

CRUEL AND UNUSUAL: THE STORY OF LEANDRO ANDRADE

*Erwin Chemerinsky**

TABLE OF CONTENTS

I. Introduction.....	1
II. Recidivist Sentencing Laws	4
III. The Constitutional Principles	8
IV. Applying the Constitutional Principles	12
V. The Supreme Court's Decisions and What They Mean.....	21
VI. Conclusion	24

I. INTRODUCTION

I want to tell you about Leandro Andrade. On November 4, 1995, Leandro Andrade—a nine-year Army veteran and father of three—was caught shoplifting five children's videotapes (*Snow White*, *Casper*, *The Fox and the Hound*, *The Pebble and the Penguin*, and *Batman Forever*), worth a total of \$84.70, from a K-Mart store in Ontario, California. The store's loss prevention officer observed Andrade's actions, stopped him, and confiscated the videotapes, and Andrade was arrested for shoplifting.

On November 18, 1995, Andrade went to a different K-Mart store, in Montclair, California, and was caught shoplifting four children's videotapes (*Free Willy 2*, *Cinderella*, *The Santa Clause*, and *Little Women*) worth

* Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California. J.D., Harvard University, 1978; B.S., Northwestern University, 1975. I am grateful to everyone at Drake Law School for the wonderful week I spent there. This paper was delivered at Drake on February 26, 2003. A week later, on March 5, the Supreme Court decided *Lockyer v. Andrade*, which was the focus of my talk. I have revised the paper, especially by adding Part IV, to discuss the Court's decision. It should be disclosed that I represented Andrade both in the United States Court of Appeals for the Ninth Circuit and in the Supreme Court.

\$68.84. Again, Andrade was observed on store video cameras, he was stopped by security officers, the videotapes were confiscated, and Andrade was arrested for shoplifting.

Under California law, this generally would be regarded as the crime of petty theft,¹ a misdemeanor punishable by a fine, a jail sentence of six months or less, or both.² California law, however, provides that petty theft with a prior conviction for a property offense is a felony offense.³ Because Andrade had at least two prior convictions, albeit for the nonviolent crime of burglary, his petty theft was prosecuted as the felony “petty theft with a prior.”⁴

While Andrade was in the Army, he became a drug addict. When he got out of the Army, he committed a series of relatively minor property crimes—some consisting of shoplifting. His most serious offenses were in 1983, twelve years before he was stealing from K-Mart, when he committed three residential burglaries on the same day. He was unarmed, and nobody was home when he did this. He was caught and convicted of burglary. He was sentenced to two and a half years in prison, which he served. But because of those three residential burglaries, Andrade’s stealing of the videotapes was charged as the crime of petty theft with a prior.

Petty theft with a prior in California is punishable by three years in prison.⁵ The way California’s sentencing structure works, two counts of petty theft with a prior is punishable by a maximum of three years and eight months in prison.⁶ If three years and eight months in prison had been Andrade’s sentence, that would be a significant sentence for stealing \$153.00 worth of videotapes.

But of course the story does not stop there. In 1994, California adopted a law called “three strikes and you’re out.”⁷ California’s three

1. CAL. PENAL CODE § 488 (West 1999).

2. *Id.* § 490.

3. *Id.* § 666 (West 1999 & Supp. 2003).

4. *See id.*

5. Andrade v. Attorney Gen. of Cal., 270 F.3d 743, 746 (9th Cir. 2001) (citing CAL. PENAL CODE §§ 18, 666).

6. CAL. PENAL CODE § 1170.1(a) (West 1999); *see infra* note 116 (explaining how the sentence of three years and eight months is calculated).

7. Career Criminal Punishment Act, ch. 12, 1994 Stat. 71 (codified at CAL. PENAL CODE § 667 (West 1999)). California’s “Three Strikes” law was initially adopted by the California Legislature as a statute, *see id.*, and then approved by the voters as an initiative, Proposition 184, approved by voters, Gen. Elec. (Nov. 8, 1994) (codified at CAL. PENAL CODE § 1170.12 (West Supp. 2003)).

strikes law provides for a sentence of twenty-five years to life imprisonment upon a defendant's third felony conviction.⁸ The three strikes law requires that the first two felonies be "serious" or "violent" felonies.⁹ But under the California three strikes law, the third strike can be any crime; it need not be a serious or a violent felony.¹⁰ Andrade was convicted of two counts of petty theft with a prior. He was sentenced under the California three strikes law to two sentences of twenty-five years to life imprisonment, to run consecutively.¹¹ His sentence, properly phrased, is an indeterminate life sentence with no possibility of parole for fifty years.¹² He was convicted in 1996 when he was thirty-seven years old. By the time he is eligible for parole in the year 2046, he will be eighty-seven years old.¹³

Andrade is not a unique individual in California. There are, in fact, 344 individuals serving sentences of twenty-five to life or more for shoplifting—for petty theft with a prior—under California's three strikes law.¹⁴

The California Court of Appeal affirmed the judgment against Andrade, finding that the sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment.¹⁵ The California Supreme Court denied review.¹⁶

Andrade then filed a timely habeas corpus petition in the United States District Court for the Central District of California.¹⁷ The district court denied the habeas petition,¹⁸ and Andrade appealed.¹⁹ I was

8. CAL. PENAL CODE § 667(e)(2)(A) (West 1999); *id.* § 1170.12(c)(2)(A) (West Supp. 2003).

9. *Id.* §§ 667(d), 1170.12(b) (defining "prior conviction of a felony").

10. *See id.* §§ 667(e)(2)(A), 1170.12(c)(2)(A) (subjecting defendants to a possible sentence of life imprisonment upon their third "felony" conviction, without qualifying the term felony); *see also* Lockyer v. Andrade, 123 S. Ct. 1166, 1170 (2003) ("Under California's three strikes law, any felony can constitute the third strike, and can thus subject a defendant to a term of 25 years to life in prison.").

11. Andrade v. Attorney Gen. of Cal., 270 F.3d 743, 749 (9th Cir. 2001).

12. *Id.* at 750.

13. *Id.*

14. Erwin Chemerinsky, *The Supreme Court's Blockbuster Term*, 39 TRIAL 72, 74 (2003).

15. Andrade v. Roe, No. CV 98-6776-CAS, 1999 U.S. Dist. LEXIS 23176, at *2 (C.D. Cal. Jan. 11, 1999) (noting the judgment in the California Court of Appeal).

