

## THIRD STRIKE OR MERELY A FOUL TIP?: THE GROSS DISPROPORTIONALITY OF *LOCKYER V. ANDRADE*<sup>1</sup>

“Let the punishment match the offense.”<sup>2</sup>

### I. INTRODUCTION

“The United States is besieged by an incarceration crisis which far surpasses that of any other nation.”<sup>3</sup> Scholars attribute the increasing prison population to changes in sentencing policy.<sup>4</sup> Politicians have used the public pressure resulting from its fear of violence to pass legislation that supports this change in policy and creates more fixed sentencing structures.<sup>5</sup>

California’s Three Strikes law (Three Strikes), an example of such a structure, has resulted in the largest increase in the prison population.<sup>6</sup>

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

2. The Quotations Page, *Cicero*, at <http://www.quotationspage.com> (last visited Nov. 7, 2003). Cicero, a lawyer and member of the Roman Senate, was born in 106 B.C. Roman Philosophy, *Cicero*, at <http://www.wsu.edu:8000/~dee/ROME/CICERO.HTM> (last visited Nov. 7, 2003). Eighteenth century Americans, including the framers of the Constitution and the Declaration of Independence, studied Cicero’s writings as part of their education. *Id.*

3. Lisa E. Cowart, Comment, *Legislative Prerogative vs. Judicial Discretion: California’s Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 616 (1998). The United States has the world’s largest prison system, with over two million people in American prisons and jails. Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491, 1491-92 (2003) [hereinafter Mauer, *Collateral Consequences*].

4. Mauer, *Collateral Consequences*, *supra* note 3, at 1491. The surge in prison population is due largely in part to a change in sentencing policies. *Id.* The trend has moved from indeterminate sentencing to more fixed sentencing. *Id.* These fixed sentencing guidelines include mandatory minimum sentencing and three strikes policies, discussed within this note. *Id.*

5. Cowart, *supra* note 3, at 616-17. “Politicians, including presidential candidates, often prey on constituents’ fears in advancing their own electoral purposes.” *Id.* Forty-seven percent of Americans in the year 2000 believed that crime had increased since the past year. Gary LaFree, *Too Much Democracy or Too Much Crime? Lessons from California’s Three-Strikes Law*, 27 LAW & SOC. INQUIRY 875, 898 (2002) (book review). Sixty-eight percent of Americans in 2000 believed that criminals are not dealt with harshly enough by the courts. *Id.* at 899. As of 2000, sixty-three percent of Americans believed in the death penalty. *Id.*

6. See *infra* note 225 (discussing the number of offenders incarcerated in California under Three Strikes since its inception).

Public pressure, spurred by the fear of violent criminals being released and committing the same crimes again and again, led to the enactment of Three Strikes.<sup>7</sup> However, the public, who now finds problems with this law and its disproportionate impact, has retracted their support for it.<sup>8</sup> Three Strikes is so disproportionate that an offender can be sentenced to life imprisonment for stealing a \$20 bottle of vitamins<sup>9</sup> or shoplifting a single magazine.<sup>10</sup>

The decision in *Lockyer* illuminates Three Strikes' disproportionate impact.<sup>11</sup> In this case, the sentence given under Three Strikes was so grossly disproportionate to the offense that it rose to the level of cruel and unusual punishment.<sup>12</sup> The trial court completely ignored on-point precedent from a materially indistinguishable case that held a similar sentence grossly disproportionate and a violation of the Eighth Amendment.<sup>13</sup> By misapplying Supreme Court precedent and imposing

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7. See *infra* notes 31-36 and accompanying text (discussing the reasons behind the passage of Three Strikes).

8. See Walter L. Gordon III, *California's Three Strikes Law: Tyranny of the Majority*, 20 WHITTIER L. REV. 577, 599 (1999). See also *infra* note 218 (discussing how the main proponent of Three Strikes stopped supporting the law). "In the first three strikes case in San Francisco, the seventy-one year old victim refused to testify at the preliminary hearing, even after the judge threatened to jail her." Gordon, *supra*, at 599. The defendant was facing sentencing under Three Strikes because he had been convicted of eleven previous felonies and burglary of the victim's car. *Id.* Most of the defendant's other felonies were for burglary. *Id.* The victim did not believe the law was just and, therefore, she refused to testify. *Id.* In Santa Clara County, a jury refused to return a guilty verdict for drug possession after learning that the defendant would be sentenced under Three Strikes. *Id.* A Santa Barbara Municipal Court Judge reduced a felony charge to a misdemeanor in order to avoid sentencing the defendant under Three Strikes. *Id.* at 602. During the process, she called the law "a piece of junk" and "a stupid piece of law." Gordon, *supra*, at 602.

9. Marc Mauer, *Why Are Tough on Crime Policies So Popular?: Despite the Promises of Political Leaders and Others Who Have Promoted Them as Effective Tools for Fighting Crime, "Tough on Crime" Policies Have Proved to be Costly and Unjust*, 11 STAN. L. & POL'Y REV. 9, 9 (1999) [hereinafter Mauer, *Promises*]. Michael Riggs, a man with prior convictions, stole vitamins from a supermarket store. *Id.* He had been homeless and a drug addict since the death of his son. *Id.* For his "crime" he received the sentence of 25 years to life imprisonment. *Id.* This disproportionate effect is exacerbated by pointing out that Riggs' offense, when not prosecuted under Three Strikes, carries only a six-month sentence. *Id.*

10. B.E. WITKIN, NORMAN L. EPSTEIN & MEMBERS OF THE WITKIN LEGAL INSTITUTE, WITKIN & EPSTEIN CALIFORNIA CRIMINAL LAW § 355, (3d ed. Supp. 2003) [hereinafter WITKIN & EPSTEIN]. Romero received a sentence of 25 years to life imprisonment for this petty theft because his past convictions for lewd conduct and battery subjected him to sentencing under Three Strikes. *Id.*; *People v. Romero*, 99 Cal. App. 4th 1418, 1424 (2002).

11. See *infra* notes 146-54 and accompanying text (discussing *Lockyer* and the Supreme Court's decision).

12. See *infra* notes 185-203 and accompanying text (discussing why the *Lockyer* decision was unconstitutional).

13. See *infra* notes 127, 200-03 and accompanying text (discussing that *Solem v. Helm*, 463 U.S. 277 (1983) *overruled by Harmelin v. Michigan*, 501 U.S. 957 (1991) is on-point with *Lockyer* and the trial court ignored it).

a grossly disproportionate sentence, the trial court acted unconstitutionally in its sentencing.<sup>14</sup>

This Note will explore the proportionality of Three Strikes, issues implicated by the law, and whether the legislation should continue to exist.<sup>15</sup> Section II discusses the Anti-Terrorism and Effective Death Penalty Act, Three Strikes, and the three major cases dealing with sentencing proportionality.<sup>16</sup> Section III discusses *Lockyer v. Andrade* and its history.<sup>17</sup> Section IV discusses whether there is a proportionality principle attached to the Eighth Amendment, whether the policy goals behind Three Strikes are being achieved, whether Three Strikes is economically efficient, and whether Three Strikes has caused any adverse effects on convicts or the judicial system.<sup>18</sup>

## II. BACKGROUND

### A. *The Eighth Amendment*

The Eighth Amendment to the United States Constitution protects against the infliction of cruel and unusual punishment.<sup>19</sup> The Fourteenth Amendment<sup>20</sup> applies the Eighth Amendment to the States.<sup>21</sup> The Eighth Amendment's prohibition against cruel and unusual punishments contains a gross disproportionality provision.<sup>22</sup>

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14. See *infra* notes 196-98 and accompanying text (discussing the disproportionality of the sentence in *Lockyer*).

15. See *infra* notes 155-203 and accompanying text (discussing whether there is a proportionality principle in the Eighth Amendment and whether Andrade's sentence was proportional). See also *infra* notes 204-47 and accompanying text (discussing the economic and policy reasons behind Three Strikes and whether the law is efficient and effective).

16. See *infra* notes 19-110 and accompanying text for Section II.

17. See *infra* notes 111-154 for Section III.

18. See *infra* notes 155-247 for Section IV.

19. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

20. U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

21. *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (applying the Eighth Amendment to the States by virtue of the Fourteenth Amendment).

22. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). "A gross disproportionality principle is applicable to sentences for terms of years." *Id.* But see *Harmelin*, 501 U.S. at 994-95. Mandatory

*B. Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)*<sup>23</sup>

The AEDPA places limitations on a “federal habeas court’s review of a state-court decision”<sup>24</sup> and is used by courts when deciding whether a sentence is grossly disproportionate under the Eighth Amendment.<sup>25</sup> When deciding whether a petition for a writ of habeas corpus<sup>26</sup> should be issued, the most important question under the AEDPA is “whether a state court decision is contrary to,<sup>27</sup> or involved an unreasonable application of,<sup>28</sup> clearly established<sup>29</sup> Federal law.”<sup>30</sup>

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sentences are not prohibited by the Eighth Amendment. *Id.* Although they may be cruel, they are not unusual. *Id.* at 994-95. The Court found that simply because a sentence is mandatory does not qualify it as cruel and unusual if it was not otherwise so. *Id.* at 995.

23. S.735. 104th Cong. § 104 (1996) (limiting federal habeas review under 28 U.S.C. § 2254 (1996)).

24. *Lockyer*, 538 U.S. at 70.

25. *Id.* An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254 (d) (1996). AEDPA “modified a federal habeas court’s role in reviewing state prisoner applications in order to prevent federal habeas ‘retrials’ and to ensure that state-court convictions are given effect to the extent possible under law.” *Bell v. Cone*, 535 U.S. 685, 693 (2002).

26. Habeas corpus is defined as “[a] writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY 715 (7th ed. 1999). In 1867, Congress enacted a statute providing that federal courts “shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States.” *Williams v. Taylor*, 529 U.S. 362, 374-75 (2000) (citing Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385).

27. *Lockyer*, 538 U.S. at 71.

[A] state court decision is “contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from our precedent.”

*Id.* at 73 (citing *Williams*, 529 U.S. at 405-406; *Bell*, 535 U.S. at 694). For example, in *Lockyer*, the California Court of Appeal’s decision must have been contrary to the “clearly established gross proportionality principle.” *Id.*

28. *Id.* at 75. A state court unreasonably applies Federal law if it “identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* The state court’s application must be “objectively unreasonable” not merely “incorrect or erroneous.” *Id.* (citing *Williams*, 529 U.S. at 413). “Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.” *Lockyer*, 538 U.S. at 76.

29. *Id.* at 71-72. “Clearly established” law is the United States Supreme Court’s holdings not dictum, as of the time the state court made its decision. *Id.* A federal habeas court can only apply law that existed “at the time the defendant’s conviction became final.” *Williams*, 529 U.S. at 381 (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). “A rule that ‘breaks new ground or imposes a new obligation on the States or the Federal Government, falls outside this universe of federal law.’”

C. *California's Three Strikes Law (Three Strikes)*

Three Strikes was first proposed by Mike Reynolds, a father whose daughter was murdered.<sup>31</sup> Three Strikes' ultimate passage was most importantly influenced by the murder of Polly Klaas.<sup>32</sup> After this murder, then California Governor Pete Wilson<sup>33</sup> picked up on Three Strikes as important crime-fighting legislation.<sup>34</sup> Democrats controlled the state legislature and they agreed to pass any crime legislation proposed by Wilson, a Republican, in order to prevent him from using the issue to gain reelection.<sup>35</sup> Three Strikes was signed into law on March 7, 1994, with almost no analysis by academics or criminal justice experts.<sup>36</sup>

Three Strikes requires a court to impose a sentence twice as long as

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*Id.* at 381. Only decisions by the Supreme Court of the United States are relevant law under the AEDPA. *Id.* A generalized standard may be sufficiently clear for habeas purposes. *Id.* at 382. "If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule." *Wright v. West*, 505 U.S. 277, 308-09 (1992).

30. *Lockyer*, 538 U.S. at 70. (citing 28 U.S.C. § 2254(d)(1)). The Supreme Court concedes that determining what is "clearly established" under Eighth Amendment jurisprudence is difficult. *Id.* Nevertheless, gross disproportionality is one "clearly established" principle. *Id.*

31. LaFree, *supra* note 5, at 876 (discussing the history of Three Strikes). Mike Reynolds is a photographer from Fresno whose 18-year-old daughter, Kimber Reynolds, had been shot in the head on June 30, 1992 "during an attempted robbery of her purse as she exited a local restaurant." *Id.* See also Autumn D. McCulloch, Note and Comment, *Three Strikes and You're In (For Life): An Analysis of the California Three Strikes Law as Applied to Convictions for Misdemeanor Conduct*, 24 T. JEFFERSON L. REV. 277, 279 (2002) (discussing why Three Strikes was promulgated). Michael Davis, a convicted criminal, was linked to Kimber's death and subsequently killed by police officers outside an apartment building. *Id.* at 280 n.17. Douglas David Walker was also linked to Kimber's death. *Id.* He pled to a lesser charge and was only sentenced to nine years in prison. *Id.*

32. LaFree, *supra* note 5, at 876-77 (discussing why Three Strikes was promulgated). Polly Klaas, a twelve year old girl, was abducted from her home in Petaluma, California in October 1993 by a violent offender who had been convicted twice previously and recently been paroled from state prison. *Id.* at 877. He confessed to sexually assaulting and murdering Polly and led police to her body. *Id.*

33. Peter Wilson was born in Illinois on August 23, 1933. *California Governors*, at <http://www.calvoter.org/archive/94general/cond/governor/wills/bro.html>. He graduated from Yale and served as a Marine before earning a University of California law degree. *Id.* He served as a Senator, Mayor of San Diego, and Assemblyman, as well as Governor of California. *Id.* He brags about being the first governor to "turn career criminals into career inmates." California Voter Foundation, *Remarks by Governor Pete Wilson on Primary Night (June 7, 1994)*, available at <http://www.calvoter.org/archive/94general/cand/governor/wils/wilsspeech1.htm>. He also holds particular dislike for rapists and child molesters stating that "for those animals, their first strike should be their last." *Id.*

34. LaFree, *supra* note 5, at 877.

35. *Id.*

36. *Id.* There was no time for analytical attention because of time pressures imposed by public outrage over the Polly Klaas case. *Id.*

the one a defendant would have received if the defendant has one prior strike and is convicted of another felony.<sup>37</sup> A defendant who is convicted of a felony and who has two or more prior strikes must receive an indeterminate sentence.<sup>38</sup> A prior strike consists of a serious or violent crime.<sup>39</sup> However, the offense that triggers the enhanced sentencing may be any felony.<sup>40</sup> A third strike may also be a “wobbler offense,” which can be charged either as a misdemeanor or as a felony.<sup>41</sup> Wobbler offenses are of particular significance when it comes to petty theft.<sup>42</sup>

Three Strikes is one of the harshest recidivist statutes<sup>43</sup> in the United States.<sup>44</sup> For example, double counting is incorporated into

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37. McCulloch, *supra* note 31, at 281 (discussing the voters’ intent in passing Three Strikes). *See infra* note 39 and accompanying text (defining what a prior strike is).

38. McCulloch, *supra* note 31, at 281. “[T]he minimum term of [this indeterminate sentence] is the greater of three possibilities: 1) three times the sentence for the current felony conviction; 2) state imprisonment for twenty-five years; or 3) the sentence as determined by the court for the instant conviction, plus any applicable enhancements.” *Id.* Each of these sentencing options guarantees that the minimum sentenced received will be twenty-five years to life. *Id.* This structure also ensures that there will be no eligibility for parole until twenty-five years have been served. *Id.*

39. *Id.* Violent crimes include “murder, mayhem, rape, forcible sex crimes, child molestation, robbery, and kidnapping.” *Id.* at 281-82. There are twenty-seven serious crimes including “burglary, arson, and providing illegal drugs to a minor.” McCulloch, *supra* note 31, at 282. Juvenile adjudications and out-of-state convictions qualify as prior strikes if they meet the serious or violent definition as determined by California law. *Id.* at 283.

40. *Id.* There are “over 500 offenses classified as felonies in California.” *Id.* at 282.

41. *Andrade v. Attorney Gen. of California*, 270 F.3d 743, 749 (9th Cir. 2001) *rev’d*, 538 U.S. 63 (2003). A “wobbler” offense is punishable by up to one year in county jail as a misdemeanor or up to three years in state prison as a felony. *Id.* A prosecutor has discretion to charge a “wobbler” offense as either a felony or a misdemeanor. *Id.* A Judge has discretion to reduce a felony charge to a misdemeanor at sentencing. *Id.* Examples of “wobbler offenses” are: petty theft with a prior, receiving stolen property, grand theft, commercial burglary, and possession of methamphetamines.” *See Alex Ricciardulli, The Broken Safety Valve: Judicial Discretion’s Failure to Ameliorate Punishment Under California’s Three Strikes Law*, 41 DUQ. L. REV. 1, 22 n.109 (2002) (listing other “wobbler” offenses).

