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The Story of *Ewing v. California*: Three Strikes Laws and the Limits of the Eighth Amendment Proportionality Review

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The Eighth Amendment prohibits “cruel and unusual punishments,”¹ and by long tradition it had provided a mechanism for challenging particular methods of punishment, such as flogging. The more controversial question is whether the amendment also imposes limitations on the excessive use of permissible forms of punishment.

The Supreme Court began to answer that question in death penalty litigation. In *Coker v. Georgia*,² decided in 1978, the Supreme Court announced that it was cruel and unusual to impose a sentence of death when that penalty was disproportionate to the offender’s crime. The Court concluded that the Eighth Amendment bars the imposition of the death penalty for the rape of an adult woman, because that crime, though heinous, does not warrant the state’s imposition of death. *Coker* was the first in a line of decisions in which the Court has applied the proportionality standard in death penalty cases.³ Although the death penalty decisions based on proportionality have been difficult and controversial, they rest on a clear categorical distinction and apply to only a relatively small and easily identifiable group of cases. Death is different in kind from any other penalty in its severity and finality, and death sentences are relatively rare.

Sentences of imprisonment, in contrast, are far more numerous and by their nature they fall all along a continuum ranging from probation to incarceration for any number of days, weeks, months, or years. Fashioning a constitutional proportionality standard for cases involving sentences of imprisonment is a much more difficult judicial task with the potential to affect a

¹“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const., Amend. VIII. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689, which provided: “[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.” *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

²433 U.S. 584 (1977). For an in depth discussion of *Coker*, see Sheri Lynn Johnson, *Coker v. Georgia: Of Rape, Race, and Burying the Past*, in *Death Penalty Stories* at 171-201 (John H. Blume & Jordan M. Steiker, eds., 2009).

³The Supreme Court’s most recent death penalty proportionality decision is *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim).

much larger number of cases. A constitutional proportionality standard would restrict the options available to the states, which prosecute the vast majority of crimes in the United States and vary widely in their sentencing policies. For that reason, the extension of the proportionality principle beyond capital cases necessarily raises hard questions of federalism and judicial competence.

In 1994 California enacted the nation's harshest "three strikes" law. The name three strikes comes from a baseball analogy: after a third qualifying conviction (or "strike"), an offender is "out" of civil society. Under the California law, a third strike requires a mandatory prison sentence of 25 years to life. In *Ewing v. California*⁴ the Supreme Court held that sending a drug addict who shoplifted three golf clubs to prison for 25 years to life under the three strikes law did not violate the cruel and unusual punishment clause of the Eighth Amendment.

This chapter explores three questions. First, why did California law impose such a draconian sentence for such a minor offense? And second, why wasn't such a sentence prohibited by the cruel and unusual punishment clause? Finally, what limits — if any — does the Eighth Amendment impose on the state's authority to replace policies based on rehabilitation, retribution, and individualized sentencing with a policy that seeks to protect society by incapacitating recidivists?

The California Three Strikes Law

During the last quarter of the 20th century most U.S. jurisdictions adopted major sentencing reforms. Before the adoption of the various reforms, sentencing was generally individualized, discretionary, and indeterminate. Sentences were individualized and discretionary because judges had largely unreviewable authority to set the sentence for an individual offender at any point within a wide statutory range, from probation to a maximum sentence of many years. Sentences were also indeterminate because they were subject to a second phase of discretionary decision making by the parole authorities, who had discretion to release a defendant on parole before he finished serving his sentence if they deemed him sufficiently rehabilitated. Thus at the time a defendant was sentenced it was not ordinarily possible to know whether he would have to serve his full sentence.

Many factors contributed to the support for major changes in the discretionary sentencing regimes.⁵ Lawmakers and policy makers came to agree that the current system, based on the goal of rehabilitating offenders, simply did not work.⁶ Crime rates had increased dramatically

⁴538 U.S. 11 (2003).

⁵Although some of the sentencing reforms, particularly the three strikes legislation and other mandatory minimum sentencing laws, had greater support among conservatives than liberals, both liberals and conservatives were concerned that discretionary sentencing was arbitrary. That agreement was the basis for the bipartisan support of the federal legislation authorizing the promulgation of federal sentencing guidelines. This legislation was co-sponsored by conservative Republican Senator Strom Thurmond and liberal Senator Edward (Ted) Kennedy. For a description of the events leading to the passage of the Sentencing Reform Act, see Kate Stith & José Cabranes, *Fear of Judging: Sentencing Guidelines and the Federal Courts* 38-48 (1998).

⁶See generally Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (1981), and Jennifer E. Walsh, *Three Strikes Laws* 4-9 (2007).

since the post-war period, and during the 1990s media coverage of crime, especially violent crime, increased even more dramatically.⁷ Conservatives argued that the excessive leniency of the system was a threat to public safety, and the public by a wide margin agreed that sentences were generally too low.⁸ By the beginning of the 1990s, crime was an increasingly salient political issue, and there was wide support for a variety of tough on crime measures. Additionally, victims (and their families), were becoming an increasingly important political force.

To respond to all of these concerns, U.S. jurisdictions began adopting a variety of restrictions on judicial sentencing discretion, most notably sentencing guidelines and mandatory minimum sentencing laws.⁹ These general developments set the stage for the adoption of the recidivist statutes popularly called three strikes laws. Although the three strikes terminology was new, habitual offender statutes, which provide enhanced sentences for an offender who has prior convictions for a specified number of felonies, have had a long history. California was one of the pioneers when a wave of new three strikes laws swept across the nation. Indeed, in just a two year period, from 1993 to 1994, 24 states enacted three strikes laws.¹⁰

The first three strikes law was adopted in Washington state in 1993 through the ballot initiative process. A victims' rights coalition drafted the measure in response to concerns that new sentencing reform legislation had weakened the sentencing laws applicable to recidivists. The ballot initiative required a mandatory life sentence without parole upon conviction of a third violent offense. With the financial backing of the National Rifle Association, which pledged up to \$100,000, supporters mailed more than 400,000 forms within the state and collected more than twice the required number of signatures to place the initiative on the ballot. It was adopted by a three to one margin.¹¹

A reform based on the Washington measure was proposed in California by Mike Reynolds, whose 18 year old daughter, Kimber, had been shot and killed during an attempted purse snatching. Both of her assailants had long criminal records, and Reynolds was enraged when one of them received a nine year sentence as part of a plea bargain. This meant, Reynolds said, that one of Kimber's attackers would get out of prison about the time the Reynolds family finished paying for her funeral.¹² At the sentencing, Reynolds also accused the state of

⁷Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market Driven News Promotes Punitiveness*, 48 Wm. & Mary L. Rev. 397, 422-36 (2006) (describing dramatic increase in crime coverage in network news, local television news, and newspapers).

⁸*Id.* at 418-20 (noting that in every year from 1980 to 1998 more than 74 % of respondents in a national poll said sentencing was not harsh enough, and 67% said sentences were too lenient in 2002).

⁹See generally Candace McCoy, *Sentencing: Mandatory and Mandatory Minimum Sentences*, in 4 Encyclopedia of Crime & Justice at 1443 (Joshua Dressler ed., 2nd ed. 2002).

¹⁰ After California and Washington State adopted their three-strikes laws in 1993 and 1994, twenty-two other states and the federal government adopted new laws enhancing punishments for repeat felony offenders. See generally John Clark et al., Nat'l Inst. of Justice, *"Three Strikes and You're Out" Legislation: A Review of State Legislation* (1997).

¹¹ Walsh, *supra* note __, at 37.

¹²Joe Domanick, *Three Strikes and the Politics of Crime in America's Golden State* 24, 68 (2004). The state allowed Douglas Walker to plead guilty because he had not pulled the trigger and could plausibly have argued that he did not know what the triggerman, Joe Davis, intended. Davis had been killed in a shootout with police.

California of being an “unindicted conspirator” in Kimber’s murder, because it had not locked her killer up long ago.

Kimber’s murder propelled Mike Reynolds on a crusade that ultimately led to the passage of the current California legislation. Reynolds took a harsh view of recidivist criminals:

They’re little more than animals. They look like people, but they’re not. And the unfortunate thing is they’re preying on us. And we have to get them out so the rest of us can go on living our lives.¹³

Reynolds vowed to go all out against recidivists. After a bill introduced by his local assemblymen failed to get out of committee, Reynolds drafted a similar initiative and began seeking the necessary signatures to place it on the ballot as an initiative. But getting an initiative on the ballot requires collecting hundreds of thousands of signatures, and Reynolds initially met with little success.¹⁴

Everything changed with the abduction and murder of 12 year old Polly Klaas on October 1, 1993. A stranger who had entered through an unlocked door took Polly from her own bedroom in Petaluma where she and two of her friends were having a sleepover party.¹⁵ Polly’s mother was asleep in a nearby room. A massive effort to find Polly was launched. Her photograph and the details of her abduction appeared in all of the state and national media, and she was featured in publications ranging from People magazine to MTV News. Actress Winona Ryder, a native of Petaluma, offered a \$200,000 reward for information leading to Polly’s safe release. Polly was the first missing child of the Internet age, and by the time her body was found over 2 billion images of Polly Klaas had been distributed worldwide.¹⁶ Polly’s father and grandfather, Marc and Joe Klaas, made a deliberate choice to use the media to keep her story on the front page and help to find her.¹⁷

The search for Polly went on for nine weeks. The case finally broke when police put together circumstantial evidence pointing to Richard Allen Davis and arrested him on other charges. After several days of interrogation Davis confessed and led police to Polly’s body. News of the December 4, 1993, discovery of Polly’s body set off a wave of grief, fear, and anger.

¹³Sasha Abramsky, *Hard Time Blues* 112 (2002) (quoting an episode of the television news show 20/20 that aired after Polly Klaas was buried).

¹⁴Walsh, *supra* note __, at 38 (noting that Reynolds was using his own money for this effort and had only been able to obtain a fraction of the approximately 400,000 signatures he needed.)

¹⁵The intruder appeared suddenly, telling the terrified girls that he had come to commit robbery. He gagged the girls, tied their hands behind them, put pillow cases over their heads, and told them to lie down on the floor and count to 1,000. Then he carried Polly away. Domanick, *supra* note __, at 94.

