field, J., dissenting); *Id.* at 371 (Harlan, J., dissenting).

<sup>276</sup> *Rummel v. Estelle*, 445 U.S. 263, 274 (1980).

<sup>277</sup> *Id.* at 274 n.11.

<sup>278</sup> *Solem v. Helm*, 463 U.S. 277, 286 (1983).

<sup>279</sup> *See Ewing*, 538 U.S. at 11 (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957 (1991).

bodies.<sup>280</sup> Certainly, this is true when the criminal punishment is constitutional, but legislative bodies cannot make criminal punishment decisions that contradict the Constitution.<sup>281</sup> The Court gives too much deference to legislative bodies to determine whether a sentence falls within the bounds of the Constitution. In *Ewing*, the Court stated that a habitual sentencing scheme is legitimate if the legislature has a “reasonable basis” for believing the sentence “advance[s] the goals of its criminal justice system in any substantial way.”<sup>282</sup> Surely, though, a state could not compel a defendant to be a witness against herself simply because it advances the state’s criminal justice goals. The suggestion that a legislatively mandated punishment is per se constitutional conflicts with the principle of judicial review.<sup>283</sup> In *Marbury v. Madison*, the Court established that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>284</sup>

The Court supports its deference to legislative bodies by observing that they have the support of the majority of the people.<sup>285</sup> However, the whole point of the Constitution is to protect certain rights against majority infringement.<sup>286</sup> If popular will determined what is constitutional, then the Constitution would have no value. Instead, the Constitution prohibits the government from using popular will as a justification for intruding on an individual’s rights.<sup>287</sup> The rights of citizens convicted of a crime are particularly vulnerable to infringement by popular will, as many believe that one who breaks the law does not deserve the protection of the law. Moreover, infringements on the rights of criminals are easily ignored, since they are isolated from the public. Yet criminals are still legal citizens of the United States protected under the Eighth Amendment’s prohibition on cruel and unusual punishments. The Supreme Court does not adequately acknowledge an individual’s federal Constitutional right to be free from

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<sup>280</sup> *Harmelin*, 501 U.S. at 998-99 (Kennedy, J., concurring in part and concurring in the judgment). It is unclear if Justice Kennedy is just stating the obvious that legislative bodies should be given deference when they employ constitutional criminal punishments or if he is making the more alarming statement that the bounds of the Eighth Amendment change depending on legislative determinations.

<sup>281</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>282</sup> *Ewing*, 538 U.S. at 28 (plurality opinion) (internal quotations omitted).

<sup>283</sup> See *Harmelin*, 501 U.S. at 1017 (Stevens, J., dissenting).

<sup>284</sup> *Marbury*, 5 U.S. (1 Cranch) at 177.

<sup>285</sup> See *Harmelin*, 501 U.S. at 998-99 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>286</sup> See THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>287</sup> California’s “Three Strikes” statute is particularly suspect, since it was quickly passed after a high profile kidnapping by a repeat criminal that led to a woman’s death. *Ewing*, 538 U.S. at 14-15 (plurality opinion).

excessive sentencing when it defers to legislative bodies. The Supreme Court has protected federal rights against state infringement in the past, such as the right to an attorney<sup>288</sup> and the right to be free of unreasonable searches and seizures.<sup>289</sup> The Supreme Court must also protect a United States citizen's right to be free from disproportionate sentencing.

#### b. The Eighth Amendment Allows a Variety of Legitimate Penological Theories

The Court's second proportionality principle stresses that the Eighth Amendment allows a variety of penological theories.<sup>290</sup> The traditional justification for punishment is that it is retribution for an injustice.<sup>291</sup> According to Aristotle, the law should treat the criminal and victim as equals.<sup>292</sup> If the court determines a person has inflicted an injustice on another, the judge should redress the inequality by punishing the offender an equivalent amount, thereby making the parties equal again.<sup>293</sup> Thus, Aristotle seeks strict proportionality between the punishment and the offense.<sup>294</sup> In its purest form, strict proportionality would require the same offense perpetrated by the criminal to be committed back on the criminal.<sup>295</sup> This is exemplified in the Old Testament's punishment principle of an eye for an eye, a tooth for a tooth.<sup>296</sup> However, society's acceptance of prison sentences as the standard for criminal punishment makes determining strict proportionality between punishment and crime difficult, as a prison sentence is usually different from the criminal's act. Thus, strict proportionality is difficult to maintain under modern penological theory.