42. McCulloch, *supra* note 31, at 282 (giving an overview of Three Strikes). “If petty theft is committed subsequent to prior convictions for non-theft offenses, even where the priors are serious and/or violent, then the petty theft must be charged as a misdemeanor and will not trigger three strikes sentencing.” *Id.* “If, however, petty theft is committed after a prior theft conviction, the petty theft will be charged as petty theft with a prior, a felony that will subject the defendant to three strikes sentencing.” *Id.*

43. BLACK’S LAW DICTIONARY 1276 (7th ed. 1999). A recidivist statute is one directed at the sentencing of criminals who have been “convicted of multiple offenses.” *See id.*

44. McCulloch, *supra* note 31, at 282 (comparing Three Strikes to other recidivist statutes). A court cannot suspend a prison sentence or grant probation. *Id.* An offender can only be committed to state prison. *Id.* The length of time between the prior strikes and the triggering offense is not considered a mitigating factor. *Id.* at 282-83. The terms of imprisonment must be imposed consecutively as opposed to concurrently. *Id.* at 283. Good-time and work-time credits, which can reduce a convicted criminal’s sentence, are drastically limited. *Id.* Offenders cannot receive such credits until actually in prison and 80% of their sentence must be served before they

Three Strikes.<sup>45</sup> Three Strikes also “imposes certain obligations and powers upon the prosecution”<sup>46</sup> such as the prosecutor must plead and prove all prior strikes and the prosecutor may dismiss prior strikes because it is in the interest of justice to do so or because of insufficient evidence.<sup>47</sup> Three Strikes targets career criminals because they pose the “greatest threat to public safety.”<sup>48</sup>

#### D. Major Precedents

##### 1. Rummel v. Estelle<sup>49</sup>

In 1973, Rummel was convicted of obtaining \$120.75 by false pretenses.<sup>50</sup> Since Rummel had two prior convictions, which qualified

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are eligible to receive such credits. McCullough, *supra* note 31, at 283. Offenders who are sentenced to indeterminate life sentences must serve their entire minimum term before they can be eligible for parole. *Id.* “[T]wo prior strikes can result from a single past criminal act.” *Id.*

45. *Id.* Double counting occurs because “a prior strike conviction can both trigger a second or third strike sentence and increase the sentence for the current offense by an additional five years under an earlier sentencing enhancement for serious felonies.” *Id.* “[T]he same conviction that can trigger a second or third strike sentence may also increase the sentence by an additional year if the prior strike conviction resulted in a prison commitment.” *Id.* “[A] prior strike can further be used to simultaneously trigger a second or third strike sentence and to provide an element of the current offense, as in the crimes of felony petty theft with a prior and felon in possession of a weapon.” McCullough, *supra* note 31, at 283. “[S]erious’ or ‘violent’ felony convictions imposed prior to the law’s enactment in 1994 can be charged as strikes.” *Andrade*, 270 F.3d at 747 (citing *People v. Kinsey*, 40 Cal. App. 4th 1621, 1631 (1995)).

46. McCullough, *supra* note 31, at 283.

47. *Id.* at 283-84 (discussing the safety valve provided by Three Strikes). By giving the prosecutor the power to dismiss prior strikes, Three Strikes gives prosecutors broad discretion. *Id.* at 284. This ability to dismiss prior strikes in the interest of justice is extended to the trial court. *Id.* However, a trial court’s power to dismiss prior strikes is more limited than the prosecutor’s. *Id.* The trial court must consider “both the constitutional rights of the defendant, and the interests of society represented by the People, in determining whether there should be a dismissal.” *Id.*

48. *Ewing v. California*, 538 U.S. 11, 24 (2003). “As one of the chief architects of California’s three strikes law has explained: ‘Three Strikes was intended to go beyond simply making sentences tougher.’” *Id.* (quoting James A. Ardaiz, *California’s Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 12 (2000)). “‘It was intended to be a focused effort to create a sentencing policy that would use the judicial system to reduce serious and violent crime.’” *Id.* (quoting Ardaiz, *supra*). The policy choice behind any three strikes law is 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.” *Id.*

49. 445 U.S. 263 (1980) (holding that state legislatures have discretion in deciding sentencing guidelines).

50. *Id.* at 266. Rummel promised to repair an air conditioner and accepted payment to do so. *Id.* at 286 (Powell, J., dissenting). The air conditioner was never repaired. *Id.* Because the amount was greater than \$50 this offense was felony theft. *Id.* Felony theft is punishable by two to ten years in the state penitentiary. *Id.* at 266.

as prior strikes,<sup>51</sup> the prosecutor proceeded against Rummel as a recidivist.<sup>52</sup> The jury found Rummel guilty of felony theft and also found that he had been convicted of two prior felonies.<sup>53</sup> Rummel was sentenced to life imprisonment in the state penitentiary.<sup>54</sup> Rummel appealed his sentence as cruel and unusual punishment.<sup>55</sup>

The United States Supreme Court found that the length of a sentence was a matter for the legislatures to decide.<sup>56</sup> Rummel claimed that the absence of violence in his crimes should militate against the imposition of such a severe sentence, but the Court rejected this proposition.<sup>57</sup> Rummel would have received more lenient sentences in almost every other state; however, the differences in the laws of other States are minimal.<sup>58</sup> In addition, a comparison and determination of whether the sentence is disproportionate fails to take into account Texas' liberal parole policy.<sup>59</sup> Even if the sentence imposed on Rummel was the most severe sentence found in any of the states, this does not

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51. *Rummel*, 445 U.S. at 265. In 1964, Rummel pled guilty to obtaining \$80 worth of goods through fraudulent use of a credit card. *Id.* This was felony theft and Rummel was sentenced to three years in the state penitentiary. *Id.* In 1969, Rummel pled guilty to passing a forged check in the amount of \$28.36. *Id.* at 265-266. This offense was punishable by two to five years imprisonment. *Id.* Rummel was sentenced to four years in the state penitentiary. *Id.* at 266.

52. *Rummel*, 445 U.S. at 266. A recidivist is defined as "[o]ne who has been convicted of multiple criminal offenses, usually similar in nature." BLACK'S LAW DICTIONARY 1276 (7th ed. 1999).

53. *Rummel*, 445 U.S. at 266.

54. *Id.* Texas' recidivist statute required a mandatory life sentence with the possibility of parole in the state penitentiary for anyone convicted of a felony that had been convicted of two prior felonies, but only if each prior felony conviction resulted in a prison sentence. *Id.* at 278.

55. *Id.* at 267. Rummel claimed his sentence was unconstitutionally disproportionate as against the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.*

56. *Id.* at 274. "[A]ny 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts." *Rummel*, 445 U.S. at 284.

57. *Id.* at 275. Society still has an interest in punishing and deterring a particular crime by punishing it severely even though it lacked violence. *Id.* High corporate officials can commit the serious crimes of bribery or anti-trust violations or violations of environmental standards which are not violent offenses, but still serious. *Id.*

58. *Id.* at 279. This excludes Texas, West Virginia, and Washington. *Id.* However, in some states, such as Colorado, Nevada, and Wyoming, life sentences are triggered by four felonies, not three. *Rummel*, 445 U.S. at 279-80. Some states, such as Mississippi, require a violent felony conviction before imposing a life sentence. *Id.* Other states, such as Washington D.C., Idaho, and Oklahoma, leave the sentencing decision within the discretion of the judge. *Id.*

59. *Id.* The liberal policy of granting good time credits to prisoners usually allows a prisoner to become eligible for parole in twelve years. *Id.* Because Rummel has no right to parole, his sentence cannot be treated as a sentence of only twelve years. *Id.* However, this liberal policy cannot be ignored when determining if Rummel's sentence is unconstitutionally disproportionate. *Rummel*, 445 U.S. at 280-81. Possibility of parole distinguishes Rummel from a person sentenced in Mississippi, which provides for a sentence without parole on the third strike. *Id.* at 281.

necessarily make Rummel's sentence grossly disproportionate to his offenses.<sup>60</sup> Each state legislature is entitled to make its own judgments on what sentences should be imposed for different crimes.<sup>61</sup> Therefore, the Court affirmed Rummel's sentence.<sup>62</sup>

Justices Powell, Brennan, Marshall, and Stevens dissented.<sup>63</sup> First, the dissent believed that "the penalty for a noncapital offense may be unconstitutionally disproportionate."<sup>64</sup> Second, "the possibility of parole should not be considered in assessing the nature of the punishment."<sup>65</sup> Third, "a mandatory life sentence is grossly disproportionate as applied to petitioner."<sup>66</sup> Fourth, "the conclusion that this petitioner has suffered

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60. *Id.* Absent national uniformity, which is against the notion of federalism, one State will always be the one to treat offenders the harshest. *Id.* at 282. For example, California considers the theft of avocados or citrus fruit as particularly repugnant; in some States, such as Idaho, theft of \$100 is punishable by a fine, in another State, such as Nevada, it could be punishable by 10 years in prison. *Id.*

61. *Id.* at 284. The legislature's determination of what sentence to impose for particular crimes is only confined by the Eighth Amendment's prohibition against cruel and unusual punishments which "can be informed by objective factors." *Rummel*, 445 U.S. at 284. The purpose of recidivist statutes is to deter repeat offenders and to segregate a person who commits criminal offenses repeatedly from the rest of society. *Id.*

62. *Id.* at 285.

63. *Id.* at 285 (Powell, J., dissenting).

64. *Id.* at 286. Disproportionality analysis focuses on whether a person deserves the punishment meted out, not whether the punishment serves some societal goal. *Id.* at 288. The principle of disproportionality comes from English law. *Rummel*, 445 U.S. at 288 (Powell, J., dissenting). The Magna Carta of 1215 insured that an offense should be fined according to the gravity of the crime. *Id.* at 288-89. By 1400, common law agreed "that punishment should not be excessive either in severity or length." *Id.* at 289. The "cruel and unusual punishments clause of the English Bill of Rights of 1689" was a "reiteration of the English policy against disproportionate penalties." *Id.* at 289. In *Weems v. United States*, 217 U.S. 349 (1910), the defendant was convicted of falsifying a public record and sentenced to 15 years imprisonment with chains, the loss of his civil rights, and perpetual surveillance. *Id.* The Court found the punishment was cruel and unusual. *Id.* The Court based its decision, in part, on "the relationship between the crime committed and the punishment imposed." *Rummel*, 445 U.S. at 289-90 (Powell, J., dissenting). The Court found that *Weems* "had been punished more severely than persons in the same jurisdiction who committed more serious crimes, or persons who committed a similar crime in other American jurisdictions." *Id.* at 290.

65. *Id.* at 286. Notably, Rummel has no right to parole, it is simply an act of executive grace. *Id.* at 293. To hold that a sentence is not cruel and unusual nor grossly disproportionate because parole is probable, is cruel itself because a prisoner "cannot enforce that expectation." *Id.* at 294. A Court has never refused to examine an Eighth Amendment claim because a prisoner might be pardoned. *Id.* "In June 1979, the Governor of Texas refused to grant parole to 79% of the state prisoners whom the parole board recommended for release." *Rummel*, 445 U.S. at 294 (Powell, J., dissenting).

66. *Id.* at 286. Objective factors should be used to determine whether a sentence is grossly disproportionate. *Id.* at 295. "Among these are (i) the nature of the offense; (ii) the sentence imposed for commission of the same crime in other jurisdictions; and (iii) the sentence imposed upon other criminals in the same jurisdiction." *Id.* (citations omitted). All of Rummel's crimes involved small amounts of money and none of them involved actual violence, the threat of violence,

a violation of his Eighth Amendment rights is compatible with principles of judicial restraint and federalism.”<sup>67</sup>

## 2. *Solem v. Helm*<sup>68</sup>

Helm was convicted by South Dakota of six non-violent felonies<sup>69</sup> and, in 1979, he pled guilty of uttering a “no account” check in the

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or injury to persons. *Id.* Since Rummel’s conviction, Texas has reclassified his third offense as a misdemeanor. *Id.* “[O]nly 12 States have ever enacted habitual offender statutes imposing a mandatory life sentence for the commission of two or three nonviolent felonies.” *Rummel*, 445 U.S. at 296 (Powell, J., dissenting). “[O]nly 3 States, Texas, Washington, and West Virginia have retained such a statute.” *Id.* Therefore, three-fourths of the States that had this scheme have decided that it does not work. *Id.* at 296-97. “Kentucky . . . replaced the mandatory life sentence with a more flexible scheme ‘because of a judgment that under some circumstances life imprisonment for a habitual criminal is not justified.’” *Id.* at 297. “Kansas abolished its statute mandating a life sentence for the commission of three felonies after a state legislative commission concluded that the legislative policy as expressed in the habitual criminal law bears no particular resemblance to the enforcement policy of prosecutors and judges.” *Id.* Washington retains the Texas scheme, but “the State Supreme Court has suggested that application of its statute to persons like the petitioner might constitute cruel and unusual punishment.” *Id.* at 297-98. “More than three-quarters of American jurisdictions have never adopted a habitual offender statute that would commit the petitioner to mandatory life imprisonment.” *Rummel*, 445 U.S. at 298 (Powell, J., dissenting). “The jurisdictions that currently employ habitual offender statutes either (i) require the commission of more than three offenses, (ii) require the commission of at least one violent crime, (iii) limit a mandatory penalty to less than life, or (iv) grant discretion to the sentencing authority.” *Id.* at 298 (footnotes omitted). No jurisdiction would require a mandatory life sentence for the commission of three nonviolent property-related offenses. *Id.* Congress also has not adopted a scheme like Texas’ statute. *Id.* at 300. The federal habitual offender statute only requires increased sentences for “‘dangerous special offender’ [sic] who have been convicted of a felony.” *Id.* at 299. In order to be a “dangerous special offender” a felon must have committed at least two previous felonies. *Id.* One of the prior felonies must have been committed in the last five years. *Rummel*, 445 U.S. at 299 (Powell, J., dissenting). The maximum sentence is not to exceed 25 years and should not be disproportionate to the maximum sentence otherwise authorized for such a felony. *Id.* Texas’ scheme mandates that a person who is convicted twice of a crime should receive a greater sentence than an offender who is only convicted once of that crime. *Id.* at 301. However, the sentence received for the twice-conviction of a crime such as the unauthorized use of a vehicle is not greater than the sentence received for the twice-conviction of a greater crime such as rape. *Id.* Therefore, when two-time offenders are sentenced, the sentence varies with the severity of the offense, but three-time felons all receive the same sentence. *Id.* Imposition of the same sentence on offenders who commit different crimes raises doubts about the proportionality of the sentence. *Id.* Review of the objective factors shows that Rummel’s sentence is grossly disproportionate. *Rummel*, 445 U.S. at 302 (Powell, J., dissenting).

67. *Id.* at 286.

68. 463 U.S. 277 (1983) *overruled by* Harmelin v. Michigan, 501 U.S. 957 (1991).

69. *Id.* at 279. “In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.” *Id.* In 1972, Helm was found guilty of receiving money under false pretenses. *Id.* at 279-80. In 1973, he was found guilty of grand larceny. *Id.* at 280. In 1975, he was convicted of driving while intoxicated, his third such offense. *Id.* The only notation in the record regarding these offenses is that “they were all non-violent, none was a crime against a person, and alcohol was a contributing factor in each case.” *Solem*, 463 U.S. at 280.

amount of \$100.<sup>70</sup> Because of Helm's criminal record, he was sentenced to life imprisonment under South Dakota's recidivist statute.<sup>71</sup> The United States Court of Appeals reversed the sentence because *Rummel* was distinguishable.<sup>72</sup> The United States Supreme Court found that the "cruel and unusual punishments" clause in the Eighth Amendment prohibits "sentences that are disproportionate to the crime committed."<sup>73</sup> The principle of proportionality is deeply rooted in common law,<sup>74</sup> however, "outside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare."<sup>75</sup> Courts should use objective factors when

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70. *Id.* at 281, 282. Helm claims he was working in Sioux Falls when he got his paycheck. *Id.* at 281. He was drinking and wound up in Rapid City with more money than he had when he left Sioux Falls. *Id.* He does not know how he got that money. *Id.*

71. *Id.* at 281, 282. "When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." *Solem*, 463 U.S. at 281. "The maximum penalty for a 'Class 1 felony' was life imprisonment in the state penitentiary and a \$25,000 fine." *Id.* Parole is unavailable under this sentencing scheme. *Id.* at 282. Although parole is unavailable under this sentencing scheme, the governor is authorized to commute sentences or pardon prisoners. *Id.* Ordinarily the maximum sentence for Helm's offense is five years imprisonment in the state penitentiary and a \$5,000 fine. *Id.* at 281.

72. *Id.* at 283. Helm received a sentence of life imprisonment without the possibility of parole, whereas Rummel could have been paroled in as little as twelve years. *Solem*, 463 U.S. at 283. "The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the same offense" and concluded that Helm's sentence was grossly disproportionate to his offense. *Id.* at 284.

73. *Id.*

74. *Id.* In 1215, the Magna Carta and the First Statute of Westminster declared that "ameracements" (fines) are not to be excessive. *Id.* Ameracements were payments to the King that were imposed against defendants, plaintiffs who failed to follow court rules, and against entire townships that did not live up to their obligations, or individuals whom the King felt deserved to be penalized. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 269 (1989). Ameracements are not the same as damages. *Id.* at 270 n.13. The Magna Carta placed limits on when and who could be amerced and the amount. *Id.* at 270. Most ameracements were not large and were a form of taxation. *Id.* at 271. Eventually, prison sentences replaced ameracements as the normal criminal sanctions. *Solem*, 463 U.S. at 285. At this point, the common law recognized that they must also be proportional. *Id.* This principle was repeated in the English Bill of Rights which was later adopted by the framers of the Eighth Amendment. *Id.* When the framers adopted the same language from the English Bill of Rights they also intended to adopt the English proportionality principle because it was a theme of the era "that Americans had all the rights of English subjects." *Id.* at 285-86. The Court in *Weems*, 217 U.S. 349, held that the sentence imposed was not cruel only because it involved the use of chains, but also because it was "cruel in its excess of imprisonment." *Id.* at 287. The Constitution is explicit that excessive fines are not permitted and cases have decided that a proportionality analysis must be done to determine that a death sentence is not excessive. *Id.* at 289. "It would be anomalous . . . if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not." *Solem*, 463 U.S. at 289.

75. *Solem*, 463 U.S. at 289-90. Nevertheless, proportionality analysis is applicable to noncapital cases because no penalty is *per se* constitutional. *Id.* at 290.

conducting a proportionality review.<sup>76</sup> The gravity of the offense and the harshness of the penalty,<sup>77</sup> a comparison of “sentences imposed on other criminals in the same jurisdiction,”<sup>78</sup> and a comparison of “the sentences imposed for commission of the same crime in other jurisdictions”<sup>79</sup> are objective factors that should be considered.<sup>80</sup> *Rummel* is essentially different from the case at bar and, therefore, is not dispositive of the issue.<sup>81</sup> By applying the objective factors, the court

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76. *Id.*

77. *Id.* at 290-91. Helm’s crime did not involve violence and the amount of the check was relatively small. *Id.* at 296. All of his prior felonies were non-violent, relatively minor, and none were against another person. *Id.* at 296-97. Barring clemency, Helm will spend the rest of his life in prison. *Solem*, 463 U.S. at 297. This is the most severe sentence that can be imposed in South Dakota because they do not have the death penalty. *Id.* at 297.