¹⁶Polly Klaas Foundation, Polly’s Story, at <http://www.pollyklaas.org/about/pollys-story.html> (last visited Feb. 14, 2010). This site includes Polly’s photograph and the posters which included her photo, a police sketch of her abductor, and the 200,000 reward.

¹⁷Joe Klaas had majored in public relations and worked as a disc jockey for a radio station, and he knew the media could help. Marc Klaas gave dozens of interviews to keep the story alive. Domanick, *supra* note __, at 118-119.

Davis had a long criminal record beginning at age 12, when he was arrested for stealing checks out of mailboxes.¹⁸ He had shown a violent streak as a child, setting fire to cats and using dogs as targets for knife-throwing practice. His early offenses were mainly property crimes, including burglaries. His first prison commitment was for a property crime, but weeks after his release he kidnapped a woman and sexually assaulted her. In the years that followed, Davis was convicted of burglary, assault, robbery, and kidnapping. Within two years of his parole he kidnapped and assaulted another victim. Davis was then sentenced to 16 years in prison, but he earned good time credits and was released on parole after serving about half of his sentence. Less than three months later, he abducted and killed Polly Klaas.

As details about Davis's criminal history emerged, they created "a political firestorm."¹⁹ Two days after the news of Polly's death was announced, Mike Reynolds appeared at a press conference with California's Attorney General, who endorsed the three strikes initiative and urged all Californians to support it. Fifteen hundred people attended Polly's memorial service, which was held in a church decorated for the event by famed filmmaker George Lucas. Governor Pete Wilson, who was facing a tough reelection campaign, spoke at Polly's memorial service and urged the legislature to take action against sex offenders and career criminals. Within a few weeks, Reynolds had collected more than double the signatures needed to get the initiative on the ballot in November of 1994.

With the Klass family looking on, Governor Wilson gave a state of the state address that focused on crime issues, and he pressed the legislature to take action on three strikes legislation. The legislature took up the three strikes bill under the glare of intense publicity. For example, when the bill was introduced into the Public Safety Committee, the event was filmed by eleven television camera crews, including crews from CNN and the television news program 20/20.²⁰

Within 59 days of its introduction, Reynolds' bill (AB 971) had been approved by four committees and passed by both houses of the California legislature by votes of 63 to 9 and 29 to 7.²¹ When his bill reached the floor, Reynolds made it clear that he would accept no amendments (even one that would have included money for crime prevention).²² Legislators faced overwhelming political pressure to support the bill exactly as written, and it passed rapidly despite various warning signs.

Reynolds's bill was significantly different than the three strikes laws adopted in Washington and later in other states, because it defined the strike zone so much more broadly. All of the laws required first and second strikes to be serious or violent offenses, but the Reynolds bill defined a larger number of offenses as serious or violent for this purpose. (It included, for

¹⁸The description of Davis's background is drawn from Domanick, *supra* note __, at 97, and Walsh, *supra* note __, at 39.

¹⁹Unless otherwise noted, the description of the political response to Polly's abduction and Davis's arrest is drawn from Walsh, *supra* note __, at 39-40, and Michael Vitiello, *Three Strikes: Can We Return to Rationality?* 87 J. Crim. L. & Criminology 395, __ (1997).

²⁰Domanick, *supra* note __, at 136.

²¹Vitiello, *supra* note __, at 414 n.107.

²²Although spectators are rarely permitted to speak during legislative debates, Reynolds simply walked to an open microphone and addressed the Assembly. *Id.* at 136.

example, all robberies, not just the most serious robberies such as those involving a weapon.) Even more important, the Reynolds bill did not require the third strike to be a serious or violent offense. Any offense defined as a felony under the California code could serve as a third strike and trigger a mandatory sentence of 25 years to life. Finally, unlike other state laws that excluded prior offenses after a number of years, under the Reynolds bill even crimes or juvenile offenses committed many decades earlier could come back to haunt an offender convicted of a non violent third felony. In addition, the Reynolds bill, unlike the Washington law, also imposed significantly enhanced penalties for the second strike²³ Thus it affected a far larger number of cases.

These critical features did not go unnoticed as the Reynolds bill and other more narrowly tailored three strikes bills wended their way through the state legislature.²⁵ The Senate Judiciary Committee and many individual members were aware, for example, that the Reynolds bill would require the imposition of a sentence of twenty five years to life in prison on a repeat felon who had never committed a violent felony, and a preliminary report from the Legislative Analyst's Office estimated that implementation of the bill could cost the state billions of dollars. The legislature nevertheless approved the Reynolds bill without amendment or a full fiscal analysis. Afraid of the charge that they were soft on crime, the legislative leadership announced it would pass whatever bill the governor backed. Governor Wilson supported the Reynolds bill rather than a narrower bill supported by the California District Attorneys Association.²⁶ At that point, nothing could stop the Reynolds bill, not even late opposition from the Klass family. Polly's father, who had initially supported the Reynolds bill, later withdrew his support because of the inclusion of non-violent offenses. As he explained, "I've had my car broken into and my radio stolen and I've had my daughter murdered, and I know the difference."²⁷

Although Mike Reynolds had initially stated he would drop his ballot initiative if the bill incorporating his three strikes proposal was passed by March 7, 1994, he changed his mind and continued to campaign for the initiative to be sure the new three strikes law could not be easily changed or dismantled.²⁸ His initiative provided that it could be amended or repealed only by another initiative or a two-thirds vote of the legislature.²⁹ On the same day that the governor signed his bill, AB 971, into law, Reynolds delivered 800,000 signatures – more than twice the number required – to put his initiative on the ballot.³⁰ His three strikes proposal had become the fastest qualifying initiative in state history, and in November 1994 it was passed by a vote of nearly three to one (72% in favor and 28% opposed).³¹

²³ For this purpose, the Reynolds bill did not require the second strike to be a serious or violent felony; a conviction for any felony was sufficient to subject an offender to the higher penalties applicable to second strikes.

²⁵*Id.* at 414-15 (footnotes omitted).

²⁶Franklin E. Zimring et al., *Three Strikes and You're Out in California* at 6 (2001).

²⁷Walsh, *supra* note __, at 67.

²⁸Dan Morain, *Three Strikes Clears State Legislature*, L.A. Times, Mar. 4, 1994, at A1.

²⁹Walsh, *supra* note __ at 42.

³⁰*Id.*

³¹*See* Vitiello, *supra* note __, at 412 (rapid qualification for the ballot); Walsh, *supra* note __, at 47 (final margin of victory).

Implementation of the new three strikes law was left to the elected district attorneys, and early studies found that the law was being applied much more frequently in some counties than in others. For example, a 1999 study found that in Los Angeles County 3.6 percent of felonies were charged as third strikes, but in Alameda and San Francisco Counties, only .07 and .03 percent of felonies were charged as third strikes.³² Densely populated Los Angeles County sent the greatest number of second and third strikers to prison, accounting for 40 percent of the state's third-strike population.³³ By March of 1996, the county was experiencing a backlog of three strikes cases that threatened to overwhelm the system.³⁴ The large number of three strikes cases in the county was due in part to the rigorous enforcement by District Attorney Gil Garcetti, who generally took a hard line on cases that fell within the statute. At one point Garcetti delegated authority to his supervising deputies, and as a result the policy began to vary from courthouse to courthouse. But he later issued a memo stating that "all county prosecutors were 'duty-bound to object every time a judge opted for leniency' in sentencing under the Three Strikes law."³⁵ In the 2000 election, Garcetti was defeated by one of his deputies who campaigned on a promise to use proportionality in deciding whether to charge a third strike.³⁶

Whatever the hopes of its supporters, the variation in charging policies among California's district attorneys reflects the fact that the adoption of the three strikes law did not eliminate all discretion in cases falling within its terms. To the contrary, prosecutorial discretion survived, and — perhaps more surprisingly — an important form of judicial discretion survived as well. Prosecutors normally have wide discretion not to prosecute an individual whose conduct violates the laws. And just as they often declined to prosecute first offenders who entered drug treatment, California prosecutors exercised their discretion by not charging second or third strikes in some individual cases.³⁷ Once the prosecutor charged a second or third strike, however, the evident purpose of the three strikes law was to restrict judicial sentencing discretion. But another section of the state penal code not amended by the three strikes law gave state courts the authority to dismiss criminal charges when necessary in "furtherance of justice," and in *People v. Romero*³⁸ the California Supreme Court concluded that the three strikes law had not stripped the state courts of their authority to dismiss (or "strike") the allegations of prior felonies when necessary in "furtherance of justice." *Romero* rested on prior decisions of the California Supreme Court holding that once a prosecution has been initiated, the power to dismiss in the interests of justice is "fundamentally judicial in nature" and qualifying that power

³²Mike Males & Dan Macallair, Symposium, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 Stan. L. & Pol'y Rev 65, 71 tbl.6 (1999).

³³See Andy Furillo, *Begging Help for Swamped Courts, Jails*, SACRAMENTO BEE, March 31, 1996; DOUGLAS W. KIESO, UNJUST SENTENCING AND THE CALIFORNIA THREE STRIKES LAW 82 (Marilyn McShane & Frank P. Williams III eds., 2005) ("As of December 31, 2001, the county had . . . 3,046 third strikers (40% of the state) in the prison population").

³⁴Furillo, *supra* note ____.

³⁵Kieso, *supra* note ____, at 118-20 (describing shifts in Garcetti's policies).

³⁶*Id.* at 123-26.

³⁷This point might have been disputed, because the three strikes law provided that the prosecutor must "plead and prove" all prior felony convictions. Cal. Penal Code **Error! Main Document Only.** § 667(f)(1). Some critics of the law argued that this provision would violate the separation of powers if it were construed to strip the executive branch of its traditional broad discretion to determine whom, and for what offenses, to prosecute. See *People v. Romero*, 917 P.2d 628, 637 n.7 (Cal. 1996).

