RECENT DEVELOPMENTS

STRUCK OUT LOOKING: CONTINUED CONFUSION IN EIGHTH AMENDMENT PROPORTIONALITY REVIEW AFTER *Ewing v. California*, 123 S. CT. 1179 (2003).

This past Term, California's "three strikes" law withstood two challenges in the Supreme Court. In *Ewing v. California*, the Court held that a sentence of 25-years-to-life imposed on a recidivist offender convicted of stealing three golf clubs worth approximately $1,200 did not violate the Eighth Amendment's Cruel and Unusual Punishments clause.[1] It made a similar holding in *Lockyer v. Andrade*, although on different grounds.[2] This note will examine the Court's treatment of California's three strikes law in *Ewing*, and will argue that the Court missed an opportunity to make a necessary clarification of its Eighth Amendment jurisprudence. Indeed, the Supreme Court made an already lamentable situation worse by applying proportionality review to non-capital sentences given to repeat offenders while neglecting to provide lower courts with any coherent guidelines to employ in conducting that review. In other words, the Court was thrown a perfect pitch on the three strikes question, but it struck out looking.

I. LEGISLATIVE HISTORY

In 1994, California became the second state to pass a recidivist sentencing law under the moniker "Three Strikes and You're Out."[3] Shortly thereafter, twenty-three other states and the federal government did the same.[4] The California law, passed both by the state legislature[5] and by voters through a ballot initiative,[6] gained

1. 123 S. Ct. 1179, 1181-83, 1185 (2003).

2. 123 S. Ct. 1166 (2003). The holding in *Andrade* relied more on the lack of a clearly established proportionality review than on the merits of the defendant's Eighth Amendment challenge. *See infra* notes 126-37 and accompanying text (discussing *Andrade*).

3. JOHN CLARK ET AL., U.S. DEP'T. OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION 1 (1997), *available at* http://www.ncjrs.org/pdffiles/165369.pdf.

4. *Id.*

5. Assembly Bill 971 passed the California Assembly on January 31, 1994, by a margin

support after the much-publicized kidnapping and murder of twelve-year-old Polly Klaas by a repeat offender.[7]

California's "three strikes" law actually is a "two strikes" law as well.[8] That is, when a defendant previously convicted of a "serious" or "violent" felony[9] is convicted of another felony, he is sentenced to "twice the term otherwise provided as punishment for the current felony conviction."[10] Additionally, pursuant to the third strike provision, a defendant with two prior serious or violent felony convictions receives "an indeterminate term of life imprisonment"[11] with parole to be determined.[12] A number of features make the California law harsher than those of other states,[13] the most significant

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of 63 to 9. An earlier version of the bill had been defeated in an Assembly committee in 1993. It passed the Senate by a vote of 29 to 7 on March 3, 1994, and was signed by Governor Pete Wilson 4 days later. *Ewing*, 123 S. Ct. at 1182. The bill is codified at CAL. PENAL CODE §§ 667(b)–(i) (West 1999).

6. Voters passed Proposition 184 on November 8, 1994, by a margin of 72 to 28 percent. *Ewing*, 123 S. Ct. at 1182. The measure is codified at CAL. PENAL CODE § 1170.12 (West Supp. 2003).

7. Reynolds Holding, *Behind the Nationwide Move To Keep Repeaters in Prison*, S.F. CHRON., Dec. 8, 1993, at A1 (reporting that the murder of Klaas "galvanized" supporters of the three strikes law). Her murderer, Richard Allen Davis, had an 11-page criminal record, but had been released in 1993 after serving one half of a 16-year sentence for kidnapping, assault and burglary. Richard Price, *Cruel Lesson/Why Polly Died/Town Angry at a System that Failed*, USA TODAY, Dec. 8, 1993, at A1. Although the murder of Klaas inspired more outrage, it actually was an earlier murder, that of 18-year-old Kimber Reynolds, which prompted the three strikes law. George Skelton, *A Father's Crusade Born from Pain*, L.A. TIMES, Dec. 9, 1993, at A3 (describing Mike Reynolds, father of the victim, as "the driving force behind a proposed ballot initiative that California voters will be reading a lot about.").

8. Autumn D. McCullogh, *Three Strikes and You're In (For Life): An Analysis of the California Three Strikes Law As Applied to Convictions for Misdemeanor Conduct*, 24 T. JEFFERSON L. REV. 277, 281 (2002). For additional explanation of the law, see *id.* at 281-84; *Ewing*, 123 S. Ct. 1182-83; Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 400-09 (1997).

9. *See* CAL. PENAL CODE § 667.5(c) (West Supp. 2003) (defining "violent" felonies); *id.* § 1192.7(c) (defining "serious" felonies).

10. *Id.* § 667(e)(1) (West 1999); *id.* § 1170.12(c)(1) (West Supp. 2003).

11. *Id.* § 667(e)(2)(A) (West 1999); *id.* § 1170.12(c)(2)(A) (West Supp. 2003).

12. Parole is possible only after a "minimum term" has been served. That term is the greater of the following: (1) three times the term otherwise provided for the present felony; (2) 25 years; or (3) a term determined by the court under Cal. Penal Code § 1170 for the original conviction, plus any enhancements. CAL. PENAL CODE §§ 667(e)(2)(A)(i)–(iii) (West 1999); *Id.* §§ 1170.12(c)(2)(A)(i)–(iii) (West Supp. 2003).

13. The law is often regarded as "draconian." *E.g.*, Rachel A. Van Cleave, *"Death is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 221-22 (2003); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 669 n.128 (1997); Adam Cohen, Editorial, *What 'Capturing the Friedmans' Says About Getting Tough on Crime*, N.Y. TIMES, July 6, 2003, § 4, at 8 (calling *Lockyer* the Supreme Court's "most regrettable decision this year"); Brief of Amicus Curiae Families Against Mandatory Minimums at

of which is perhaps the additional penalty for a second strike, which has had a larger effect than the third strike provision.[14] There also are temporal oddities: courts are not allowed to consider the amount of time separating the offenses, and in fact two strikes may result from a single act.[15] More significant in this context is the existence of "wobblers." These are crimes that may be charged either as misdemeanors or felonies and that trigger the three strikes law only if treated as felonies.[16] One court gave this definition: "An offense which is punishable either by imprisonment in the state prison or by incarceration in the county jail is said to 'wobble' between the two punishments and hence is frequently called a 'wobbler' offense."[17] Examples of wobblers include participation in a criminal street gang,[18] receiving stolen property,[19] and possession of methamphetamine.[20] For some wobblers, the choice between misdemeanor and felony depends on a defendant's record; for example, if a defendant has served time for certain theft-related

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*6, Ewing v. California, 123 S. Ct. 1179 (2003) (No. 01-6978), 2002 WL 1467405. One amicus curiae brief in *Ewing* criticized the law in this way:

> California's law is the only one in the country that combines all of the following characteristics: (i) it does not require the third strike to be a serious or violent offense; (ii) it imposes a minimum sentence of 25 years; (iii) it excludes meaningful opportunities for parole; (iv) it does not require the prior "strikes" to have been tried or punished on separate occasions; and (v) it strictly limits sentencing judges' discretion to impose lesser sentences.

Id. at *3.

