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THE CRUEL AND UNUSUAL REALITY OF CALIFORNIA'S THREE STRIKES LAW: *EWING V. CALIFORNIA* AND THE NARROWING OF THE EIGHTH AMENDMENT'S PROPORTIONALITY PRINCIPLE

INTRODUCTION

For the first time in *Ewing v. California*,[1] the United States Supreme Court addressed the constitutionality of California's three strikes law. Despite the controversial 25-year-to-life sentence given to Gary Albert Ewing for shoplifting three golf clubs, the Court rejected his claim that the length of his sentence was "grossly disproportionate," and, thus, "cruel and unusual," under the Eighth Amendment.[2] In fact, the Court's 5-4 decision confirms the proposition, first promulgated in *Rummel v. Estelle*,[3] that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[4]

California's three strikes law aims to punish repeat criminal offenders by "ensur[ing] longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."[5] Although voters originally intended to put "'rapists, murderers and child molesters behind bars where they belong,'"[6] in practice, non-violent and non-serious offenders make up the majority of those sentenced under three strikes.[7] Consequently, questions and concerns regarding the proportionality of repeat offenders' sentences have emerged in the shadows of the three strikes law.

This Comment analyzes California's heavily debated three strikes law and the Supreme Court's decision in *Ewing*. Part I offers a brief synopsis of the facts surrounding the *Ewing* case. Part II addresses the origins of three strikes, provides an overview of the law's key provisions, and examines the jurisprudence surrounding the proportionality of non-capital sentences under the Eighth Amendment. Part III is an in-depth look at the Court's plurality decision, which affirmed the indeterminate

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1. 538 U.S. 11 (2003).
2. *Ewing*, 538 U.S. at 30-31.
3. 445 U.S. 263 (1980).
4. *Rummel*, 445 U.S. at 272.
5. CAL. PENAL CODE ANN. § 667(b) (West 2003).
6. Autumn D. McCullough, *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, 280 (2002) (citing CAL. BALLOT PAMPHLET, GEN. ELECTION 5 (Nov. 8, 1994), *available at* http://holmes.uchastings.edu/ballot_pdf/1994g.pdf (last visited April 21, 2004)).
7. *Id.* at 277–81 (citing Carl Ingram, *Serious Crime Falls in State's Major Cities*, L.A. TIMES, Mar. 13, 1996, at A3).

life sentence in *Ewing*. Part IV argues that the *Ewing* plurality's extremely narrow threshold test stopped short of applying the fundamental principle of the "'evolving standards of decency'"[8] to Ewing's three strikes sentence and, thus, missed the mark in resolving the proportionality debate. Part IV also addresses the plurality's ruling that any reform of the law should be left to the legislature, by examining the plausibility of such reform, as well as the social and economic arguments for revising three strikes. Finally, the Comment concludes that the California legislature should accept the *Ewing* Court's challenge and limit the law's application to only *serious* and *violent* crimes: a solution that would not only alleviate the economic and social burdens of three strikes, but would also ultimately silence the controversy surrounding California's divisive recidivist statute.

I. FACTS OF *EWING V. CALIFORNIA*

On March 12, 2000, only ten months after being paroled from a nine-year prison term, Gary Ewing limped out of a pro shop in El Segundo, California in an attempt to hide three golf clubs in his pants leg.[9] Suspicious of Ewing, a shop employee notified the police, who subsequently arrested Ewing for theft in the golf course's parking lot.[10] The value of the three clubs totaled approximately $1,197.[11] As a result of his actions, the State convicted Ewing of "one count of felony grand theft of personal property in excess of $400."[12]

Ewing's criminal history dated back to 1984, when he pleaded guilty to theft at the age of twenty-two.[13] Between 1988 and September 1993, Ewing's "rap sheet" continued to grow. In particular, Ewing served time for a variety of offenses, including thefts, battery, burglary, and trespassing.[14] On December 9, 1993, Ewing was arrested and later convicted of "first-degree robbery and three counts of residential burglary," of an apartment complex in California.[15] In 1999, after serving approximately six years of a nine-year sentence, Ewing once again faced the wrath of California's criminal justice system for stealing the three golf clubs.[16]

Given Ewing's four prior strikes for the three burglaries and the robbery, Ewing desperately tried to avoid the harsh consequences of California's three strikes law. Specifically, during his sentencing hearing

8. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
9. Ewing v. California, 538 U.S. 11, 17-18 (2003).
10. *Ewing*, 538 U.S. at 18.
11. *See id.*
12. *Id.* at 19 (citing CAL. PENAL CODE ANN. § 484 (West. Supp. 2002); § 489 (West 1999)).
13. *Id.* at 18.
14. *Id.* at 18-19.
15. *Id.* at 19.
16. *Id.*

for stealing the clubs, Ewing asked the court to reduce his grand theft conviction to a misdemeanor under California's "wobbler" law.[17] Ewing also asked the trial court to use its discretion and "dismiss . . . some or all of his prior serious or violent felony convictions . . . ."[18] However, Ewing's pleas went unanswered. Instead, the trial court sentenced Ewing to 25-years-to-life under the three strikes law.[19]

On appeal, Ewing raised an Eighth Amendment argument contending that his sentence was grossly disproportionate to the crime of shoplifting three golf clubs.[20] Yet, the California Court of Appeals disregarded Ewing's claim, and affirmed his conviction.[21] The court justified Ewing's sentence pointing to "the legitimate goal [of the three strikes law] of deterring 'repeat offenders . . . .'"[22] The Supreme Court of California followed suit and declined to review Ewing's case.[23] Finally, the United States Supreme Court granted certiorari to address the constitutionality of Ewing's sentence.[24]

II. BACKGROUND

A. The Birth of the Three Strikes Law

California's three strikes law was the culmination of public and political concerns over the need for penological reform.[25] Following the murder of Kimber Reynolds by a parolee, Reynolds's father called on state officials to sponsor a measure directed towards incarcerating repeat offenders.[26] In response to his cries, Assembly Bill 971 emerged.[27] Mike Reynolds's extremely broad proposal endorsed substantial sentencing enhancements for a second felony, allowed a non-violent criminal history to necessitate a 25-year-to-life sentence, and accepted *any* felony in Cali-

17. *Id.* A "wobbler" is an offense that can be charged as either a misdemeanor or a felony at the court's discretion. *Id.* at 16-17. Grand theft is a "wobbler" despite the defendant's prior record. *Id.* (citing CAL. PENAL CODE ANN. § 489(b) (West 1999). Conversely, other crimes, which are typically categorized as misdemeanors, become "wobblers" because of the defendant's prior record. *Id.* at 1183 (citing CAL. PENAL CODE ANN. § 490 (West 1999); § 666 (2002)). If a court uses its discretion to lower a felony, such as grand theft, to a misdemeanor, a three strikes punishment can be avoided. *Id.*

18. *Id.* at 19.

19. *Id.* at 20. Ewing will not be eligible for parole for at least 25 years. Brief of Amici Curiae Families Against Mandatory Minimums at 10, Ewing v. California, 123 S. Ct. 1179 (2003) (No. 01-6978).

20. People v. Ewing, No. B143745, 2001 WL 1840666, at *3 (Cal. Ct. App. Apr. 25, 2001).

21. *Ewing*, No. B143745, 2001 WL 1840666, at *3.

22. *Id.* at *4.

23. *Ewing*, 538 U.S. at 20.

24. *Id.*

25. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 3–6 (2001).

26. Bill Jones, *Why the Three Strikes Law Is Working in California*, 11 STAN. L. & POL'Y REV. 23, 23 (1999).

27. Ewing v. California, 538 U.S. 11, 15 (2003).

fornia's penal system for the third strike.[28] Despite bipartisan support, the Assembly Committee on Public Safety defeated the bill soon after its introduction.[29]

By the beginning of 1994, five new versions of the three strikes legislation resurfaced in reaction to public fury over the kidnapping and murder of twelve-year-old Californian, Polly Klaas.[30] Rather than voting for one of these alternatives, the California legislature deferred the decision to Governor Pete Wilson, and announced it would pass any plan the governor selected.[31] Not surprisingly, Governor Wilson chose a "copycat" version of Reynolds's radical three strikes proposal to support his "getting tough on crime" campaign.[32] Upon the murder conviction of "career kidnapper," Richard Allen Davis, public support of the three strikes initiative intensified.[33]

By January 31, 1994, an amended version of Assembly Bill 971 passed the Assembly, and shortly thereafter, the California Senate, by considerable margins.[34] After Governor Pete Wilson signed the bill into law in March 1994, voters "overwhelmingly approved [Proposition 184] by a margin of 72 percent to 28 percent."[35] Ultimately, California enacted two codified versions of the three strikes law.[36] Following the birth of three strikes, the broad scope and dramatic effects of the law's unique provisions became a stark reality.[37]

B. Overview of Three Strikes' Statutory Provisions

Three strikes is "designed to increase the prison terms of repeat felons,"[38] by punishing offenders convicted of prior "serious"[39] or "vio-

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28. *See* ZIMRING ET AL., *supra* note 25, at 4. Reynolds's proposed three strikes program was significantly broader than any other habitual-offender laws being proposed in the nation. *Id.* For instance, Washington passed the first habitual-offender law in 1993, which enumerated only select, serious felonies, with a life sentence on the third conviction. *Id.* (citing Daniel W. Stiller, *Initiative 593: Washington's Voters Go Down Swinging*, 30 GONZ. L. REV. 433, 434-35 (1995)).