³⁸917 P.2d 628 (Cal. 1996) (relying on Cal. Penal Code **Error! Main Document Only.** § 1385(a)).

would unacceptably compromise judicial independence.³⁹ A later decision established that prior convictions charged as second and third strikes should be dismissed “in furtherance of justice” when the court finds the defendant falls outside the spirit of the three strikes law in light of the nature of the offense and the defendant’s background and character.⁴⁰

The criminal case against Richard Allen Davis was unaffected by the passage of the new legislation. He was convicted and sentenced to death in 1996,⁴¹ and his conviction was affirmed by the California Supreme Court.⁴²

The Supreme Court Considers Eighth Amendment Challenges to the Three Strikes Law

In 2000 the United States Supreme Court granted certiorari in two three strikes cases from Los Angeles. Neither defendant was a violent offender like Richard Allen Davis. Both were drug addicts with lengthy criminal records whose third strikes were nonviolent shoplifting offenses. For procedural reasons, only Gary Ewing’s case squarely presented the constitutional issues.⁴³

Gary Ewing was born October 11, 1962, and by 2000 he had a long criminal history. His first recorded criminal offense was theft, committed in Columbus, Ohio when he was twenty-two years old. The court suspended Ewing’s six-month jail sentence, so he served no time on that offense. Four years later, in 1988, Ewing was again convicted of grand theft, this time in Los Angeles, California. Although he was sentenced to one year in jail, the sentencing court allowed him to withdraw his plea and then dismissed the case after Ewing completed his jail term and

³⁹The *Romero* court also relied on the principle that legislation should be construed, when possible, to be constitutional, as well as the principle of lenity. 917 P.2d at 647.

⁴⁰*People v. Williams*, 948 P.2d 429, 437 (Cal. 1998).

⁴¹At his sentencing hearing, Davis suggested that Polly had been sexually abused by her father, Marc Klaas. Klaas lunged at Davis, and was forced out of the courtroom. The judge then sentenced Davis to death, saying that sentencing someone to death is “always a traumatic and emotional decision for a judge. You made it very easy today by your conduct.” Domanick, *supra* note ___, at 155.

⁴²*People v. Davis*, 208 P.3d 78 (2009), *cert. denied*, 2010 WL 58573 (U.S. Jan. 11, 2010) (No. 09-7352). As of February 16, 2010, Davis had not been executed, and he was maintaining a website, hosted by the Canadian Coalition Against the Death Penalty, available at <http://www.ccadp.org/richarddavis.htm>. It has photographs of Davis, some of his artwork, and a statement about his childhood.

⁴³Unless otherwise noted, the facts concerning Ewing’s case are drawn from the Supreme Court’s opinion in *Ewing v. California*, 538 U.S. 11 (2003), the Supreme Court docket, the joint appendix, the parties’ briefs, and the unpublished opinion of the California Court of Appeals, *People v. Ewing*, 2001 WL 1840666 (Cal. App. 2d 2001). The other three strike case was *Lockyer v. Andrade*, 538 U.S. 63 (2003). Andrade received a 50 year to life sentence for two felony counts of petty theft with a prior conviction. He had stolen approximately \$150 worth of children’s videotapes from two different Kmart stores. Andrade – a nine-year army veteran and father of three – was similar in many ways to Ewing. He too had a long criminal history and a problem with drug abuse. Andrade had been in and out of state and federal prisons since 1982. His various crimes included petty theft, multiple residential burglaries, transportation of marijuana, and a state parole violation for escape from federal prison. Unlike Ewing, Andrade did not use or display a weapon during the commission of any of those crimes. Andrade could not win his case unless the Court ruled in favor of Ewing on the Eighth Amendment issue, and even then Andrade faced an additional hurdle. Because his conviction was final and his case was in federal court on a habeas petition, the question was whether the state court’s action in upholding his sentence was contrary to, or involved an unreasonable application of, clearly established federal law.

three years of probation. In the years that followed, Ewing racked up a series of convictions in California for petty theft, battery, possession of drug paraphernalia, appropriation of lost property, burglary, and possession of a firearm. Some of these offenses occurred in Los Angeles, the others in the nearby communities of Torrance, Seal Beach, and Long Beach. Ewing was sentenced to jail terms ranging from 10 days to 6 months in jail, with various terms of probation.

Ewing's most serious offenses occurred in Long Beach in 1993, when he went on a five-week crime spree, committing three residential burglaries and a robbery in which he brandished a knife. All of the burglaries were committed in a single residential complex. On two occasions he encountered a resident. One of the victims was asleep on her living room sofa and awakened to find Ewing trying to disconnect her video recorder. Ewing ran out the front door when the victim screamed. On the other occasion, Ewing accosted a male victim in the mail room of the apartment, told him he had a gun, and ordered him to hand over his wallet. When the victim resisted, Ewing threatened the victim with a knife and forced him into his apartment, where Ewing took the victim's money and credit cards. Ewing was arrested when he once again returned to the apartment complex. The knife he had used in the robbery and a cocaine pipe were found in the patrol car used to drive him to the police station. Ewing was convicted, sentenced to nine years and eight months in prison, and released on parole in 1999 after having served less than six years.

Just ten months out of prison and still on parole for the burglaries and robbery, on March 12, 2000, Ewing walked into the pro shop of The Lakes of El Segundo golf course. Although the name suggests an exclusive country club, The Lakes is a municipal golf course run by the city of El Segundo.⁴⁴ El Segundo, one of many separate municipalities in Los Angeles County, is a predominantly white town just south of LAX airport.⁴⁵

Ewing entered The Lakes pro shop and looked at golf clubs for 10 to 15 minutes before purchasing a token that could be retrieved for golf balls on the driving range. He asked for directions to the driving range, and then walked back to the golf clubs. As Ewing left the pro shop, the employee running the shop noticed that Ewing was noticeably limping, that he was heading to the parking lot rather than the driving range, and that he looked "totally out of place." The employee called 911. When the police arrived at the parking lot, they observed Ewing pulling three golf clubs from his pants leg. They arrested him on the spot.

A mug shot of Ewing provided by the El Segundo police department is reproduced below.⁴⁶

⁴⁴Information about the course and the pro shop, including photos, is available at <http://www.golfthelakes.com/>.

⁴⁵In the 2000 census, it had a population of 16,033, of which 83.6 % were white, 11 % Hispanic or Latino, 4.5 % Asian, and 1.2 % Black or African American. The median household income of its residents was \$61,341. See U.S. Census Bureau, Fact Sheet, El Segundo city, California, at http://factfinder.census.gov/servlet/SAFFacts?_event=Search&geo_id=&_geoContext=&_street=&_county=el+segundo&_cityTown=el+segundo&_state=04000US06&_zip=&_lang=en&_sse=on&pctxt=fph&pgsl=010&show_2003_tab=&redirect=Y.

⁴⁶As his photo indicates, Ewing is a dark skinned African American. There is no way to know whether his race had any effect on his case. Was he acting so oddly that anyone would have noticed him in the pro shop? Or was his race one of the reasons he looked "out of place" in El Segundo? Once he was arrested did his race (and his

Ewing's Trial, Sentencing, and State Appeal

Ewing was charged with one count of felony grand theft in excess of \$400 and one count of burglary. The case was tried to a jury. Superior Court Judge Deanne Myers presided. Myers, who had been on the bench for more than 10 years, was a cum laude graduate of Loyola Law School with experience as both an Assistant U.S. Attorney and a civil litigator. Ewing was represented by Los Angeles County Deputy Public Defender Gail Bristo, and the state was represented by Deputy District Attorney Jodi Link.

The state's main witness was the pro shop employee, who testified that the clubs found in Ewing's possession were Callaway golf clubs priced at \$399 each, that they still had the shop's identification numbers on them, and that Ewing had neither paid for them nor had permission to remove them. The jury found Ewing guilty of grand theft but found him not guilty of burglary (which required proof of intent to commit larceny or some other felony at the time of entry into the pro shop.)

The jury's verdict set the stage for the sentencing phase. The prosecution charged that the grand theft conviction was Ewing's third strike. Although grand theft normally carries a maximum three-year sentence, if treated as a third strike it would require a prison sentence of twenty-five years to life. Ewing might not have been charged as a third striker if the theft had occurred in another county, but Los Angeles County District Attorney Gil Garcetti generally took a hard line on three strikes cases.⁴⁷ Ewing's timing was particularly bad: just a few months after his sentencing, Garcetti lost his reelection bid to a challenger who campaigned on a policy that third strikes should be charged only when proportional to the crime.⁴⁸

Judge Myers had discretion not to sentence Ewing as a third striker. Two options were open to her under state law. First, state law defined grand theft as a "wobbler" offense, which meant it could be treated as either a felony or a misdemeanor. If Judge Myers treated the wobbler as a misdemeanor, rather than a felony, it could not be Ewing's third strike. Alternatively, Judge Myers had the authority to "strike" – or dismiss – either of the prior offenses that the prosecution was counting as the first and second strikes "in furtherance of justice,"⁴⁹ meaning Ewing would not yet have reached his third strike even if the wobbler were treated as a felony.

Judge Myers held a sentencing hearing. District Attorney Link presented evidence that Ewing had previously been convicted of first degree robbery and three separate residential burglaries in 1993, all of which were serious or violent felonies under the three strikes laws.

appearance) influence the prosecutors in some subtle way? Or the sentencing judge? At a systemic level, one might also ask whether racial concerns affected the passage of the three strikes laws. There is some evidence that racial stereotypes, amplified by the news media's treatment of crime, played a role in the support for California's three strikes law and other harsh sentencing laws. *See generally* Beale, *supra* note ____ (describing media coverage of crime during the 1990s and its relationship to public support for punitive policies).

⁴⁷Garcetti's policy is discussed *supra* at ____.

⁴⁸Cooley's campaign to unseat Garcetti is discussed *supra* at _____. In 2010 Cooley announced a plan to run for Attorney General and Mike Reynolds attacked him as weak on crime. *See infra* at ____.

⁴⁹For a discussion of the judge's discretion in three strikes cases, see *supra* at ____.

Link urged Judge Myers to sentence Ewing as a third striker, emphasizing his long criminal record. “He has had 10 convictions in his lengthy criminal history for someone as young as he is.... He has repeatedly been placed on probation. He has repeatedly failed miserably at probation. He goes to state prison, he gets paroled. He fails miserably on parole.”⁵⁰

Ewing’s lawyer, Ms. Bristo, asked Judge Myers to treat his current offense as a misdemeanor or to strike one of the first two offenses on which the prosecution was relying. She argued that all of Ewing’s offenses were drug related, and that he had never received assistance for his drug problems. In addition to his drug addiction, Ewing was battling full blown AIDS. At the time of trial, complications from the disease had caused him to go blind in one eye (and he later began to lose vision in the other). Bristo portrayed Ewing as a terminally ill man who posed no threat of violence in the future.