14. *See supra* note 8 and accompanying text; CLARK ET AL., *supra* note 3, at 13 (predicting a minor impact on sentences in most states with the possible exception of "broadly defined two-strikes provisions such as California's"). Indeed, of 42,703 inmates imprisoned under the law as of December 31, 2002, the number of second strikers is 35,077, whereas the number of third strikers is only 7626. CAL. DEP'T. OF CORRECTIONS, SECOND AND THIRD STRIKERS IN THE INSTITUTION POPULATION: DECEMBER 31, 2002, at 3-64 tbl. 1 (2003), http://www.corr.ca.gov/offenderinfoservices/reports/quarterly/strike1/strike1d0212.pdf; *see also* FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY 83 (2001) ("[S]econd-strike penalties are nine times as frequent in California as third-strike penalties, even though our study found that second-strike offenders outnumber third-strike offenders only by 2.66 to 1.").

15. McCullogh, *supra* note 8, at 282-83 (citing CAL. PENAL CODE § 667(c)(3); People v. Benson, 954 P.2d 557, 563 (Cal. 1998)); *cf.* Brief for Families Against Mandatory Minimums at *5, *Ewing* (No. 01-6978) ("Bizarrely, had Ewing escalated his wrongdoing sequentially from shoplifting, to burglary, to robbery, his sentence for robbery in that event would be less than his sentence for shoplifting here, since the shoplifting would not qualify as a strike.").

16. *See* Ewing v. California, 123 S. Ct. 1179, 1183 (2003) (explaining "wobblers"); *id.* at 1200-02 (Breyer, J., dissenting) (criticizing the inclusion of Ewing's crime among offenses triggering the three strikes law).

17. People v. Kunkel, 176 Cal. App. 3d 46, 51, n.3 (Cal. Ct. App. 1985).

18. CAL. PENAL CODE § 186.22(a) (West Supp. 2003).

19. *Id.* § 496.

20. CAL. HEALTH & SAFETY CODE § 11377(a) (West Supp. 2003).

crimes, a subsequent conviction of petty theft—otherwise a misdemeanor—is a felony.[21] Though prosecutors are required to allege all prior felonies,[22] a three strikes sentence still can be avoided: The prosecutor can move to treat the wobbler as a misdemeanor[23] or to vacate a prior strike,[24] and the courts can do the same.[25]

The three strikes law has proven to be exceptionally controversial. Opponents criticize the inclusion of crimes such as petty theft among triggering offenses,[26] the fact that the sentences might well exceed the time at which a career criminal would retire from a life of crime,[27] and the general shift from retribution and rehabilitation to incapacitation as a penological theory,[28] among other things.[29] Yet the law is not without its supporters, who credit it with identifying and isolating

21. CAL. PENAL CODE § 490 (West 1999); *id.* § 666 (West Supp. 2003). Other crimes, such as grand theft, are wobblers without regard to a defendant's record. *Id.* § 489 (West 1999).

22. *Id.* § 667(f)(1), (g). Section (g) also bars prosecutors from using prior strikes in plea bargains.

23. *Id.* § 17(b)(4).

24. *Id.* § 667(f)(2) (permitting a motion to strike "in the furtherance of justice" or upon insufficient evidence).

25. *Id.* § 17(b)(5) (permitting magistrates to treat wobblers as misdemeanors); People v. Super. Ct. of San Diego Cty. *ex. rel.* Romero, 917 P.2d 628, 648 n.13 (Cal. 1996) (granting trial courts "discretion to strike prior felony conviction allegations in furtherance of justice").

26. *E.g.*, McCullogh, *supra* note 8, at 284. As of December 31, 2002, there were 7626 inmates imprisoned for a third strike; 353, or 4.6 percent, were convicted for petty theft with a prior. Overall, 3468, or 45.5 percent, were imprisoned for crimes against persons; the remaining 54.5 percent were imprisoned for nonviolent offenses. CAL. DEP'T. OF CORRECTIONS, *supra* note 14, at table 1.

27. *E.g.*, RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, AGING BEHIND BARS: 'THREE STRIKES' SEVEN YEARS LATER 4-6 (2001) (concluding that "long-term incarceration incurs diminishing returns in crime control."), http://www.sentencingproject.org/pdfs/9087.pdf; Vitiello, *supra* note 8, at 437-41; Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 68 (1999) (finding no deterrent effect from the law in offenders over 30 years old).

28. *E.g.*, Vitiello, *supra* note 8, at 423-32; David Shichor & Dale K. Sechrest, *Three Strikes as Public Policy*, *in* THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY 265, 267 (David Shichor & Dale K. Sechrest eds., 1996) [hereinafter VENGEANCE AS PUBLIC POLICY].

29. *See, e.g.*, Gilbert Geis, *A Base on Balls for White-Collar Criminals*, *in* VENGEANCE AS PUBLIC POLICY, *supra* note 28, at 244-64 (criticizing the exclusion of white-collar crime from the purview of the law); PETER W. GREENWOOD ET AL., RAND CORP., THREE STRIKES AND YOU'RE OUT: ESTIMATED BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY SENTENCING LAW (1994), *reprinted in* VENGEANCE AS PUBLIC POLICY, *supra* note 28, at 53-89 (predicting a decline in serious felonies by adults of 23-34%, but at a cost of $4.5 to $6.5 billion per year if the law were fully implemented); Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89, 106 (2001) (concluding that offenders, in an effort to evade a third strike, will commit 3300 more homicides of victims and witnesses each year).

intractable delinquents.[30] One scholar, while not endorsing the law, concludes that it has a significant deterrent effect not merely on habitual offenders but also on others who wish to avoid a first or second strike.[31]

II. HISTORY OF *EWING*

A. Facts

From 1984 to 1993 appellant Gary Albert Ewing accumulated ten arrests and fourteen criminal convictions.[32] First convicted of grand theft in Ohio in 1984, he moved to California, where he was convicted of grand theft auto in 1988 (convicted of a felony and reduced to a misdemeanor after completing probation) and petty theft with a prior in 1990.[33] Subsequently, over a seventeen-month period beginning in July, 1992, he tallied up five arrests and the following convictions: battery, theft, burglary, possession of drug paraphernalia, appropriation of lost property, possession of a firearm, trespassing, robbery, and three additional counts of burglary.[34]

The final robbery and burglaries occurred over a 5-week period at an apartment complex in Long Beach, California.[35] There, while attempting to steal a video cassette recorder, Ewing disturbed one of

30. *See, e.g.*, James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 12-30 (2000) (responding to criticisms and concluding that the three strikes law is the "simplest explanation" for lower crime rates in California); Edward J. Erler & Brian P. Janiskee, *California's Three Strikes Law: Symbol and Substance*, 41 DUQ. L. REV. 173, 175 (2002) (arguing that if a targeted class of repeat offenders is incarcerated, "it is inevitable that crime will decline"); Daniel E. Lungren, Letter to the Editor, *Financial Costs of '3 Strikes' Law*, L.A. TIMES, Jan. 10, 1996, at B8 (stating claim by state Attorney General that the three strikes law is "having an immediate impact on the 7% of all criminals who commit between 50% and 70% of all crimes"). Unfortunately, many of the law's supporters rely on the presumption that a small percentage of criminals commit the majority of crimes, but the numbers they cite are suspect. *Compare id.*, *with* Marc Mauer, *"Three strikes and you're out": Politics, Crime Control . . . And Baseball?*, CRIM. JUST., Fall 1994, 30, 30-32 (criticizing the use of such statistics).

31. Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strike Legislation*, 31 J. LEGAL STUD. 159, 161-62, 200-01 (2002) (concluding that the "full deterrence" of the law prevented approximately eight murders, 3952 aggravated assaults, 10,672 robberies and 384,488 burglaries in its first two years, for a savings to society of approximately $889 million).

32. Brief of Amicus Curiae United States at *5, Ewing v. California, 123 S. Ct. 1179 (2003) (No. 01-6978), 2002 WL 1798896.

33. *Id.*

34. *Id.*

35. Ewing v. California, 123 S. Ct. 1179, 1184 (2003).

his victims as she slept; he ran away after she screamed.[36] Another victim was less fortunate. Ewing, claiming to have a gun, confronted that victim in the mailroom and demanded his wallet.[37] After the victim refused, Ewing took out a knife and forced the victim into the apartment.[38] The victim managed to flee, after which Ewing made off with his money and credit cards.[39] Following Ewing's arrest in December of 1993, a jury convicted him of first-degree robbery and three counts of residential burglary.[40] Although sentenced to nine years and eight months in prison, Ewing was paroled five and a half years later in June, 1999.[41]

Nine months after his release, on March 12, 2000, Ewing stole three Callaway golf clubs from the pro shop at El Segundo Golf Course in Los Angeles County.[42] The clubs, each worth $399, were hidden in his pants leg.[43] The resultant limp in Ewing's gait attracted the attention of an El Segundo employee, who called the police.[44] An officer detained Ewing in the parking lot of the pro shop.[45]

B. Procedural History

A California jury found Ewing guilty of felony grand theft of personal property in excess of $400, yet acquitted him of burglary.[46] Pursuant to the three strikes law, the prosecutor alleged, and the trial court found, that Ewing previously had been convicted of four serious or violent felonies after his spree at the Long Beach apartment complex.[47] At sentencing, Ewing attempted to avoid a three strikes sentence by asking the trial court both to reduce his grand theft conviction—a wobbler—to a misdemeanor,[48] and to dismiss some or

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*; *People v. Ewing*, No. B143745, 2001 WL 1840666, at *1 (Cal. App. 2d Dist. Apr. 25, 2001).
42. *Ewing*, 2001 WL 1840666, at *1; Ewing v. California, 123 S. Ct. 1179, 1183 (2003).
43. *Ewing*, 2001 WL 1840666, at *1.
44. *Id.*
45. *Id.*
46. *Ewing*, 123 S. Ct. at 1184.
47. *Id.* at 1184; *see* CAL. PENAL CODE ANN. § 484 (West Supp. 2002); § 489 (West 1999).
48. 123 S. Ct. at 1184. For more information on the court's ability to reduce a defendant's grand theft conviction to a misdemeanor, see *supra* note 23-25 and

all of his prior serious or violent felony convictions.[49] The court declined to strike Ewing's prior convictions, instead noting that his recidivism posed a threat to the community.[50] It imposed the mandatory sentence of 25-years-to-life, but avoided a one-year sentence enhancement by striking a prior prison term allegation.[51]

The Court of Appeals for the Second District of California affirmed in an unpublished opinion.[52] It first rejected Ewing's contention that the trial court abused its discretion in denying his motion to reduce the wobbler offense to a misdemeanor.[53] The appeals court found no basis for the claim that the trial court neglected to consider information regarding Ewing's background,[54] notwithstanding that the trial court made no statement regarding that information.[55]

The appellate court next rejected Ewing's contention that the trial court abused its discretion by refusing to strike his prior felony convictions.[56] Under California law, the trial court is to consider whether, given the circumstances of the offense and the defendant's history, the defendant falls within the spirit of the three strikes scheme.[57] The Court of Appeals agreed that Ewing belonged within that scheme given his extensive criminal background, the fact that he had been on probation or parole since 1988, the fact that he committed this offense only nine months after his release, and the fact that his rehabilitative prospects were "bleak."[58]

The appellate court's final pertinent holding was its rejection of Ewing's claim that his sentence was cruel and unusual in violation of

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accompanying text; CAL. PENAL CODE § 17(b)(5) (West 1999); *id.* § 667(d)(1); *id.* § 1170.12(b)(1) (West Supp. 2003).

49. 123 S. Ct. at 1184. For more information on the court's ability to dismiss a defendant's prior convictions, see *supra* note 23-25 and accompanying text; People v. Super. Ct. of San Diego Cty. *ex. rel.* Romero, 917 P.2d 628, 647-48 (Cal. 1996).

50. *Ewing*, 2001 WL 1840666, at *1.

51. *Id.*; *see also* CAL. PENAL CODE § 667.5(b) (West Supp. 2003).

52. *Ewing*, 2001 WL 1840666, at *5.

53. *Id.* at *2.

54. *Id.* The information put forth by Ewing included the following: he suffered from AIDS and was blind in one eye; the instant offense was nonviolent; he stated a desire to act as an AIDS advocate in the community; and he stated a willingness to enter drug treatment. *Id.* at *1-2.

55. *Id.* at *2. In any event, the point was moot, as Ewing waived his right to challenge the denial of his § 17(b) motion when he failed to suggest to the trial court that it consider these factors. *Id.*; People v. Scott, 885 P.2d 1040, 1050 (Cal. 1994).

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

57. *Id.* (quoting People v. Williams, 948 P.2d 429, 437 (Cal. 1998)).

58. *Id.*

the state and federal constitutions.[59] It held that his recidivist past and "dim prospects for the future" rendered the sentence proportional to the offense and offender, and that the sentence was comparable to those given to repeat offenders in California and other states.[60] It also held that, given the Supreme Court's holding in *Rummel v. Estelle*,[61] which upheld a life sentence for a recidivist charged with obtaining $120.75 under false pretenses, Ewing's 25-years-to-life sentence did not violate the Eighth Amendment protection against cruel and unusual punishment.[62]

Ewing appealed. The Supreme Court of California declined to hear the case, but the United States Supreme Court granted certiorari.[63]

III. SUPREME COURT DISPOSITION

A. Plurality Opinion

The Supreme Court affirmed Ewing's 25-years-to-life sentence, with Justice O'Connor writing a plurality opinion in which the Chief Justice and Justice Kennedy joined.[64] After a recitation of the history of California's three strikes law and of the facts of the case, the plurality asserted that "[t]he Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'"[65] The plurality never

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59. *Id.*

60. *Id.* at *4. *Compare In re* Lynch, 503 P.2d 921, 934-949 (Cal. 1972) (establishing 3 factors for California courts to determine whether a sentence is disproportionate to the crime: (1) the nature of the offense and the offender, (2) a comparison to sentences for more serious offenses in California, and (3) a comparison to sentences for a similar offense in other states), *with* Solem v. Helm, 463 U.S. 277, 292 (1983) (establishing similar criteria for Eighth Amendment proportionality analysis).

61. 445 U.S. 263 (1980).

62. *Ewing*, 2001 WL 1840666, at *4.