16. People v. Andrade, No. S062030, 1997 Cal. LEXIS 4637, at *1 (Cal. July 23, 1997).

17. Andrade v. Roe, 1999 U.S. Dist. LEXIS 23176, at *2.

18. *Id.* at *1.

appointed to represent Andrade in the Ninth Circuit Court of Appeals and did so successfully; the Ninth Circuit held that Andrade's sentence was cruel and unusual punishment.²⁰ The State of California petitioned for certiorari, which the Supreme Court granted.²¹

The same day that I argued Andrade's case, the Supreme Court heard oral argument in another case coming from California²² regarding the three strikes law. This case involved a man by the name of Gary Ewing.²³ Ewing went into a pro shop and stole three golf clubs worth \$1200.²⁴ I am not a golfer and I was astounded to find out that golf clubs could be worth that much. He put them down his pants and tried to walk out of the store.²⁵ He was caught and charged with grand theft, and because of his prior convictions he was sentenced to life in prison with no possibility of parole for twenty-five years.²⁶

My thesis is a simple one: It is cruel and unusual punishment, a violation of the Eighth Amendment, to sentence a person to life in prison for committing a minor offense. In developing this thesis, I make four points. First, I discuss the recidivist sentencing laws that exist across the country. Second, I look at the constitutional principles to be used in evaluating these recidivist sentences. Third, how should these constitutional principles be applied in cases like Andrade's? Fourth, and finally, I analyze the Supreme Court's decisions ruling against Andrade and Ewing and consider what these are likely to mean for the future.

II. RECIDIVIST SENTENCING LAWS

Every state has some form of recidivist sentencing law.²⁷ For example, Iowa Code section 902.8 refers to habitual offenders.²⁸ Habitual

19. Andrade v. Attorney Gen. of Cal., 270 F.3d 743, 746 (9th Cir. 2001).

20. *Id.* at 767.

21. Lockyer v. Andrade, 535 U.S. 969 (2002).

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

23. *Id.* at 1183.

24. *Id.*

25. *Id.*

26. *Id.* at 1185.

27. Andrea E. Joseph, Note, *What Goes Around Comes Around—Nichols v. United States: Validating the Collateral Use of Uncounseled Misdemeanor Convictions for the Purpose of Sentence Enhancement*, 23 PEPP. L. REV. 965, 1000 n.203 (1996) ("At a minimum, every state has adopted some type of legislation that enhances sentences for recidivist behavior.").

28. IOWA CODE § 902.8 (2003).

offenders are those who have two prior felony convictions.²⁹ Iowa's law says that a habitual offender will be given a sentence of at least three years in prison, but not more than fifteen years in prison.³⁰ This is a traditional habitual offender law.³¹

Recidivist sentencing schemes are not new. Judges have long imposed harsher sentences on second or third or multiple offenders as opposed to first time offenders.³² No one denies that this is constitutional.

However, in the early 1990s, a movement swept the country to enact much more strict recidivist sentencing laws.³³ These took on the name "three strikes and you're out." Twenty-six states across the country have some form of a three strikes law.³⁴ All of these provide that upon three felony convictions the person will be sentenced to life in prison.³⁵

In many ways, California's is the harshest of all of these laws. Several aspects of the law, as interpreted by the California courts, led to Andrade being sentenced to fifty years to life for stealing \$153 worth of videotapes. First, although only "serious" or "violent" felonies, as defined by the California Penal Code,³⁶ qualify as prior strikes,³⁷ *any* felony, including petty theft with a prior, may serve as a third strike and be the basis for a life sentence.³⁸ Prior strikes need not be violent offenses as long as they are

29. *Id.*

30. *Id.*

31. See Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinant Sentencing Reform*, 81 CAL. L. REV. 61, 67-68 (1993) (describing traditional habitual offender sentencing schemes).

32. Leonard N. Sosnov, *Due Process Limits on Sentencing Power: A Critique of Pennsylvania's Imposition of a Recidivist Mandatory Sentence Without a Prior Conviction*, 32 DUQ. L. REV. 461, 461-62 (1994).

33. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 400 n.28 (1997) (stating that "approximately 22 states have enacted more stringent statutes as a reaction to 'get tough on crime' campaigns of the early 1990s" and that a 1993 Washington initiative on persistent offenders "served as a catalyst for enactment of recidivist legislation across the states").

34. Bill Mears, *Supreme Court Upholds Long Sentences Under 3-Strikes-You're-Out Law*, (Mar. 5, 2003), at <http://www.cnn.com/2003/LAW/03/05/scotus.three.strikes>.

35. See John Clark et al., *'Three Strikes and You're Out': Are Repeat Offender Laws Having Their Anticipated Effect?*, 81 JUDICATURE 144, 147-48 (1998) (providing a description of how three strikes laws across the nation determine sentences for three felony convictions).

36. CAL. PENAL CODE §§ 667.5, 1192.70 (West 1999 & Supp. 2003).

37. See *supra* note 9 and accompanying text.

38. See *supra* note 10 and accompanying text.

deemed “serious,”³⁹ and Andrade’s prior burglary convictions meet this latter requirement.⁴⁰ Under the California three strikes law, Andrade would have been subject to an indeterminate life sentence for any act of petty theft, even shoplifting a candy bar.⁴¹

Second, Andrade was considered to have two prior strikes, even though both of his prior burglary convictions were sustained in the same proceeding.⁴² Third, there is no “washout” period after which prior qualifying convictions will no longer be considered as strikes,⁴³ so it is irrelevant under the three strikes law that Andrade’s prior convictions occurred in 1983, twelve years before his arrests for shoplifting. Fourth, defendants with prior strikes who are convicted of multiple felonies must serve consecutive sentences.⁴⁴ Thus, Andrade received two sentences of twenty-five years to life in prison, to run consecutively.⁴⁵ Finally, each sentence is deemed to be an indeterminate life sentence, with no possibility of parole until a minimum of twenty-five years have been served.⁴⁶ Therefore, Andrade’s earliest possible parole date is in 2046, fifty years after his 1996 convictions. In 2046, Andrade will be eighty-seven years old.⁴⁷

There is tremendous discretion under California’s three strikes law, which is typical of recidivist sentencing themes across the country.⁴⁸ Use

39. CAL. PENAL CODE §§ 667(d), 1170.12(b) (requiring the prior felonies to be either violent *or* serious).

40. *See id.* §§ 460(a) (requiring habitation for burglary to be of the first degree), 1192.7(c)(18) (including burglary of a residence as a serious felony).

41. *See supra* note 10 and accompanying text (noting that the third strike can be any felony); CAL. PENAL CODE § 666 (making petty theft with a prior a felony offense).

42. *See, e.g.,* *People v. Askey*, 56 Cal. Rptr. 2d 782, 785 (Ct. App. 1996) (“The three strikes law does not require otherwise qualifying prior convictions to be based on charges brought and tried separately.”).

43. *See, e.g.,* *People v. Martinez*, 84 Cal. Rptr. 2d 638, 646 n.9 (Ct. App. 1999).

44. CAL. PENAL CODE §§ 667(c)(6) (West 1999), 1170.12(a)(6) (West Supp. 2003).

45. *Andrade v. Attorney Gen. of Cal.*, 270 F.3d 743, 749 (9th Cir. 2001).

46. *In re Cervera*, 16 P.3d 176, 181 (Cal. 2001) (noting that the relevant penal code statute “generally provides for enhancement of sentence for a defendant convicted of any of certain specified felonies . . . an indeterminate term of life imprisonment with a minimum term of 25 years”).

47. *Andrade v. Attorney Gen. of Cal.*, 270 F.3d at 750.