Ewing himself addressed the court, stating, “I would just like to beg the mercy of the court asking that any sentence I be given be suspended and I’m given a chance in a drug rehab to get my life together. I don’t have very long and the little time I do have left to live I want to do something, make myself better.” Several people, including a jail chaplain, wrote letters on Ewing’s behalf. One such letter suggested that Ewing could spend the remainder of his life acting as an AIDS advocate and warning others about the dangers of drug abuse. The judge took time during the hearing to read the letters.

At the conclusion of the hearing Judge Myers refused to strike any of Ewing’s prior convictions and declined to treat the wobbler as a misdemeanor. She stated that the question was whether Ewing fell “outside the spirit and intent of the three strikes law.” Noting Ewing’s long record of “consistent criminal activity” and the fact that he was on parole when the grand theft offense occurred, she concluded:

I think there is no way I could find, which is what I am required to find, you are outside the [three strike law’s] spirit and the intent. I do have to consider threats to the community and although there isn’t a real pattern of violent crimes that you pose a threat, you are clearly posing a threat for theft offenses.... And it’s for that reason that I cannot consider and will not strike any of the strikes.

Finding that Ewing had committed a qualifying third strike, she sentenced him to imprisonment for 25 years to life. He would first become eligible for parole in the year 2025 at the age of 63 (if he were still living). After the trial and sentencing, defense attorney Bristo stated she was “really disturbed” by the life sentence for the theft of three golf clubs. When asked about Ewing’s earlier crimes, including the residential burglaries, Bristo said that as far as she knew “he scared [the victims] half to death but he didn’t physically hurt them.”⁵¹

⁵⁰ The description of the sentencing hearing is drawn from the transcript included in the Joint Appendix, available at 2002 WL 32102970.

⁵¹Carla Hall, *Thefts Were Petty, but Ruling Won’t Be*, LOS ANGELES TIMES, Apr. 7, 2002, at 2:1.

Ewing appealed to the California Court of Appeals for the Second District, and Karyn Bucur, a solo practitioner, was appointed to represent him. In an unpublished opinion, the court affirmed Ewing's conviction, rejecting both his arguments that the trial judge had erred under state law and his claim that the resulting sentence was cruel and unusual. Relying on numerous state precedents, the appeals court held that Ewing bore the burden of establishing that his sentence was unreasonable. In light of Judge Myers's conclusion that Ewing posed a threat to the community based on his recidivism and that his rehabilitative prospects were weak, she had not abused her discretion or acted arbitrarily in declining to reduce grand theft to a misdemeanor or to strike any of Ewing's priors. Nor was his sentence cruel and unusual punishment under either state or federal law. Rather, it was "reasonably proportional" to both the offense and offender, and the severity of the sentence was properly affected under the three strikes law by his prior offenses. The court emphasized that the state's three strikes law served the legitimate goals of deterring repeat offenders and separating recidivists from the remainder of society.

Ewing Takes His Case to the Supreme Court – The Players and Their Preparation

After the California Supreme Court summarily denied Ewing's petition for review, Ms. Bucur filed a petition for a writ of certiorari to the United States Supreme Court which presented the following question:

Does petitioner's twenty-five year to life prison sentence violate federal constitutional provisions against cruel and unusual punishment because his sentence is grossly disproportionate to the offense of "stealing golf clubs"?

The petition was granted on April 1, 2002,⁵² and Ewing was optimistic that the Supreme Court would hold his sentence to be excessive and grant him relief.⁵³

Quin Denvir was added to the Ewing defense team to brief and argue the case in the Supreme Court. Denvir, then 62 years old, was the Federal Public Defender in Sacramento. He had already argued two Supreme Court cases and had an impressive and varied professional background. After graduating from Notre Dame he obtained a master's in economics at American University and a law degree from University of Chicago School of Law with honors. Although he had experience with private firms in both Washington, D.C. and California, Denvir had also spent nearly 20 years working for various federal and state organizations representing indigents. Before representing Ewing, Denvir had been involved in several high profile cases. Most notably, he negotiated a plea agreement that spared Unabomber Ted Kaczynski from the death penalty.⁵⁴ Colleagues spoke of Denvir in glowing terms, calling him a "complete lawyer," "a guy with a first-class academic pedigree," "smart and even-tempered."⁵⁵ Judy Clark, Denvir's

⁵²*Ewing v. California*, 535 U.S. 969 (2002).

⁵³Jan Crawford Greenburg, *Court Upholds 3-Strikes Sentencing*, CHICAGO TRIBUNE, Mar. 6, 2003, at 1.

⁵⁴For more information about the Unabomber investigation, the prosecution of Kaczynski, and a critical appraisal of Denvir's role in the case, see Michael Mello, *The United States versus Theodore John Kaczynski: Ethics, Power, and the Invention of the Unabomber* (1999). Many of the documents in the case are available online at <http://unazod.com/sacbee.pdf> (last visited Feb. 10, 2010).

⁵⁵Howard Mintz, *Complete Lawyer in Kaczynski's Corner*, THE RECORDER, June 18, 1996, available at

co-counsel in the Kaczynski case, said that “Quin Denvir comes as close as anyone I know to walking on water.”⁵⁶ Speaking of his motivation and his role as federal defender, Denvir said, “what I like the most, is [to] represent the nameless defendants facing the might of the federal government. Helping the little guys with no resources get through the federal criminal justice system is what the office is all about.”⁵⁷

The state was represented in the Supreme Court by Deputy Attorney General Donald De Nicola. De Nicola was born in Brooklyn, New York, in 1951. He received his bachelor's degree at Fordham and his law degree from Georgetown.⁵⁸ De Nicola joined the California Attorney General's Office directly from law school and worked in the criminal division, specializing in state appellate and federal habeas cases. At the time De Nicola took over the Ewing case, he had been in the Attorney General's office for almost 25 years. This was his first United States Supreme Court argument, but it would not be his last.⁵⁹ De Nicola's first reaction was that it would be an uphill battle to defend a 25 year to life sentence for stealing three golf clubs, but as he immersed himself in the case he became convinced of the state's argument of the importance of judicial deference to legislative judgments as well as federal deference to the states.⁶⁰ The United States participated in the case as an amicus supporting the state, and De Nicola worked closely with an attorney from the Office of the Solicitor General who peppered him many times a day with emails as they prepared their briefs, requiring De Nicola to think through every possible issue and argument.

The U.S. was represented at the oral argument by Michael Chertoff, then Assistant Attorney General for the Criminal Division in the Department of Justice. Chertoff was an experienced prosecutor who had prosecuted mob and political corruption cases as an Assistant U.S. Attorney and later served as U.S. Attorney for New Jersey.⁶¹

The Earlier Eighth Amendment Cases

In three previous cases the Supreme Court had considered the question whether an individual sentence for a term of years constituted cruel and unusual punishment under the Eighth Amendment. The cases had produced sharp divisions within the Court about the question

<http://www.lectlaw.com/files/cur71.htm> (last visited Feb. 10, 2010).

⁵⁶Denny Walsh, *A Lawyer's Lawyer: Quin Denvir Prepares to Retire After a Decade of Defending the Poor*, SACRAMENTO BEE, Oct. 12, 2005, at B1.

⁵⁷*Id.*

⁵⁸Email from Donald De Nicola to Sara Beale (Feb. 10, 2010), on file with author.

⁵⁹In 2006 De Nicola was named Deputy State Solicitor General and given supervisory responsibility for all California criminal cases in U.S. Supreme Court and California Supreme Court. He argued *Giles v. California*, 128 S.Ct. 2678 (2008), a major confrontation clause decision.

⁶⁰Telephone Interview with Donald De Nicola, Deputy Attorney General, California Department of Justice (Feb. 11, 2009).

⁶¹Chertoff subsequently served briefly as a judge on the Third Circuit, from which he resigned to take the post of Secretary of Homeland Security. He is credited as one of the co-authors of the USA PATRIOT Act. A brief biography of Chertoff is available on the website of the Chertoff Group, which he founded to advise on crisis management, global security, and risk identification. <http://www.chertoffgroup.com/team.html>.

whether the Eighth Amendment included a prohibition against disproportionate punishments in non-capital cases, and, if so, how robust the proportionality review should be.

Three views had emerged in the prior cases. One view, championed by Justice Scalia, was that the proportionality principle is limited to death penalty cases, and is not applicable to sentences of imprisonment.⁶² Put simply, death is different, and the proportionality review that courts undertake in death penalty cases cannot be carried over into non-capital cases. Other members of the Court agreed that the Eighth Amendment prohibits both capital and non-capital sentences that are disproportionate to the crime committed, but they disagreed on the standard for proportionality. The second view, advanced by Justice Powell, held that the Eighth Amendment requires a proportionality analysis grounded on three “objective” factors that include a comparative review of sentences both within and between jurisdictions.⁶³ The third view, articulated by Justice Kennedy, was a stripped down version of the three factor test designed to be substantially more deferential to state legislative judgments.⁶⁴ Under this view, unless a court first finds that the penalty is “grossly disproportionate” to the gravity of the offense, it should not undertake any comparative review.

In the early 1980s the Court decided two cases involving recidivist sentences by votes of 5 to 4. Although the results in the two decisions were difficult to reconcile, it seemed that by a bare majority the Court had adopted Justice Powell’s three-factor test for proportionality.

The first case, *Rummel v. Estelle*,⁶⁵ upheld a life sentence for the offense of obtaining \$120 by false pretenses in the case of a defendant whose only prior convictions were for two non-violent property offenses. The majority rejected the three factor approach proposed by the dissenters, and suggested that proportionality review (if it existed) would apply only in an extreme (and presumably hypothetical) case “if a legislature made overtime parking a felony punishable by life imprisonment.”⁶⁶

Just three years later, in *Solem v. Helm*,⁶⁷ the Court reversed a life sentence for a recidivist convicted of a seventh non-violent felony, writing a \$100 check on a non-existent account. The dissenters in *Rummel* were now in the majority, joined by Justice Blackmun, who provided the swing vote but did not write in either case.⁶⁸

⁶²See *Harmelin v. Michigan*, 501 U.S. 957, 984, 985 (1991).