Furthermore, strict proportionality is inappropriate given the Supreme Court's acceptance of utilitarian penological theories.<sup>297</sup> Unlike a retributive justification for punishment that aims to punish individuals in relation to the scope of their offenses, a utilitarian justification seeks to impose punishment that will produce beneficial results for society in the

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<sup>288</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

<sup>289</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)).

<sup>290</sup> *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>291</sup> See *Granucci*, *supra* note 12, at 844.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> See *id.*

<sup>296</sup> *Id.*

<sup>297</sup> See *Ewing*, 538 U.S. at 31 (Scalia, J., concurring in the judgment).

future.<sup>298</sup> Three main penological theories have developed under the utilitarian view: deterrence, rehabilitation, and incapacitation.<sup>299</sup>

Deterrence is based on the theory that if a criminal knows he will be punished harshly for a crime, then he will be discouraged from committing that crime.<sup>300</sup> A person could have an incentive to commit a crime if an offender's sentence was strictly proportioned to his crime.<sup>301</sup> For instance, suppose that half of robbery crimes are solved and that robbery is punished in exact proportion to the amount of money stolen. A criminal planning to steal a hundred dollars would expect only a fifty dollar penalty (hundred dollar punishment multiplied by fifty percent chance of being caught), thus providing an incentive to the criminal to commit crime. Thus, by setting punishments that are disproportionately higher than the offense, a deterrent punishment seeks to discourage crime.<sup>302</sup> However, detractors of deterrent punishments argue that it is unfair to punish a person in excess of his crime just to set an example to the rest of society.<sup>303</sup> As Immanuel Kant noted, "One man ought never to be dealt with as a means subservient to the purpose of another . . . ."<sup>304</sup>

Rehabilitation is based on the penological theory that punishment can help reform the criminal so that his wish to commit crimes will be lessened, and perhaps so that he can be a useful member of society in the future.<sup>305</sup> The unpleasantness of serving a punishment might be enough to make a criminal avoid future crime and punishment.<sup>306</sup> However, rehabilitation usually involves positive steps to alter criminal behavior and develop skills, in order to make the criminal less antisocial.<sup>307</sup> Critics of rehabilitative punishment question its success in correcting criminal behavior and object to rewarding a criminal with positive steps such as education.<sup>308</sup>

<sup>298</sup> See Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 163 (1996).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Cf.* United States v. Jackson, 835 F.2d 1195, 1199 (7th Cir. 1987) (Posner, J. concurring).

<sup>302</sup> *Id.*

<sup>303</sup> See Grossman, *supra* note 298 at 163.

<sup>304</sup> IMMANUEL KANT, *THE PHILOSOPHY OF LAW, PART II*, 194-98 (University of Pennsylvania Press 1961) (1887).

<sup>305</sup> See Grossman, *supra* note 298, at 163.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

Incapacitation is based on the theory that isolation of a criminal from society will end the risk that he will harm society again.<sup>309</sup> Incapacitation physically prevents a dangerous person from acting upon their destructive tendencies.<sup>310</sup> The death penalty, for instance, is a way for society to guarantee that incredibly violent criminals will never cause future harm to society.<sup>311</sup> Critics argue that incapacitation can be both overly expensive for society and unnecessarily cruel to criminals that potentially would never commit another crime.<sup>312</sup>