63. Ewing v. California, 535 U.S. 969 (2002) (mem.).

64. Ewing v. California, 123 S. Ct. 1179, 1181 (2003).

65. *Id.* at 1185 (quoting Harmelin v. Michigan, 501 U.S. 957, 996-97 (1991)) (Kennedy, J., concurring in part and concurring in judgment); *see also* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The plurality's application of the "narrow proportionality principle" in this case is notable for two reasons. First, that principle originally appeared in Justice Kennedy's concurrence in *Harmelin v. Michigan*—a case which considered not a recidivism statute but one mandating a life sentence for possession of more than 650 grams of cocaine. 501 U.S. at 961, 996. Second, in joining the *Ewing* plurality Chief Justice Rehnquist returned to his position in *Rummel*—apparently abandoned in *Harmelin*—that proportionality review applies to sentences short of capital punishment. *Compare Rummel*, 445 U.S. at 274 n.11 (accepting the possibility of proportionality review of a sentence of life imprisonment for overtime parking), *and*

defined the proportionality principle it purported to apply; instead, it discussed four previous cases and adopted Justice Kennedy's distillation in *Harmelin* of the principles from those cases.[66] A look at those cases is helpful to discern what was at stake in *Ewing*.[67]

The first of those cases, *Rummel v Estelle*, upheld a mandatory life sentence imposed pursuant to a recidivism statute.[68] Rummel's prior offenses were felonies for fraudulent use of a credit card and passing a forged check for $80 and $28.36, respectively;[69] his triggering offense was obtaining $120.75 under false pretenses.[70] The Court, with then-Justice Rehnquist writing for the majority, noted that although prior cases occasionally mentioned a gross disproportionality principle in the context of the Eighth Amendment,[71] challenges to sentences short of capital punishment are "exceedingly rare."[72] The Court also noted the deference given to legislative sentencing decisions: "[F]or crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."[73]

The second and third cases discussed by the *Ewing* plurality represent a dramatic shift in Eighth Amendment jurisprudence. In

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Ewing, 123 S. Ct. at 1185 (applying a "narrow proportionality principle" to the instant case), *with Harmelin*, 501 U.S. at 994 (opinion of Scalia, J.) (arguing that proportionality review was "an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law."). For more discussion of the Chief Justice's jurisprudence on this topic, see Van Cleave, *supra* note 13, at 227 (concluding from these and other cases that the Chief Justice "seems to have accepted proportionality, at least in principle.").

66. *Ewing*, 123 S. Ct. at 1185-87.

67. For another look at this jurisprudence, see Frank A. Zeigler & Rolando V. del Carmen, *Constitutional Issues Arising From "Three Strikes and You're Out" Legislation*, *in* VENGEANCE AS PUBLIC POLICY, *supra* note 28, at 3-23.

68. 445 U.S. at 264-65.

69. *Id.* at 265-66.

70. *Id.* at 266.

71. *Id.* at 271-72.

72. *Id.* at 272.

73. *Id.* at 274. The implication seems to be that Eighth Amendment review of sentences which fall short of capital punishment is appropriate only where the crime is not rationally classifiable as a felony. Indeed, the majority acknowledged that a proportionality principle would apply "if a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at n.11. This fits with the majority's explanation of *Weems v. United States*, which struck down a sentence of "cadena temporal"—12 years of hard labor and permanent restriction on the offender's liberty—for the crime of falsifying a public document. 217 U.S. 349, 362-65, 382 (1910). The majority states that *Weems* can only be considered with regard to "the triviality of the charged offense" as well as the nature and length of punishment. 445 U.S. at 272-74.

1982 the Court's per curiam opinion in *Hutto v. Davis* upheld a sentence of two consecutive terms of 20 years for possession with intent to distribute nine ounces of marijuana and distribution of marijuana. [74] The Court acknowledged the admonition in *Rummel* that cases in which particular sentences are struck down should be "exceedingly rare."[75] The next term, however, saw one such rare case: *Solem v. Helm.*[76] There the Court, with Justice Powell writing for the majority, struck down a life sentence without parole imposed for a seventh nonviolent felony[77] where the triggering offense was "uttering a 'no account' check for $100."[78] The Court confirmed the existence of a proportionality principle in Eighth Amendment jurisprudence.[79] It then gave three factors it said are relevant to the proportionality analysis: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[80] Using those factors, the Court found that the defendant "received the penultimate sentence for relatively minor criminal conduct," and that he was treated more harshly than more serious criminals in that state and similar criminals in almost all others.[81] On these bases it held the sentence to be "significantly disproportionate" to the crime and therefore in violation of the Eighth Amendment.[82]

The final case discussed by the *Ewing* plurality is *Harmelin v. Michigan.*[83] *Harmelin* dealt not with a recidivist offender, but with a first-time offender given a life sentence without parole for possessing 672 grams of cocaine.[84] A split majority rejected Harmelin's gross disproportionality claim; Justice Scalia wrote the opinion of the court,

74. 454 U.S. 370, 370-72 (1982) (per curiam).

75. *Id.* at 374.

76. 463 U.S. 277 (1983).

77. *Id.* at 279-82.

78. *Id.* at 281.

79. *Id.* at 284.

80. *Id.* at 292. A similar set of factors can be found in *Rummelv. Estelle*, 445 U.S. 623, 295 (1980) (Powell, J., dissenting).

81. *Solem*, 463 U.S. at 303.

82. *Id.* The Court declared that its decision was not incompatible with its holding in *Rummel*, which it distinguished by pointing out that, unlike in *Rummel*, parole was not a real option for the defendant in *Solem*. *Id.* at 288 n.13, 300-03.

83. 501 U.S. 957 (1991).

84. *Id.* at 961.

in which the Chief Justice joined.[85] Scalia surveyed the history of the Eighth Amendment and concluded that the proportionality principle applied only to capital punishment.[86] Justice Kennedy wrote a concurring opinion that delineated four principles of proportionality review—"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that our proportionality review be guided by objective factors"—which together "inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[87] It was this statement of the proportionality principle(s) that guided the plurality's opinion in *Ewing*.[88]

Before analyzing Ewing's Eighth Amendment claim, the plurality observed that the "sea change in criminal sentencing" due to three strikes laws represented a deliberate decision by legislatures to isolate those individuals who were not deterred by conventional punishment.[89] In addition, it noted that its traditional standard of deference to legislative policy choices includes deference to the selection of the rationale or rationales behind a state's sentencing scheme.[90] Thus, incapacitation is a permissible justification for a recidivism statute, and recidivism is itself a "legitimate basis for increased punishment."[91]

Lastly, the plurality considered and disposed of Ewing's Eighth Amendment claim. While purporting to adopt the framework in Justice Kennedy's *Harmelin* concurrence, the plurality assessed "the gravity of the offense compared to the harshness of the penalty" but employed no clear methodology.[92] Rejecting Ewing's framing of the issue as "shoplifting three golf clubs," the plurality instead defined his crime as felony grand theft of almost $1,200 worth of goods after

85. *Id.*

86. *Id.* at 994.

87. *Id.* at 1001 (Kennedy, J., concurring in part and concurring in judgment) (citing *Solem*, 463 U.S. at 288).

88. Ewing v. California, 123 S. Ct. 1179, 1187 (2003). *But see infra* Part IV (arguing that the plurality's approach failed to clarify proportionality review).

89. *Ewing*, 123 S. Ct. at 1187.

90. *Id.* (quoting *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in judgment)).

91. *Id.* at 1188.