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

⁶⁴*Harmelin*, 501 U.S. at 997-1001 (Kennedy, J., concurring).

⁶⁵445 U.S. 263 (1980).

⁶⁶455 U.S. at 274 n. 11

⁶⁷463 U.S. 277 (1983).

⁶⁸The case also involved some extenuating circumstances: the defendant, an alcoholic, went on a bender after getting paid and was surprised to awake and discover he had more money than when he began drinking. When he was charged with writing a check on a non-existent account, he plead guilty without the assistance of counsel. It seems doubtful that he realized this would subject him to a mandatory life sentence without possibility of parole. Some or all of these features may have tipped the balance for Justice Blackmun. Legal historians may be able to shed light on the question of what factors motivated Justice Blackmun. At his death, Blackmun donated his papers to the Library of Congress, and the catalogue indicates that Box 385 contains material related to the *Solem* case.

In an opinion written by Justice Powell, the new five member majority in *Solem* held that the proportionality analysis under the Eighth Amendment should be guided by three objective factors:

(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.

But surprisingly the majority opinion did not overrule *Rummel v. Estelle*; instead, it noted that defendant in *Rummel* had been eligible for parole, while the defendant in *Solem* was not.

The majority that came together briefly in *Solem* did not hold. Eight years later, in 1991, in *Harmelin v. Michigan*,⁶⁹ the Court upheld a first time drug offender's life sentence for possession of 672 grams of cocaine. Although the amount suggested that the drugs were intended for distribution, the state had neither charged nor proved intent to distribute. The Michigan law, which was enacted in response to the crack epidemic, imposed a mandatory life sentence without possibility of parole for anyone found in possession of 650 grams or more of the drug. The case produced no majority opinion. Four members of the Court adhered to *Solem v. Helm*'s three-factor analysis and concluded that the sentence was cruel and unusual punishment for mere possession. Two members of the Court took the view that the Eighth Amendment included no proportionality principle in non-capital cases. Writing for the three swing votes, Justice Anthony Kennedy sought to define a middle position. While not overruling *Solem*, Justice Kennedy wrote that the focus on the first step of the analysis should be to determine whether the sentence in question is grossly disproportionate. Only if a sentence meets this threshold should the second and third factors of the *Solem* test, the comparative analysis, come into play. In Justice Kennedy's view, this version of the proportionality standard gives appropriate deference to the states' legislative policy judgments. But the Justices who advocated continued adherence to the three part *Solem* test saw the Kennedy reformulation as unworkable: how, they asked, can courts determine whether a penalty is grossly disproportionate without comparing it to other sentences?

When the Court granted certiorari in the California three strikes cases, more than 10 years had passed since the decision in *Harmelin* and the Court's membership had changed. Justices Blackmun, Marshall, and White had retired, and Justices Breyer, Ginsburg, and Thomas had taken their places. *Ewing* gave the Court an opportunity to revisit the debate about the Eighth Amendment and proportionality review in non-capital cases.

*The Oral Argument*⁷⁰

At the beginning of the oral argument, one of the justices asked defense counsel Quin Denver about Ewing's record and then commented that "the purpose of the three-strikes law, as I

⁶⁹501 U.S. 957 (1991).

⁷⁰A transcript of the oral arguments are available at 2002 WL 31525401. The description that follows is drawn from that transcript. The transcript does not identify the individual justices, though occasionally the identity of a justice is clear from the context.

understand it, is to take off the street that very small proportion of people who commit an enormously high proportion of crimes.” Ewing, the justice suggested, was “precisely the kind of person you want to get off the streets” because he’s “obviously going to do it again.”

Denvir responded that under *Solem v. Helm* the focus for determining whether Ewing’s sentence was disproportionate must be on the offense for which he was sentenced, although his prior record could be “relevant” because it aggravated the crime for which he was being sentenced. The sentence for a recidivist can be a stiffened penalty for the instant crime, Denvir argued, but it may not be punishment for the prior offenses. Denvir struggled to explain and justify this distinction. He argued that any added punishment for prior offenses would offend the Double Jeopardy Clause. Accordingly, the focus at sentencing must be on what this defendant did on this occasion.

One of the justices observed that Denvir’s characterization of the case as one about a life sentence for stealing three golf clubs made it seem “like we’re some judges out of Victor Hugo,” but Denvir was really asking the Court to ignore recidivism. And recidivism was “the whole purpose of the California law.” Denvir responded that California could impose a reasonable enhancement of the normal penalty for grand theft for a recidivist, but at some point that enhancement becomes unreasonable.

Under *Harmelin*, Denvir argued, the sentence in this case was grossly disproportionate. Regardless of his recidivism, a sentence of 25 years to life was disproportionate to the offense for which Ewing had been convicted.

Denvir was then asked about a hypothetical defendant who had committed a much longer series of offenses, such as 100 thefts of golf clubs; couldn’t the state ever say enough is enough, and give him a life sentence? No, Denvir responded, the offense for which he has been convicted is still just stealing golf clubs, not a serious offense like robbery, rape, or murder. Otherwise, he argued, someone who had 100 jay walking offenses could be given a life sentence. But, a justice responded, jay walking does not hurt others as does theft, which may also lead to a physical confrontation. True, responded Denvir, but when California assessed the degree of harm from grand theft, it set the maximum penalty at three years in prison. Moreover, he noted, Ewing was certainly trying to avoid any physical confrontation. This led to a light hearted question by a member of the Court: “Was he a very tall man, or were these irons rather than wood[s]?” Denvir responded that Ewing was not a tall man, and he had no idea how he had managed to get the clubs out of the shop.

The respondent’s argument was divided between California and the United States as amicus in support of the state. Donald De Nicola began his argument for the state by emphasizing that California had revised its sentencing laws to move away from a more lenient policy of rehabilitation to a tougher policy of incapacitation. The first question to him was whether he knew of any case anywhere in the U.S. within the past 100 years in which a person, even one with a serious prior record, had received as long a sentence as Ewing for stealing property worth \$1,200. When De Nicola said he did not know, a member of the Court asked how they could determine proportionality without such empirical evidence. De Nicola responded that the major

objective factor the Court should employ is the legislative definition of the offense as a felony, rather than a misdemeanor. That is the traditional line of demarcation by society of offenses that are deemed to be serious. In making these judgments, he said, the legislature is subject to significant political and economic restraints, and courts should not second guess legislative decisions.

A member of the Court noted that the statute sounded mandatory for a third strike, but both prosecutors and judges have discretion under state law. Were there guidelines for prosecutors in exercising their discretion? No statewide guidelines, De Nicola responded. Each elected district attorney had the option to promulgate guidelines, some had done so, and some of the guidelines differ. He noted that this was “rather unremarkable” because “prosecutorial discretion is always going to lead to some sort of different approach depending on local conditions.”

Most of the remainder of De Nicola’s argument was spent on the question whether the Eighth Amendment would bar a life sentence after a hypothetical defendant had been convicted of a long series of speeding offenses. De Nicola’s first response was if the legislature classified the offenses as felonies, under *Harmelin* that would be a major objective factor suggesting the sentence was not grossly disproportionate. He was then asked whether the legislature could really provide the same penalty for speeding as for torture and murder. When De Nicola hesitated, Justice Scalia suggested a possible response: “it might seem disproportionate insofar as the penal goal of punishment or retribution is concerned, but it depends on what you want your penal goals to be.” If the goal is incapacitation, then the penalty would not be disproportionate. De Nicola agreed that the state had adopted and relied upon a theory of incapacitation.

Another justice followed up, asking whether allowing the state to change its penological theory would “read comparability analysis right out of the law”? How could the courts engage in comparisons, when they would have “apples and oranges instead of oranges and oranges”? De Nicola responded that under *Harmelin* the courts should defer to the state’s choice of penological objectives. The Eighth Amendment should not be construed to disable the states from changing to deal with new conditions.

Assistant Attorney General Michael Chertoff took the remainder of the respondent’s time. He noted that the final questions to De Nicola had framed the issue in light of *Harmelin*, and that he read that case as establishing two principles. First, because the standard analysis is not close proportionality but rather gross proportionality, it provides an “extremely rare basis to invalidate a statute.” Second, “states are entitled to adopt different penological theories, or a mix of theories.” Accordingly, the Court has very limited review of comparability. Chertoff noted that the California three strikes regime was very different from the situation in *Solem*, “where you have a single judge who is apparently an outlier.” In contrast, Chertoff noted, there were 200 to 300 individuals in California prisons whose third strike was a property based crime. Ewing did not, therefore, represent a rare or exceptional case. The state of California had permissibly embraced an incapacitation theory, rather than deterrence or some other theory.

Chertoff agreed with the suggestion of a member of the Court that the proportionality analysis could be framed as the question whether the state had a reasonable basis for imposing

the sentence under its statute given its theory of sentencing. He argued that even in the case of relatively minor felonies, the state could say that if someone is repeatedly unable to conform his conduct to the law, the state may incapacitate him. He paraphrased Blackstone, saying that “when you deal with habitual offenders, it would be cruel to the public simply to allow that person to get out again and commit their next crime.” Chertoff concluded that where state law gives the sentencing judge the power to tailor the sentence to the offender and offense, for the federal courts to “come in under gross disproportionality analysis and recalibrate” would convert the federal courts “into a constitutional sentencing commission.”

On rebuttal, Quin Denvir closed with a warning against allowing the state to defend Ewing’s sentence as incapacitation. This “writes the Eighth Amendment protections against grossly disproportionate sentences out,” because a state can “always say they want to incapacitate any criminal for any amount of time.”

The Opinions

On March 5, 2003, exactly four months after the oral argument, the Supreme Court upheld Gary Ewing’s conviction⁷¹ (and also reversed the Ninth Circuit’s decision granting habeas relief to three striker Leandro Andrade).⁷² The Court continued to be divided into three camps, and there was no majority opinion.

Justice O’Connor announced the judgment of the Court in an opinion in which only Justice Kennedy and Chief Justice Rehnquist concurred. After reviewing the Court’s prior decisions, she announced that Justice Kennedy’s earlier distillation of the proportionality principles in *Harmelin* would guide the plurality’s application of the Eighth Amendment. She described those principles as follows:

Justice Kennedy specifically recognized that “[t]he Eighth Amendment proportionality principle also applies to noncapital sentences.” He then identified 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 proportionality review be guided by objective factors”—that “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.” Justice Kennedy’s concurrence also stated that *Solem* “did not mandate” comparative analysis “within and between jurisdictions.”⁷³

⁷¹*Ewing v. California*, 538 U.S. 11 (2003).