The Eighth Amendment should nonetheless provide a ceiling against excessive utilitarian-based prison sentences. Acceptance of utilitarian theories of punishment makes strict proportionality impractical. Indeed, some of the utilitarian justifications for punishment overtly contradict strict proportionality between punishment and offense.<sup>313</sup> For example, deterrence explicitly makes the punishment disproportionately greater than the crime so that criminals have a disincentive to commit the crime.<sup>314</sup> However, this should not mean that courts have no role in reviewing deterrent-based punishments.<sup>315</sup> Courts need to consider whether the punishment does indeed provide a benefit to society or whether it is just a “purposeless and needless imposition of pain and suffering.”<sup>316</sup> For example, imposing a life sentence without parole to a child that steals a candy bar would certainly deter other candy thefts and incapacitate the child from stealing anymore candy bars, but it is unreasonably excessive in achieving those objectives.<sup>317</sup> Thus, the Supreme Court should require that a penological theory does not lead to excessive punishment.

### c. The Nature of Our Federal System Allows Diverse Sentencing Determinations Among the States

The Court’s third proportionality principle stresses that our federal system of government naturally leads to different sentencing determinations

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<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Cf.* United States v. Jackson, 835 F.2d 1195, 1199 (7th Cir. 1987) (Posner, J. concurring).

<sup>313</sup> *See* Ewing, 538 U.S. at 31 (Scalia, J., concurring in the judgment).

<sup>314</sup> *See id.*

<sup>315</sup> *See id.* at 33-35 (Stevens, J., dissenting).

<sup>316</sup> Coker v. Georgia, 433 U.S. 584, 592 (1977).

<sup>317</sup> *Cf.* Jackson, 835 F.2d at 1199 (Posner, J. concurring) (noting that a statute that provides mandatory life imprisonment for battery seems excessive in its goal to incapacitate batterers, as an eighty-year-old man is unlikely to pose much of a battery threat to society).



among the states.<sup>318</sup> This principle emphasizes that each state is a separate entity and is only subject to some federal government regulations.<sup>319</sup> Comparing a state's sentencing standards with other states' would be like comparing the state's sentencing standards with other nations.<sup>320</sup> Differences between state sentencing guidelines allow states to experiment with different penological solutions.<sup>321</sup> However, the states cannot experiment with penological solutions that offend the Constitution of the United States.<sup>322</sup> Again, the Court seems to be confusing legitimate deference to state legislative determinations that are constitutional and illegitimate deference to state legislative determinations that are unconstitutional. Comparison of a state's sentencing standards with sentencing standards in other states helps determine if the sentence is unusual under the "Cruel and Unusual Punishments" Clause.<sup>323</sup> Perhaps admitting this point, the plurality opinion in *Ewing* often does conduct interjurisdictional sentencing comparisons to support that California's three strikes law is not unusual.<sup>324</sup> However, a comparison between a state's sentencing standards and the federal government's sentencing standards provides a more useful inference that a state's sentence is disproportionate to *federal* sentencing norms.<sup>325</sup> Thus, the dissent in *Ewing* was correct to stress the federal mandatory sentencing guidelines in its comparison.<sup>326</sup>

#### d. Proportionality Review Should be Guided by Objective Factors

The Court's final proportionality principle states that proportionality review should be based on objective factors.<sup>327</sup> Nonetheless, the Court frankly concedes that its "cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality."<sup>328</sup> Lower courts are

<sup>318</sup> *Harmelin v. Michigan*, 501 U.S. 957, 999-1000 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>323</sup> *See Solem v. Helm*, 463 U.S. 277, 291 (1983).

<sup>324</sup> *Ewing*, 538 U.S. at 24 (plurality opinion) ("[M]ost States have had laws providing for enhanced sentencing of repeat offenders."); *id.* at 28 (plurality opinion) ("Theft of \$1,200 in property is a felony under federal law and in the vast majority of States.") (internal citations omitted).

<sup>325</sup> *Cf. id.* at 45 (Breyer, J., dissenting).

<sup>326</sup> *Id.* (Breyer, J., dissenting).