78. *Id.* at 291. “If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive.” *Id.* The other crimes for which a South Dakota court can impose a life sentence are treason, first degree manslaughter, murder, first degree arson, and kidnapping. *Id.* at 298. “Attempted murder, placing an explosive device on an aircraft, and first degree rape were only Class 2 felonies.” *Id.* “Aggravated riot was only a Class 3 felony.” *Id.* at 298. “Distribution of heroin and aggravated assault were only Class 4 felonies.” *Solem*, 463 U.S. at 298. “[T]he penalty for a second or third felony is increased by one class.” *Id.* There is nothing in the record that any recidivist other than Helm had ever been sentenced as severely for comparable crimes. *Id.* at 299.

79. *Id.* Only in Nevada could Helm have received a life sentence without the possibility of parole for his crime. *Id.* In addition, the sentence is not mandatory in Nevada, it is merely authorized. *Id.* at 299-300. No defendant in Nevada who is in the same position as Helm has ever actually received this sentence. *Solem*, 463 U.S. at 299-300.

80. *Id.* at 290-91. Judges are competent to compare offenses on a relative scale because these are the types of judgments courts have traditionally had to make. *Id.* at 292. “Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender.” *Id.* For instance, crimes that involve violence or the threat of violence are more serious than non-violent crimes. *Id.* at 292-93. “The absolute magnitude of the crime may be relevant.” *Id.* at 293. For example, stealing a million dollars is sentenced more severely than stealing \$100 and a lesser included offense is punished less severely than the greater offense. *Solem*, 463 U.S. at 493. Attempts are not as serious as completed crimes. *Id.* An accessory after the fact should receive a lesser sentence than the principal. *Id.* Negligence is less serious than intentional conduct. *Id.* A review of a defendant’s motive is also important. *Id.* The courts’ ability to compare different sentences is troublesome because it requires line-drawing. *Id.* at 294. A 25-year sentence is more severe than a 15-year sentence, but it is hard to say one violates the Eighth Amendment and the other does not. *Solem*, 463 U.S. at 294. However, this is the type of line-drawing courts have to make in other contexts. *Id.* An example of this is the Sixth Amendment, which requires that an accused be provided with a speedy trial, but the permissible delay must be determined on a case-by-case basis. *Id.* Another example is the Sixth Amendment’s requirement of a jury trial. *Id.* at 295. The Court has drawn a line by determining that the right to a jury trial is only provided where the defendant might receive a sentence of six months or more. *Id.* In choosing this standard, the Court “relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months.” *Id.* This supports the proposition that courts can distinguish different sentences from each other and that courts may properly look at other jurisdictions in deciding where to draw the line. *Solem*, 463 U.S. at 295.

81. *Id.* at 300. In *Rummel*, the defendant had the possibility of parole. See *supra* note 65. In *Solem*, the defendant only has the possibility that the governor may commute his sentence. *Solem*,

held that Helm's sentence was grossly disproportionate to his offense and was, therefore, unconstitutional because it was prohibited by the Eighth Amendment.<sup>82</sup>

Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissented.<sup>83</sup> They found that the majority ignored recent precedent.<sup>84</sup> The majority's holding cannot be reconciled with *Rummel*, yet the majority did not overrule it.<sup>85</sup> The *Rummel* Court rejected the analysis used by the majority in this case.<sup>86</sup> Legislatures are better equipped to balance the differing interests in order to determine what the appropriate sentences for different crimes should be.<sup>87</sup>

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463 U.S. at 300. Commutation is essentially different than parole. *Id.* Parole is a normal expectation in the criminal system and is a regular part of the system. *Id.* The law specifies standards and procedures for when prisoners should be granted parole and specifies when a prisoner is eligible for such. *Id.* To some extent, it is possible to predict when parole will be granted. *Id.* at 301. Commutation has no such standards. *Id.* A governor may grant clemency at any time and for any reason. *Solem*, 463 U.S. at 301. Finally, Texas has a rather liberal parole policy. *Id.* It is much more difficult to obtain commutation in South Dakota. *Id.* at 302. It has been over eight years since a life sentence has been commuted. *Id.* Even if Helm's sentence was commuted, he would still only be eligible for parole. *Id.* In South Dakota, Helm must serve three-fourths of his sentence before he would be eligible for parole. *Id.* at 303.

82. *Solem*, 463 U.S. at 303. Helm received the highest sentence possible for a relatively minor offense. *Id.* "He has been treated more harshly than other criminals in the State who have committed more serious crimes." *Id.* "He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State." *Id.*

83. *Id.* at 304 (Burger, C.J., dissenting).

84. *Id.* Chief Justice Burger pointed out that the precedent set by *Rummel* had not been followed by the majority. *Solem*, 463 U.S. at 304 (Burger, C.J., dissenting).

85. *Id.* at 304. The Court in *Solem* held that a life sentence imposed after a seventh felony was grossly disproportionate, but held in *Rummel* that a life sentence imposed after only three prior felonies was not grossly disproportionate. *Id.* Comparing Helm's crimes to Rummel's makes Rummel look like a "model citizen." *Id.* Helm was convicted of three burglaries and had a third conviction for drunk driving. *Id.* at 304. Helm's crimes posed a real threat to the public, whereas Rummel's did not. *Solem*, 463 U.S. at 315-16 (Burger, C.J., dissenting). Helm demonstrated his inability to conform to society's standards far more than Rummel did. *Id.* at 316. The distinction between a life sentence without the possibility of parole and one with the possibility of parole does not withstand scrutiny. *Id.* A well-behaved prisoner in Helm's position is not likely to actually serve the full life term. *Id.* Since 1964, twenty-two life sentences in South Dakota have been commuted to terms of years and twenty-five requests for commutation were denied. *Id.* at 316-17.

86. *Id.* at 308. The *Rummel* Court refused to draw a line between violent and non-violent offenses. *Solem*, 463 U.S. at 308 (Burger, C.J., dissenting). The Court also rejected Rummel's attempt to draw a comparison between his sentence and sentences in other States for the same offense. *Id.* Such comparisons are flawed because laws are widely varying and "some States have comprehension provisions for parole and others do not." *Id.* at 308-09. "Such comparisons trample on fundamental concepts of federalism." *Id.* at 309. Finally, the *Rummel* Court rejected an attempt to measure Rummel's sentence against those imposed for other crimes in Texas. *Id.* The sentences imposed for different crimes is a matter of legislative discretion. *Id.* at 310.

87. *Solem*, 463 U.S. at 314 (Burger, C.J., dissenting).

### 3. *Harmelin v. Michigan*<sup>88</sup>

Harmelin was convicted of possessing 672 grams of cocaine and sentenced to life in prison without the possibility of parole.<sup>89</sup> Justice Scalia announced the judgment of the Court.<sup>90</sup> He also delivered an opinion which the Chief Justice joined.<sup>91</sup> Justice Scalia concluded by looking at old English precedent that the Eighth Amendment did not include a proportionality analysis.<sup>92</sup> The cruel and unusual punishment clause in the American Constitution was meant to be a check upon the Legislature.<sup>93</sup> According to Scalia, the framers of the Constitution did not mean to include proportionality analysis in the Eighth Amendment when they included the phrase “cruel and unusual punishments.”<sup>94</sup>

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88. 501 U.S. 957 (1991).

89. *Id.* at 961.

90. *Id.* The Court affirmed Harmelin’s sentence. *Id.* at 994-95.

91. *Id.*

92. *Id.* at 965. The Magna Carta provided that a fine should be proportional to the offense. *Harmelin*, 501 U.S. at 967. When imprisonment became the usual criminal sanction, the proportionality principle was continued. *Id.* The drafters of the English Declaration of Rights (Bill of Rights) knew of this principle, but chose not to prohibit disproportionate sentences. *Id.* Instead, they prohibited “cruell and unusuall Punishments.” *Id.* The preamble to the Declaration of Rights referred to the illegality of Chief Justice Jeffreys’ sentences rather than the disproportionality of those sentences. *Id.* at 969. “[T]he phrase ‘cruell and unusuall’ is treated as interchangeable with ‘cruel and illegal.’” *Id.* at 973. The Supreme Court observed that “an earlier draft of the [Declaration of Rights] prohibited ‘illegal’ punishments, and that the change ‘appears to be inadvertent.’” *Harmelin*, 501 U.S. at 974 (citing *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring)). At that time, “[n]ot all punishments were specified by statute; many were determined by the common law.” *Id.* “Departures from the common law were lawful only if authorized by statute.” *Id.* “A requirement that punishment not be ‘unusuall’ . . . was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition.” *Id.*

93. *Id.* at 975-76. The English meaning of the “cruel and unusual punishments” clause cannot be transplanted to American constitutionalism because “[t]here were no common-law punishments in the federal system.” *Id.* at 975. Therefore, the clause must have been meant to prevent the Legislature from authorizing particular punishments. *Harmelin*, 501 U.S. at 975-76.

94. *Id.* at 977. Proportionality was not a novel idea at the time the constitution was framed. *Id.* Many State Constitutions included proportionality provisions. *Id.* “[T]o use the phrase ‘cruel and unusual punishment’ to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly.” *Id.* “There is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such [proportionality] provisions, yet chose not to replicate them.” *Id.* The New Hampshire Constitution (adopted 8 years before ratification of the Eighth Amendment) and the Ohio Constitution (adopted 12 years after the Eighth Amendment ratification), both contained provisions against “cruel and unusual punishments” as well as separate proportionality provisions. *Harmelin*, 501 U.S. at 977-78. Notably, New Hampshire’s provision prohibited against “cruel or unusual” punishment. *Id.* During the debates at the state ratifying conventions only methods of punishments were discussed, not proportionality. *Id.* at 979. After the Bill of Rights was proposed, Congress “punished forgery of United States securities, ‘run[ning] away with [a] ship or vessel, or any goods or merchandise to the value of fifty dollars,’ treason, and murder on the high seas” with

There are no clear guidelines for analyzing the proportionality of punishments as there are with determining whether modes of punishments are “cruel and unusual.”<sup>95</sup> Scalia does admit that there is a proportionality review in the Eighth Amendment when it comes to the death penalty.<sup>96</sup> Scalia announced the opinion of the Court holding that mandatory sentences are not unconstitutional.<sup>97</sup>

Justices Kennedy, O’Connor, and Souter concurred in the judgment.<sup>98</sup> They found that, although the Court’s proportionality principles have not been clear, they can be reconciled and stare decisis

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the punishment of hanging. *Id.* at 980-81. Yet, there is no indication that anyone considered these punishments unconstitutional because they were disproportionate. *Id.* at 981. During the nineteenth century many States ratified constitutions that provided for prohibitions against both cruel and unusual punishments and disproportionate punishments. *Id.* at 982.

95. *Harmelin*, 501 U.S. at 985. A proportionality principle is an invitation to impose subjective values. *Id.* This is clear when the three-factor test from *Solem* is considered. *Id.* at 986. The gravity of the offense is difficult to measure because of the variation among ages, generations, and jurisdictions regarding what offenses are considered serious. *Id.* at 987. Sodomy is punished more severely in Massachusetts than assault and battery, while several states do not even punish sodomy. *Id.* (citing MASS. GEN. LAWS §§ 272:34, 265:13(a) (1988)). “In Louisiana, one who assaults another with a dangerous weapon faces the same maximum prison term as one who removes a shopping basket ‘from the parking area or grounds of any store . . . without authorization.’” *Id.* (citing LA. REV. STAT. ANN. §§ 14:37, 14:68.1 (West 1986)). Also, “a battery that results in ‘protracted and obvious disfigurement’ merits imprisonment ‘for not more than five years,’ one half the maximum penalty for theft of livestock or an oilfield seismograph.” *Harmelin*, 501 U.S. at 987 (cites omitted) (citing LA. REV. STAT. ANN. §§ 14:34.1, 14:67.1, 14:67.8 (West 1986)). Regarding the second factor, if there is no objective standard of gravity, then one cannot compare sentences of similar gravity from different jurisdictions. *Id.* at 988. In addition, even if crimes could be said to be “similarly grave,” they still could not be compared because there are many justifications for differing sentences. *Id.* Crimes that are difficult to detect may require higher penalties. *Id.* at 989. Crimes that are not deterred by penalty and crimes that are committed once in a lifetime by citizens who will not benefit from rehabilitation may require lower punishments. *Id.* The third factor has no relevance to the Eighth Amendment. *Id.* States may punish acts that other states reward, for example, killing an endangered animal. *Harmelin*, 501 U.S. at 989. States may punish an act more severely that other states are more lenient with or do not punish at all. *Id.* Nothing in the Constitution requires states to treat certain offenses in the same manner. *Id.* at 990. “The substitution of individual subjective moral values for those of the legislature” becomes apparent when the judiciary begins to look at the proportionality of offenses, except in non-debatable cases. Petitioner’s Brief at 18, *Lockyer v. Andrade*, 538 U.S. 63 (2003) (No. 01-1127). *But see* Respondent’s Brief at 30-32, *Lockyer v. Andrade*, 538 U.S. 63 (2003) (No. 01-1127) (discussing the subjectivity of not having a proportionality principle). The legislature could impose virtually any sentence it subjectively chose if there was no proportionality review of sentences. *Id.* at 30. Therefore, without a proportionality review, there is an invitation to impose subjective values of the legislature. *Id.*

96. *Harmelin*, 501 U.S. at 994. “Death is different.” *Id.*

97. *Id.* at 994-95. “Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense.” *Id.* at 994. In addition, there remains the possibility of executive clemency. *Id.* at 996. Executive clemency is “the power of the President or a governor to pardon a criminal or commute a criminal sentence.” BLACK’S LAW DICTIONARY 245 (7th ed. 1999).

98. *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring).

requires that they be followed.<sup>99</sup> They stated that there are some common principles regarding proportionality,<sup>100</sup> and by using the objective factors, Harmelin's sentence was not grossly disproportionate to his crime.<sup>101</sup>

Justices White, Blackmun, and Stevens dissented.<sup>102</sup> They thought it is illogical to presume that the Eighth Amendment would restrict the power to fine, but leave the power to imprison wholly unrestrained.<sup>103</sup> Whether or not the framers of the Constitution intended the Eighth Amendment to include a proportionality principle with regards to sentencing, prior decisions of the Court have found that the principle is included.<sup>104</sup> The *Solem* analysis<sup>105</sup> should be applied in proportionality

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99. *Id.* A proportionality principle had existed for 80 years at the time of this decision (1990). *Id.* The first case to recognize proportionality was *Weems*, 217 U.S. 349. Harmelin, 501 U.S. at 997. The case interpreted the Eighth Amendment as prohibiting "greatly disproportioned" sentences. *Id.* (citing *Weems*, 217 U.S. at 371).

100. *Id.* at 998. The first common principle is that the fixing of prison terms is at the discretion of legislatures. *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring). The legislatures are best able to balance the "sanctity of the individual, the nature of the law, and the relation between law and the social order." *Id.* Legislatures should be granted substantial deference in making these decisions. *Id.* at 999. The second common principle is that the Eighth Amendment does not require the adoption of a single penological theory. *Id.* The third common principle is that large variances in sentencing theories and the length of the sentences are inevitable. *Id.* The fourth common principle is that objective factors should be used in reviewing the proportionality of sentences. *Id.* at 1000. The last common principle is that "the Eighth Amendment does not require strict proportionality between crime and sentence." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring). Only extreme, grossly disproportionate, sentences are forbidden. *Id.*

101. *Id.* at 1002-05. Harmelin's crime was not minor; the amount of cocaine he possessed had the potential of yielding 32,500 to 65,000 doses. *Id.* at 1002.

[D]rugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture.

*Id.* Since Harmelin's crime was so serious, no comparative analysis is necessary. *Id.* at 1004. "[O]ne factor may be sufficient to determine the constitutionality of a particular sentence." *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring). "[I]ntra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.*

102. *Id.* at 1009 (White, J., dissenting).

103. *Id.* at 1010.

104. *Id.* at 1012. In *Weems*, 217 U.S. 349, the Court stated that "the inhibition [of the Cruel and Unusual Punishments Clause] was directed, not only against punishments which inflict torture, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Id.* (quoting *Weems*, 217 U.S. at 371). Scalia admits that there is a proportionality principle in death penalty cases. *Harmelin*, 501 U.S. at 1014 (White, J., dissenting). He fails to explain why the words "cruel and unusual" contain a proportionality principle for some types of cases, but not others. *Id.* In addition, there are limitations to a "purely historical analysis." *Id.* at 1014. Time brings changes, therefore, a principle must be capable of "wider application than the mischief which gave it birth." *Id.* (quoting *Weems*, 217 U.S. at 373). "This is particularly true of constitutions." *Id.* (quoting *Weems*, 217 U.S. at 373). Without a proportionality analysis, there

review.<sup>106</sup> The dissent concluded that application of the *Solem* factors shows that the sentence in this case was grossly disproportionate to the crime.<sup>107</sup>

Justices Stevens, while joining in Justice White's dissenting opinion, filed a separate dissenting opinion finding that the sentence at issue here was grossly disproportionate to the offense.<sup>108</sup> Justice

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would be "no mechanism for addressing a situation such as that proposed in *Rummel*, in which a legislature makes overtime parking a felony punishable by life imprisonment." *Id.* at 1018. Scalia claims that such an example would be easy to declare disproportional and would, therefore, never occur. *Harmelin*, 501 U.S. at 1018 (White, J., dissenting). However, "absent a proportionality guarantee, there would be no basis for deciding such cases should they arise." *Id.*

105. *See supra* text accompanying notes 70-87 (detailing the *Solem* analysis).