48. *See* Danielle M. D’Addesa, Comment, *The Unconstitutional Interplay of California’s Three Strikes Law and California Penal Code Section 666*, 71 U. CIN. L. REV. 1031, 1057 (2003) (describing judges’ discretion to charge the offenses as misdemeanors rather than felonies and their ability to strike prior convictions or prior

Andrade's case as the model. The prosecutor could have charged Andrade with two counts of petty theft or with one or two counts of petty theft with a prior.⁴⁹ The prosecutor also could have charged one or both under the three strikes law. It is up to the prosecutors to decide, in their discretion, whether to charge six months, one year, three years, three years eight months, twenty-five years, or fifty years. Giving tremendous discretion to prosecutors is characteristic of the three strikes laws and recidivist sentencing laws all over the country. It is also characteristic of federal sentencing guidelines giving prosecutors tremendous discretion in charging, which then influences the sentence received.

For reasons I confess I have never understood, the prosecutor in Andrade's case decided to seek the maximum sentence, fifty years to life, and the judge imposed the maximum sentence.⁵⁰ Unfortunately, this is not atypical. It seems that, all too often, defendants receive the maximum sentence.⁵¹

In California, and probably in most states, the reality is that two variables affect the likelihood of prosecutors seeking the maximum sentences. The first variable is geography. For example, one study found:

Analysis shows that California counties have radically different rates of sentencing under "Three Strikes." The sentencing rate ranged from 0.3 per 1,000 violent crime arrests in San Francisco, to 3.6 in both Sacramento and Los Angeles. Data revealed that the highest sentencing counties invoke the law at rates 3 to 12 times higher than the lowest counties.⁵²

Another study concluded:

[T]he state has yet to develop a uniform application of the Three Strikes law. Consequently, while some repeat offenders convicted of minor crimes for their third strike are sent away for life, others receive much lighter sentences. . . . San Diego and San Francisco counties lie at opposite ends of this divide. In San Francisco, the law is

strikes in the interest of justice).

49. Andrade v. Attorney Gen. of Cal., 270 F.3d at 749.

50. *Id.*

51. See D'Addesa, *supra* note 48, at 1057 (stating that judges rarely exercise their discretion to charge offenses as misdemeanors instead of felonies or strike prior convictions or strikes "in the interest of justice").

52. CTR. ON JUVENILE & CRIMINAL JUSTICE, STRIKING OUT: THE FAILURE OF CALIFORNIA'S "THREE STRIKES AND YOU'RE OUT" LAW (1999), available at http://www.cjcj.org/pubs/three_strikes/strikingout.html.

implemented only against defendants charged with violent felonies. . . . [San Diego] endorses a more rigid approach, potentially prosecuting all felonies as strikes. Nevertheless, even San Diego fails to apply the law strictly as written. Instead, uneven application creates arbitrary incongruity within San Diego, resulting in intracounty disparity, in addition to the larger problem of geographic disparity.⁵³

This study concluded that “[d]ifferent sentencing structures across the state, therefore, create vast disparities in the treatment of equally culpable minor criminals.”⁵⁴

Andrade’s thefts occurred in San Bernardino County, California, a relatively conservative county. Had he done the same thing in San Francisco County, or now in Los Angeles County, even in Orange County, he would have gotten a year in jail, or at most, three years in prison. The district attorneys in those counties have announced that they generally will not charge such crimes under the three strikes law.⁵⁵ However, because he was in San Bernardino County, Andrade was charged under the three strikes law.⁵⁶

The other variable that is important with respect to whether defendants get charged under the three strikes law is race. The reality is that African-American and Latino defendants are much more likely to have the three strikes law used against them than white defendants.⁵⁷ Leandro Andrade was a Latino who had the misfortune of shoplifting in San Bernadino County.⁵⁸

III. THE CONSTITUTIONAL PRINCIPLES

Almost a century ago, in *Weems v. United States*,⁵⁹ the Supreme Court held that the Eighth Amendment prohibits “greatly disproportioned” sentences and stated “that it is a precept of justice that punishment for

53. Joshua E. Bowers, Note, “*The Integrity of the Game Is Everything*”: *The Problem of Geographic Disparity in Three Strikes*, 76 N.Y.U. L. REV. 1164, 1165-66 (2001).

54. *Id.* at 1179.

55. *See id.* at 1175-80 (discussing the disparity among counties in California in enforcing the Three Strikes Law).

56. *Andrade v. Attorney Gen. of Cal.*, 270 F.3d 743, 746 (9th Cir. 2001).

57. *See Vitiello, supra* note 33, at 457 (noting that such laws have a disparate impact on minorities).

58. *See Andrade v. Attorney Gen. of Cal.*, 270 F.3d at 746.

59. *Weems v. United States*, 217 U.S. 349 (1910).

crime should be graduated and proportioned to [the] offense.”⁶⁰ On other occasions, the Court has declared sentences unconstitutional as being “grossly disproportionate.” For example, in *Coker v. Georgia*,⁶¹ the Court held that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”⁶² In *Solem v. Helm*,⁶³ the Court held that it was grossly disproportionate to sentence a person to life imprisonment for passing a bad check for \$100 because of six prior nonviolent offenses.⁶⁴ Justice Powell, writing for the Court, observed that “the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments.”⁶⁵

In *Harmelin v. Michigan*,⁶⁶ seven Justices endorsed the principle that grossly disproportionate sentences are unconstitutional.⁶⁷ Only Chief Justice Rehnquist joined Justice Scalia’s opinion arguing otherwise.⁶⁸ Expressly disagreeing with Justice Scalia, Justice Kennedy declared in his concurring opinion that “*stare decisis* counsels [this Court’s] adherence to the narrow proportionality principle that has existed in Eighth Amendment jurisprudence for 80 years.”⁶⁹ Justice Kennedy explained: “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.”⁷⁰ Justices O’Connor and Souter joined Justice Kennedy’s opinion and his conclusion that grossly disproportionate punishments are unconstitutional.⁷¹ The four dissenting Justices in *Harmelin*, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and concluded that “gross disproportionality” was too restrictive a constitutional standard.⁷²

60. *Id.* at 367.

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

62. *Id.* at 592.

63. *Solem v. Helm*, 463 U.S. 277 (1983).

64. *Id.* at 303.

65. *Id.* at 288 (citations omitted).

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

67. *Id.* at 997 (Kennedy, O’Connor, and Souter, J.J., concurring in part and concurring in the judgment); *id.* at 1009 (White, Blackmun, and Stevens, J.J., dissenting); *id.* at 1027-28 (Marshall, J., dissenting).

68. *Id.* at 985.

69. *Id.* at 995 (Kennedy, J., concurring in part and concurring in the judgment).

70. *Id.* at 1001.

71. *Id.* at 997.