92. *Id.* at 1189.

having been convicted of two violent or serious felonies—not a negligible offense.[93] The plurality also stated that its inquiry into the gravity of Ewing's offense must consider not only the felony at hand but also his long recidivist history.[94] Because of the state's interest in incapacitating recidivists, as well as Ewing's long history of felonies, the plurality held that his was not "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[95]

B. Scalia and Thomas, Concurring in Judgment

Justices Scalia and Thomas filed separate opinions concurring in the result.[96] Both did so on the ground that the Eighth Amendment does not include a proportionality principle.[97] Scalia explained that, even if he were inclined to accept the narrow proportionality principle found in *Solem*, he would not know how to apply it.[98] Scalia asserted that the concept of proportionality is inherently tied to the penological goal of retribution, and thus cannot sensibly be applied to a law aiming at incapacitating recidivists.[99] That is, the retributive calculus matching punishment and crime is backward-looking,[100] whereas incapacitation is utilitarian, looking to future behavior (after all, a lengthy sentence given to a habitual offender is given, in part, because of his *habit*, and not just his *offense*).[101] Once penological goals other

93. *Id.* The plurality also rejected the argument that the trial judge abused her discretion in declining to downgrade grand theft to a misdemeanor. *Id.*

94. *Id.* at 1189-90.

95. *Id.* at 1190 (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment)).

96. *Id.* at 1190-91 (Scalia, J., concurring in judgment); *id.* at 1191 (Thomas, J., concurring in judgment).

97. *Id.* at 1191 (citing *Harmelin*, 501 U.S. at 985 (opinion of Scalia, J.)).

98. *Id.* at 1190 (Scalia, J., concurring in judgment). Justice Thomas, on the other hand, said that even if the *Solem* proportionality test were clear enough for judicial application, he nonetheless would not apply it. *Id.* at 1191 (Thomas, J., concurring in judgment).

99. *Id.* (citing *Harmelin*, 501 U.S. at 989).

100. The proportionality principle can be traced to the *Lex talionis*, the notion of "an eye for an eye." *Harmelin*, 501 U.S. at 989 ("[P]erfect proportionality is the talionic law."); 7 OXFORD ENGLISH DICTIONARY 582 (2d ed. 1989) (defining "talion" as "RETALIATION; *esp.* in the Mosaic, Roman, and other systems of Law, the *Lex Talionis*, . . . the principle of exacting compensation, 'eye for eye, tooth for tooth'"); *Exodus* 21:23-24 ("If any harm follows, then you shall give life for life, eye for eye, tooth for tooth . . . .") (New Revised Standard Version).

101. *See* Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 60 (2000) ("Since an offender's propensity for recidivism is not necessarily connected to the offense he committed, proportionality could only emerge accidentally from an incapacitation-based system.")

than retribution are weighed, Scalia wrote, "the game is up": proportionality has lost its analytical utility because the gravity of the prior offenses are no longer relevant.[102]

C. Stevens, Dissenting

Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, dissented.[103] He wrote separately to emphasize that, in his view, proportionality review is both capable of application and mandated by the Eighth Amendment.[104] The fact that it must be applied on a case-by-case basis is not fatal, as judges must often draw lines like this.[105] Further, Stevens argued, it is "anomalous" to apply Eighth Amendment proportionality review to bail and fines but not imprisonment.[106] Therefore, Stevens would read the Eighth Amendment to strike down Ewing's sentence under a "broad proportionality principle"[107]—not the "narrow" principle from *Harmelin*[108]

D. Breyer, Dissenting

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, also filed a dissent.[109] In Breyer's view, *Solem* was the controlling case here, and the facts in each were similar enough that Ewing's sentence also should have been held grossly disproportionate.[110] Nonetheless, even using Justice Kennedy's approach in *Harmelin*,

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(citation omitted).

102. *Ewing*, 123 S. Ct. at 1190.

103. *Id.* at 1191 (Stevens, J., dissenting).

104. *Id.* at 1191-92.

105. *Id.* at 1192. *See, e.g.*, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (applying a Due Process Clause proportionality review on a case-by-case basis to punitive damages awards); Doggett v. United States, 505 U.S. 647 (1992) (doing the same for speedy trials under the Sixth Amendment).

106. 123 S. Ct. at 1192 (quoting Solem v. Helm, 463 U.S. 277, 289 (1983)). *But see* Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.) ("There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue.").

107. *Id.* at 1193. "[T]he Eighth Amendment's prohibition of 'cruel and unusual punishments' expresses a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions." *Id.*

108. *Id.* at 1191 n.1 (accepting for "present purposes" the majority's use of the *Harmelin* principle, but asserting that the *Solem* framework is more on point).

109. *Id.* at 1193 (Breyer, J., dissenting).

110. *Id.*

Breyer would find gross disproportionality here.[111] Breyer argued that the *Ewing* plurality mischaracterized Kennedy's approach. Breyer would make "a threshold comparison" of the crime and the sentence.[112] If the result were an inference of gross disproportionality, he would carry out intra- and interjurisdictional analyses of the sentence.[113] These analyses are meant to answer two questions: "First, how would other jurisdictions (or California at other times, *i.e.*, without the three strikes penalty) punish the *same offense conduct*? Second, upon what other conduct would other jurisdictions (or California) impose the *same* [real] *prison term*?"[114]

Breyer found Ewing's case to be a "strong" one, which satisfied the threshold inquiry.[115] In this inquiry he compared the facts at hand to those in *Rummel* and *Solem*, two previous recidivism cases with opposite holdings; he said Ewing's sentence falls between them, and thus raises a constitutional question.[116] Breyer also argued that the sentence represents an extremely harsh punishment for a "less serious" crime, and that many judges would disagree with the harshness of the sentence.[117] Moving on to the intrajurisdictional analysis, Breyer noted that before the three strikes law no one in Ewing's position could have been sentenced to more than 10 years.[118] He also cited numbers that show that recidivists served an average of 3 to 4 additional years, and that 25-years-to-life sentences such as Ewing's usually are reserved for much more serious criminals such as first-degree murderers.[119] In his interjurisdictional analysis Breyer provided an extensive Appendix to his opinion;[120] the data show, among other things, that a person in Ewing's position would not serve more than 10 years in 32 states plus the District of Columbia and the

111. *Id.* at 1193-94.

112. *Id.* at 1194 (quoting *Harmelin*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

113. *Id.*

114. *Id.* at 1197.

115. *Id.* at 1196-97.

116. *Id.* at 1194-95.

117. *Id.* at 1195-97 (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2002) (omitting shoplifting from the list of crimes that trigger extended sentences for recidivists under the United States Sentencing Guidelines)).

118. *Id.* at 1197. *But see id.* at 1187 n.1 (opinion of O'Connor, J.) (arguing this statistic is "hardly surprising," since "[p]rofound disappointment with the perceived lenity of criminal sentencing (especially for repeat felons) led to passage of three strikes laws in the first place.").

119. *Id.* at 1198.