106. *Harmelin*, 501 U.S. at 1015 (White, J., dissenting). This "analysis has worked well in practice." *Id.* "Courts appear to have had little difficulty applying the analysis to a given sentence, and application of the test by numerous state and federal appellate courts has resulted in a mere handful of sentences being declared unconstitutional." *Id.* at 1015. It is clear that courts are not instituting their own subjective beliefs for those of the legislature. *Id.* at 1016. All the factors from *Solem* should be applied. *Id.* at 1019. The Court in *Solem* made it clear that "no one factor will be dispositive in a given case." *Id.* Numerous cases have used intrajurisdictional and interjurisdictional comparisons of crimes and punishments in making proportionality reviews. *Harmelin*, 501 U.S. at 1019 (White, J., dissenting). A court "would have no basis for its determination that a sentence was – or was not – disproportionate, other than the 'subjective views of individual [judges]'" if it only looked at the first *Solem* factor. *Id.* at 1020.

107. *Id.* at 1021. The sentence of life in prison without the possibility of parole is the most severe possible sentence, since Michigan has no death penalty. *Id.* at 1022.

[I]n evaluating the gravity of the offense, it is appropriate to consider "the harm caused or threatened to the victim or society," based on such things as the degree of violence involved in the crime and "[t]he absolute magnitude of the crime," and "the culpability of the offender," including the degree of requisite intent and the offender's motive in committing the crime.

*Id.* (quoting *Solem*, 463 U.S. at 292-93). Possession of drugs mostly affects the possessor. *Id.* The ripple effect on society is usually a consequence of addiction and not mere possession. *Harmelin*, 501 U.S. at 1022-23. "Because possession is necessarily a lesser included offense of possession with intent to distribute, it is odd to punish the former as severely as the latter." *Id.* at 1024. The penalty of life in prison without the possibility of parole is reserved for three offenses in Michigan: "first-degree murder; manufacture, distribution, or possession with intent to manufacture or distribute 650 grams or more of narcotics; and possession of 650 grams or more of narcotics." *Id.* at 1025-26 (cites omitted). Second-degree murder and armed robbery do not carry as harsh a penalty as the crime at issue here. *Id.* at 1026. *Harmelin* has been treated as, or more, severely than criminals who have committed graver crimes. *Id.*

No other jurisdiction imposes a punishment nearly as severe as Michigan's for possession of the amount of drugs at issue here. Of the remaining 49 States, only Alabama provides for a mandatory sentence of life without parole for a first-time drug offender, and then only when a defendant *possesses 10 kilograms* or more of cocaine.

*Id.*

108. *Harmelin*, 501 U.S. at 1029 (Stevens, J., dissenting). Justice Blackmun similarly agreed with Justice White's dissent while also joining Justice Stevens in his separate opinion. *Id.* at 1028. The type of sentence at issue here "must rest on a rational determination that the punished 'criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.'" *Id.* (quoting *Furman*, 408 U.S. at

Marshall also separately dissented to restate his opinion that capital punishment is always “cruel and unusual.”<sup>109</sup> Yet Justice Marshall agreed with Justice White’s finding that there is a general proportionality requirement in both capital and non-capital cases.<sup>110</sup>

### III. STATEMENT OF THE CASE

#### A. *Statement of Facts*

Leandro Andrade is a longtime heroin addict.<sup>111</sup> On November 4, 1995, he stole five videotapes worth \$84.70 from a K-Mart store in Ontario, California.<sup>112</sup> Two weeks later, Andrade stole four videotapes worth \$68.84 from another K-Mart store in Montclair, California.<sup>113</sup> In both cases, store personnel stopped Andrade before he left the premises.<sup>114</sup> Andrade’s heroin addiction prompted these crimes.<sup>115</sup>

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307). The Federal Sentencing Guidelines, including all relevant enhancements, would have only sentenced Harmelin to 10 years. *Id.* at 1029. In most states, the period of imprisonment would be substantially shorter. *Id.*

109. *Harmelin*, 501 U.S. at 1027 (Marshall, J., dissenting). “I adhere to my view that capital punishment is in all instances unconstitutional.” *Id.*

110. *Id.* According to Justice Marshall, if the Court properly applied the proportionality principle in this case it would have concluded that “mandating life sentences with no possibility of parole even for first-time drug possession offenders is unconstitutional” because it is disproportional and the Constitution requires sentences to be proportional. *Id.*

111. *Andrade v. Attorney General of California*, 270 F.3d 743, 748 (9th Cir. 2001) *rev’d*, 538 U.S. 63 (2003). Andrade’s pre-sentence report indicates that he has been a heroin addict since 1977. *Lockyer v. Andrade*, 538 U.S. 63, 67 (2003). Heroin addiction occurs quickly. NarcOnon, *Heroin Addiction Treatment*, available at <http://www.drugaddictiontreatment.info/heroin.htm> (last visited Sept. 2, 2004). Addicts need more heroin each time in order to satisfy this addiction. *Id.* The habit can cost “\$100-\$200 a day.” *Id.* This “can cause addicts to quickly turn to lives of shoplifting, burglary, theft, drug dealing, and prostitution to support their habits.” *Id.* Recent years have seen an increase in heroin addiction of 20% mostly due to the fact that it is cheaper, more potent, and more is available. *Id.* In California, heroin is “cheap, potent, and plentiful.” *Id.* Emergency rooms see two to three overdoses each day. NarcOnon, *supra*.

112. *Lockyer*, 538 U.S. at 66.

113. *Id.* Shoplifting is a problem. See Monifa Marrero, *Heavy Lifting: Shoplifters Under the Microscope*, UVISION (April 2003), available at [http://www.uvi.edu/pub-relations/u\\_vision/\\_private/shoplifting.htm](http://www.uvi.edu/pub-relations/u_vision/_private/shoplifting.htm). The K-mart store in Lockhart Gardens suffered \$27,000 in losses due to shoplifting from September 2002 to January 2003. *Id.* Of the \$31 billion in inventory shrinkage, \$10 billion resulted from shoplifting. *Id.* Effects of shoplifting go beyond the cost to retailers. *Id.* The average family of four will pay an additional \$440 this year in higher prices. *Id.* In addition, retailers pay \$4.8 million a month for prosecution and protection. *Id.*

114. *Lockyer*, 538 U.S. at 66.

115. *Id.* at 67 (stating that Andrade’s pre-sentence report indicates that he stole the videotapes in order to support his habit).

## B. Procedural History

### 1. The Trial Court

The kinds of thefts that Andrade committed are normally considered minor in California.<sup>116</sup> However, petty theft with a prior conviction is a “wobbler” offense.<sup>117</sup> Andrade was previously convicted of several non-violent offenses.<sup>118</sup> Because of Andrade’s previous conviction for petty theft, the prosecutor charged him with two felonies instead of misdemeanors.<sup>119</sup> Since Andrade had two prior felonies,<sup>120</sup> the new felonies were charged as his third and fourth strikes under Three Strikes.<sup>121</sup> The jury found Andrade guilty as charged.<sup>122</sup> Andrade was sentenced to 50 years to life imprisonment.<sup>123</sup>

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116. *Andrade*, 270 F.3d at 749 (discussing that Cal. Penal Code 490 classifies both of these offenses as petty thefts subject up to six months in county jail and a \$1000 fine).

117. *Id.* See *supra* note 41 and accompanying text for the definition of a “wobbler” offense.

118. *Andrade*, 270 F.3d at 748-49. Andrade was convicted in 1982 of misdemeanor theft and drug diversion. *Id.* He served six days in county jail and received twelve months probation. *Id.* at 748. In 1983, Andrade pled guilty to three counts of first-degree residential burglary. *Id.* He was sentenced to 120 months in prison. *Lockyer*, 538 U.S. at 66. In 1988, Andrade was convicted of felony transportation of marijuana. *Andrade*, 270 F.3d at 748-49. He was sentenced to eight years in prison and served less than one and a half years. *Id.* at 749. In 1990, Andrade was convicted of petty theft. *Id.* He was sentenced to 180 days in jail. *Lockyer*, 538 U.S. at 66. Again in 1990, Andrade was convicted of felony transportation of marijuana. *Andrade*, 270 F.3d at 749. He was sentenced to six years in prison, but served less than two and a half years. *Id.* In 1991, Andrade received parole for escape from a federal prison. *Id.*

119. *Andrade*, 270 F.3d at 749.

120. *Id.* The three 1983 burglary convictions were Andrade’s first two strikes. *Id.*

121. *Id.*

122. *Id.* The trial court denied Andrade’s motions to strike his prior convictions and to reduce the charges from felonies to misdemeanors. *Id.* The trial court then bifurcated Andrade’s trial into two proceedings; the first one to determine whether he committed the current offenses he was charged with, and the second one to determine whether he had any prior convictions that would count as prior strikes under Three Strikes. *Andrade*, 270 F.3d at 749. He was found guilty of two counts of petty theft with a prior under California Penal Code 666. *Id.* The jury also found that he had been convicted of three counts of residential burglary in 1983. *Id.*

123. *Id.* This sentence is made up of two 25 years to life sentences for each of his thefts from the two K-Mart stores to be served consecutively. *Id.* Andrade will not be eligible for parole for 50 years because Three Strikes requires the sentences to be served consecutively. *Id.* (citing Cal. Penal Code §§ 667(c)(6), 1170.12(a)(6)). Andrade will be 87 years old before he is eligible for parole in 2046. *Id.* at 750. After receiving the sentence he stated, “I wasn’t aware that for that little mistake I was going to receive a 25-to-life sentence.” CBS News Stories, *Three Strikes* (July 9, 2003), at <http://www.cbsnews.com/stories/2002/10/28/6011/main527248.shtml>. One of the two forepersons on Andrade’s jury, Deborah Freeman, stated that she did not even know what the sentence would be until after the court handed it down. *Id.* She stated that it was “ludicrous.” *Id.* The other foreperson, Bridget George, was “pretty shocked” at the sentence and declared it “incredibly out of this world for me for this particular crime.” *Id.* She stated that “I think it is cruel and unusual punishment, 50 to life, for stealing videotapes.” *Id.*

## 2. Ninth Circuit Court of Appeals Decision

Andrade filed several appeals before the case reached the Ninth Circuit Court of Appeals.<sup>124</sup> The Ninth Circuit granted Andrade a certificate of appealability to raise the Eighth Amendment issue.<sup>125</sup> The court found that *Rummel*,<sup>126</sup> *Solem*,<sup>127</sup> and *Harmelin*<sup>128</sup> were clearly established federal law under the AEDPA.<sup>129</sup> Gross disproportionality analysis requires a comparison to all three cases.<sup>130</sup> The court found that Andrade's case was most analogous to *Solem* and the state court's failure to address that case was clear error and, therefore, an unreasonable application of federal law.<sup>131</sup> The court also found that Andrade's sentence was grossly disproportionate and a decision to the contrary was an unreasonable application of federal law.<sup>132</sup> The court

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124. *Andrade*, 270 F.3d at 750. The California Court of Appeal affirmed Andrade's conviction and sentence on May 13, 1997. *Id.* The opinion was unpublished, but the court rejected the argument that the sentence was cruel and unusual punishment under the Eighth Amendment. *Id.* The California Supreme Court denied Andrade's petition for review and made no comments. *Id.* Andrade filed a petition for a writ of habeas corpus in federal district court. *Id.* The petition was denied because "the state court[s] conclusions . . . were reasonable applications of federal law." *Id.* Judgment was entered on February 19, 1999. *Andrade*, 270 F.3d at 750. The district court denied Andrade's certificate of appealability. *Id.*

125. *Id.* The Ninth Circuit also appointed counsel to Andrade, who had initiated his appeal proceedings pro se. *Id.*

126. 445 U.S. 263 (1980) (finding that a sentence of 25 years to life with the possibility of parole in twelve years for fraudulent use of a credit card to obtain \$80 worth of goods and services was *not* cruel and unusual punishment). *See supra* notes 49-67 and accompanying text for a full analysis of this case.

127. 463 U.S. 277 (finding that a sentence of 25 years to life without the possibility of parole for uttering a "no account" check for \$100 was cruel and unusual punishment). *See supra* notes 68-87 and accompanying text for a full analysis of this case.

128. 501 U.S. 957 (finding that a sentence of 25 years to life without the possibility of parole for possession of 672 grams of cocaine was not cruel and unusual punishment). *See supra* notes 88-110 and accompanying text for a full analysis of this case.

129. *See Andrade*, 270 F.3d at 766. 28 USC § 2254 is the Anti-Terrorism and Effective Death Penalty Act, which circumscribes a federal habeas court's review of a state court decision. *Lockyer*, 538 U.S. at 70.

130. *Andrade*, 270 F.3d at 766.

131. *Id.* at 766-67. Even though Andrade's criminal history is close to the defendant's in both *Rummel* and *Solem*, his life sentence with parole in 50 years is most analogous to the *Solem* defendant's life without the possibility of parole as compared to the *Rummel* defendant's life with the possibility of parole in 12 years. *Id.* at 765. *See also* Respondent's Brief at 17, *Lockyer v. Andrade*, 538 U.S. 63 (2003) (No. 01-1127) (discussing why *Harmelin* is distinguishable from the present case).

132. *Andrade*, 270 F.3d at 767. The court applied the *Solem* test. *Id.* at 758. First, the court found that the sentence was harsh. *Id.* at 758-59. It was the second most severe sentence available. *Id.* at 759. Andrade would not be eligible for parole until he was 87 years old, yet the average life expectancy of a man was 77 years. *Id.* It was likely that Andrade would spend the rest of his life in prison. *Id.* However, where would this line of reasoning stop? Petitioner's Brief at 19, *Lockyer v. Andrade*, 538 U.S. 63 (2003) (No. 01-1127). What if Andrade had been 20 years old at the time of

reversed the judgment of the district court.<sup>133</sup>

### C. United States Supreme Court Decision

#### 1. The Majority Opinion

In 2002, the Supreme Court granted California Attorney General

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sentencing, what if the statistics on life expectancy change, or should health problems be included in the calculation? *Id.* No matter how minimal the possibility of parole for Andrade was, it still existed, and therefore Andrade's sentence was not the same as life without the possibility of parole. *Id.* *But see* Respondent's Brief at 17, *Lockyer* (No. 01-1127) (discussing how a fifty years to life sentence is the equivalent of a life sentence without the possibility of parole). *See also* 21A AM. JUR. 2D *Criminal Law* § 954 (2003) (discussing how age is a factor that can be considered in determining whether a sentence is proportional to the crime). Second, the court found that the triggering offense was not that grave. *Andrade*, 270 F.3d at 759. It was for a small amount of money and did not involve violence. *Id.* Petty theft of this kind is normally a misdemeanor. *Id.* Andrade's prior strike felonies were more than a decade earlier and adjudicated in one proceeding. *Id.* at 760. Comparing the severity of the sentence with the gravity of the offense, the court found an inference of gross disproportionality. *Id.* at 761. However, the petitioner argued that the absence of violence or looking at the value of what was taken should not minimize the offense. Petitioner's Brief at 12, *Lockyer* (No. 01-1127). The element of recidivism should play a larger role in determining the severity of the offense. *Id.* Society could have an interest in deterring offenses that do not involve violence. *Id.* at 13. Californians' judgment about which offenses should receive particular sentences should be given deference. *Id.* *But see* Respondent's Brief at 30, *Lockyer* (No. 01-1127) (discussing how no state should have unlimited discretion in determining sentences). Performing an intrajurisdictional comparison, the court found that Andrade's sentence was only exceeded by first-degree murder and a few violent felonies, such as kidnapping, train wrecking, or unlawful explosion resulting in death or great bodily injury, but most violent crimes are punished less severely. *Andrade*, 270 F.3d at 761-62. Andrade's sentence was twice as long as any of the sentences for recidivists cited by the state. *Id.* at 762. *See also* Respondent's Brief at 19, *Lockyer* (No. 01-1127) (discussing how grossly disproportionate Andrade's sentence was when compared with other sentences in the same jurisdiction). However, "Andrade's sentence is twice as long as other three-strikes defendants because he committed twice as many offenses." Petitioner's Brief at 19, *Lockyer* (No. 01-1127). Finally, the court performed an interjurisdictional comparison. *Andrade*, 270 F.3d at 762. There are only four other states with recidivist statutes which Andrade's offense would qualify for sentencing under: Rhode Island, West Virginia, Texas, and Louisiana. *Id.* at 763. However, Andrade would not have received as severe a sentence in any of those jurisdictions. *Id.* *See also* Respondent's Brief at 20-21, *Lockyer* (No. 01-1127) (discussing how Andrade's sentence compares with other sentences for the same crime in different jurisdictions). *See supra* note 43 for the definition of a recidivist statute. Petitioner disagrees with any interjurisdictional analysis because without uniform national guidelines some state will always have to be the most severe. Petitioner's Brief at 22, *Lockyer* (No. 01-1127). *But see* Respondent's Brief at 22, *Lockyer* (No. 01-1127) (discussing how, in other contexts, the Supreme Court has looked at a consensus of the states regarding punishments to determine whether a punishment was grossly disproportionate). Petitioner also argues that there can be no proportionality review for term of years sentences because there are no objective factors to apply to "sentences of different lengths." Petitioner's Brief at 19, *Lockyer* (No. 01-1127).