72. *Id.* at 1009, 1012 (White, J., dissenting); *id.* at 1027 (Marshall, J.,

No decision since *Harmelin* has questioned the principle established by almost a century of Eighth Amendment decisions—that grossly disproportionate punishments are cruel and unusual punishment in violation of the Eighth Amendment. In *United States v. Bajakajian*,⁷³ the Court, in an opinion by Justice Thomas, invalidated a forfeiture as violating the “excessive fines” clause of the Eighth Amendment and stated: “[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents.”⁷⁴

Indeed, the idea that grossly excessive punishment is cruel and unusual is not new; it was part of English law for hundreds of years before the founding of the United States. As the Supreme Court has long recognized, the requirements of the Eighth Amendment were “taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta.”⁷⁵ William Blackstone, in his *Commentaries on the Laws of England*, observed that the Magna Carta, in 1215, prohibited excessive punishments.⁷⁶

As prison sentences became more common in later years, the English courts were equally insistent that “imprisonment ought always to be according to the quality of the offense.”⁷⁷ In 1689, the English Bill of Rights adopted the reference to “cruel and unusual” punishments that was repeated verbatim by the framers of the Eighth Amendment.⁷⁸ Only three months later, that language was interpreted by the House of Lords, which declared that a “fine of thirty thousand pounds, imposed by the court of King’s Bench upon the earl of Devon was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land.”⁷⁹

In fact, Blackstone specifically wrote that the prohibition of cruel and

dissenting).

73. *United States v. Bajakajian*, 524 U.S. 321 (1998).

74. *Id.* at 336. The Court’s adoption of the gross disproportionality analysis for the “excessive fines” clause of the Eighth Amendment is relevant here because, as the Court stated in *Solem v. Helm*, “It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not.” *Solem v. Helm*, 463 U.S. 277, 289 (1983).

75. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (footnote omitted).

76. 4 WILLIAM BLACKSTONE, COMMENTARIES *10.

77. *Solem v. Helm*, 463 U.S. at 285 (citing *Hodges v. Humkin*, 80 Eng. Rep. 1015, 1016 (K.B. 1615)).

78. *Id.* at 285-86, 286 n.10.

79. *Id.* at 285 (quoting *Earl of Devon’s Case*, 11 State Tr. 133, 136 (1689)).

unusual punishment forbids excessively harsh sentences for recidivist conduct.⁸⁰ Blackstone discussed the permissibility of capital punishment for those who repeatedly violated statutes prohibiting loaded wagons on public roads.⁸¹ Blackstone said that such a punishment for recidivism was impermissible because “the evil to be prevented is not adequate to the violence of the preventive” and the punishment would violate “dictates of conscience and harmony.”⁸²

This principle of proportionality was also reflected in colonial laws, which served as the source of many constitutional provisions. The Maryland Charter of 1632, for example, authorized penalties if “the Quality of the Offence require[d] it.”⁸³ The Massachusetts Body of Liberties of 1641 allowed whipping only if the “crime be very shamefull.”⁸⁴ The Charter of Rhode Island, adopted in 1663, explicitly extended proportionality to prison sentences, requiring “the imposing of lawfull and reasonable ffynes . . . [and] imprisonments.”⁸⁵

Following independence, numerous state constitutions adopted a similar view. The Pennsylvania Constitution of 1776 called for a revision of the penal system to make “punishments in some cases less sanguinary and in general more proportionate to the crime.”⁸⁶ The South Carolina Constitution also instituted reform to make punishments “more proportionate to the crime.”⁸⁷ When George Mason copied a cruel and unusual punishment clause almost verbatim into the Virginia Declaration of Rights, he intended to include the protections of both the English Bill of Rights and the common-law rights of Englishmen as publicized by Blackstone.⁸⁸ His goal, and that of the Eighth Amendment, was to continue the ban on disproportionate punishment.

Of course, “[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by

80. 4 BLACKSTONE, *supra* note 76, at *10.

81. *Id.* at *10-11.

82. *Id.*

83. SOURCES OF OUR LIBERTIES 107 (Richard L. Perry & John C. Cooper eds., 1959) (quoting MARYLAND CHARTER art. 7 (1632)).

84. *Id.* at 153 (quoting MASSACHUSETTS BODY OF LIBERTIES art. 43 (1641)).

85. *Id.* at 173 (quoting CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663)).

86. PA. CONST. § 38.

87. S.C. CONST. art. XL.

88. *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983).

those that currently prevail.”⁸⁹ The Supreme Court recently reaffirmed that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man,” and “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁹⁰

IV. APPLYING THE CONSTITUTIONAL PRINCIPLES

How do these basic constitutional principles apply to Leandro Andrade? The Supreme Court has repeatedly stated that proportionality is to be determined by “objective factors to the maximum possible extent.”⁹¹ In *Solem v. Helm*, the Court stated the following objective criteria:

[A] court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.⁹²

In *Harmelin v. Michigan*, Justice Kennedy’s concurring opinion agreed with *Solem*’s holding that a grossly disproportionate sentence of imprisonment violates the Eighth Amendment.⁹³ Justice Kennedy also agreed with *Solem*’s three-part test.⁹⁴ However, Justice Kennedy said that courts need not examine the second and third factors mentioned in *Solem*—the intrajurisdictional and interjurisdictional reviews—unless a “threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”⁹⁵

Under these well-established criteria, Andrade’s sentence was grossly disproportionate to the offense. First, the offense was minor—shoplifting a small amount of merchandise that was recovered before he left the store—

89. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

90. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

91. *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980); *see also Atkins v. Virginia*, 536 U.S. at 312 (stating that the inquiry into whether punishment is unconstitutionally excessive in light of evolving community standards “should be informed by objective factors to maximum possible extent”) (quoting *Hamelin v. Michigan*, 501 U.S. 957, 1000 (1991)).

92. *Solem v. Helm*, 463 U.S. at 292.

93. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

94. *Id.* at 1005.

95. *Id.*

but the punishment was extreme: a sentence of fifty years to life in prison. Under California law, this is deemed to be an indeterminate life sentence.⁹⁶ Andrade is not eligible for parole until he has served fifty years in prison.⁹⁷ For Andrade, this is likely a life sentence because he will not be eligible for consideration for release from prison until the year 2046, when he will be eighty-seven years old.

Andrade's crime is very similar to the crime committed in *Solem v. Helm*, in which the Court found that a life sentence for "uttering a no account check" worth about \$100 violated the Eighth Amendment.⁹⁸ The crimes of both Jerry Helm and Leandro Andrade "involved neither violence nor [the] threat of violence to any person" and only a "relatively small amount of money."⁹⁹ Both passing a bad check and shoplifting are types of crime that are "viewed by society as among the less serious offenses."¹⁰⁰ Furthermore, as the Ninth Circuit explained, "By classifying such conduct as a misdemeanor, the California legislature has indicated that petty theft is regarded as a relatively minor offense."¹⁰¹

The facts of Andrade's case are quite different, therefore, from *Harmelin v. Michigan*, in which the Court upheld a life sentence for possession of more than 650 grams of cocaine.¹⁰² As Justice Kennedy noted, Harmelin possessed enough cocaine to provide between 32,500 and 65,000 doses.¹⁰³ Justice Kennedy distinguished Harmelin's offense from the "relatively minor, nonviolent crime at issue in *Solem*,"¹⁰⁴ concluding that Harmelin's crime was "as serious and violent as the crime of felony murder

96. See *People v. Dozier*, 93 Cal. Rptr. 2d 600, 605-06 (Ct. App. 2000) (discussing proper calculation of a third-strike sentence).