⁷²In *Lockyear v. Andrade*, 538 U.S. 63, 77 (2003), a majority of the Court held that the gross disproportionality principle “reserves a constitutional violation for only the extraordinary case,” and the “it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade’s sentence of two consecutive terms of 25 years to life in prison” for twice stealing a small number of videotapes. Justice O’Connor wrote the majority opinion for five members of the Court. Justice Souter wrote a dissenting opinion, in which Justices Stevens, Ginsburg, and Breyer concurred.

⁷³538 U.S. at 23.

Before turning to Ewing's sentence, Justice O'Connor reviewed the legislative history and purpose of California's three strikes laws, noting that it responded to widespread public concern about crime by "targeting the class of offenders who pose the greatest threat to public safety: career criminals." The three strikes law in California and similar laws in other states represented a "deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." The Court's deference to legislative policy choices meant that sentencing policy is made by the state legislatures, not the courts. Recidivism is a serious concern, and states have a valid interest in deterring and segregating habitual criminals. Moreover, there was evidence that California's policy had been effective: four years after the passage of the three strikes law, the recidivism rate of parolees had dropped dramatically.

Against this backdrop, Justice O'Connor concluded that Ewing's sentence was not grossly disproportionate, because "[t]he gravity of his offense was not merely 'shoplifting three golf clubs.' Rather, Ewing was convicted of felony grand theft for stealing nearly \$1,200 worth of merchandise after previously having been convicted of at least two 'violent' or 'serious' felonies." If the Court did not consider Ewing's prior history in weighing the gravity of his offense, she reasoned, it would fail to accord the proper deference to the California legislature's policy judgments. Ewing's sentence was "justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." It was "of no moment" that the grand theft offense was a "wobbler," since the trial judge had justifiably exercised her discretion not to reduce it to a misdemeanor.

Justice Scalia and Justice Thomas concurred in the judgment (but not O'Connor's opinion). Both took the view that the Eighth Amendment contains no proportionality principle, at least in non-capital cases. Writing separately, Justice Scalia argued that a review for proportionality cannot be squared with deference to the legislature's choice among different sentencing theories. Proportionality, he reasoned, compares the gravity of the offense to the sentence because it assumes that punishment is intended to serve a retributive function. But in enacting the three strikes law the California legislature could and did adopt a different sentencing goal: incapacitation.

The four dissenters – Stevens, Souter, Ginsburg and Breyer - concluded that Ewing's sentence was disproportionate to his crime under either the original *Solem v. Helm* test or the stripped down version first advanced by Justice Kennedy in *Harmelin*.

Writing for all of the dissenters, Justice Stevens argued that the full *Solem* three-factor proportionality review – not the crabbed version advocated by Justice Kennedy – was both "capable of judicial application" and also "required by the Eighth Amendment." Stevens noted that courts already undertake Eighth Amendment proportionality reviews in the context of bail and fines, and it would be anomalous to refuse to undertake the same review in cases of imprisonment. The Eighth Amendment broadly prohibits excessive sanctions, and the absence

of some bright line rule does not prevent courts from exercising their discretion in construing the outer limits of sentencing authority.

Justice Breyer dissented and took the unusual step of reading part of his dissenting opinion aloud from the bench to draw attention to it.⁷⁴ Breyer (whose opinion was joined by all of the dissenters) accepted Justice Kennedy's "gross disproportionality" test for purposes of the case and concluded that this was one of the rare cases that crossed even Kennedy's narrow gross disparity threshold. Considering the harm to society, the absolute magnitude of the crime and his culpability, Ewing's offense ranked "well toward the bottom of the criminal conduct scale." The proper focus was on the offense that triggered the life sentence, "with recidivism playing a 'relevant,' but not necessarily determinative, role." Applying these standards, the disparity between Ewing's offense and his sentence was sufficient to cross the gross disparity threshold.

Turning to an analysis of sentences within California and nationwide, Justice Breyer identified a number of points of comparison.

- Before the passage of the three strikes law, Ewing could have served no more than 10 years in prison in California.
- Except for cases to which the three strikes law applies, California reserves sentences as severe as Ewing's for criminals convicted of far worse offenses, such as murder, and 90% of typical first degree murderers serve less than 20 years in prison.
- Under the Federal Sentencing Guidelines, Ewing's sentence as a recidivist would be no more than 18 months; the Guidelines reserve a 25 year to life sentence for recidivists convicted of a triggering offense such as murder, air piracy, or an aggravated robbery involving the discharge of a firearm, serious bodily injury, and a loss of \$1 million.
- It would be impossible for Ewing to serve more than 10 years in prison in at least 33 jurisdictions.
- Exhaustive research had disclosed only one case from a state other than California in which an offender was serving or would serve a sentence as long as Ewing's for a similar offense.

In Justice Breyer's view, this comparative review confirmed that Ewing's sentence was grossly disproportionate, and no other considerations could justify it.

The Impact of the Decision

Although the Court could not agree on a single opinion or even a common rationale, the bottom line was clear: California's three strikes law had withstood constitutional challenge, and a majority of the Court was prepared to give substantial deference to state legislative judgments

⁷⁴Greenberg, *supra* note ___, at 1.

about sentencing. But the Court had not completely closed the door on constitutional challenges to sentences of imprisonment as cruel and unusual punishment. Seven members of the Court agreed that the Eighth Amendment includes a proportionality principle, and that it bars the rare punishment that is grossly disproportional to the offender's crime. But what would it take to meet that standard, if a 25 year to life sentence for shoplifting by a recidivist offender was not grossly disproportionate?

Ewing thus set in motion two developments. One was legislative. The Court's decision accorded deference to the state political process, thereby putting the ball back in the state legislature's court. In California, however, that political process also included both the legislature and voter initiatives. At a national level, Justice Anthony Kennedy emerged as a surprising advocate of legislative change, and his call to action spurred a major initiative by the American Bar Association. But *Ewing* also left open a role for the judiciary. Courts in California and elsewhere continued to review individual sentences, and in a few cases they granted relief as described more fully below.

Of course the case was also about an individual. As of February 2010, Gary Ewing, Inmate # J15228, was incarcerated in the California Medical Facility in Vacaville, California.⁷⁵ Blind in one eye at the time of trial, he has lost the sight in his other eye due to complications of AIDS and what he regards as substandard medical treatment in prison.⁷⁶

Efforts to Amend the California Three Strikes Law

Because California law insulates voter initiatives from legislative change, Mike Reynolds' decision to continue his three strikes ballot initiative – even though the legislature had already enacted his proposal – made it very difficult in later years to amend the three strikes law. Under the California constitution, unless an initiative itself provides otherwise, a law enacted by the initiative process may be repealed or amended by legislation only when that action is approved by the voters.⁷⁷ Reynolds' initiative included a specific provision governing subsequent amendment or repeal, providing that the three strikes law could be amended by two means only: a roll call vote in which two thirds of legislature concurred, or a statute passed by the normal legislative process and then approved by the voters.⁷⁸ Not surprisingly, interest groups seeking amendment or repeal of the three strikes law were unable to muster the necessary super majority in the California legislature, and a variety of reform bills introduced between 1997 and 2003 either died in committee or failed to get the necessary two thirds approval.⁷⁹

Accordingly, reformers sought to change the law with their own voter initiative, leading to a hotly contested campaign in which millions of dollars were spent on advertising and public opinion shifted dramatically in the days before the vote. The initiative campaign was launched

⁷⁵Email from Amy M. Taylor, Reference Librarian and Lecturing Fellow, Duke Law School, to Sara Beale, Feb. 11, 2010, on file with author, based upon information provided by the California Department of Corrections..

⁷⁶Telephone Interview with Quin Denvir (May 8, 2010).

⁷⁷CA Const. Art. 2, § 10(c).

⁷⁸CA Penal Code § 667(j).

⁷⁹Walsh, *supra* note ___, at 155 & 167 n.12 (listing the proposed bills).

in 2004 after polling found that more than 70 percent of respondents disapproved of applying the three strikes laws to offenses such as petty theft and other non-violent offenses.⁸⁰ Jerry Keenan, a wealthy insurance broker whose son was serving a long prison sentence, spent more than \$1.5 million to finance an initiative campaign. The measure, Proposition 66, narrowed the strike zone for future cases and allowed resentencing for those convicted under the old law.⁸¹ Unlike the original law, which allowed any felony to serve as the third strike, Proposition 66 limited third strikes (which require sentences of 25 years to life) to violent or serious felonies. Supporters argued that voters had been misled in 1994 to believe that the law targeted violent and serious offenders, and did not mean to sweep up persons convicted of minor property offenses. This argument seemed to resonate with voters. Less than a month before the election, an LA Times poll found 62% supported Proposition 66, and only 21 percent opposed it.⁸²

The proposition, however, had numerous opponents. These included the California District Attorneys Association (which had ironically opposed the original Reynolds initiative), as well as California's current governor, Arnold Schwarzenegger, and four former governors.⁸³ The powerful California prison guards union, which opposed the amendment, contributed \$700,000 to the effort to defeat it.⁸⁴ The opponents argued that (1) the Three Strikes law was working well and had helped significantly reduce crime rates without raising prison costs, and (2) the prosecution and the courts already had discretion to exclude offenders who should not be subject to a mandatory sentence.⁸⁵ They emphasized the danger of narrowing the strike range and releasing violent offenders.

In the final two weeks before the election, wealthy individuals pumped millions into television advertising focusing on the three strikes initiative. An opposition advertising blitz was funded by Broadband founder Henry Nicholas, who provided at least \$1.5 million (some news stories say he gave \$3.5 million), and Governor Arnold Schwarzenegger's California Recovery Team, which contributed \$1 million.⁸⁶ In response, George Soros and John Sperling both donated \$500,000 for advertising to support the initiative.⁸⁷

Fifteen second ads featuring Gov. Schwarzenegger blanketed the state in the last few days before the election. Walking among oversized mug shots of convicted felons, Schwarzenegger warned:

⁸⁰Kieso, *supra* note ___, at 233.