<sup>327</sup> *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>328</sup> *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

therefore placed in a tough position: the Supreme Court requires them to use objective factors, but concedes those factors are difficult to ascertain.<sup>329</sup> Most lower courts avoid this bind by comparing the facts of the case with the facts in Supreme Court cases to determine whether a sentence is disproportionate.<sup>330</sup> Though this practice appears objective, whether the facts of two cases can be distinguished greatly depends on whether you want the cases distinguished or not. This is particularly true given that the Supreme Court has failed to clarify whether courts should consider facts specifically or generally.<sup>331</sup> Thus, a lower court could find that a felony drug possession with intent to distribute a small amount of drugs is similar to *Harmelin*, since it involves a felony drug possession charge, or dissimilar to *Harmelin*, since it does not involve a large amount of drugs.<sup>332</sup> Indeed, courts appear to consider individual facts when they feel a sentence is unjust.<sup>333</sup>

In addition, the Supreme Court has only reviewed a few cases for sentence disproportionality. Thus, lower courts are left to fill many gaps between cases. Yet how is a lower court supposed to assess factual situations within these gaps without clear objective factors? Many lower courts have turned to Justice Breyer's dissent in *Ewing* for help in such situations, since he specified three factors that he thought were relevant in disproportionality claims: (1) "the length of the prison term in real time"; (2) the sentence-triggering offense; and (3) the offender's criminal history.<sup>334</sup> Justice Breyer is correct to separate a defendant's sentence-

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<sup>329</sup> See *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999) ("[Justice Kennedy] did not outline specific criteria for courts to consider in making this threshold determination of gross disproportionality.").

<sup>330</sup> See *supra* Part V.

<sup>331</sup> In *Solem v. Helm*, the Supreme Court stated the defendant's status "cannot be considered in the abstract" and considered the defendant's age, battles with alcohol, non-violent criminal past, and problems holding a job to reach its conclusion that his sentence was disproportionate to his crime. 463 U.S. 277, 296, 297 n.22 (1983). In *Harmelin v. Michigan*, five Justices held that courts should not consider mitigating factors, such as the offender's age, unless the criminal statute identifies the factor as significant. 501 U.S. at 994-96. The plurality opinion in *Ewing* was unclear whether individualized facts should be considered since it considered *Ewing*'s disproportionality claim using generalized facts. 538 U.S. at 28 (plurality opinion) (noting that *Ewing*'s crime was not "shoplifting three golf clubs," but felony grand theft). But the Court also cited a footnote in *Solem* that considered mitigating factors. *Id.* (plurality opinion).

<sup>332</sup> Cf. *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001).

<sup>333</sup> See *State v. Davis*, 79 P.3d 64, 72 (Ariz. 2003) (finding a mandatory fifty-two year prison sentence for a twenty-year-old defendant for having non-coerced sex with two post-pubescent teenage girls disproportionate because of the offender's youth, after noting comments from jury and victims' mothers that sentence was unjust).

<sup>334</sup> *Ewing*, 538 U.S. at 37 (Breyer, J., dissenting).

triggering offense from his criminal past. In *Ewing*, the plurality opinion considered Ewing's criminal history collectively with his sentence-triggering offense when assessing the severity of his crime.<sup>335</sup> But combining the sentence-triggering offense with the offender's criminal history may unreasonably inflate the severity of the crime.<sup>336</sup> For instance, if a criminal with a violent criminal history is arrested for illegally bringing in foreign agriculture to the United States, a court that sentenced the criminal as if he again committed a violent offense would be inflating the offender's crime. Instead, the court should sentence him for breaking United States' customs law and augment the sentence based on his past criminal record.

However, the majority of the Supreme Court correctly refused to accept parole as a factor in disproportionality claims in *Rummel*.<sup>337</sup> Parole is not an enforceable individual right, but is instead dependent on state discretion.<sup>338</sup> For instance, as of 2000, the parole authority in California only recommended parole in one percent of the 2000 cases that came before them with a life sentence.<sup>339</sup> By allowing courts to consider parole in assessing the severity of a sentence, the Court would be allowing states an easy way to tailor constitutional sentencing schemes while maintaining control over a criminal's sentence.