133. *Andrade*, 270 F.3d at 767. The writ of habeas corpus is to be issued if the state has not resentenced Andrade within 60 days of the issuance of this mandate. *Id.*

Bill Lockyer's<sup>134</sup> petition for a writ of certiorari.<sup>135</sup> The Court undertook the issue of whether the Ninth Circuit Court of Appeals violated the AEDPA<sup>136</sup> by reversing Andrade's conviction.<sup>137</sup> The first matter the Court addressed was identifying the clearly established federal law of the Supreme Court.<sup>138</sup> The only clearly established federal law is the gross disproportionality principle in the Eighth Amendment and its applicability to terms of years sentences.<sup>139</sup> After making this determination, the Court turned to the main thrust of its decision in deciding whether the California Court of Appeal's affirmation of the sentence<sup>140</sup> was "contrary to or involved an unreasonable application of" the clearly established principle of gross proportionately.<sup>141</sup> A writ of habeas corpus<sup>142</sup> was not appropriate in this case because the California Court of Appeal's decision was not "'contrary to' the governing legal principles."<sup>143</sup> The Court also did not find that the California Court of

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134. *Lockyer*, 538 U.S. at 63. Bill Lockyer served in the state Legislature before becoming California's Attorney General in 1999. Office of the Attorney General, at <http://ag.ca.gov/ag/lockyer.htm> (last visited Oct. 10, 2004). He played an important role in passing "hundreds" of toughened criminal laws. *Id.*

135. *Lockyer v. Andrade*, 535 U.S. 969 (2002) (granting a petition for writ of certiorari).

136. 28 U.S.C. § 2254. The AEDPA "circumscribes a federal habeas court's review of a state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003).

137. *Lockyer*, 538 U.S. at 70. This Court decided whether the Ninth Circuit Court of Appeals erred in finding that Andrade's sentence of 50 years to life in prison was "contrary to, or an unreasonable application of, clearly established federal law" according to 28 U.S.C. § 2254(d)(1). *Id.* at 66. The Court chose not to reach the issue of whether the state court erred in imposing two consecutive 25 years to life prison sentences under Three Strikes. *Id.* at 71. The Court decided whether Andrade could obtain habeas relief under 28 U.S.C. § 2254(d) on his Eighth Amendment claim. *Id.*

138. *Id.* A petition for habeas corpus can only be granted if a court's decision is "contrary to" or "an unreasonable application of" clearly established federal law. *Id.* at 73. The state contends that gross disproportionality is not clearly defined. Petitioner's Brief, *Lockyer v. Andrade*, 538 U.S. 63 (2003) (No. 01-1127).

139. *Lockyer*, 538 U.S. at 73. Supreme Court cases have not established a set of clear factors to determine gross disproportionality. *Id.* In *Solem*, the Court stated that a fifteen-year sentence is harsher than a twenty-five year sentence, but it would be difficult to say one violates the Eighth Amendment while the other does not. *Id.* In *Harmelin*, the Court stated that *Solem* was unclear and the proportionality decisions have not been clear or consistent. *Id.* Justices Kennedy and Scalia repeatedly stated in *Harmelin* that *Solem* was unclear and that there have been no clear and consistent proportionality decisions set down by the Supreme Court. *Id.* Therefore, the contours of gross disproportionality are unclear and the principle is "applicable only in the 'exceedingly rare' and 'extreme' case." *Id.*

140. *Lockyer*, 538 U.S. at 66. The California Court of Appeal affirmed Andrade's sentence of two 25 years to life in prison terms to be served consecutively for a "third strike" conviction. *Id.*

141. *Id.* at 73.

142. See *supra* note 26 for definition of a writ of habeas corpus.

143. *Lockyer*, 538 U.S. at 73-4. A decision is "contrary to" federal law "'if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme

Appeal's decision was an "unreasonable application of" federal law.<sup>144</sup> The Court reversed the judgment of the Ninth Circuit Court of Appeals.<sup>145</sup>

## 2. The Dissent<sup>146</sup>

The dissent agrees with the majority that gross disproportionality is part of the Eighth Amendment.<sup>147</sup> The dissent also agrees that the term "gross disproportion" is so general as to provide state courts with considerable leeway in determining gross disproportionality.<sup>148</sup> Nonetheless, the disproportionality review by the state court was erroneous and unreasonable for two reasons.<sup>149</sup> First, *Solem* is controlling<sup>150</sup> because the facts here are on-point with those in *Solem*.<sup>151</sup>

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Court] and nevertheless arrives at a result different from [its] precedent." *Id.* at 73 (quoting *Williams*, 529 U.S. at 405-06). *See also Bell*, 535 U.S. at 694. It was not contrary to the law for the California Court of Appeals to rely on *Rummel* in making its decision. *Lockyer*, 538 U.S. at 73. *Harmelin* and *Solem* specifically state that they did not overrule *Rummel*. *Id.* In addition, the state court was not presented with facts materially indistinguishable from this case. *Id.* at 74. Therefore, the state court could not have "arrived at a result different from [Supreme Court] precedent." *Id.* Andrade's sentence falls between the sentences in *Rummel* and *Solem* and, therefore, is not materially indistinguishable from either. *Id.* Andrade has the possibility of parole and the defendant in *Solem* did not. *Id.* *But see* Respondent's Brief at 17-18, *Lockyer v. Andrade*, 538 U.S. 63 (2003) (No. 01-1127) (discussing how parole in 50 years is equivalent to no parole at all). However, Andrade is eligible for parole in 50 years whereas *Rummel* is eligible in 12 years. *Lockyer*, 538 U.S. at 74.

144. *Lockyer*, 538 U.S. at 76. A state court unreasonably applies federal law if the state court correctly states the governing principle, but its application of that principle to the facts of the case is objectively unreasonable. *Id.* at 75 (citing *Williams*, 529 U.S. at 413). This is not the same as the decision being clear error. *Id.* "It is not enough that a federal habeas court, in its 'independent review of the legal question' is left with a 'firm conviction' that the state court was 'erroneous'" *Id.* (quoting *Andrade*, 270 F.3d at 753). Legislatures have broad discretion under the governing legal principle when making a sentence that fits within the proportionality scope. *Id.* at 76 (citing *Harmelin*, 501 U.S. at 1011). It was not objectively unreasonable for the Court of Appeals to believe that Andrade's sentence fit within the unclear contours of the proportionality principle. *Id.*

145. *Lockyer*, 538 U.S. at 77.

146. *Id.* (Souter, J., dissenting). Justice Souter was joined in his dissent by Justice Stevens, Justice Ginsburg, and Justice Breyer. *Id.*

147. *Id.* It is "clearly established" that the Eighth Amendment's exclusion of cruel and unusual punishments applies to terms of years sentences, and sentences that are "grossly disproportionate to the offense" are unconstitutional. *Id.*

148. *Id.* at 77-8.

149. *Lockyer*, 538 U.S. at 78 (Souter, J., dissenting).

150. *Id.* *Solem* is important because it is the Supreme Court's most recent review of the gross disproportionality of a recidivist's sentence and *Harmelin* established its authority. *Id.* The case also established a benchmark in applying the gross disproportionality principle. *Id.* Life in prison for uttering a \$100 no account check was grossly disproportionate regardless of the defendant's six previous non-violent felonies. *Id.*

151. *Id.* Andrade and the defendant in *Solem* (Helm) are both recidivists whose triggering offense was theft of minimal value. *Lockyer*, 538 U.S. at 78 (Souter, J., dissenting). Their criminal

Since the cases' facts are the same, the decisions should be the same.<sup>152</sup> Second, the policy behind Three Strikes<sup>153</sup> cannot support the imposition of a 25-year-to-life sentence for a second minor felony committed soon after the triggering offense.<sup>154</sup>

#### IV. ANALYSIS

##### *A. There is a Gross Disproportionality Principle in the Eighth Amendment*

Traditionally, proportionality has been a principle in determining punishments.<sup>155</sup> It was included in the Magna Carta, the First Statute of Westminster, and the English Bill of Rights.<sup>156</sup> This tradition

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backgrounds are comparable, including burglary (although Andrade's was residential whereas Helm's was not) and no history of violence or crimes against persons. *Id.* The sentences are also similar. *Id.* Even though Andrade's sentence is supposed to be two different sentences it can only be understood as one. *Id.* The thefts were separated by only two weeks, the victim was the same person, they were both committed for the same reason (to finance a heroin addiction), both offenses were charged in one indictment, and the state court spoke of the sentences as one, stating that the sentence carried a 50-year minimum. *Id.* Because of the 50-year minimum and the fact that Andrade was 37 years old when sentenced, his sentence is the equivalent of a life without parole sentence, the same as the sentence in *Solem*. *Id.* at 79.

152. *Lockyer*, 538 U.S. at 79 (Souter, J., dissenting). The only way to reach a different sentence is to either deny that parole eligibility after 50 years is not equivalent to having no possibility of parole or to ignore *Solem* as authority. *Id.* A man released after 50 years would have no real life left even if he was granted parole and survived to see it. *Id.* "Prison environments are themselves potentially damaging situations [that have] negative psychological effects." Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUBL. POL'Y & L. 499, 504 (1997). Long prison sentences serve to increase crime. *Id.* *Solem* has never been overruled and discounting it is wrong as a matter of law. *Lockyer*, 538 U.S. at 79 (Souter, J., dissenting).

153. *Lockyer*, 538 U.S. at 80. The policy behind the Three Strikes law is deterrence and incapacitation to protect the safety of the public. *Id.*

154. *Id.* at 79-80. Andrade did not become twice as dangerous because he stole five more videotapes. *Id.* at 82. Because the defendant's condition did not change between the commission of the two offenses, the sentence cannot be doubled without violating the gross disproportionality principle in the Eighth Amendment. *Id.* at 81-2. The second theft did not render Andrade so dangerous that after 25 years (the date he would be eligible for parole after the first sentence) he would need to be incarcerated for another 25 years. *Id.* at 82. There is no other jurisdiction that would double a sentence merely because two related thefts took place on separate occasions. *Lockyer*, 538 U.S. at 82 (Souter, J., dissenting). See text accompanying *supra* note 42 for the definition of a triggering offense.

155. *Solem*, 463 U.S. at 284.

156. *Id.* at 285. The Magna Carta stated that excessive amercements (fines) were not permitted. *Id.* at 284. The common law also recognized that prison sentences should be proportional since they had become normal criminal sanctions. *Id.* at 285. The English Bill of Rights, the language of which was later adopted in the Eighth Amendment, stated that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments

contributed to the United States Constitution's Framers' intent when they drafted the Eighth Amendment.<sup>157</sup> Because the English Bill of Rights contained a proportionality principle, when the Framers adopted its language they also adopted this principle.<sup>158</sup> However, some commentators have questioned whether the English Bill of Rights actually contained a proportionality principle with regards to punishments.<sup>159</sup> The traditional approach is that only "torture and barbarous punishments" were prohibited based on the Bloody Assizes.<sup>160</sup>

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inflicted." *Id.*

157. *Id.* at 285-86.

158. *Solem*, 463 U.S. at 285-86. "One of the consistent themes of the era was that Americans had all the rights of English subjects." *Id.* at 286. See also Chris Baniszewski, Comment, *Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment's Proportionality Requirement*, 25 ARIZ. ST. L.J. 929, 934-35 (1993) (discussing the history of the Eighth Amendment); Joel E. Hunter, Note, *State v. Bonner: In Search of an Objective Eighth Amendment Analysis for "Cruel and Unusual Punishment" in South Dakota*, 44 S.D. L. REV. 399, 399-400 (1999) (discussing how the drafters intended to include proportionality review in the Eighth Amendment). "Under the English system, both fines and sentences were required to be proportionate to the crime committed, and were therefore not solely limited to the 'mode' of punishment inflicted." *Id.* at 407. The Bill of Rights was drafted to ensure that these rights were protected. *Solem*, 463 U.S. at 286. But see *supra* note 96 (Justice Scalia's opinion in *Harmelin* discussing that the English Declaration of Rights did not include a proportionality principle). Even if the Framers intended the Eighth Amendment to protect more than the English Bill of Rights, the fact that the Framers used the same language shows their intent to provide the same minimum level of protection already provided to Englishmen. *Solem*, 463 U.S. at 286. See also Stephanie E. Carlson, State v. Pack: *Proportionality of Sentences – Should It Be a Necessary Factor in Determining Whether a Sentence "Shocks the Conscience of the Court?"* 40 S.D. L. REV. 130, 141 (1995) (discussing that the Eighth Amendment includes a proportionality principle because it was included in the language of the English Bill of Rights which the framers adopted); Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461, 501 (2000) (discussing the same).

159. Baniszewski, *supra* note 158 (discussing the history of the Eighth Amendment). But see Peter Mathis Spett, Note, *Confounding the Gradations of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in Harmelin v. Michigan*, 24 COLUM. HUM. RTS. L. REV. 203, 205 (1992/1993) (discussing that the framers may have had a different meaning of cruel and unusual in mind other than to prevent excessive punishments).

160. Baniszewski, *supra* note 158, at 931. The "Bloody Assizes" refers to the Duke of Monmouth and his compatriots' trials for treason. *Id.* The Duke of Monmouth's uncle inherited the throne of England, and apparently the Duke was not happy about this. *Id.* He invaded England but was defeated and executed. *Id.* A special commission was created in order to put the Duke's supporters on trial. *Id.* The guilty were executed in the traditional method for traitors, "drawing the man on a cart to the gallows where he was hanged by the neck, cut down while still alive, disemboweled and his bowels burnt before him, then beheaded and quartered." *Id.* A few years later, William took the throne and the English Declaration of Rights was written in response to the public outrage over the executions. Baniszewski, *supra* note 158, at 931-32. Therefore, this document was "meant to prohibit torture and barbarous methods of punishments." *Id.* at 932. See also Aisha Ginwalla, *Proportionality and the Eighth Amendment: And Their Object Not "Sublime, To Make the Punishment Fit the Crime,"* 57 MO. L. REV. 607, 610 (1992) (discussing that one

However, the meaning of cruel and unusual has evolved into more than just physical torture.<sup>161</sup> A more recent approach suggests that the English Bill of Rights was a response to the Titus Oates trial in 1685.<sup>162</sup> Proponents of this approach believe that the dissenting opinion in Oates' appeal shows the English Bill of Rights did include a proportionality principle.<sup>163</sup> Another argument is that, given the framer's interest in Enlightenment thinking, it is to be expected that they would adopt a proportionality principle.<sup>164</sup> Justice Scalia's majority opinion in *Harmelin* argued that the evidence of the day proved that the drafters did not intend to include a proportionality principle in the Eighth Amendment.<sup>165</sup> However, any evidence that the drafters did not intend

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argument was that the framers intended to prevent torturous and barbarous punishments).

161. *United States v. White*, 54 M.J. 469, 474 (C.A.A.F. 2001). "[T]he current standard is that the Eighth Amendment prohibits 'punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society,' . . . or which 'involve the unnecessary and wanton infliction of pain[.]'" *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976)).

162. *Baniszewski*, *supra* note 158, at 932. Since the types of punishments used during the "Bloody Assizes" were common for that time period, they cannot be the basis for the Rights that were adopted. *Id.* The Oates trial is the "only recorded use of the clause contemporaneous with its drafting." *Id.* Oates perjured himself by falsely accusing several Catholics of plotting the assassination of the King, resulting in their executions. *Id.* at 932-33. Since perjurers could no longer be sentenced to death, the judge sentenced Oates to "a fine of 2,000 marks, life imprisonment, pillorying four times a year, and whippings from Aldgate to Newgate and two days later from Newgate to Tyburn." *Id.* at 933. The judge also removed Oates' Canonical Habits. *Id.* The House of Lords affirmed Oates' sentence, but the recent approach focuses on the dissent. *Baniszewski*, *supra* note 158, at 933.

163. *Id.* The dissent stated that the punishments were "barbarous, inhuman, and unchristian; and there is no Precedent to warrant the Punishments of whipping and committing to Prison for Life, for the Crime of Perjury; which yet were but Part of the Punishments inflicted upon him." *Id.* They concluded that the "Judgments were contrary to Law and ancient Practice, and therefore erroneous." *Id.* at 934. The House of Commons reversed Oates' sentence as unauthorized. Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 44 (2000).

164. *Ginwalla*, *supra* note 160, at 610.

165. *Harmelin*, 501 U.S. at 1011. Justice Scalia concluded that since the Framers had examples of multiple state constitutions to choose from, which contained specific proportionality requirements and chose not to use the same language, they did not intend to include a proportionality principle in the Eighth Amendment. Mary K. Woodburn, Note, *Harmelin v. Michigan and Proportionality Review Under the Eighth Amendment*, 77 IOWA L. REV. 1927, 1936 (1992). "Both the New Hampshire Constitution, adopted 8 years before ratification of the Eighth Amendment, and the Ohio Constitution, adopted 12 years after, contain, in separate provisions, a prohibition of 'cruel and unusual punishments' and a requirement that 'all penalties ought to be proportioned to the nature of the offence.'" *Harmelin*, 501 U.S. at 977-78. See also Margaret P. Spencer, *The Sentencing Controversy: Punishment and Policy in the War Against Drugs: Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 360 (1995) (stating the same); Johnson, *supra* note 158, at 502-03 (stating the same). Only certain modes of punishment were prohibited by the English Bill of Rights. See Spencer, *supra*. However, this argument fails to realize that the Court gave the Eighth Amendment an "evolving meaning." *Id.* at 361.

to include a proportionality principle in the Constitution is still insufficient to overcome “the reach of the words that otherwise could reasonably be construed to include it.”<sup>166</sup>

For almost a century, the principle of proportionality has been recognized in this country.<sup>167</sup> The majority of the Justices have found a proportionality principle within the Eighth Amendment.<sup>168</sup> The first case in the United States to find a proportionality principle was *Weems v. United States*.<sup>169</sup> The court found that “[T]he inhibition [of the Cruel and Unusual Punishments Clause] was directed, not only against punishments which inflict torture, ‘but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.’”<sup>170</sup>

The text of the Eighth Amendment itself evidences a proportionality principle.<sup>171</sup> It states that fines and bails are not to be

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166. *Harmelin*, 501 U.S. at 1011 (White, J., dissenting). Justice Scalia failed to account for the fact that “constitutional language is often ‘boilerplate.’” Woodburn, *supra* note 165, at 1936-37. In addition, the States likely interpreted the broad language in the Eighth Amendment to encompass the language in their constitutions. *Id.* at 1937. This is supported by the fact that there was little protest during the conventions. *Id.* In all likelihood, States would have protested if they believed the United States Constitution was significantly different from their own constitutions. *Id.* Since the Eighth Amendment contains such general language, the Framers intended future generations to define the clause since the “meaning of a constitutional provision can change over time” and “situations may arise which the Framers never could have contemplated.” *Id.*

167. *Solem*, 463 U.S. at 286. The first case to find a proportionality principle was decided in 1910. *Id.* at 287. *See also Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring) (finding that, under the principle of stare decisis, a proportionality principle has existed for 80 years).