29. *Ewing*, 538 U.S. at 14, 15.

30. ZIMRING ET AL., *supra* note 25, at 6.

31. *Id.* By deferring the choice to the governor, the Democratic legislature hoped he would back down from tough on crime stance or "be politically neutralized if he persisted." *Id.*

32. *Id.* The governor rejected a narrow version of three strikes proposed by the California District Attorneys Association. *Id.*

33. *Ewing*, 538 U.S. at 15.

34. *Id.*

35. Jones, *supra* note 26, at 24. The passage of Proposition 184 was overshadowed by Proposition 187, which addressed immigration issues in California. *See* ZIMRING ET AL., *supra* note 25, at 6.

36. Shannon Thorne, *One Strike and You're Out: "Double-Counting" and Dual Use Undermines the Purpose of California's Three Strikes Law*, 34 U.S.F. L. REV. 99, 101 (1999). The two provisions included: CAL. PENAL CODE ANN. tit. 16, §§ 667(b)-(i) (2003) (based on Assembly Bill 971), and 1170.12 (2003) (premised on Proposition 184). *Id.*

37. *See* ZIMRING ET AL., *supra* note 25, at 17-22. For instance, by 1998 California had 40,000 sentences under its three strikes law while none of the other jurisdictions with recidivist statutes had reached 1,000 convictions. *Id.* at 20-21.

38. People v. Superior Court (Romero), 917 P.2d 628, 630 (Cal. 1996).

lent"[40] felonies, generally referred to as "prior strikes."[41] Paramount to the three strikes law is that both second-time and third-time convicted criminals receive enhanced sentences.[42] Specifically, an offender with one prior "serious" and/or "violent" strike must receive a sentence of "twice the term otherwise provided as punishment for the current felony conviction."[43] Under the "third-strike provision," an offender, who has two or more prior strikes, is sentenced to "an indeterminate term of life imprisonment," with the minimum term equaling at least twenty-five years.[44]

Although an offender's two prior strikes must fall under the definition of serious and/or violent felonies, the third strike, or "triggering offense," definition includes both non-violent and non-serious felonies.[45] The law also allows a "wobbler"—an offense that can be charged as either a misdemeanor or felony—to constitute a third strike.[46] For example, the "'petty theft with a prior'" statute, "classifies a petty theft as a 'felony'" if the offender's record contains at least one theft-related conviction.[47] As a result, a repeat offender who has committed one prior violent crime and one prior property-related crime will fall into the "wobbler" provision if convicted of petty theft.[48] On the other hand, a repeat offender with two prior violent crimes, and no history of property-related crimes, will not be subjected to a three strikes penalty.[49]

In order to mitigate the ostensible harshness of the law, supporters of three strikes point to the discretionary dilutions available to prosecutors and judges under California's legal system. First, prosecutors have an enormous amount of discretion in charging recidivists.[50] Although the law mandates that prosecutors "shall charge" repeat offenders with a third strike, in practice, prosecutors can choose to charge a "wobbler" as

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39. *See* CAL. PENAL CODE ANN. § 1192.7(c) (West 2003). Serious offenses include arson, burglary and assault with a deadly weapon among more than 30 enumerated offenses. *Id.*

40. *See id.*§ 667.5. Violent offenses include such crimes as murder, rape, mayhem and child molestation. *Id.*

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

42. *See* CAL. PENAL CODE ANN. § 667(e).

43. *Id.* §§ 667(e)(1), 1170.12 (c)(1). While the first strike must be a serious or violent felony, the second strike can be either a non-serious or non-violent felony. *See* Beres & Griffith, *supra* note 41, at 103.

44. CAL. PENAL CODE ANN. § 667(e)(2)(A) (stating that a minimum term of the indeterminate sentence is calculated as "the greater of: (i) Three times the term otherwise provided as punishment for each current felony conviction . . . . (ii) Imprisonment in the state prison for 25 years. (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement[s] . . . .").

45. Beres & Griffith, *supra* note 41, at 103.

46. *See Ewing*, 538 U.S. at 16.

47. *Id.* at 50 (Breyer, J., dissenting) (quoting CAL. PENAL CODE § 666 (2002)).