120. *Id.* at 1202-07.

federal system.[121]

Breyer argued that California could not justify subjecting Ewing's theft to treatment under the three strikes law, since the theft was not one of the "serious" or "violent" crimes at which the recidivist statute was directed.[122] Finally, though conceding the guidance a bright-line rule would offer, Breyer argued that the Eighth Amendment demands a case-by-case analysis of sentences.[123]

IV. ANALYSIS

After its review of the three strikes law and relevant precedent, the plurality in *Ewing* disposed of Ewing's appeal in less than four pages.[124] But what Eighth Amendment proportionality jurisprudence needed was precision, not parsimony. Perhaps the most that can be said about the plurality holding in *Ewing* is that it confirmed how rare (yet not impossible) the successful proportionality challenge will be, at least for sentences imposed pursuant to a legitimate incapacitation regime.[125] However, lower courts faced with interpreting *Ewing* would have been better served by more concrete guidelines as to how exactly they should decide whether a case falls within the set of rare proportionality challenges that have merit.[126]

The imprecise state of proportionality review was emphasized by *Lockyer v. Andrade*,[127] the companion case to *Ewing*.[128] Leandro Andrade had a criminal record including five felonies and two

121. *Id.* at 1198, 1202-05.

122. *Id.* at 1199-1202. *But see id.* at 1190 n.2 (opinion of O'Connor, J.) (arguing that the California legislature decided not to have the gravity of the triggering felony determine the applicability of the statute).

123. *Id.* at 1202.

124. *Id.* at 1187-90 (opinion of O'Connor, J.).

125. *Id.* at 1190.

126. One potential guideline, discussed in more detail below, would be to add to this account the caveat that the triggering offense must be capable of definition as a serious or violent crime. *See infra* notes 151-53 and accompanying text; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66 n.225 (1997) (characterizing Kennedy's *Harmelin* opinion as endorsing proportionality while concluding that intra- and interjurisdictional analyses are unnecessary if the crime at hand is serious). Indeed, the *Ewing* plurality noted the seriousness of Ewing's triggering theft, and its treatment of the "wobbler" question also lends some support to the notion that its focus remains on the seriousness of the triggering offense. *Ewing*, 123 S. Ct. at 1189. However, the plurality undermined the usefulness of this guidepost by focusing not only on the triggering offense but also on Ewing's recidivist history. *Id.* at 1190-91.

127. 123 S. Ct. 1166 (2003).

128. *Andrade* was argued and decided on the same days as *Ewing*. *See id.*; *Ewing*, 123 S. Ct. at 1179.

misdemeanors, all nonviolent, for theft, burglary, and marijuana charges.[129] In 1995, he was arrested after two thefts of videotapes worth approximately $150 total.[130] Because of his prior offenses, he was sentenced to two consecutive terms of 25-years-to-life under the three strikes law.[131] The Court of Appeals for the Ninth Circuit reversed the sentence on the grounds that it was an "unreasonable application of clearly established Supreme Court law"—namely, Eighth Amendment jurisprudence as embodied in *Solem*.[132] The Supreme Court, with Justice O'Connor writing for a majority, reversed and reinstated Andrade's sentence.[133] Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer.[134] The majority did not reach the merits of Andrade's constitutional claim; instead, it focused on whether Andrade's sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law."[135] The problem with the court's ruling below, the majority wrote, was the difficulty with defining the "clearly established Federal law" in Eighth Amendment disproportionality claims.[136] Indeed, the Court admitted, "our precedents in this area have not been a model of clarity."[137] The majority found only one rule clearly established: "A gross disproportionality principle is applicable to sentences for terms of years."[138] Because Andrade's sentence was not the "extraordinary" case failing that test, it was not an unreasonable application of federal law for the lower court to have relied on *Rummel* in upholding his sentence.[139]

Although *Andrade* acknowledged the abysmal state of Eighth

129. Andrade v. Attorney Gen., 270 F.3d 743, 748-49 (9th Cir. 2001). In addition, Andrade, a longtime heroin addict, violated his parole by escaping from federal prison. *Id.* at 749.

130. *Id.*

131. *Id.*

132. *Id.* at 766-67. The court granted relief under the Antiterrorism and Effective Death Penalty Act (AEDPA), which defines federal habeas corpus remedies for state inmates. 28 U.S.C. § 2254(a), (d)(1) (2000).

133. *Andrade*, 123 S. Ct. at 1169, 1176.

134. *Id.* at 1176. Souter argued that *Solem* supported the Ninth Circuit's holding striking the sentence. *Id.* He also argued that there was no possible justification, public-safety or otherwise, for the second 25-years-to-life sentence imposed on Andrade. *Id.* at 1178.

135. *Id.* at 1172-75 (citing 28 U.S.C. § 2254(d)(1)).

136. *Id.* at 1172-73.

137. *Id.* at 1173.

138. *Id.*

139. *Id.* at 1175-76.

Amendment proportionality review, *Ewing* did not do enough to remedy the same. The *Ewing* plurality claimed to apply Justice Kennedy's *Harmelin* test, which begins with a threshold comparison of the crime and the sentence, and then undertakes intra- and interjurisdictional analyses only where the threshold analysis "leads to an inference of gross disproportionality."[140] However, one will not find in the opinion a coherent explanation of how lower courts should carry out this threshold inquiry. Indeed, Justice Scalia was correct that the plurality's threshold analysis did not convincingly show how a twenty-five-years-to-life sentence is proportional to a nonviolent theft of $1197 in golf clubs.[141] Perhaps acknowledging this shortcoming, the plurality also weighed Ewing's history of felony recidivism and California's interest in incapacitating repeat offenders as part of its threshold analysis.[142] In so doing it recognized that Ewing was being punished not only for the triggering offense but also for his long criminal record.[143] But at some point to consider those earlier convictions is to cross the threshold. The threshold analysis must be primarily a comparison of "the crime committed and the sentence imposed."[144] To incorporate Ewing's criminal record into the threshold analysis so completely is to treat his sentence more as an *additional* penalty for his earlier convictions than a *stiffened* penalty for the triggering crime.[145] This undermines the constitutional legitimacy of recidivism statutes by skirting the protection of the

140. Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in judgment); Ewing v. California, 123 S. Ct. 1179, 1187, 1190 (2003).

141. *Ewing*, 123 S. Ct. at 1191 (Scalia, J., concurring in judgment); *cf. Lockyer*, 123 S. Ct. 1177-78 n.2 (Souter, J, dissenting) (arguing that "the triggering offense must reasonably support the weight of even the harshest possible sentences").

142. *Ewing*, 123 S. Ct. at 1189-90. *See id.* at 1191 (Scalia, J., concurring in judgment) (criticizing the consideration of these factors).

143. *Id.* at 1189-90 (citing Rummel v. Estelle, 445 U.S. 268, 276 (1980); Solem v. Helm, 463 U.S. 277, 296 (1983)); *see supra* text accompanying note 91.

144. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment).

145. The Court has noted that this distinction—between an additional penalty and a stiffened penalty—is what rescues recidivism statutes from double jeopardy concerns:

> In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes," but instead as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

Witte v. United States, 515 U.S. 389, 400 (1995) (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948)).