97. *In re Cervera*, 16 P.3d 176, 177 (Cal. 2001) (discussing how to calculate when a three-strike defendant would be eligible for parole).

98. *Solem v. Helm*, 463 U.S. 277, 296 (1983).

99. *Id.* at 296-97. The similarities between *Solem v. Helm* and Andrade's case are notable: both Helm and Andrade were in their late thirties at the time of conviction for their principle crimes; each had received his first felony conviction approximately fourteen years earlier for residential burglary; each had a history of nonviolent offenses, principally property crimes; and each was sentenced to life in prison for a minor offense.

100. *Id.* at 296 (referring to passing a bad check).

101. *Andrade v. Attorney Gen. of Cal.*, 270 F.3d 743, 759-60 (9th Cir. 2001).

102. Compare *id.* at 746 (convicting Andrade for shoplifting), with *Harmelin v. Michigan*, 501 U.S. 957, 957 (1991) (convicting Harmelin for drug possession).

103. *Harmelin v. Michigan*, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment).

104. *Id.*

without specific intent to kill.”¹⁰⁵ The same cannot be said about Andrade. Andrade’s shoplifting, like Solem’s bad check, did not pose a “grave harm to society.”¹⁰⁶ Yet, the punishment imposed on Andrade—an indeterminate life sentence with no possibility of parole for fifty years—is essentially the same sentence that the Supreme Court declared unconstitutional when imposed on a seven-time recidivist felon in *Solem*.¹⁰⁷

*Rummel v. Estelle*¹⁰⁸ is also easily distinguishable from Andrade’s situation. In *Rummel*, the Court upheld a life sentence for obtaining \$120.75 by false pretenses, because Rummel was eligible for parole within twelve years.¹⁰⁹ Andrade, by contrast, must serve more than four times the length of Rummel’s sentence before he becomes eligible for parole.

The second factor to be considered is the sentence imposed on other criminals in the same jurisdiction.¹¹⁰ Under California law, Andrade’s crimes constitute petty theft—theft of goods or money worth less than \$400¹¹¹—a misdemeanor punishable by a fine or a jail sentence of six months or less.¹¹² The penalty for two counts of petty theft, punishable by the maximum of one year in jail,¹¹³ is vastly different from a sentence of fifty years to life in prison.

Petty theft with a prior—that is, petty theft when committed after a conviction and time served for petty theft, grand theft, auto theft, burglary, carjacking, robbery, receiving or concealing stolen property¹¹⁴—is a “wobbler” and thus is punishable either as a misdemeanor with up to one year in county jail or as a felony with up to three years in state prison.¹¹⁵ Two counts of petty theft with a prior, prosecuted as felonies, would

105. *Id.* at 1004.

106. *Id.* at 1002.

107. Compare *Andrade v. Attorney. Gen. of Cal.*, 270 F.3d at 746 (sentencing Andrade to fifty years for shoplifting), with *Solem v. Helm*, 463 U.S. 277, 303 (1983) (declaring Solem’s life sentence for writing a bad check to be unconstitutional).

108. *Rummel v. Estelle*, 445 U.S. 263 (1980).

109. *Id.* at 280.

110. *Id.* at 292.

111. CAL. PENAL CODE § 487 (West 1999 & Supp. 2003) (defining grand theft as theft of more than \$400); *id.* § 488 (West 1999) (defining petty theft as that other than grand theft).

112. *Id.* § 490.

113. *Id.* § 666.

114. *Id.*

115. *Lockyer v. Andrade*, 123 S. Ct. 1166, 1170 (2003) (citing CAL. PENAL CODE § 666).

receive a maximum sentence of three years and eight months.¹¹⁶

In fact, for purposes of the intrajurisdictional comparison, it is noteworthy that if Andrade's prior convictions had been for violent crimes, such as murder or manslaughter, his maximum punishment for the two acts of shoplifting would have been one year in prison. This is because under California law, the felony of petty theft with a prior requires that there is a prior *property* crime;¹¹⁷ if petty theft is committed after multiple prior convictions for nontheft offenses, including serious and violent offenses, then the petty theft must be charged as a misdemeanor and cannot trigger application of the three strikes law.¹¹⁸ So, for example, if Andrade's prior convictions had been for felonious assault, or manslaughter, or rape, only a one-year sentence for two counts of petty theft would have been possible.¹¹⁹

The gross disproportionality of Andrade's sentence is revealed by comparing, as required by *Solem* and *Harmelin*,¹²⁰ his sentence to that imposed by the same jurisdiction for other crimes. As the Ninth Circuit noted: "Andrade's indeterminate sentence of 50 years to life is exceeded in California only by first-degree murder and a select few violent crimes."¹²¹ For example, in California, voluntary manslaughter is punishable by up to eleven years in prison;¹²² rape is punishable by up to eight years in prison;¹²³ second degree murder is punishable by fifteen years to life in prison;¹²⁴ and sexual assault on a minor is punishable by up to eight years in prison.¹²⁵

Finally, in evaluating gross disproportionality, as *Solem* and *Harmelin* require, courts are to consider the sentences imposed for the same crime in other jurisdictions.¹²⁶ As Justice Stevens noted, California is the "only

116. See CAL. PENAL CODE § 1170.1 (explaining how to calculate sentences for defendants with two or more felony convictions). Under California Penal Code § 1170.1(a), a defendant receives only one third of the middle term of the second count in this situation. *Id.* § 1170.1(a). For Andrade, it would be one third of a middle term of two years—that is, eight months. See *id.* Therefore, the maximum sentence for two counts of petty theft with a prior would be three years and eight months in prison.

117. *Id.* § 666.

118. D'Addesa, *supra* note 48, at 1031 (citing CAL. PENAL CODE § 666).

119. CAL. PENAL CODE § 666.

120. See *supra* notes 63-72 and accompanying text.

121. Andrade v. Attorney Gen. of Cal., 270 F.3d 743, 761 (9th Cir. 2001).

122. CAL. PENAL CODE § 193(a).

123. *Id.* § 264(a).

124. *Id.* § 190(a).

125. *Id.* § 288(a).

126. See *supra* note 92 and accompanying text.

State in which a misdemeanor could receive such a severe sentence.”¹²⁷ At the time Andrade was convicted, a similarly situated defendant would not have faced a fifty-year-to-life sentence for his offenses anywhere but in California or Louisiana, and in Louisiana, he would have had a strong claim for relief under the state constitution.¹²⁸

Petty theft with a prior qualifies for recidivist sentencing in only four other jurisdictions: Rhode Island, West Virginia, Texas, and Louisiana.¹²⁹ But Rhode Island’s recidivist statute is not triggered by theft of less than \$100,¹³⁰ and West Virginia does not count nonviolent priors such as Andrade’s previous offenses.¹³¹ Furthermore, under Texas law, parole is generally available in fifteen years or less.¹³²

Although Louisiana, in 1995, might have imposed a comparable sentence for shoplifting, it has since amended its law so that petty theft, even with a prior record like Andrade’s, cannot trigger recidivist sentencing.¹³³ Even under the law as it stood in 1995, such a sentence would quite possibly have been held excessive under the state

127. *Riggs v. California*, 525 U.S. 1114, 1115 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari).