#### B. THE PROPER ROLE FOR COURTS IN REVIEWING EXCESSIVE PRISON SENTENCES

The Supreme Court's current sentence disproportionality jurisprudence is so muddled that it is useless.<sup>340</sup> The Court appears to say that the Eighth Amendment forbids disproportionate sentences, but that the Eighth Amendment does not prohibit sentences mandated by state legislative bodies, except if the sentence is not the result of a criminal policy decision. The Court needs to refocus its sentence disproportionality jurisprudence on the Eighth Amendment's forbiddance of cruel and unusual punishment. A textual analysis of the "Cruel and Unusual Punishments" Clause provides a

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<sup>335</sup> *Id.* at 28-30 (plurality opinion).

<sup>336</sup> *See id.* at 39-40 (Breyer, J., dissenting).

<sup>337</sup> *Rummel v. Estelle*, 445 U.S. 263, 280-81 (1980).

<sup>338</sup> *Id.*

<sup>339</sup> Brief for Amici Curiae Families Against Mandatory Minimums at 18, *Ewing v. California*, 538 U.S. 11 (2003) (No. 01-6978).

<sup>340</sup> *See Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999) ("[Justice Kennedy] did not outline specific criteria for courts to consider in making this threshold determination of gross disproportionality.").

good guide for what sentences are prohibited. In particular, a sentence must be both (1) cruel *and* (2) unusual for the Constitution to apply.

A court should find a sentence “cruel” if it is excessive.<sup>341</sup> Unfortunately, there is no clear line for determining when a sentence is excessive. This determination is much like the Court’s current threshold test of whether a comparison between an offender’s sentence and his crime creates an inference of disproportionality. However, the Court currently makes this analysis from the point of view of the state, not of the individual. Thus, incapacitation of a repeat thief is constitutional because states have an interest in curbing the harm caused by repeat thefts. However, the Eighth Amendment was adopted to protect *individuals* from government intrusion. Therefore, the question should be whether the sentence is excessive considering the specific facts of the individual. States may still use utilitarian-based punishment schemes under this test, but they cannot be so broad that they cause purposeless pain on individuals.<sup>342</sup> By adopting this approach, courts would link sentencing review with other areas where the court reviews sentence proportionality, such as capital punishment, excessive criminal fines, and excessive civil fines.

Second, a court should find a sentence unusual if it is “out of the ordinary” or “deviating from the normal.”<sup>343</sup> A comparison between a state’s sentencing standards and the federal government’s sentencing standards provides a useful test for determining if the sentence is unusual given *federal* standards.<sup>344</sup> However, a court should also compare the sentence with sentences in other states. This determination is primarily an objective determination. Fears that this infringes on federalism rights are diminished by the fact that a sentence must be both cruel and unusual. Thus, if a state experiments with a scheme that is unusual, but not cruel, the Eighth Amendment would not apply.

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<sup>341</sup> “Excessive” is a more workable understanding of cruel than the dictionary definitions of “disposed to inflict pain” or “bitterly conducted: devoid of mildness” or “severe: distressing.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 546 (1976). Indeed, nearly all sentences are “disposed to inflict pain,” so cruel would be easily met under the dictionary definition.

<sup>342</sup> See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (stating that a punishment offends the Eighth Amendment “if it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain”).

<sup>343</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2514 (1976).

<sup>344</sup> Cf. *Ewing*, 538 U.S. at 45 (Breyer, J., dissenting).

## VII. CONCLUSION

The *Ewing* Court held that the Eighth Amendment's proportionality requirement did not prohibit the State of California from sentencing a repeat felon to a prison term of twenty-five years to life under the State's "Three Strikes and You're Out Laws."<sup>345</sup> A majority of the Court correctly affirmed that the Eighth Amendment has a proportionality principle that applies to noncapital sentences.<sup>346</sup> But the Court's opinion gives too much deference to legislative bodies and not enough consideration to an individual's constitutional right to protection from excessive punishment.

James J. Brennan

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<sup>345</sup> *Id.* at 30-31 (plurality opinion).

<sup>346</sup> *Id.* at 23-24 (plurality opinion); *Id.* at 35-36 (Breyer, J., dissenting).