Double Jeopardy clause of the Fifth Amendment.[146]

The question of when a sentence imposed under a recidivism statute is a permissible stiffened penalty as opposed to an unconstitutional additional penalty has gone unanswered for over a century.[147] It arose in *Rummel* and *Solem* and has arisen again in the context of California's three strikes law.[148] The plurality dodged the question with its all-inclusive definition of Ewing's crime as incorporating his recidivism.[149] But this approach fails. It fails because, presumably, if California were to make "overtime parking a felony punishable by life imprisonment"[150] it would run afoul of the proportionality principle.[151] That would be true even if the overtime parking sentence were simply part of a three strikes scheme meant to incapacitate highly recidivist offenders.[152] That is, the holding cannot be explained merely by expanding the definition of Ewing's crime, since other expanded definitions likely would not survive proportionality review. The *Ewing* plurality opinion lacks an analytical guidepost by which to make this threshold determination of

146. *Id.*; U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ").

147. Brief of Amicus Curiae Families Against Mandatory Minimums at *7, Ewing v. California, 123 S. Ct. 1179 (2003) (No. 01-6978), 2002 WL 1467405 (quoting Moore v. Missouri, 159 U.S. 673, 677 (1895) ("[T]he punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself . . . .") (internal quotation marks omitted).

148. *Rummel*, 445 U.S. at 284 ("This segregation [under a recidivism statute] and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time . . . ."); *Solem*, 463 U.S. at 296 n.21 ("We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision."); Riggs v. California, 525 U.S. 1114 (1999) (opinion of Stevens, J., respecting denial of certiorari) ("It is thus unclear how, if at all, a defendant's criminal record beyond the requisite two prior 'strikes' . . . affects the constitutionality of his sentence, especially when the State 'double counts' the defendant's recidivism in the course of imposing that punishment.").

149. *Ewing*, 123 S. Ct. at 1189-90.

150. *Rummel*, 445 US. at 274 n.11. This "overtime parking" example is frequently cited in Eighth Amendment proportionality case law. *See, e.g.*, *Solem*, 463 U.S. at 288 (relying on the example); Harmelin v. Michigan, 501 U.S. 957, 962-63 (1991) (criticizing the use of the example); Lockyer v. Andrade, 123 S. Ct. 1166, 1177 n.2 (2003) (Souter, J., dissenting) (mentioning "parking violators").

151. If this hypothetical example would not violate the proportionality principle, then perhaps Justice Souter is correct that the Court in *Andrade* left that principle with "no meaning." *Andrade*, 123 S. Ct. at 1179 (Souter, J., dissenting).

152. Brief for Families Against Mandatory Minimums at *7, Ewing v. California, 123 S. Ct. 1179 (2003) (No. 01-6978), 2002 WL 1467405 ("The driver's criminal history might justify an enhanced penalty, perhaps even a brief stay behind bars. But even if the driver were John Gotti, a State could not constitutionally rely on that history to impose upon him a sentence of the sort usually reserved for murder . . . .").

proportionality.

One such guidepost is a holding that proportionality review only applies to a sentence given to a recidivist offender when the triggering offense (or, perhaps, any of the prior offenses) is not rationally classifiable as a felony. The Court in *Rummel* seemed to suggest a similar limitation;[153] it might have resurrected it here. Another possible guidepost would have been a holding that where a defendant's criminal history shows a propensity toward a certain sort of crime (such as armed robbery), a latter conviction within the same category of crime, even if much less significant (such as petty theft), justifies a much longer sentence.[154] However, the plurality specifically rejected this limitation.[155] Lower courts therefore are left with the task of divining solid jurisprudence out of the plurality's hollow reasoning.

A more honest account of the holding in *Ewing* is that it confirmed that proportionality review of sentences will be quite limited where the sentences are given as part of a legitimate scheme designed to incapacitate recidivist offenders. The plurality acknowledged that the Court generally grants deference to states in matters of sentencing,[156] that such deference includes respect for a state's choice of a penological theory,[157] and that incapacitation of repeat serious offenders is one such "reasonable" choice.[158] The result in *Ewing* must be read as a confirmation that, where a state chooses incapacitation as its goal, the Court will substantially limit its proportionality review of a sentence imposed on a recidivist who has committed serious crimes. But the Court simply ignored or glossed over the fundamental issues at play in this case: the boundaries of legitimacy for incapacitation regimes, and the weight prior convictions may have in the threshold inquiry.

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153. *Supra* note 73 and accompanying text.

154. *See, e.g., State v. Clifton*, 580 S.E.2d 40, 45 (N.C. 2003) ("The fact that defendant has now been convicted of two charges of the same offense as one of his predicate offenses for habitual felon status emphasizes the purpose of the Habitual Felon Act . . . .").

155. To be sure, the plurality acknowledged that Ewing's prior strikes included a robbery and three burglaries. *Ewing*, 123 S. Ct. at 1190 (opinion of O'Connor, J.). Even so, it explicitly downplayed the importance of the categorical relation among his offenses when it rejected Justice Breyer's framing of the issue as one of "property-crime-related incapacitation." *Id.* at n.2; *id.* at 1201-02 (Breyer, J., dissenting).

156. *Id.* at 1187 (opinion of O'Connor, J.).

157. *Id.*

158. *Id.* at 1187-89. In contrast, Justice Souter appears to question the constitutional legitimacy of the theory of incapacitation. *See Andrade*, 123 S. Ct. at 1178 (Souter, J., dissenting) (prefacing a comment with the following: "Whether or not one accepts the State's choice of penalogical policy as constitutionally sound . . .").

Such an elaboration on the holding in *Ewing* would have been superior for at least two reasons. First, it more fully accounts for relevant Supreme Court case law. For example, it incorporates the problematic set of cases typified by the example of a life sentence for an overtime parking violation.[159] The more difficult precedent is *Solem*. Proponents of a robust proportionality review rely, as they must, on that case.[160] And at first glance, *Solem* might seem hard to reconcile with the account of *Ewing* above as limiting review of sentences imposed pursuant to an incapacitation regime, since *Solem* also dealt with a recidivist statute. Three factors, however, suggest that this account can in fact be squared with *Solem*. First, *Solem* dealt with a history of nonviolent offenses and a $100 triggering theft, whereas the record in *Ewing* included crimes against persons and a triggering theft of $1200. Second, the *Ewing* plurality pointed out that *Solem* turned in part on the fact that the defendant there received a life sentence without parole, unlike the parole-eligible defendant in *Rummel*.[161] Likewise, Ewing was eligible for parole.[162] Third, *Harmelin*, although not dealing with recidivism, and not overruling *Solem* in so many words, circumscribed the scope of proportionality review.[163] One can fairly say that what survives from *Solem* is clearly a limited proportionality review and therefore that this review can be settled with the account of *Ewing* above.

The second reason the elaboration suggested above would have been superior is it would serve as a much clearer guide for lower courts, which will not find much to guide them in *Ewing*. The plurality's version of Justice Kennedy's *Harmelin* threshold analysis presents such an eccentric interpretation of proportionality that it can

159. *See supra* notes 150-52 and accompanying text.

160. *Ewing*, 123 S. Ct. at 1193 (Breyer, J., dissenting); Erwin Chemerinsky, *Is Any Sentence Cruel and Unusual Punishment?*, TRIAL, May 2003, 78, 78-79.

161. *Ewing*, 123 S. Ct. at 1186.

162. *See supra* note 12 (explaining parole under the California three strikes law); *Andrade*, 123 S. Ct. at 1174 (distinguishing *Andrade* from *Solem* on similar parole-related grounds). *But see* Chemerinsky, *supra* note 160, at 79 ("After O'Connor's opinion, a state can immunize its sentences from Eighth Amendment analysis—while virtually ensuring that a convict will never be released—just by setting parole in 75 or 100 years").