128. *Andrade v. Attorney Gen. of Cal.*, 270 F.3d 743, 763, 764 (9th Cir. 2001). “Louisiana amended its recidivism statute [in 2001], and Andrade would no longer be eligible for a comparable sentence.” *Id.* at 764 n.22 (citing 2001 La. Sess. Law Serv. 403 (West)). Under the current statute, Andrade’s “crimes would not count as third or fourth strikes.” *Id.*; see LA. REV. STAT. ANN. § 15:529.1(A)(1)(b)(ii) (West Supp. 2003) (“If the third felony and the two prior felonies are felonies defined as a crime of violence . . . , a sex offense . . . when the victim is under the age of eighteen . . . , or as a violation of the Uniform Controlled Dangerous Substance Law punishable by imprisonment for ten years or more, or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without the benefit of parole, probation, or suspension of sentence.”).

129. See LA. REV. STAT. ANN. §§ 14:67(B)(3), 15:529.1 (West 1997 & Supp. 2003); R.I. GEN. LAWS §§ 11-41-20(d), 12-19-21(a) (2002); TEX. PENAL CODE ANN. § 31.03(e)(4)(D) (Vernon 1998); W. VA. CODE §§ 61-3-13, 61-11-18(c) (2000).

130. See R.I. GEN. LAWS §§ 11-41-20(d), 12-19-21(a).

131. See *State v. Deal*, 358 S.E.2d 226, 231 (W. Va. 1987) (holding that when the appellant’s most recent conviction did not involve violence, and the appellant had not demonstrated a propensity toward violence in the past sixteen years, the life sentence imposed was disproportionate to the offense).

132. See TEX. GOV’T CODE ANN. § 508.145(f) (Vernon 1998 & Supp. 2003) (stating that, unless it is a special needs parole, an inmate “is eligible for release on parole when the inmate’s actual calendar time served plus good conduct time equals one-fourth of the sentence imposed or 15 years, whichever is less”).

133. See *supra* note 128.

constitution.¹³⁴

In *Solem v. Helm*, the Court noted that Nevada authorized life without parole under similar circumstances, but the Court said that it was “not advised that any defendant, whose prior offenses were so minor, actually ha[d] received the maximum penalty in Nevada.”¹³⁵ California has not identified any other defendant, in Louisiana or anywhere other than California in the United States, regardless of background, who has received an indeterminate life sentence with no parole possible for fifty years for shoplifting.¹³⁶

Forty-nine of fifty states would not permit the life sentence for misdemeanor shoplifting that was imposed on Andrade.¹³⁷ Thus, Andrade’s sentence was not just cruel and unusual, it was cruel and unique. Indeed, other states have expressly ruled that it is unconstitutional to impose a life sentence for misdemeanor conduct. For example, in *People v. Gaskins*,¹³⁸ the Colorado Court of Appeals found that it violates the United States Constitution to impose a life sentence for misdemeanor conduct, even if a defendant has prior felony convictions.¹³⁹

The Supreme Court has recognized that generally the government may harshly punish recidivist conduct.¹⁴⁰ But there are several reasons why this principle does not justify the sentence imposed on Andrade. First, California essentially “double counts” the prior offenses. Under California

134. See *State v. Hayes*, 739 So. 2d 301, 303-04 (La. Ct. App. 1999) (invalidating, as excessive under the state constitution, a life sentence for misappropriating over \$500, where the prior record was minor); *State v. Burns*, 723 So. 2d 1013, 1018-20 (La. Ct. App. 1998) (invalidating, as excessive under state constitution, a life sentence for possession and distribution of crack cocaine, where the prior record was nonviolent and mitigating circumstances existed).

135. *Solem v. Helm*, 463 U.S. 277, 300 (1983).

136. Brief for Respondent at 6, *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003) (No. 01-1127).

137. See *Andrade v. Attorney Gen. of Cal.*, 270 F.3d 743, 763 (9th Cir. 2001) (noting that at the time Andrade was sentenced, only Louisiana’s statute would have permitted a comparable sentence); *id.* at 764 n.22 (observing that the same result would not be reached under the current Louisiana statute). See generally JOHN CLARK ET AL., NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, “THREE STRIKES AND YOU’RE OUT”: A REVIEW OF STATE LEGISLATION (Sept. 1997) (reviewing state three strikes statutes).

138. *People v. Gaskins*, 923 P.2d 292 (Colo. Ct. App. 1996).

139. *Id.* at 297; see also *State v. Deal*, 358 S.E.2d 226, 231 (W. Va. 1987) (holding that a life sentence imposed for a nonviolent third offense violated the state constitution’s proportionality requirement).

140. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 276 (1980) (stating that Texas has an interest in dealing harshly with repeat offenders).

law, Andrade's conduct generally would be regarded as the crime of petty theft, a misdemeanor punishable by a fine, a jail sentence of six months or less, or both.¹⁴¹ But because of his prior offenses, Andrade's misdemeanor conduct is converted by statute into a "wobbler" offense—"petty theft with a prior conviction."¹⁴² Once prosecuted as a felony, that felony is used under the three strikes law to impose a sentence of twenty-five years to life in prison on each count.¹⁴³ In other words, the prior offenses are used twice: first to convert a misdemeanor into a felony, and then to impose a life sentence based on it being a felony.

States can punish recidivists more harshly, but there is a limit. In *Rummel v. Estelle*, the Court expressed the need for great deference to legislative choices regarding punishments for recidivists, but stated: "This is not to say that a proportionality principle would not come into play in [an] extreme example . . . , if a legislature made overtime parking a felony punishable by life imprisonment."¹⁴⁴ Yet, California's double-counting constitutes just such an extreme example. A misdemeanor is deemed a felony because of prior offenses. Then, as enhanced, relatively trivial conduct, such as twice stealing videotapes worth less than \$100, becomes the basis for a sentence of fifty years to life imprisonment.

Second, the Supreme Court has never approved such harsh sentences for misdemeanor conduct, even when the offender is a recidivist. The distinction between misdemeanors and felonies is deeply embedded in the law. In *Apprendi v. New Jersey*,¹⁴⁵ the Court observed that "[t]he common law of punishment for misdemeanors—those 'smaller faults, and omissions of less consequence'" did not include prison sentences.¹⁴⁶ The Court stated that "[a]ctual sentences of imprisonment for such offenses, however, were rare at common law until the 18th century for 'the idea of prison as a punishment would have seemed an absurd expense.'"¹⁴⁷

In *Rummel v. Estelle*, the Court repeatedly emphasized that it was considering permissible punishment for felony conduct.¹⁴⁸ In fact, the

141. CAL. PENAL CODE § 490 (West 1999).

142. *Id.* § 666; see *Lockyer v. Andrade*, 123 S. Ct. 1166, 1170 (2003) (referring to petty theft with a conviction as a "wobbler" offense).