168. Hunter, *supra* note 158, at 407-08. *See also Parr*, *supra* note 163, at 41 (discussing the same); Rachel A. Van Cleave, “Death is Different,” *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages - Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 224-25 (2003) (discussing that at least six current Supreme Court Justices agree that the Eighth Amendment contains a proportionality principle); Michael J. O’Connor, Note, *What Would Darwin Say?: The Mis-Evolution of the Eighth Amendment*, 78 NOTRE DAME L. REV. 1389, 1400 (2003) (discussing the same). A sentence may violate the Eighth Amendment if it is not proportionate to the crime that resulted in the defendant’s conviction. *Esparza v. Lockyer*, No. C 99-3781 CRB (PR), 2001 WL 1528384, \*10 (N.D. Cal.) (finding that two 25 years to life sentences for drunk driving was not disproportionate). *See also Ewing*, 538 U.S. at 20 (finding that proportionality between sentences and crimes has been constitutionally recognized for almost one hundred years in the United States); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (finding that excessive sanctions are prohibited by the Eighth Amendment); *Edmund v. Florida*, 458 U.S. 782, 788 (1982) (finding that the Eighth Amendment’s cruel and unusual punishment clause includes a disproportionality principle); *Carmona v. Ward*, 439 U.S. 1091, 1093-94 (1979) (finding that proportionality between a crime and its punishment is a firmly rooted principle).

169. 217 U.S. 349 (finding that the Eighth Amendment includes a proportionality principle and a comparative analysis should be used to determine whether a sentence is disproportionate).

170. *Harmelin*, 501 U.S. at 1012 (Kennedy, J., concurring).

171. *Solem*, 463 U.S. at 289.

excessive.<sup>172</sup> This implies that punishments are not to be excessive either.<sup>173</sup> As Justice White has stated, “[i]n cases where the courts have a discretionary power to fine and imprison, shall it be supposed, that the power to fine is restrained, but the power to imprison is wholly unrestricted by it?”<sup>174</sup> Justice Scalia would claim such, but his reasoning is weak because his arguments would reduce the Eighth Amendment to meaningless words.<sup>175</sup>

In contrast, the utilitarian policies behind punishments – rehabilitation, deterrence, and incapacitation – do not support a proportionality requirement.<sup>176</sup> Utilitarian theories are forward-looking to future behavior, harm, and benefits, whereas proportionality is backward-looking to the seriousness of the offense committed.<sup>177</sup> Mandatory sentencing laws, such as Three Strikes, do not work because they leave no room for consideration of these goals when determining the appropriate sentence.<sup>178</sup>

The policy that supports proportionality is retribution.<sup>179</sup> Under a retribution theory, the seriousness of the crime “conveys the magnitude of the censure.”<sup>180</sup> Therefore, it would be unjust to not proportion

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172. *Id.* See *supra* note 19 for the text of the Eighth Amendment.

173. *Solem*, 463 U.S. at 289. “It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not.” *Id.* See also *Harmelin*, 501 U.S. at 1009 (White, J., dissenting) (discussing the text of the Eighth Amendment); Eli Velasquez, *The Shaping of an American Consensus Against the Execution of Mentally Retarded Criminals: A Case Note on Atkins v. Virginia*, 24 WHITTIER L. REV. 955, 980 (2003) (discussing how the Eighth Amendment includes a proportionality principle because it prohibits “excessive sanctions”).

174. *Harmelin*, 501 U.S. at 1010 (White, J., dissenting).

175. *Id.* Justice Scalia claims that if Americans had wanted a proportionality principle they would have included one. *Id.* He also claims that no punishment would have been unusual because the government was new and had no track record regarding criminal law. *Id.* However, criminal law was in existence in the States, and “there would have been no lack of benchmarks for determining unusualness.” *Id.* at 1011. If Justice Scalia’s argument was accepted, the Eighth Amendment would have no meaning. *Id.* See also *supra* note 154 (discussing other weaknesses in Scalia’s arguments).

176. Parr, *supra* note 163, at 60. Rehabilitation attempts to prevent future crime by creating a positive change in offenders. *Id.* at 61. Deterrence uses the threat of punishment to “deter persons at large (general deterrence) or particular individuals (specific deterrence) from offending or re-offending.” *Id.* at 60. Incapacitation reduces crime by physically restraining offenders from committing additional crimes. *Id.*

177. *Id.*

178. Richard S. Frase, *Sentencing Reform in Minnesota, Ten Years After: Reflections on Dale G. Parent’s Structuring Criminal Sentences: The Evolution of Minnesota’s Sentencing Guidelines*, 75 MINN. L. REV. 727, 741 (1991).

179. Parr, *supra* note 163, at 61. Retribution is expressing “censure for the particular conduct.” *Id.*

180. *Id.* If two crimes are significantly different in seriousness, their punishments should be

sentences to the seriousness of the offense.<sup>181</sup>

Another policy concern is that without a proportionality review, there would be no check on state legislatures' power.<sup>182</sup> Imagine if a state "legislature makes overtime parking a felony punishable by life imprisonment."<sup>183</sup> Without a proportionality principle, there would be no way for the Supreme Court to strike down imposition of this type of sentence.<sup>184</sup>

### B. *The Sentence in Lockyer Was Unconstitutional*

The Ninth Circuit Court of Appeals was correct in deciding that the lower court's decision in *Lockyer* was unconstitutional because it was contrary to and an unreasonable application of clearly established law.<sup>185</sup> However, the Supreme Court held the opposite.<sup>186</sup> The first inquiry under the AEDPA considers what law is clearly established.<sup>187</sup> There is not much disagreement that *Rummel*, *Solem*, and *Harmelin* are clearly established federal law.<sup>188</sup>

The next step is to determine whether the decision was "contrary to" or an "unreasonable application of" this clearly established federal law.<sup>189</sup> Contrary usually means "diametrically different, opposite in

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significantly different. *Id.* If the two offenses do not differ much, then neither should their sentences. *Id.*

181. *Id.* "Imposition of an unwarranted amount of punishment . . . is unprincipled and unjust." Parr, *supra* note 163, at 62.

182. *Harmelin*, 501 U.S. at 1018.

183. *Id.*

184. *Id.*

185. See *supra* notes 124-33 and accompanying text for the Ninth Circuit's decision.

186. See *supra* notes 134-45 and accompanying text for the Supreme Court's decision.

187. *Williams*, 529 U.S. at 379. The area of relevant law is limited to the law determined by the United States Supreme Court. *Id.* at 381. "A rule that 'breaks new ground or imposes a new obligation on the States or the Federal Government,' falls outside this universe of federal law." *Id.* (quoting *Teague*, 489 U.S. at 301). The law must also be "dictated by precedent existing at the time the defendant's conviction became final." *Id.* (quoting *Teague*, 489 U.S. at 301). If a law is expressed in generalized terms rather than as a bright-line rule, it still may be clear enough for this purpose. *Id.* at 382. Even if the rule requires a case-by-case examination, the multitude of applications do not themselves create a new rule; the rule is still clearly established for the purposes of the AEDPA. *Id.* (citing *Wright v. West*, 505 U.S. 277, 308-309 (1992) (opinion concurring in judgment)).

188. *Lockyer*, 2001 WL 1528384, at \*10. "A proper analysis of gross disproportionality requires a comparison to all three cases." *Id.* Under these cases, the court must first compare the penalty's harshness to the offense's gravity to determine if an inference of gross disproportionality is raised. *Id.* If there is such an inference, then the court must compare sentences imposed on others in the same jurisdiction with the current sentence. *Id.* Next, the court must compare sentences imposed for commission of the same offense in other jurisdictions. *Id.*

189. *Bell v. Cone*, 535 U.S. 685, 694 (2002).

character or nature, or mutually opposed.”<sup>190</sup> The latter inquiry uses an objectively unreasonable standard.<sup>191</sup>

Because *Solem* is clearly established federal law and the lower court failed to review that case, the lower court unreasonably applied clearly established federal law.<sup>192</sup> However, the Supreme Court decided that the only clearly established federal law was a gross disproportionality principle.<sup>193</sup> This is incorrect because a case that is repeatedly applied as precedent cannot be unclear.<sup>194</sup> The lower court also unreasonably applied federal law by holding that Andrade’s sentence was not grossly disproportionate to his crime.<sup>195</sup> Many sentences for crimes and prior strikes that were worse than Andrade’s have been held to be grossly disproportionate.<sup>196</sup> The Supreme Court

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190. *Id.* at 698 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)). A court violates the “contrary to” clause if it “applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court] have done on a set of materially indistinguishable facts.” *Id.* at 694 (citing *Williams*, 529 U.S. at 404-405). See also *Young v. Dretke*, No. 02-50341, 2004 WL 42623, at \*5 (5th Cir. Tex. 2004) (stating the same); *Mitchell v. Esparza*, 124 S.Ct. 7, 10 (2003) (stating the same). “A state court need not even be aware of our precedents, ‘so long as neither the reasoning nor the result of the state-court decision contradicts them.’” *Mitchell*, 124 S.Ct. at 10.

191. *Bell*, 535 U.S. at 694. A state court violates the “unreasonable application” clause of the AEDPA if it “correctly identifies the governing legal principle from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case.” *Id.* See also *Young*, 2004 WL 42623 at \*5 (defining the phrase “unreasonable application of”).

192. See *supra* notes 139, 143 and accompanying text (discussing how *Solem* was clearly established and why not applying it is an unreasonable application of clearly established federal law).

193. See *supra* note 139 and accompanying text for this discussion.

194. See e.g. *Ewing*, 538 U.S. 11; *Romero*, 99 Cal. App. 4th 1418; *Lockyer*, 2001 WL 1528384.

195. See *supra* note 132 and accompanying text (discussing why the sentence in *Lockyer* was grossly disproportionate). See also *infra* notes 200-01 and accompanying text (discussing why the sentence in *Lockyer* was grossly disproportionate). Most violent crimes in California receive shorter sentences than the one Andrade received. Allan Ides, *Habeas Standards of Review Under* 28 U.S.C. § 2254(d)(1): *A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 732 (2003). Andrade’s sentence was twice as long as any he would receive in most other jurisdictions. *Id.* Only in Louisiana would Andrade have received such a severe sentence. *Id.* at 733.

196. Romualdo P. Eclavea, Annotation, *Imposition of Enhanced Sentence Under Recidivist Statute as Cruel and Unusual Punishment*, 27 A.L.R. FED. 110, § 7 (2004). A sentence imposed under a valid recidivist statute may be unconstitutional if it fails to take into account the goals of punishment, it is imposed only for the purpose of hurting the defendant, and it is grossly disproportionate. *Id.* A defendant, whose prior strikes consisted of writing a bad check for \$50, transporting \$140 worth of forged checks across state lines, and perjury, received a life sentence which the court held to be grossly disproportionate under West Virginia’s valid recidivist statute. *Id.* A life sentence received for heroin possession was grossly disproportionate when the maximum sentence for a first time offender was three years. *Id.* A defendant convicted of petty theft should not receive a life sentence. See WITKIN & EPSTEIN, *supra* note 10, § 355. Earnest Bray Jr. was

decided that Andrade's sentence could not be held grossly disproportionate because it fit within the unclear contours of the proportionality principle.<sup>197</sup> As discussed previously, the federal law with regards to proportionality of sentences is clear enough to determine that Andrade's sentence is grossly disproportionate.<sup>198</sup> If the Supreme Court continues with its line of reasoning, no term-of-years sentence will ever be found grossly disproportionate.<sup>199</sup>

The lower court also violated the AEDPA's "contrary to" prong because *Solem* is materially indistinguishable from *Lockyer*.<sup>200</sup> The Supreme Court's main problem with holding that *Solem* and *Lockyer* are on-point with each other is the fact that the defendant in *Solem* did not have the possibility of parole and the defendant in *Lockyer* did.<sup>201</sup> However, a minimum sentence of fifty years is the functional equivalent of no parole; thus, the fact that a sentence contains the possibility of parole should not carry a great deal of weight when determining

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convicted of shoplifting videotapes which he blames on his use of drugs. Jason Hoppin, *9th Circuit in the Strike Zone: Judges Ask Sentencing Scheme Trailblazer to Argue Two More Appeals*, S.F. RECORDER, Nov. 20, 2001, at 1. He had prior convictions for armed robbery. *Id.* Richard Brown was convicted of car theft. *Id.* His prior strikes occurred 10-15 years previously. *Id.* Both men received 25-years-to-life sentences as opposed to Andrade's sentence of 50 years to life. *Id.* See also e.g. *Hutto v. Davis*, 454 U.S. 370, 371, 375 (1982) (Powell, J., concurring) (finding that a sentence of 20 years and a fine of \$10,000 on each count for possession of marijuana with an intent to distribute and distribution of marijuana was grossly disproportionate); *Robinson v. California*, 370 U.S. 660, 667 (1962) (finding that a sentence of 90 days for being a drug addict was cruel and unusual because "even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"); *Henderson v. Norris*, 258 F.3d 706, 707, 710, 712 (8th Cir. 2001) (holding that a life sentence for a first-time conviction of .238 grams of cocaine base worth \$33.33 was grossly disproportionate); *Thompson v. Bock*, No. 01-10021-BC, 2004 WL 306106, \*2, \*16 (E.D. Mich. 2004) (discussing that concurrent sentences of forty to sixty years for being a felon in possession of a firearm is severe and the court would have chosen a lesser minimum sentence); *State v. Davis*, 79 P.3d 64, ¶¶ 7, 10, 48 (Ariz. 2003) (holding that a minimum sentence of 52 years imprisonment for "four counts of sexual misconduct with a minor" was disproportionate after taking the particular facts into question).

197. See *supra* note 144 (discussing why the sentence in *Lockyer* was not an unreasonable application of clearly established federal law).

198. See *supra* note 192 and accompanying text (discussing that *Solem* is clearly established federal law).

199. Nathan H. Seltzer, Note, *When the Tail Wags the Dog: The Collision Course Between Recidivism Statutes and the Double Jeopardy Clause*, 83 B.U.L. REV. 921, 926 (2003). Only the "unrealistic example of a life sentence for overtime parking" would qualify. *Id.*

200. See *supra* note 132 (discussing the analogy between the *Solem* and *Lockyer* cases). The facts of *Solem* are on-point with the facts of *Lockyer*. Seltzer, *supra* note 199, at 928. By the Court holding that they were distinguishable and that Andrade's sentence was not grossly disproportionate, it merely claims there is a proportionality principle but leaves it without any meaning. *Id.*

201. See *supra* note 139 (discussing why *Lockyer* was not materially indistinguishable from *Solem*).

proportionality.<sup>202</sup> Therefore, it is contrary to clearly established federal law to reach a different conclusion than that which the *Solem* Court reached, which was that the sentence was grossly disproportionate.<sup>203</sup>

### C. *The Policies Behind California's Three Strikes Are Not Being Met*

Three Strikes is intended to incapacitate those who threaten the public safety and deter illegal conduct.<sup>204</sup> However, offenders who threaten public safety are not the ones who are usually affected by Three Strikes.<sup>205</sup> Individuals sentenced under Three Strikes tend to be older

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202. See *supra* notes 132 (discussing how Andrade's sentence with parole is analogous to the sentence in *Solem* that does not include parole). But see *Lugo v. Hickman*, No. C 99-5196 WHA (PR), 2003 WL 1798122 (N.D. Cal. 2003) (holding that because the defendant had the possibility of parole his sentence was distinguishable from *Solem*). Just because a convict is given a sentence that includes the possibility of parole does not mean that he will be paroled, only that he would be eligible for parole. *Sonner v. State*, 955 P.2d 673, 675 (Nev. 1998). The granting of parole does not change a prisoner's status as a convict. 67A C.J.S. *Pardon & Parole* § 61 (2003). A paroled prisoner is still in the custody of the state. *Id.* "Parole is in legal effect imprisonment." *Id.* In addition, a lengthy sentence has the same effect as a life term. *People v. Carson*, 560 N.W.2d 657, 663 (Mich. Ct. App. 1996). See also *State v. Davis*, 79 P.3d 64, ¶¶ 7, 10, 48 (Ariz. 2003) (holding that a sentence of 52 years without the possibility of parole was grossly disproportionate even though the crime was four counts of sexual misconduct with a minor). Judge Paez found that the fact that Andrade will be 87 years old before he is eligible for parole makes his sentence the functional equivalent of a life sentence. Tony Mauro, *Supremes Grant Review of Three Strikes Cases*, S.F. RECORDER, April 2, 2002. See also Danya W. Blair, *A Matter of Life and Death: Why Life Without Parole Should Be A Sentencing Option in Texas*, 23 AM. J. CRIM. L. 191, 206 (1994) (discussing how proponents of Texas' forty-year minimum capital murder sentence see it as equivalent to life without the possibility of parole). But see *United States v. Ortiz*, No. 93-5473 slip op. at 2 (4th Cir. 1995) (*per curiam*) (holding that there is no proportionality review for sentences of less than life without the possibility of parole); *United States v. Lockhart*, 58 F.3d 86, 89 (4th Cir. 1995) (holding the same).

203. *Solem*, 463 U.S. at 303 and see *supra* notes 75 and 82.

204. *Ewing*, 538 U.S. at 15. See also CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL LAW § 1 (15th ed. 2003). The goals of Three Strikes is to keep the public safe by incarcerating recidivist and to deter criminal conduct. Daniel Rogers, Note, *People v. Fuhrman and Three Strikes: Have the Traditional Goals of Recidivist Sentencing Been Sacrificed at the Altar of Public Passion?*, 20 T. JEFFERSON L. REV. 139, 164 (1998).