⁸¹Walsh, *supra* note ___, at 154-55. The initiative (1) required that all first, second, and third strikes be serious or violent felonies, (2) excluded some felonies (including residential burglary, attempted burglary, non residential arson, and conspiracy to commit assault) from the definition of serious or violent felonies, (3) made these changes retroactive and allowed for resentencing of offenders whose crimes no longer fell within the law, (4) prohibited a defendant from earning more than one strike at a single trial, and (5) raised the sentences for child molesters. *Id.*

⁸²*Id.*

⁸³Walsh, *supra* note ___, at 156. Former Democratic governors Gray Davis and Jerry Brown and former Republican governors Pete Wilson and George Dukemejian opposed Proposition 66. *Id.*

⁸⁴Kelso, *supra* note ___, at 233.

⁸⁵*Id.*

⁸⁶Megan Garvey, *Big Money Pours in for 3 Strikes Ads*, L.A. Times, Oct. 28, 2004, at 1.

⁸⁷*Id.*

Under Proposition 66, 26,000 dangerous criminals will be released from prison. Child molesters. Rapists. Murderers. Keep them off the streets and out of your neighborhood. Vote no on 66. Keep them behind bars.⁸⁸

Was this number accurate? Although proponents – and the state legislative analyst's office – said that Proposition 66 would affect only about 4,000 prisoners whose prior strikes would not fall within the narrower strike zone, a study by the California District Attorneys Association (which opposed the initiative) supported the Governor's ad.⁸⁹ And the inmates who were affected would be resentenced, not simply released.

Both sides sought to personalize the effects by focusing on individual stories. Supporters of the initiative created tombstone-shaped placards captioned “Buried Alive” with photos of inmates incarcerated for their third strikes, such as one stating that the inmate had received a sentence of 25 years to life for aiding in a shoplifting offense. Opponents responded with their own mug shots, such as one featuring a convicted murderer who had raped his own mother and was caught with a 2 foot machete etched with an anti-gay slur.⁹⁰

Proposition 66 failed by a vote of 47.3 percent in favor and 52.7 percent opposed. Polling data suggested that 1.5 million voters changed their minds in the last 10 days of the campaign, which was the fastest reversal of public opinion in decades.⁹¹ Voters in liberal counties supported Proposition 66 regardless of relatively high crime rates, and more conservative counties with lower crime rates voted against it by wide margins.⁹²

More than 15 years after its adoption the three strikes law continues to be a controversial issue in California politics, and Mike Reynolds remains a force to be reckoned with. In 2010, Reynolds sought to block veteran Los Angeles County District Attorney Steve Cooley's run for state attorney general, denouncing Cooley as “liberal” and “pro criminal.”⁹³ Cooley had been an advocate of introducing greater proportionality into the three strikes laws, making that his policy in Los Angeles County and backing an unsuccessful initiative effort in 2006 to narrow the statute.

Has California's three strikes law reduced crime? The answer depends on whom you ask. Although California government officials say the law has been a major success,⁹⁴ academic researchers are divided. The academics whose work has raised doubts about the law's

⁸⁸*Id.*

⁸⁹Megan Garvey, *Initiative Fight Puts Focus on Felons*, L.A. Times, Sept. 27, 2004, at 1.

⁹⁰*Id.*

⁹¹Walsh, *supra* note __, at 157-58.

⁹²*Id.*

⁹³Tim Rutten, *GOP hard-liners take aim at Cooley*, L.A. Times, Feb. 3, 2010, at 19, 2010 WLNR 2233599.

⁹⁴*See, e.g.*, Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES, May 23, 2010, Section MM (Magazine), at 40 (noting that Governor Arnold Schwarzenegger opposed reforms of the three strikes law based on his belief that the law as originally devised was responsible for reducing crime); Bill Jones, *Why the Three Strikes Law is Working in California*, 11 STAN. L. & POL'Y REV. 23, 23, 25 (1999) (declaring the law to be a “proven and effective tool to combat crime” because it “ensures that after a certain point, there will never again be a chance for repeat offenders to continue committing crimes”).

effectiveness found no evidence it has had a major impact on crime. Their data show that crime was dropping in California before the passage of the three strikes law and continued to drop at the same rate after the law went into effect.⁹⁵ As for deterrence, they found only “weak evidence of a detectible, marginal deterrence on the primary targets of the legislation,” i.e., defendants eligible for treatment as second or third strikers.⁹⁶ Their final estimate of the short-term deterrent effect was between zero and 2% of California crime.⁹⁷ But supporters of the law have challenged the critics’ methodology and analysis.⁹⁸ And one researcher concluded that California’s three strikes law had a significant deterrent effect on a different group of potential offenders; after the three strikes law persons who did not yet have a first or second strike committed fewer offenses that would qualify as first or second strikes, but they committed more offenses not covered by the law. According to this analysis, during the first two years the law deterred approximately eight murders, 3,952 aggravated assaults, 10,672 robberies, and 384,488 burglaries (though larcenies increased by 17,700).⁹⁹

California’s emphasis on incarceration—including the three strikes law—has been costly. As of January, 2010, there were more than 150,000 inmates in California state prisons.¹⁰⁰ The prisons, which were designed to hold approximately 79,000 inmates, were at 188 percent capacity.¹⁰¹ The Department of Corrections and Rehabilitation has a staff of more than 63,000, and its proposed budget for 2009 was \$10.6 billion or \$49,000 per year for each inmate.¹⁰² For nearly a decade California has been embroiled in class action litigation challenging overcrowding and the lack of medical care in its prisons.¹⁰³ Finding that conditions in the prisons constitute cruel and unusual punishment and violate the Eighth Amendment, the federal district court has appointed a receiver to develop a constitutionally adequate health care delivery

⁹⁵FRANKLIN E. ZIMRING, ET AL., *CRIME AND PUNISHMENT IN CALIFORNIA: THE IMPACT OF THREE STRIKES AND YOU’RE OUT* 69 (1999).

⁹⁶FRANKLIN E. ZIMRING, ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* 105 (2001) (finding arrest data showed no perceptible decline in the percentage of offenses committed by second strikers and only a .06% decline in the percentage of crimes committed by third strikers).

⁹⁷*Id.* at 85.

⁹⁸Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and Romero: An Analysis of the Case Against California’s Three Strikes Law*, 39 DUQ. L. REV. 43, 43, 44, 46-47 (2000) (arguing that Zimring et al. focused unduly on deterrence alone, ignoring incapacitation, and they relied upon inexact sampling techniques, conflated arrests with crime rates, and ignored anecdotal evidence of the law’s deterrent effect).

⁹⁹Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California’s Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002).

¹⁰⁰Cal. Dep’t Corrections & Rehabilitation, Weekly Report of Population as of January 27, 2010, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad100127.pdf (last visited Feb. 8, 2010).

¹⁰¹*Id.*

¹⁰²Cal. Dep’t Corrections & Rehabilitation, Fourth Quarter 2008 Facts and Figures, http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/docs/Fourth_Quarter_2008_Facts_and_Figures.pdf (last visited Feb. 8, 2010).

¹⁰³The litigation is described briefly in *Plata v. Schwarzenegger*, 560 F.3d 967 (9th Cir. 2009) (holding that the district court had not issued a final order, dismissing the appeal, and denying mandamus), *appeal dismissed*, 2010 WL 154851 (Jan. 19, 2010) (No. 09-416). In its most recent order, the three judge district court ordered the state to reduce the prison population in a series of steps beginning with a reduction to no more than 167% of design capacity in six months. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P and C01-1351 TEH (Jan. 12, 2010).

system, ordered the state to transfer \$250 million to the receiver, and ordered the state to reduce the prison population to no more than 137.5% of capacity within two years.¹⁰⁴

As of December, 2009, 41,009 California inmates were serving sentences for second or third strikes, including 8,570 third strikers.¹⁰⁵ More than 10,000 of the second and third strikers had been convicted of property crimes. The third strike offense for 479 of these inmates (including Gary Ewing) was grand theft or petty theft with a prior offense.

Justice Kennedy Calls for Reform

Recall that it was Justice Kennedy's concurring opinion in *Harmelin* which became the blueprint for the decisive votes that upheld Gary Ewing's sentence. Less than six months later, Justice Kennedy made a dramatic speech at the annual meeting of the American Bar Association in which he attacked mandatory minimum sentencing laws like the California three strikes statute and called on the legal profession to become advocates for reform.¹⁰⁶ He spoke of what he called the "inadequacies" and "injustices" of our prison system, drawing attention to the "remarkable scale" of incarceration in the U.S. and its enormous costs. He said that "[o]ur resources are misspent, our punishments too severe, our sentences too long." Finally, Kennedy called for the repeal of mandatory minimum sentences:

Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just. Few misconceptions about the government are more mischievous than the idea that a policy is sound simply because a court finds it permissible. A court decision does not excuse the political branches or the public from the responsibility for unjust laws.¹⁰⁷

The ABA responded by forming what it called the Justice Kennedy Commission, and the Commission prepared and presented a lengthy report including a large number of recommendations.¹⁰⁸ Most notably, the Commission recommended that all mandatory minimum sentences be repealed. The ABA House of Delegates adopted the Commission's recommendations in August 2004.

More recently, in a 2010 speech in California, Justice Kennedy criticized the state's sentencing policies and crowded prisons, and called the influence that unionized prison guards had in passing the three-strikes law "sick."¹⁰⁹ He noted that U.S. sentences are eight times longer

¹⁰⁴ *Id.*

¹⁰⁵The statistics from December 2009 are drawn from Dep't Corrections & Rehabilitation, *Second and Third Striker Felons in the Adult Institutional Population, December 31, 2009*, Table 1, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d0912.pdf.

¹⁰⁶Justice Anthony M. Kennedy, Address at American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

¹⁰⁷*Id.* at 6.