143. CAL. PENAL CODE § 667(2)(A)(ii).

144. *Rummel v. Estelle*, 445 U.S. at 274 n.11.

145. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

146. *Id.* at 480 n.7 (citation omitted).

147. *Id.* (citations omitted).

148. See *Rummel v. Estelle*, 445 U.S. at 274, 278, 284.

Court stressed the “line dividing felony theft from petty larceny”¹⁴⁹ *Rummel* involved felony theft,¹⁵⁰ while Andrade’s case concerns what California deems to be petty theft.¹⁵¹ Justice Stevens explained the importance of this distinction: “While this Court has traditionally accorded to state legislatures considerable (but not unlimited) deference to determine the length of sentences ‘for crimes concededly classified and classifiable as felonies,’ petty theft does not appear to fall into that category.”¹⁵²

Third, although a state may impose harsher punishments on recidivists, Andrade cannot be punished now for his earlier offenses because that would unquestionably violate the Constitution’s prohibition on double jeopardy.¹⁵³ Further, a defendant cannot be punished for the “status” of being a felon.¹⁵⁴ Therefore, the punishment must be proportionate for *this* offense, while taking into account the individual’s prior criminal record.¹⁵⁵ As the Court declared in *Solem v. Helm*: “In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.”¹⁵⁶

An indeterminate life sentence, with no possibility of parole for fifty years, is obviously not proportionate to the crimes for which Andrade was convicted: stealing \$153 worth of videotapes. In *Solem*, the Court said: “We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for his prior offenses.

149. *Id.* at 264.

150. *Id.* at 265.

151. CAL. PENAL CODE § 488 (West 1999).

152. *Riggs v. California*, 525 U.S. 1114, 1114-15 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari) (quoting *Rummel v. Estelle*, 445 U.S. at 274).

153. U.S. CONST. amend. V; *see, e.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717-18 (1969) (holding that the Double Jeopardy Clause protects against multiple punishments for same offense); *Ex parte Lang*, 85 U.S. (18 Wall.) 163, 172 (1873) (noting that the Double Jeopardy Clause is violated if there is subsequent punishment for the same offense).

154. *See, e.g.*, *Powell v. Texas*, 392 U.S. 514 (1968) (asserting that an individual cannot be punished for mere status); *Robinson v. California*, 370 U.S. 660 (1962) (holding that status cannot constitutionally be made a crime).

155. *Witte v. United States*, 515 U.S. 389, 400 (1995) (“[T]he enhanced punishment imposed for the [present] offense is ‘not to be viewed as a[n] . . . 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.’”) (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)).

156. *Solem v. Helm*, 463 U.S. 277, 290 (1983).

But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision."¹⁵⁷ Andrade's prior offenses were for nonviolent offenses. The only prior offenses used to trigger the three strikes law, and the indeterminate life sentence, were three burglary convictions from the same day in 1983. Although a state may punish recidivists more harshly, an indeterminate life sentence with no possibility of parole for fifty years is cruel and unusual punishment when imposed in circumstances such as these.

The question might be asked, however, as to whether the three strikes law is justified because it decreases crime. Careful studies of the effects of the three strikes law have shown that it has had no such effect on crime in California. One empirical study of "the relationship between Three Strikes and the recent decline in California's crime rate" concluded "that there is no evidence that Three Strikes played an important role in the drop in the crime rate."¹⁵⁸ The most extensive study of the effects of the three strikes law, conducted by three prominent professors, also concluded that the "decline in crime observed after the effective date of the Three Strikes law was not the result of the statute."¹⁵⁹ This is supported by another empirical study finding that "counties that vigorously and strictly enforce the Three Strikes law did not experience a decline in any crime category relative to the more lenient counties."¹⁶⁰ Analysts at RAND compared crime rates between "three strikes" states and "non-three strikes" states and found that three strikes laws had no independent effect on the crime rate in states with such statutes.¹⁶¹

Moreover, even if the three strikes law generally has some benefit, there is no benefit in imposing an indeterminate life sentence with no possibility of parole for fifty years on a person for shoplifting. A state can choose to punish recidivists more harshly, but a life sentence for stealing \$153 worth of videotapes is irrational and is clearly grossly disproportionate in violation of the Eighth Amendment.

157. *Id.* at 296 n.21.

158. Linda S. Beres & Thomas D. Griffith, *Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 LOY. L.A. L. REV. 101, 102 (1998).

159. FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* 101 (2001).

160. 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, 67 (1999).

161. Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 75 (1999).

V. THE SUPREME COURT'S DECISIONS AND WHAT THEY MEAN

In *Ewing v. California*¹⁶² and *Lockyer v. Andrade*,¹⁶³ the Supreme Court in two 5-4 decisions rejected the defendants' Eighth Amendment arguments and upheld the application of California's three strikes law to each of them.¹⁶⁴ Both opinions were written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas.¹⁶⁵

In *Ewing*, the Court found that states may impose a life sentence on recidivists, even if the last crime triggering the punishment is shoplifting.¹⁶⁶ In upholding Ewing's sentence, Justice O'Connor's plurality opinion stressed that "[t]hough three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding."¹⁶⁷ After emphasizing the need for deference to the legislature, Justice O'Connor considered the first part of the test from *Solem* and *Harmelin*.¹⁶⁸ She said that in weighing the gravity of the offense and the harshness of the punishment, "we must place on the scales not only his current felony, but also his long history of felony recidivism."¹⁶⁹ This is quite different from the approach taken in *Solem v. Helm*, where the Court stated: "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."¹⁷⁰

By requiring consideration of a defendant's entire criminal record in evaluating a recidivist sentence, the Court made it much harder to argue that a punishment is grossly excessive. Because of his prior record, the Court concluded: "We hold that Ewing's sentence of 25 years to life in prison, imposed for the offense of felony grand theft under the three strikes law, is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishment."¹⁷¹

162. *Ewing v. California*, 123 S. Ct. 1179 (2003).

163. *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003).

164. *Ewing v. California*, 123 S. Ct. at 1190; *Lockyer v. Andrade*, 123 S. Ct. at 1175-76.

165. *Ewing v. California*, 123 S. Ct. at 1181; *Lockyer v. Andrade*, 123 S. Ct. at 1169.

166. *Ewing v. California*, 123 S. Ct. at 1185-87.

167. *Id.* at 1187.

168. *Id.* at 1189.

169. *Id.*

170. *Solem v. Helm*, 463 U.S. 277, 290 (1983).

171. *Ewing v. California*, 123 S. Ct. at 1190.