205. David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557, 573-74 (2000). Three Strikes has been unsuccessful in targeting violent felons because its application has mostly occurred in cases involving marijuana. *Id.* The main triggers for Three Strikes are non-violent crimes and drug offenses. *Id.* at 574. These type of offenses account for 85% of those convicted under Three Strikes. *Id.*

[D]uring the first eight months of California's three strikes law, 70% of those sentenced under it were for nonviolent and drug related offenses, and 41% of those subject to three strikes were there because of a property offense as opposed to 17% of those who committed a second strike felony offense.

*Id.* "Between April 1994 and March 1996, only 14.5 percent of two-strikes sentences and 25.5 percent of three-strikes sentences were for crimes against the person." Joanna M. Shepherd, *Fear of*

and, therefore, less likely to commit more crimes because they are at the end of their criminal careers.<sup>206</sup> The types of individuals who are most greatly affected by Three Strikes are not those individuals whom Three Strikes intended to incarcerate.<sup>207</sup>

Furthermore, Three Strikes is not deterring crime.<sup>208</sup> A comparison

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*the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159, 164 (2002). "Property crimes accounted for 41.1 percent of two-strikes sentences and 38.8 percent of three-strikes sentences, while drug offenses accounted for 31.6 percent and 22 percent, respectively." *Id.* "As of June 30, 2002, the total number of defendants serving life in prison under Three Strikes for identifiable offenses was 7,148." Ricciardulli, *supra* note 41, at 32. "42.7% of the total defendants serving life were there due to non-serious current offenses." *Id.*

Of this total, in 344 cases, or 4.8%, the current offense was petty theft with a prior; in 115 of the cases, or 1.6%, the current offense was non-vehicular grand theft; 457 cases, or 6.4%, were commercial/vehicular burglaries; and in 647 cases, or 9.1%, the current offense was possession of controlled substances for personal use.

*Id.*

206. Gordon, *supra* note 8, at 586. The most violent criminals tend to be under the age of 24. *Id.* Criminal behavior normally declines as a person enters his thirties and forties. *Id.* "[F]elony offenders in their 30s and 40s are eight and ten times, respectively, more likely to be sentenced under Three Strikes than felons in their early 20s." Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65, 66 (1999). However, Three Strikes will necessarily affect the older criminals who have had a chance to accumulate a criminal record. Gordon, *supra* note 8, at 586. "From 1978 to 1998, annual felony arrests of adults over age 30 increased by almost 167,000, while arrests of adults between ages 20 and 29 increased by just over 32,000." Males & Macallair, *supra*, at 66. While California's population's age increased by four years, the age of an arrestee increased by seven years. *Id.* After age 28, there is a steady and serious decline in criminal activity. *Id.* at 68. The effects of incapacitation are maximized when the most serious offenders are incarcerated. Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 CRIME & JUST. 359, 465 (2003). More crimes will be averted when high offenders are incapacitated during the time when they are at a high risk of offending. *Id.* at 466. Incapacitation policies are more effective when used during active criminal careers as opposed to when careers are in a downswing. *Id.*

207. McCulloch, *supra* note 31, at 280. Considering the murders that prompted the passage of Three Strikes, it is clear that the law intended to keep serious or violent convicts incarcerated. *Id.* at 278. The pamphlets distributed to voters for the Three Strikes proposal stated that Three Strikes "would keep 'rapists, murderers and child molesters behind bars where they belong.'" *Id.* at 280. *See also id.* at 280 n.20. Therefore, the voters did not intend that Three Strikes would "result in numerous life sentences for petty theft convictions." *Id.* at 280-81. Even Polly Klaas' father knew that Three Strikes was not working as intended, and he withdrew his support for it stating "we blindly supported the . . . initiative in the mistaken belief that it dealt only with violent crimes." Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 CAL. L. REV. 257, 264 (2002) (book review) [hereinafter Vitiello, *Hard Look*].

208. *See* Franklin E. Zimring & Sam Kamin, *Facts, Fallacies, and California's Three Strikes*, 40 DUQ. L. REV. 605 (2002) (discussing how Three Strikes is not reducing crime). While crime rates declined after March 1994 in nine major California cities, the crime rate had begun to decline 17 months before Three Strikes was enacted and crime continued to drop at the same rate after enactment. *Id.* at 605-06. Crime in California was only reduced by six-tenths of one percent after enactment of Three Strikes. *Id.* at 606. The deterrent effect of Three Strikes is only between zero and two percent of California crime. *Id.* at 606-07. The California Crime Index was not decreased

of states that have Three Strikes laws and States that do not shows that Three Strikes laws do not deter crime.<sup>209</sup> Three Strikes has no effect on the criminal mentality.<sup>210</sup> A growing body of research establishes that increased rates of incarceration do not translate into lowered crime rates as previously assumed.<sup>211</sup> Crime rates have fluctuated while

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by Three Strikes below what was expected by pre-existing trends. Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 177 (2003). The sharp decline in crime directly after Three Strikes enactment cannot be explained by that enactment. Vitiello, *Hard Look*, *supra* note 207, at 268. The results of longer prison terms would not kick in immediately. *Id.* The results would not come into effect until after an offender served the portion of his sentence he would have served anyway absent Three Strikes. *Id.* “Many criminologists suggest that the crime rate is dropping faster in California than elsewhere in the nation due to factors such as ‘a strong economy, a decreasing number of people in their crime-prone years, and fewer turf battles among crack cocaine dealers.’” *Id.* at 270. “Crime dropped 21.3% in the six counties that have been the most lenient in enforcing Three Strikes, while the toughest counties experienced only a 12.7% drop in their crime rates.” *Id.*; Michael Vitiello, *Three Strikes Law: A Real or Imagined Deterrent to Crime?*, 29-SPG HUM. RTS. 3, 4 (2002) [hereinafter Vitiello, *Real or Imagined*]. See also Males & Macallair, *supra* note 206, at 67-68 (comparing the crime rates in counties that invoked Three Strikes frequently with those that are more lenient). Sacramento and Los Angeles counties use Three Strikes seven times more than Alameda and San Francisco counties who rarely use the law, but they do not have a larger decrease in crime. *Id.* at 68. “San Francisco County, which had the lowest rate of Three Strike commitments, experienced a 35 percent decline in homicides, a 33 percent decline in all violent crimes, and a 28 percent decline in all index crimes.” *Id.* “Sacramento County, which had the highest rate of three strike commitments, [only] experienced a 23 percent decline in homicides, a 10 percent decline in all violent crimes, and a 7 percent decline in all index crimes.” *Id.* “Santa Clara [County], the sixth most frequent county to employ the ‘Three Strikes’ law, experienced a rise in violent crimes after the ‘Three Strikes’ law went into effect.” Tina M. Olson, Comment, *Strike One, Ready for More?: The Consequences of Plea Bargaining “First Strike” Offenders Under California’s “Three Strikes” Law*, 36 CAL. W. L. REV. 545, 560 (2000).

209. Doob & Webster, *supra* note 208, at 175. “From 1994-1995, violent crime in non-three strikes states fell nearly three times more rapidly than in three-strikes states.” *Id.* “In non-three-strikes states, violent crime fell by 4.6 percent.” *Id.* “In states which have passed three-strikes laws, crime fell by only 1.7 percent.” *Id.* “From 1994-1995, total crime decreased by an average of 0.4 percent in the three-strikes states and decreased by an average of 1.2 percent in states which have not implemented the three-strikes law.” *Id.*

210. *Id.* at 182. Sixty prisoners who had been in prison at least twice and at least once for armed robbery or burglary were interviewed. Doob & Webster, *supra* note 208, at 182. They stated that they did not consider the legal consequences when planning their crimes nor they think about getting caught. *Id.* Fifty-two of the prisoners never thought they would be caught; therefore, their possible sentence was unimportant. *Id.* Thirty-two of the prisoners did not even know what their punishments might be. *Id.* For those that had stopped committing crimes, reasons other than punishment were reported. *Id.*

211. Mauer, *Collateral Consequences*, *supra* note 3, at 1492. See also Symposium, *The Impact of Truth-In-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75 (1999) (discussing that there is no correlation between increased incarceration and lower crime rates). Massive increases in incarceration have failed to translate into a noticeable reduction in crime rates. Thomas C. Castellano, *Limits of the Criminal Sanction in Controlling Crime: A Plea for Balanced Punishments*, 23 S. ILL. U. L.J. 427, 433 (1999). A study by Irwin and Austin found that changes in crime rates between 1980 and 1991

incarceration rates have experienced steady increases.<sup>212</sup> The overall crime rate in California rose 2.4% in 2003.<sup>213</sup> Instead of lowering crime rates, increased incarceration, may actually be increasing them.<sup>214</sup>

#### *D. Three Strikes Does Not Make Sense Financially*

It costs \$21,000 to \$22,000 a year to incarcerate one prisoner, and the prison population is increasing dramatically due to Three Strikes.<sup>215</sup> It costs even more to incarcerate an aging prisoner, who Three Strikes is

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were not strongly related to increases in incarceration. *Id.* Between 1985 and 1995 the incarceration rate in the United States increased by 92%, but there was little impact on crime rates. Cynthia M. Conward, *Where Have All the Children Gone?: A Look At Incarcerated Youth in America*, 27 WM. MITCHELL L. REV. 2435, 2440 (2001). Frequent offenders are more likely to be imprisoned than less frequent offenders; therefore, offending rates among prisoners are higher than among those who are free. David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 461-62 (2001). A study by the National Research Council of the National Academy of Sciences found that the time served per violent crime from 1975 to 1989 when tripled had no measurable impact on violent crime rates. *Id.* at 462. The chances of being arrested for committing a crime in the United States are low. Florida Corrections Commission, *Crime Rates and Incarceration Rates: A Critical Review of the Literature*, available at <http://fcc.state.fl.us/fcc/reports/rates/rate.html> (last visited Oct. 9, 2004). Criminals know this; therefore, deterrence does not work. *Id.* Many factors influence crime. *Id.* The relationship between crime rates and incarceration is greatly weakened when factors other than incarceration are included. *Id.*

212. Mauer, *Promises*, *supra* note 9, at 12. New York is an illustrative example of the lack of correlation between increased incarceration and lowering crime rates. *Id.* New York violent crime rates declined 34% between 1990 and 1995 and property crime rates dropped 39%. *Id.* However, New York City's jail population actually declined and New York state's prison population barely rose above the rate of increase of the national prison population. *Id.*

213. Three Strikes and You're Out Official Website, *Three Strikes Information*, available at <http://threestrikes.org/articles.html> (last visited Sept. 3, 2004).

214. R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 596-97 (2003). Diana Rose and Todd Clear, two researchers at the City University of New York, found that crime rates went up after a certain incarceration level is reached. Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 80 n.95 (2002). Increased incarceration rates have weakened the communities' capacity to "raise children, provide a healthy environment for families, provide jobs for young and old, and sustain a vibrant civic life." *Id.* It is this weakening that has increased crime rates as incarceration rates increase. *Id.* The children of incarcerated parents are six times more likely than children without imprisoned parents to become incarcerated. Conward, *supra* note 211, at 2440.

215. Ardaiz, *supra*, note 48 at 27. As of 1998, at least 1,300 people had been incarcerated in California under Three Strikes. Cowart, *supra* note 3, at 643. *See also supra*, note 205 (discussing how many people have been imprisoned under Three Strikes and how often California uses the law). It is believed that to achieve a 10% drop in the crime rate, the prison population will have to double. Piquero, Farrington & Blumstein, *supra* note 206, at 381. Another effect Three Strikes will have on the prison population is that the number of older prisoners will increase and they cost the state more to incarcerate than younger criminals. Vitiello, *Real or Imagined*, *supra* note 208, at 4.

most likely to effect.<sup>216</sup> Some say that these costs are offset by society's economic benefits from reduced crime rates.<sup>217</sup> However, as discussed previously, crime rates are not being reduced.<sup>218</sup> "Increased funds are . . . necessary to maintain the prison housing of . . . inmates, as opposed to less costly methods of punishment."<sup>219</sup> Higher education will take the hit in the state budget for these extra costs.<sup>220</sup> Variations on

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216. Nkechi Taifa, "Three-Strikes-and-You're-Out"—Mandatory Life Imprisonment for Third Time Felons, 20 U. DAYTON L. REV. 717, 722 (1995). Three Strikes keeps prisoners in jail until they are well beyond the age of criminal activity. *Id.* However, only one percent of crime is committed by individuals over the age of sixty. *Id.* Absent Three Strikes, young criminals are still kept in prison after a third violent felony well past middle age when the risk they pose on society is small. *Id.* The cost of incarcerating an aging criminal is three times more than the cost of incarcerating the average prisoner. *Id.* "Three younger, more violent-prone offenders could be held in the place of one geriatric prisoner." *Id.*

217. Ardaiz, *supra* note 49, at 27. See also Brandon C. Welsh & David P. Farrington, *Monetary Costs and Benefits of Crime Prevention Programs*, 27 CRIME & JUST. 305, 305-06 (2000) (discussing the tangible and intangible costs of crime).

218. See *supra* notes 217-23 and accompanying text (discussing how crime is not being deterred by Three Strikes).

219. Cowart, *supra* note 3, at 632.

220. Loren L. Barr, Comment, *The "Three Strikes" Dilemma: Crime Reduction At Any Price?*, 36 SANTA CLARA L. REV. 107, 129 (1995). "The RAND study concludes that three strikes will cost Californians an additional \$5.5 billion annually, or about \$16,000 per serious crime prevented." *Id.* at 128. Prior to the enactment of Three Strikes, state spending was as follows: "36% for K-12 education, 35% for health and welfare, 12% for higher education, 9% for miscellaneous services such as pollution control and workplace safety, and 9% for corrections." *Id.* By 2002, Three Strikes will increase the budget allocation for corrections to 18%. *Id.* This will increase taxes by \$300 per year per taxpayer or one of the other budget areas could be cut. *Id.* Increasing taxes is unlikely at this point in California given the current political situation. *Id.* at 129. The budget for primary education cannot be reduced because it has a set minimum level. Barr, *supra*, at 129. The budgets for welfare and health have been growing each year, therefore, spending cuts are unlikely to come from these areas. *Id.* By 2002, "the state will be spending 46% of its general fund on primary education, 35% on health and welfare, and 18% on corrections, leaving a virtually nonexistent 1% for the combined higher education and miscellaneous services that now consume 21% of the state budget." *Id.* However, Three Strikes may not be implemented as planned. James Austin, "Three Strikes and You're Out": The Likely Consequences on the Courts, Prisons, and Crime in California and Washington State, 14 ST. LOUIS U. PUB. L. REV. 239, 247 (1994). With prosecutor's discretion, they could eliminate prior strikes in order to facilitate plea bargaining. *Id.* But see *infra* notes 241-44 and accompanying text (discussing the loss of judicial integrity resulting from prosecutorial discretion); *infra* note 233 (discussing that most Three Strikes cases are not being pled). Proponents of Three Strikes argue that only a few thousand more individuals will be incarcerated over two decades. Robert Heglin, Note, *A Flurry of Recidivist Legislation Means: "Three Strikes and You're Out,"* 20 J. LEGIS. 213, 224 (1994). See also Kent Scheidegger & Michael Rushford, *The Social Benefits of Confining Habitual Criminals*, 11 STAN. L. & POL'Y REV. 59, 61 (1999) (discussing that the actual prison population is much less than that predicted by RAND when it projected the costs of Three Strikes). Many of these prisoners would be recidivist and would keep costing the system more money for repeatedly going through the judicial system. Heglin, *supra*, at 224. See also Meredith McClain, Note, *Three Strikes and You're Out": The Solution to the Repeat Offender Problem?*, 20 SETON HALL LEGIS. J. 97, 121-22 (1996) (discussing that it costs more to prosecute recidivists than to keep them imprisoned and Three Strikes only affects a small number of

Three Strikes that cost less, such as requiring the third strike to be a serious felony, are possible, but they would also be less effective at crime reduction.<sup>221</sup>

Since Three Strikes was passed, jury trials and their related expenses have increased by 40% in California.<sup>222</sup> “Defendants charged under [Three Strikes] seek a [jury] trial in hope for acquittal instead of opting for the certainty of enhanced sentences under the second or third strike.”<sup>223</sup> Court resources are being diverted to adjudicating Three Strikes cases and away from civil cases.<sup>224</sup> Some counties have tried

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recidivists). The intangible costs of crime, such as the loss of life or physical injury and property loss, far outweigh the monetary costs of Three Strikes. Heglin, *supra*, at 224. Billions are spent to compensate victims for these types of loss and to prosecute habitual offenders. Derrick A. Carter, *Reflections of the Proposed Federal Crime Bill*, 8-JUN NBA NAT'L B. ASS'N MAG. 23, 23 (1994). See also Scheidegger, *supra*, at 61-63 (discussing the intangible costs of crime); Ilene M. Shinbein, Note, “Three-Strikes and You’re Out”: A Good Political Slogan to Reduce Crime, But a Failure in Its Application, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175, 199-200 (1996) (discussing that billions are spent on the costs of crime other than those related to prosecuting criminals). *But see supra* note 225 and accompanying text (discussing the number of individuals that have been imprisoned under Three Strikes); *supra* note 230 and accompanying text (discussing the extreme cost of Three Strikes and the areas of California’s budget that will suffer).

221. Peter W. Greenwood et al., *California’s New Three-Strikes Law: Benefits, Costs, and Alternatives*, RAND, available at <http://www.rand.org/publications/RB/RB4009/RB4009.word.html> (last visited Sept. 3, 2004).

222. Cowart, *supra* note 3, at 661. Four percent of all felonies in Los Angeles go to trial, but 25% of Three Strikes cases are going to trial. Schultz, *supra* note 215, at 575. “Second- and third-strike cases account for forty-eight percent of the state’s jury trials.” Joshua E. Bowers, “The Integrity of the Game is Everything”: The Problem of Geographic Disparity in Three Strikes, 76 N.Y.U. L. REV. 1164, 1194 (2001). Typical jury trials do not last as long as Three Strikes trials because more motions are filed by defendants and they fight harder. *Id.* at 1194-95. In addition, there has to be a second trial for sentencing. *Id.* at 1195. California trial times have increased to 106 days from 46 days for second strike cases and to 160 days for third-strike cases. *Id.* San Diego County predicts a tripling and Santa Clara County predicts a doubling of jury trials. Harvey Gee, *New Paradigms of Criminal Justice for the Twenty-First Century: A Review Essay*, 27 OHIO N.U.L. REV. 29, 64 (2000).