¹⁰⁸Am. Bar Ass'n, Justice Kennedy Comm'n Reports with Recommendations to the ABA House of Delegates (Aug. 2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

¹⁰⁹Carol J. Williams, *Justice Kennedy laments the state of prisons in California*, U.S., L.A. Times, Feb. 4, 2010,

than those issued by European courts, and he urged voters to compare spending on prisons with spending on elementary education. Kennedy's speech provoked an editorial in the *New York Times*, which called for the courts to impose constitutional limits on state sentencing policy just as they had imposed such limits on punitive damages in state civil cases.¹¹⁰

Cruel and Unusual Punishment Cases After Ewing

Ewing did not shut the door completely on Eighth Amendment claims in cases involving sentences of imprisonment. Although the dissenters were unable to muster a majority for the full three-factor *Solem* test, seven members of the Court agreed that a sentence is cruel and unusual within the meaning of the Eighth Amendment if the court finds it to be grossly disproportionate to the crime and this disproportion is then confirmed by a comparative review. But *Ewing* also established that the threshold for establishing gross disproportionality is high indeed, and that proportionality must be assessed in the light of great deference to the state's legislative judgments and penal objectives.

Accordingly, successful post-*Ewing* challenges under the Eighth Amendment are rare. In the main, courts reject these charges without extended discussion, citing *Ewing* and *Harmelin*. The most difficult cases continue to arise under mandatory minimum sentencing laws. These statutes take no account of the degree of the individual defendant's involvement in the offense and allow no mitigation based on individual offender characteristics. In some cases, these statutes require sentences even longer than *Ewing*'s sentence of 25 years to life.

In cases involving mandatory minimum sentencing statutes, the courts in post-*Ewing* cases have generally upheld the sentences, deferring to the legislative judgments embodied in the statutes even when they disagree strongly with those policies. For example, in a case involving consecutive mandatory minimum sentences for federal gun offenses, a reviewing judge announced that he was bound to uphold the sentence under *Ewing* and *Harmelin* despite his sense that the sentence was profoundly unjust:

[I]t is difficult to escape the conclusion that the current mandatory sentencing laws have imposed an immensely cruel, if not barbaric, 159-year sentence on a severely mentally disturbed person who played a limited and fairly passive role in several robberies in which no one was physically harmed.¹¹¹

There have, however, been a few successful Eighth Amendment challenges in both the state and federal courts, including three cases involving mandatory minimum sentences for sexual offenses and sex offender registration offenses. In a Georgia case that garnered national

available at <http://articles.latimes.com/2010/feb/04/local/la-me-kennedy4-2010feb04> .

¹¹⁰See Editorial, *Justice Kennedy on Prisons*, *N.Y. Times*, Feb. 16, 2010, at _____. For a discussion of the Supreme Court's decisions regarding punitive damages, see *infra* at ____.

¹¹¹*United States v. Hungerford*, 465 F.3d 1113, 1120 (9th Cir. 2006) (Reinhardt, J., concurring). See also *id.* at 1121 (noting that the principal who wielded the firearm during the robberies plead guilty and received a sentence one fifth the length of that received by his mentally disturbed accomplice though the accomplice's conduct was relatively minimal and her mental illness prevented her from acknowledging her guilt).

publicity, the state supreme court held that a ten year prison sentence was grossly disproportionate to the offense committed by a 17 year old high school honor student who received oral sex from a 15 year old who initiated the act at a New Year's Eve party. At the time of the offense Georgia law treated consensual sexual intercourse between teens as a misdemeanor offense, but oral sex, even if consensual, as a felony punishable by a mandatory term of 10 years. A jury acquitted the teen, Genarlow Wilson, of rape but convicted him of the oral sex offense, and he was sentenced to ten years in prison. Wilson's conviction and sentence received wide negative coverage in the press,¹¹² and the state legislature responded by amending the law to bring down the penalties for oral sex. But because it did not make the changes retroactive, Wilson's sentence was unaffected. After Wilson had served two years of his sentence, the state supreme court voted 4 to 3 that his sentence constituted cruel and unusual punishment.¹¹³ Emphasizing the "sea change" in the state legislature's view of the seriousness of oral sex among teens (which was now a misdemeanor) and the prevalence of oral sex among teens, the majority found Wilson's sentence to be grossly disproportionate, a view confirmed by its inter and intra jurisdictional comparisons.

Two California three strikes cases involving technical failures to comply with the sex offender notification laws have also been found to be cruel and unusual punishment. In the first case, the California Court of Appeal held that a sentence of 25 years to life was grossly disproportionate to the offense of failure to update a sex offender registration within five days of the offender's birthday.¹¹⁴ The court characterized the offense as "a passive, nonviolent, regulatory offense that posed no direct or immediate danger to society." Because there had been no change in the defendant's address since he had registered a few months before, he did not evade or intend to evade law enforcement officials, and his parole officer was aware of his residence at all times, the court found this "the most technical and harmless violation of the registration law we have ever seen." Moreover, the court's comparative review revealed that California was the only state that would require a 25 year to life sentence for non compliance with an annual registration law. This state decision laid the foundation for a federal habeas decision setting aside a sentence of 28 years to life for a similar technical violation of California's sex offender registration law.¹¹⁵

These cases are rare outliers, and it is clear that only a minuscule fraction of California three strikes offenders will be able to mount a successful Eighth Amendment challenge under *Ewing* and *Harmelin*. For that reason, advocates for three strikes prisoners have taken a new tack:

¹¹²Wilson was covered in not only the national press, but also in sports related publications. See, e.g., Wright Thompson, *Outrageous Injustice*, <http://sports.espn.go.com/espn/eticket/story?page=Wilson> (last visited Feb. 17, 2010).

¹¹³*Humphrey v. Wilson*, 652 S.E.2d 501 (Ga, 2007).

¹¹⁴*People v. Carmony*, 127 Cal. Rptr.3d 365 (2005).

¹¹⁵*Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008). The state did not seek en banc review or certiorari in the United States Supreme Court, and Gonzalez was resentenced to 9 years, which was the maximum two strike sentence, and equated roughly to the time he had already served. Email from Gia Kim, counsel for Gonzalez, to Sara Beale, March 4, 2009, on file with author. The *Gonzalez* decision is of particular interest, because the defendant had to surmount two barriers: he had to show that his sentence was constitutionally excessive under the *Ewing/Harmelin* test, and also to show that habeas relief was warranted under *Lockyer v. Andrade*, discussed in note —, supra.

seeking resentencing to lesser terms based upon additional information not presented at the time of sentencing. In 2009 law students from Stanford convinced judges to reduce the sentences for four prisoners, and three were released after having completed reduced sentences ranging from six to ten years.¹¹⁶

Defendants convicted of state offenses may also be able to turn to the state constitution for relief. Most state constitutions contain a provision similar to the Eighth Amendment's cruel and unusual punishment clause, and the state courts are the arbiters of those provisions. They are equally free to follow a U.S. Supreme Court decision they find persuasive, or to construe the state constitution as providing broader protection. One year after the Supreme Court upheld a mandatory life sentence for mere possession of cocaine under the Michigan statute in *Harmelin*, the Michigan Supreme Court concluded that the provision in question violated the state's provision banning cruel and unusual punishments.¹¹⁷

Conclusion

The *Ewing* decision let stand a sentence that many would find far too harsh, and it signals that the federal constitution provides only the most minimal limitations on state sentencing policy. Why did a majority of the Supreme Court decline to adopt a more exacting standard of proportionality under the Eighth Amendment? And were they right to do so?

The toughest question in *Ewing* may have been one that was not directly posed during the oral argument: if the Court had found that 25 years to life was disproportionate for Ewing's offense, what was the maximum sentence that the legislature could constitutionally impose? Twenty years? Fifteen? Ten? What qualifies the federal courts to override a state legislature if it chooses twenty years instead of fifteen? If there really is no good answer to this question, should courts be in the business of second guessing the length of sentences? And if they do review such sentences, are they competent to do anything other than nullify the rarest of outliers?

Writing 35 years before the decision in *Ewing*, Justice Hugo Black articulated a deep skepticism of the limits of judicial competence to decide contested issues of criminal justice policy and a preference to leave issues to local decision making. He wrote:

This Court, instead of recognizing that the experience of human beings is the best way to make laws, is asked to set itself up as a board of Platonic Guardians to establish rigid binding rules upon every small community in this large Nation.... It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary--it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow. I suspect

¹¹⁶Jack Leonard, *Helping to Free 3-Strikes Inmates*, L.A. Times, May 13, 2009, at 1.

¹¹⁷*People v. Bullock*, 485 N.W.2d 866 (Mich. 1992).

this is a most propitious time to remember the words of the late Judge Learned Hand, who so wisely said:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.¹¹⁸

Ewing can be understood as a decision in which a majority of the Court avoided the temptation to usurp the role of Platonic Guardians, respecting the need for the federal courts to defer to legislative judgments and local policy making.

There are two problems with that characterization. First, to some degree the Constitution itself places the federal courts in the role of Platonic Guardians. Creating a constitutional ban on cruel and unusual punishments necessarily makes courts the guardians of the individual's right to be free of such punishments. It forces upon courts the difficult task of determining when to set aside the sentences imposed in conformity with local law.

Second, in the decade since *Ewing* the Court has not always deferred to legislative policy choices and local decision making. In the criminal context, the Court employed proportionality analysis in *United States v. Bajakijian*¹¹⁹ to strike down a forfeiture order that a majority of the Court found to be disproportionate to the crime in question and thus an "excessive fine" prohibited by the Eighth Amendment. The Court seemed to be willing to use proportionality analysis to protect a criminal defendant's property, but not his liberty. And in the civil context, the Court has been very active in policing the permissible scope of punitive damages. It has identified five factors that it will employ to determine whether a punitive damage award is reasonable, and employing those criteria it has overridden punitive damage verdicts authorized by state law and approved by local juries.¹²⁰ Are these decisions consistent with *Ewing*? Critics of the *Ewing* decision think they are not.¹²¹ The Constitution includes an express provision banning cruel and unusual criminal punishments but includes no provision directly addressing punitive damages, and the corporate defendants in civil cases generally have more political influence and ability to protect their own interests than criminal defendants. Can judicial deference and principles of federalism justify providing criminal defendants facing long terms of imprisonment with less judicial protection than persons facing financial losses from forfeiture or punitive damages?

¹¹⁸*Powell v. Texas*, 392 U.S. 514, 547-48 (1968) (Black, J., concurring) (citation omitted).

¹¹⁹524 U.S. 321 (1998).

¹²⁰See Erwin Chemerinsky, *The Constitution and Punishment*, 56 *Stan. L. Rev.* 1049, 1071-78 (2004).

¹²¹See Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 *Va. L. Rev.* 1249 (2000).