163. Note, *Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors*, 112 HARV. L. REV. 1349, 1358-59 (1999) ("Aside from a single, now-discredited case that strongly endorsed proportionality review, precedent indicates that the legislature possesses extensive discretion to outline penalties for criminal offenses." (footnote omitted)); Stuntz, *supra* note 126, at 66 (noting that "the Supreme Court briefly, but only briefly, embraced" a proportionality rule).

only lead to confusion.[164] This is illustrated by the conflicting approaches taken in two cases decided since *Ewing* and purporting to apply it. In one case, *Crosby v. State*, the Supreme Court of Delaware struck down a 45-year sentence given to a habitual offender convicted of second-degree forgery and criminal impersonation.[165] Appellant Chris Crosby, arrested on several drug charges, gave the officer a false name and false date of birth, and signed an official document with that false name.[166] Based on his record of five prior felonies, Crosby was given a life sentence, which the Delaware court treated as a 45-year term.[167] The Delaware court held that this sentence failed the *Harmelin* threshold test,[168] and in its comparative analysis determined that Crosby's sentence was extraordinarily harsh compared to other recent sentences under the habitual offender statute.[169] Therefore, given that Crosby's triggering offense was "the least serious type of felony," that his record did not include repeated violent crimes, and that his sentence far exceeded recent sentences under the same statute, the court concluded that the Supreme Court would find Crosby's sentence unconstitutional.[170]

The North Carolina Supreme Court took a different tack in *State v. Clifton*.[171] Defendant Alfred Dominique Clifton had used bogus checks totaling $56,580.78 to acquire a Yamaha motorcycle and a

164. *Compare* Laurie L. Levenson, *Picking up the Slack*, NAT'L L.J., Aug. 18, 2003, at 33 ("[M]ost state and federal courts are interpreting [*Ewing* and *Andrade*] as precluding any Eighth Amendment challenges to sentences by defendants charged as habitual offenders.") *with* Crosby v. State, 824 A.2d 894 (Del. 2003) (upholding an Eighth Amendment challenge by a repeat offender). There are also judges who, instead of being confused by the Court's holdings, are outraged by them. *E.g.*, Rico v. Terhune, 63 Fed. Appx. 394 (9th Cir. 2003) (Reinhardt, J., concurring) (joining an opinion affirming a denial of a habeas corpus petition with the following caveat: "I concur only under compulsion of the Supreme Court decision in *Andrade*. I believe the sentence is both unconscionable and unconstitutional."); *id.* (Pregerson, J., dissenting in part) (declining to apply a three strikes sentence because "[i]n good conscience, I can't vote to go along with the sentence imposed in this case").

165. 824 A.2d 894, 896 (Del. 2003).

166. *Id.*

167. *Id.* at 896, 902.

168. *Id.* at 907.

169. *Id.* at 912. The court noted that only one person out of 28 convicted under the statute in 2002 was given a sentence of more than 2 1/2 years. *Id.*

170. *Id.* The characterization of the felony as of the "least serious type" is a nod to *Ewing*, where the crime "was certainly not 'one of the most passive felonies a person could commit.'" Ewing v. California, 123 S. Ct. 1179, 1189 (2003) (quoting Solem v. Helm, 463 U.S. 277, 296 (1983) (internal quotation marks omitted)).

171. 580 S.E.2d 40 (N.C. 2003).

Chevrolet Suburban.[172] Because of his criminal record—assault with a deadly weapon on a law enforcement officer, obtaining property by false pretenses and escape from prison (all felonies)—Clifton was convicted as a habitual felon.[173] A lower court sentenced him to two consecutive terms of 168 months to 211 months of imprisonment—a possible total of over thirty-five years.[174] Reviewing this sentence, the North Carolina Supreme Court noted the continued uncertainty of Eighth-Amendment law: "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."[175] The court noted the serious nature of Clifton's criminal record, which included one violent offense, as well as the fact that the offenses at hand were similar to one of his prior convictions.[176] Finally, brushing aside the argument that the underlying crimes here were not serious enough to trigger the habitual offender statute, it held the sentence to be constitutional.[177]

The disparity in outcomes between these two recent decisions suggests that *Ewing* insufficiently elucidated the current state of Eighth Amendment law. While these two outcomes might be considered consistent had the Court in *Ewing* articulated the notion that only nonviolent offenders could bring successful proportionality challenges, a closer look at the courts' respective methodologies reveals deeper contradictions. For example, the Delaware court in *Crosby* found so little guidance in the *Ewing* plurality opinion for its threshold analysis that it instead turned to Justice Breyer's dissent.[178] On the other hand, the North Carolina court in *Clifton*, echoing the

172. *Id.* at 41-42, 45.

173. *Id.* at 42.

174. *Id.* at 42-43.

175. *Id.* at 45 (citing *Ewing*, 123 S. Ct. at 1190).

176. *Id.* at 45.

177. *Id.* at 45-46.

178. Crosby v. State, 824 A.2d 896, 910 (Del. 2003); *see Ewing*, 123 S. Ct. at 1194-95 (Breyer, J., dissenting) (looking to three factors: (1) the real-time prison term; (2) the sentence-triggering offense; and (3) the offender's criminal record) (citing Rummel v. Estelle, 445 U.S. 263, 265-66, 269, 276, 278, 280-81 (1980); Solem v. Helm, 463 U.S. 277, 290-303 (1983)). The Delaware court's attempt to distinguish Ewing's criminal record as "far more serious" is not entirely persuasive. 824 A.2d at 911. The court noted that "Crosby's criminal history includes numerous misdemeanors and five prior felony convictions spanning a fifteen-year period: (1) Burglary in the Third Degree; (2) Forgery in the Second Degree; (3) Possession of a Deadly Weapon by a Person Prohibited; (4) Possession with the Intent to Deliver; and (5) Burglary in the Second Degree." *Id.* at 908.

Ewing plurality in its vagueness, upheld the defendant's sentence after a rather brief threshold inquiry.[179] It noted the seriousness of the triggering offense and the fact that Clifton earlier had been convicted on similar charges.[180] The court also observed that the sentence fell within the guidelines provided by the recidivism statute for an offender in Clifton's position[181]—as of course it always will as long as lower courts respect their duties under those guidelines. Finally, the North Carolina court quoted the *Ewing* plurality's view that under an incapacitation regime a court is to look not only at the instant offense but also at the offender's history.[182]

Other courts adjudicating Eighth Amendment claims no doubt will wonder which is the proper approach—that of the Delaware court, the North Carolina court, or perhaps another analysis as yet unarticulated. Unfortunately, those courts cannot know for sure, because *Ewing* did not tell them. One might have thought that the proportionality principle would provide a certain degree of foreseeability and consistency in outcomes. Instead, these cases suggest that the Court's failure to meaningfully define and explain its proportionality review in *Ewing* has produced a recipe for further unpredictability. Perhaps the Court will take another swing at providing that predictability during its next at-bat on this issue. As we say here in Boston, there's always next year.

Joshua R. Pater

179. 580 S.E.2d at 45-46.
180. *Id.* at 45.
181. *Id.* at 45-46.
182. *Id.* at 46 (quoting *Ewing*, 123 S. Ct. at 1189-90).