223. Schultz, *supra* note 215, at 575. See also Samara Marion, *Justice by Geography? A Study of San Diego County’s Three Strikes Sentencing Practices from July – December 1996*, 11 STAN. L. & POL’Y REV. 29, 35 (1999) (discussing the increase in Three Strikes jury trials). Only fourteen percent of second-strike cases are pled out and only six percent of third-strike cases have ended this way. J. Anthony Kline, *Comment: The Politicalization of Crime*, 46 HASTINGS L.J. 1087, 1089 (1995). “The result . . . is more trials, more public costs for prosecutors, and more costs associated with public defenders who represent most of those coming to bat for three strike felonies.” Schultz, *supra* note 215, at 575. “Because many three strikers are either unable or ineligible to make bail and more of them demand trials, local jails have become more crowded.” *Id.* at 580. Therefore, the costs of housing more individuals and paying for more security personnel to guard them have increased. *Id.* Pretrial detention has increased 11% in California local jails as a result of Three Strikes. *Id.* Many criminals sentenced under Three Strikes were convicted of drug crimes, but drug treatment programs or traditional sentences are less expensive than Three Strikes sentences. *Id.*

224. Gee, *supra* note 232, at 63. Nine out of twenty courts have indicated a lack of courtrooms for civil trials. *Id.* Three out of ten superior court districts are no longer hearing civil cases. Kline,

creative solutions to help with the increased jury trials and expenses such as asking for reimbursement from the state, allocating specialists to hear Three Strikes cases, releasing prisoners early, and increasing budgets.<sup>225</sup>

*E. Three Strikes Does Not Allow for the Maintenance of Judicial Integrity*

The monetary expense of Three Strikes will result in a loss of judicial system integrity.<sup>226</sup> There will not be enough prosecutors to try Three Strikes cases.<sup>227</sup> Therefore, prosecutors will use their discretion to avoid Three Strikes trials instead of applying the law.<sup>228</sup> Judges have also found ways to avoid imposing enhanced sentences under Three Strikes even though they are not supposed to have the power to do so.<sup>229</sup> Judges and prosecutors are not the only ones who have found ways to avoid imposing Three Strikes; witnesses, jurors and victims have also done so.<sup>230</sup>

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*supra* note 233, at 1090. Half of the district courtrooms have been changed from civil to criminal trials. *Id.* The Los Angeles Superior Court predicts that eventually two-thirds to three-fourths of civil courtrooms will be diverted to criminal trials. *Id.* Because of a shortage of criminal judges, many civil judges have been reassigned to criminal courts. *Gee, supra* note 232, at 64. Twenty-five percent of the courts are so overcome with criminal trials that they can no longer hear civil cases. *Id.*

225. *Gee, supra* note 232, at 64. Los Angeles County submitted a claim to the state seeking reimbursement of \$169 million for Three Strikes costs from 1994-1996. *Id.* San Diego County implemented a program where specialists, including public defenders, judges, and prosecutors, hear Three Strikes cases. *Id.* Some counties have increased their criminal justice agencies' budgets and others have shifted resources away from civil cases to criminal cases. E. D'Angelo, *Office of the Legislative Analyst*, 15-WTR CAL. REG. L. REP. 28, 30 (1995). Other counties have begun releasing non-Three Strikes inmates from jail early. *Id.*

226. Barr, *supra* note 230, at 135.

227. *Id.* at 136. Defendants will be advised by their attorneys to assert their right to a speedy trial. *Id.* at 135. However, since there will be so many Three Strikes trials, there will not be enough prosecutors to try all these cases. *Id.*

228. *Id.* at 136. Some defendants will not be charged or will be charged to lesser offenses to avoid longer Three Strikes jury trials. *Id.* "Wobblers that should probably be charged as felonies will be charged as misdemeanors to avoid a three strikes jury trial." Barr, *supra* note 230, at 136. "Prosecutors will be forced to strike the prior convictions of two and three strike defendants who the public would expect to receive, and who may well deserve, enhanced three strike sentences." *Id.* Some prosecutors just choose to ignore Three Strikes' ban on plea bargaining. Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 25 (1998).

229. Luna, *supra*, note 238 at 24. Judges have dismissed prior strikes in order to place the defendant outside the sentencing scheme of Three Strikes. *Id.* Judges have reduced crimes which were clearly felonies to misdemeanors. *Id.* Finally, some judges just do not apply Three Strikes. *Id.*

230. *Id.* at 25. Two times burglary victims refused to testify because they feared the burglars would receive a life sentence. *Id.* See also *supra* note 8 (discussing other times victims, jurors, and

Three Strikes was not intended to be a discretionary law and yet is has become one.<sup>231</sup> The amount of discretion invested in prosecutors alone results in a loss of judicial integrity.<sup>232</sup> Differing approaches to enforcing Three Strikes reflect a prosecutor's individual principles, and not the legislature's intent.<sup>233</sup> The discretion invested in prosecutors increases their plea bargaining power, thereby tilting the playing field drastically and unfairly in their favor.<sup>234</sup>

*F. How Does California's Three Strikes Law Compare with Similar Laws*

California's Three Strikes law is the harshest of its kind,<sup>235</sup> and is

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witnesses have circumvented imposition of Three Strikes).

231. Bowers, *supra* note 232, at 1183. Voters intended Three Strikes to end discretion by ending indeterminate sentences. *Id.* However, all they accomplished was to switch discretion from the judge to the prosecutor. *Id.* See also *infra* note 243 (discussing the discretion granted prosecutors under Three Strikes and its implications).

232. Bowers, *supra* note 232, at 1185. "Prosecutors in California's more populous counties [are] more likely to strike some offenses than others." Schultz, *supra* note 215, at 575. Equal protection issues are raised by a law that invests prosecutors with this amount of discretion. Gordon, *supra* note 8, 578 at n.314. The differences between counties "is an arbitrary factor and has no relation to culpability." *Id.* "Studies also indicate that local political pressures seem to determine the use of three strikes." Schultz, *supra* note 215, at 575. "In addition, the lack of flexibility has discouraged prosecutors from using these laws, and they prefer to employ other preexisting habitual offender laws already on the books." *Id.* The application of Three Strikes seems to depend on which county an individual is charged under. Shepherd, *supra* note 215, at 164. The "southern part of the state is very stringent in its application, whereas counties in the urban northern areas are 'cautious' in enforcing the law." *Id.* The fact that prosecutors are invested with too much discretion is exemplified by the odd fact that those who committed a single violent felony were sentenced to two years more in prison than those who committed two violent felonies. Charles R. Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship*, 34 J. MARSHALL L. REV. 281, 295 (2000). *But see* Ardaiz, *supra* note 49, at 24-5 (discussing that the public gives prosecutors discretion because it is their job to keep the community safe and, in order to maintain consistency, all discretion would have to be eliminated which would result in all third-strikers being treated the same regardless of the facts and circumstances of the case).

233. Bowers, *supra* note 232, at 1187. Prosecutors cannot claim that discretion is required based on the individual characteristics of those charged under Three Strikes. *Id.* However, some prosecutors, such as San Francisco District Attorney Terrence Hallinan, apply or don't apply the law to entire classes of individuals without basing the decision on individual characteristics. *Id.*

234. Samuel H. Pillsbury, *A Problem in Emotive Due Process: California's Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483, 489 (2002). In return for a guilty plea on the current offense, prosecutors will not charge strike enhancements. *Id.* See also *supra* note 238 (discussing the evils of allowing prosecutors to choose not to charge second and third strike enhancements). The defendant is no longer completely free to choose whether to accept or reject an offer made by the prosecutor's office. Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 589 (1999).

235. See *Ides*, *supra* note 205, at 732 (reviewing the *Lockyer* case). The two other leading three strikes states, Washington and Wisconsin, do not have a rate of incarceration anywhere near that of

dramatically different from other states.<sup>236</sup> This is exemplified by the fact that California has sentenced more offenders under Three Strikes than any other state,<sup>237</sup> and permits less serious offenses to trigger the law.<sup>238</sup>

Forty-one states other than California have enacted recidivist statutes.<sup>239</sup> Unlike California, twenty-five of those states require prior convictions to be “brought and tried separately” in order to qualify as strikes.<sup>240</sup>

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California. Cowart, *supra* note 3, at 625. *See also* Romero, 99 Cal. App. 4th at 1433 (discussing that Three Strikes is one of the most severe laws of its kind); WITKIN, EPSTEIN & MEMBERS OF THE WITKIN LEGAL INSTITUTE, *supra* note 10 § 355 (discussing that California is the only state where a person could receive a sentence of 25 years to life imprisonment for shoplifting a bottle of vitamins); Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55, 55 n.6 (2001) (discussing that California leads the nation in toughness and enforcing its three strikes law).

236. Vitiello, *Hard Look*, *supra* note 207, at 262.

237. *Id.* at 263. “The number of Three Strikes cases in California dwarfs the number of similar cases in all of the other states and the federal system combined.” *Id.* California uses its law more than any other state. *Id.* For example, even though California is six times more populous than Washington, it uses Three Strikes 33 times more than Washington uses their three strikes law. *Id.* The federal system has only sentenced 35 offenders under their three strikes law since it was enacted in 1994 through 1996. *Id.* During the same period, California sentenced 40,000 offenders under Three Strikes. Vitiello, *Hard Look*, *supra* note 207, at 263. There have only been 121 three strikes convictions in Washington through August 1998. Schultz, *supra* note 215, at 572-73. Florida only had 116 convictions through June 1998. *Id.* at 573. In Colorado, North Carolina, New Mexico, Tennessee and Pennsylvania, there have been five or less offenders sentenced under each state’s three strikes laws through August 1998. *Id.* Wisconsin has sentenced three offenders under its three strikes laws, New Jersey has sentenced six, and Utah has not sentenced any under its three strikes laws. *Id.*

238. Vitiello, *Hard Look*, *supra* note 207, at 262. Most other laws only target violent crime, but California includes residential burglary as a triggering offense. *Id.* The third triggering strike in California does not have to be for a violent crime and can even include crimes that could have been charged as misdemeanors. Mauro, *supra* note 202.

239. Rogers, *supra* note 204, 159-60. Twenty-four states and the federal government enacted three-strike laws between 1993 and 1995. John Clark, James Austin, & D. Alan Henry, *Three Strikes and You’re Out: Are Repeat Offender Laws Having Their Anticipated Effects?*, 81 JUDICATURE 144, 144 (1998).

240. Rogers, *supra* note 204, at 160. Some states specifically require this; others have a requirement like this within the statutory language. *Id.* Wyoming is an example of a state that explicitly requires this. *Id.* Georgia and Illinois are examples of states that have comparable language in their statutes. *Id.* More specifically, Illinois requires that for a second offense to qualify as a second strike, the second offense must be committed after the individual is convicted of a first qualifying offense. *Id.* at 161. Nearly all states and the federal government have some type of minimum sentencing requirements. Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 635 (2002). Thirty-nine states have truth-in-sentencing laws, twenty-four states have strikes laws, and seventeen states have sentencing guidelines for certain crimes. *Id.* No state has abolished parole boards or similar organizations that release prisoners. *Id.*

Two other statutes are comparable in harshness to Three Strikes, Washington and Texas.<sup>241</sup> However, even though Washington's statute is considered harsh, it still requires the third strike to be a serious felony rather than just any felony.<sup>242</sup> Texas goes beyond this to require the third strike to be a violent felony.<sup>243</sup>

### *G. Three Strikes Is Creating Violence Instead of Decreasing It*

Offenders facing Three Strikes sentencing tend to be more violent than they normally would be.<sup>244</sup> The type of prison overcrowding as a result of Three Strikes is a cause of prison violence.<sup>245</sup> Even increased recidivism can be traced to prison violence and overcrowding.<sup>246</sup> Increased recidivism and violence runs completely contrary to the goals of Three Strikes.<sup>247</sup>

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241. Mark W. Owens, Note, *California's Three Strikes Law: Desperate Times Require Desperate Measures – But Will It Work?*, 26 PAC. L.J. 881, 898 (1995).

242. *Id.* at 899. Washington statutes specifically enumerate the felonies that qualify for each strike. Clark, Austin & Henry, *supra* note 239, at 145.

243. Owens, *supra*, note 241, at 899. Texas also permits judges to use their discretion to sentence third-strike defendants to lesser sentences. *Id.*

244. Cowart, *supra* note 3, at 633. "Such felons will do whatever it takes to resist arrest by police officers, or will threaten, injure, or kill witnesses who may testify against them." *Id.* For example, Kevin Lee Robinson planned to bomb several county administrative buildings in order to destroy his criminal records and avoid being sentenced under Three Strikes. *Id.* at 666. Another example is Clinton James Warner who committed suicide so that he would not have to serve a possible life sentence for drug possession under Three Strikes. *Id.* A high rate of resisting arrest by third-strikers has been experienced by San Francisco police officers. Luna, *supra* note 228, at 31. For criminals serving life or extremely long sentences, the threat of another conviction is unlikely to prevent violence against inmates or prison guards. *Id.* The amount of violence against prison guards has doubled since the enactment of Three Strikes. *Id.* A Milwaukee, Oregon corrections officer, Dave Paul, wrote "[i]magine a law enforcement officer trying to arrest a twice-convicted felon who has nothing to lose by using any means necessary to escape. Expect assaults on police and correctional officers to rise precipitously." ACLU, *10 Reasons to Oppose "3 Strikes, You're Out,"* at <http://archive.aclu.org/library/pbr4.html> (last visited Sept. 3, 2004).

245. Cowart, *supra* note 3, at 644. This includes "assaultive or disruptive behavior." *Id.*

246. *Id.* Prison overcrowding and increased violence can cause recidivism. *Id.* Many offenders sentenced under Three Strikes are nonviolent offenders. *Id.* As a result of prison violence, these nonviolent criminals may become violent after they are released even though they exhibited no violent tendencies before incapacitation. *Id.* at 644-45. In addition, because prisons will become filled with third-strikers, officials will have to release other prisoners before they have fully served their time. Luna, *supra* note 228, at 32. This may include releasing violent criminals in order to make room for recidivist who are most likely at the end of their criminal career. *Id.* See also *supra* note 216 (discussing aging prisoners). Sherman Block, Los Angeles County Sheriff, had to release what he believed to be more violent criminals in order to make room for Three Strikes defendants. Luna, *supra* note 228, at 32. Thirty-three thousand inmates in Orange County California were released early due to overcrowding in prisons in 1996. *Id.* Sixty-four of the inmates released were sex offenders. *Id.*

247. Cowart, *supra* note 3, at 645. See also *supra* note 204 and accompanying text (discussing

## V. CONCLUSION

Three Strikes is the harshest law of its kind in any state and federal system, and it is clear that there are serious problems which require its repeal.<sup>248</sup> The law will prove to cost much more than it will ever save.<sup>249</sup> The policies and benefits that prompted the passage of Three Strikes are not being achieved.<sup>250</sup> To the contrary, the law may be turning nonviolent criminals into violent ones.<sup>251</sup> In addition, judicial integrity is declining due to the prosecutorial discretion inherent in Three Strikes.<sup>252</sup>

Even absent the problems that are inherent in Three Strikes, it suffers from the most fatal flaw of all; it results in decisions that violate the Eighth Amendment.<sup>253</sup> The Three Strikes sentence in *Lockyer* is unconstitutional.<sup>254</sup> It violated the Eighth Amendment because it was disproportionate to the crime committed and, as discussed previously, there is a proportionality principle inherent in the Eighth Amendment.<sup>255</sup> The Ninth Circuit Court of Appeals should have been permitted to overturn the sentence under the AEDPA because the decision was “contrary to” and an “unreasonable application of” clearly established federal law.<sup>256</sup> The decision was “contrary to” the law because the trial court failed to follow materially indistinguishable precedent, namely *Solem*.<sup>257</sup> The decision was also an “unreasonable application of” the

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the goals of Three Strikes); Ardaiz, *supra* note 48, at 1-2 (discussing the same).

248. See *supra* notes 42-43, 235-43 and accompanying text (comparing Three Strikes to the same type of law in other states and the federal system).

249. See *supra* notes 215-25 and accompanying text (discussing the financial impact of Three Strikes).

250. See *supra* notes 201-11 and accompanying text (discussing the policy goals of Three Strikes and whether or not they are being met).

251. See *supra* notes 244-47 and accompanying text (discussing the increase in violence caused by Three Strikes).

252. See *supra* notes 231-34 and accompanying text (discussing how prosecutorial discretion is causing the loss of judicial integrity).

253. See *supra* notes 155-84 and accompanying text (discussing that there is a disproportionality principle in the Eighth Amendment).

254. See *supra* notes 185-203 (discussing why the Supreme Court should have upheld the Ninth Circuit Court of Appeals decision that Andrade’s sentence was unconstitutional).

255. See *supra* note 139 (discussing how the sentence in *Lockyer* was disproportionate to the crime committed); 163-92 (discussing that the Eighth Amendment contains a disproportionality principle).

256. See *supra* notes 155-84 and accompanying text (discussing how the AEDPA permitted the Ninth Circuit Court of Appeals to overturn the sentence in *Lockyer* because it was disproportionate and contrary to clearly established precedent, namely *Solem*).

257. See *supra* notes 187-89 and accompanying text (finding that *Solem* is materially indistinguishable from *Lockyer* and should have been applied to Andrade’s sentence to determine that it was grossly disproportionate).

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law because the sentence was grossly disproportionate to the crime committed.<sup>258</sup>

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258. *See supra* notes 195-199 and accompanying text (discussing that the sentence in *Lockyer* was grossly disproportionate to the crime Andrade committed).