The Court came to this conclusion even though, as Justice Breyer pointed out in his dissent, no one in the country would have received a sentence like Ewing's prior to the three strikes law.¹⁷²

Justices Scalia and Thomas wrote separate opinions concurring in the judgment in which they argued that no sentence should ever be found to be cruel and unusual punishment.¹⁷³ Justice Scalia contended that only an impermissible type of punishment, and not the length of a sentence, can violate the Eighth Amendment.¹⁷⁴

In *Lockyer v. Andrade*, the Court focused on the availability of relief through a writ of habeas corpus.¹⁷⁵ The Antiterrorism and Effective Death Penalty Act of 1996 significantly narrowed the availability of habeas corpus relief to state prisoners.¹⁷⁶ The Act modified 28 U.S.C. § 2254(d) to provide that a federal court may grant habeas corpus only if a state court decision is "contrary to," or an "unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court."¹⁷⁷ In *Lockyer v. Andrade*, the Supreme Court held that Andrade was not entitled to habeas corpus relief because first, there was no clearly established law; and second, the state court decision was neither contrary to federal law nor an unreasonable application of federal law.¹⁷⁸

The Court's conclusion that there was no clearly established law is surprising because it did not explain why the three-part test from *Solem* and *Harmelin* does not meet this requirement.¹⁷⁹ On many occasions, the Supreme Court has approvingly cited to this test.¹⁸⁰ Moreover, Justice O'Connor's opinion stated that the "only relevant clearly established law . . . is the gross disproportionality principle."¹⁸¹ However, Justice O'Connor never explained why a life sentence with no possibility of parole for fifty years fails to meet this standard. Justice O'Connor's opinion will

172. *Id.* at 1198-99 (Breyer, J., dissenting).

173. *Id.* at 1191 (Scalia, J., concurring in the judgment); *id.* (Thomas, J., concurring in the judgment).

174. *Id.* (Scalia, J., concurring in the judgment).

175. *Lockyer v. Andrade*, 123 S. Ct. 1166, 1172-75 (2003).

176. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of U.S.C.).

177. *Id.* § 104(3), 110 Stat. at 1218 (amending 28 U.S.C. § 2254(d) (2000)).

178. *Lockyer v. Andrade*, 123 S. Ct. at 1172.

179. *Id.* at 1172-73.

180. *See, e.g., Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (citing *Solem v. Helm*, 463 U.S. 277, 290-91, 293, 295-300 (1983)); *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (citing *Solem v. Helm*, 463 U.S. at 288, 290).

181. *Lockyer v. Andrade*, 123 S. Ct. at 1173.

make it much harder for habeas petitioners to gain relief because it sets such a difficult, and indeed ambiguous, standard for determining whether there is clearly established federal law.

Further, the Court ruled that the state court decision was not “contrary to,” or an “unreasonable application of,” clearly established federal law.¹⁸² The Supreme Court has held that a state court decision is “contrary to” federal law “if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts.”¹⁸³ The Court rejected the argument that the California Court of Appeal acted contrary to federal law when it failed to apply the three-part test prescribed by *Solem* and *Harmelin*.¹⁸⁴

Under § 2254(d), a federal court also can grant habeas corpus if the state court “decides a case differently than we have done on a materially indistinguishable set of facts.”¹⁸⁵ The factual similarities between *Lockyer* and *Solem* are striking. Both Andrade and Helm were in their mid-thirties when sentenced to life in prison.¹⁸⁶ Both had received their first felony convictions approximately fifteen years earlier, each for residential burglary.¹⁸⁷ Both had purely nonviolent prior records, consisting of principally financial and property crimes.¹⁸⁸ Both received a life sentence under state recidivist statutes for minor offenses: Helm for uttering a no account check worth approximately \$100, and Andrade for shoplifting approximately \$153 worth of videotapes.¹⁸⁹

Justice O’Connor reasoned that the difference between *Lockyer v. Andrade* and *Solem v. Helm* is that Andrade was eligible for parole in fifty years, whereas Helm was sentenced to life in prison without the possibility of parole.¹⁹⁰ Justice O’Connor thus concluded that *Andrade* was similar to *Rummel v. Estelle*, in which the defendant was sentenced to life in prison for misappropriating approximately \$100 worth of property, but was

182. *Id.* at 1175.

183. *Bell v. Cone*, 535 U.S. 685, 694 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

184. *Id.* at 698.

185. *Id.* at 694 (citing *Williams v. Taylor*, 529 U.S. at 405-06).

186. *Lockyer v. Andrade*, 123 S. Ct. at 1176; *Solem v. Helm*, 463 U.S. 277, 297 (1983).

187. *Lockyer v. Andrade*, 123 S. Ct. at 1170; *Solem v. Helm*, 463 U.S. at 278.

188. *Lockyer v. Andrade*, 123 S. Ct. at 1170; *Solem v. Helm*, 463 U.S. at 278.

189. *Lockyer v. Andrade*, 123 S. Ct. at 1169-70; *Solem v. Helm*, 463 U.S. at 277.

190. *Lockyer v. Andrade*, 123 S. Ct. at 1173.

eligible for parole in twelve years.¹⁹¹ Justice O'Connor's analysis means that a sentence is immune from Eighth Amendment attack so long as there is the theoretical possibility of parole at some point. Realistically, an indeterminate life sentence with no possibility of parole for fifty years is the same as a life sentence with no chance of parole. After Justice O'Connor's opinion, a state can immunize its sentences from Eighth Amendment analysis just by allowing parole in seventy-five or one hundred years.

Federal courts also can grant habeas corpus if a state court decision is an "unreasonable application of" clearly established federal law.¹⁹² The United States Court of Appeals for the Ninth Circuit held that this standard is met if the state court commits "clear error."¹⁹³ Justice O'Connor, however, said that this standard "fails to give proper deference to state courts."¹⁹⁴ The Court stated that "[i]t is not enough that a federal habeas court, in its 'independent review of the legal question' is left with a 'firm conviction' that the state court was 'erroneous.'"¹⁹⁵ However, Justice O'Connor never explained why a "clear error" by a state court is not sufficient to be an "unreasonable application" of federal law.¹⁹⁶ Nor does she explain the standard courts should use in the future for making this determination.¹⁹⁷ In this way, *Lockyer v. Andrade* is likely to create much confusion in the law of habeas corpus and be used as a significant new obstacle for state prisoners seeking remedies for constitutional violations.

VI. CONCLUSION

I still feel quite devastated by the Supreme Court's decision in *Lockyer v. Andrade*. Had one Justice decided differently, Andrade would be a free man today, because he already had served seven years for stealing \$153 worth of videotapes, and it is highly unlikely the State would have resentenced him. Now he must wait forty-three years before he is even eligible for parole.

191. *Id.* (citing *Rummel v. Estelle*, 445 U.S. 263, 267 (1980)).

192. *Id.* at 1174 (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000)).

193. *Id.* at 1175 (citing *Van Tran v. Lindsey*, 212 F.3d 1143, 1152-54 (9th Cir. 2000)).

194. *Lockyer v. Andrade*, 123 S. Ct. at 1175.

195. *Id.* (quoting *Van Tran v. Lindsey*, 212 F.3d at 1153-54).

196. *See id.*

197. *See id.*