48. *Id.*

49. *Id.*

50. *See* ZIMRING ET AL., *supra* note 25, at 26.

either a felony or misdemeanor and, thus, spare the offender of an enhanced three strikes penalty.[51] Second, if an offender faces a third strike charge, the court may exercise leniency by dismissing prior felonies "in the furtherance of justice."[52] However, a judge's discretion is restricted to "proceed[ing] in strict compliance with section 1385(a) [of California's Penal Code], and is subject to review for abuse of discretion."[53] Additionally, the judge must consider whether the defendant falls outside the spirit of the three strikes law, by examining the offender's background, the present offense, and the nature of the offender's prior offenses.[54] Accordingly, a judge's exercise of discretion is substantially limited in scope and is rarely used.[55] Thus, while prosecutors maintain a substantial influence in determining a repeat offenders' punishment, "the checks and balances of judicial . . . discretion have been removed."[56]

Moreover, despite the legal system's alleged safeguards, California's three strikes is still considered "one of the harshest habitual offender laws in the nation."[57] Beyond the fact that any third felony triggers a three strikes penalty, once convicted, the law also precludes release of offenders for good credit at any time before the minimum term is served.[58] Furthermore, plea bargaining of prior strikes is not allowed, and out of state, as well as juvenile adjudications, can count as prior strikes.[59] Critics of three strikes note that both "dual use," (counting a prior felony conviction twice), and "double counting," (when a single act constitutes two strikes), add to the law's inconsistencies.[60] However, the primary critique of three strikes is that the 25-year-to-life sentence mandated under the law is "grossly disproportionate" to the crime and, consequently, in violation of the Eighth Amendment.[61] In order to fully understand the Supreme Court's plurality decision in *Ewing*, an analysis of the Court's prior decisions regarding the proportionality of non-capital sentences is imperative. Throughout the Court's lengthy examination of the Cruel and Unusual Punishments Clause over the years, the Court remains divided on whether the proportionality principle applies to non-capital sentences.

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51. *See* McCullough, *supra* note 6, at 284.

52. CAL. PENAL CODE ANN. § 1385(a) (West 2003) (giving judges the discretion to strike prior felonies to avoid enhancing a sentence); *see also Romero*, 917 P.2d. at 632 (recognizing that judges may use § 1385(a) to impose lesser sentences).

53. Brief of Amicus Curiae for Respondent Leandro Andrade at 6, Lockyer v. Andrade, 123 S.Ct. 1166 (2003) (No. 01-1127) (internal quotations omitted).

54. *Id.* at 7 (quoting People v. Williams, 17 Cal. 4th 148, 161 (Cal. 1998)).

55. *Id.* at 2.

56. *See* ZIMRING ET AL., *supra* note 25, at 27.

57. *See* McCullough, *supra* note 6, at 282 (citing Andrade v. Attorney Gen., 270 F.3d 743 (9th Cir. 2001) (recognizing that only four states, Rhode Island, Texas, West Virginia and Louisiana, have repeat offender laws that marginally compare to California's three strikes law)).

58. *Id.* at 283.

59. *Id.*

60. *See* Thorne, *supra* note 36, at 106-16.

61. *See* McCullough, *supra* note 6, at 278.

C. Supreme Court Jurisprudence Regarding Proportionality of Non-Capital Sentences

The Eighth Amendment demands that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[62] For more than a century, the Supreme Court has attempted the daunting task of determining whether the Eighth Amendment's Cruel and Unusual Punishments Clause includes a proportionality principle.[63] In addressing the proportionality question, courts often consider "'the evolving standards of decency that mark the progress of a maturing society.'"[64] Accordingly, the prohibition of grossly disproportionate sentences most frequently appears in death penalty cases due to the egregious nature of the punishment.[65] Although successful proportionality challenges to non-capital sentences are uncommon, the *Ewing* Court relied on four leading cases, *Rummel v. Estelle*,[66] *Hutto v. Davis*,[67] *Solem v. Helm*,[68] and *Harmelin v. Michigan*,[69] to address the proportionality of Ewing's three strikes sentence.

1. *Rummel v. Estelle*[70]

The Supreme Court first considered the constitutionality of recidivist statutes for non-capital offenses in *Rummel v. Estelle*.[71] In this 1980 case, the Court concluded that the "length of the sentence actually imposed is purely a matter of legislative prerogative."[72] The Court affirmed a mandatory life sentence with a chance of parole for Rummel's conviction of "obtaining $120.75 by false pretenses."[73] Although Rummel pointed to the absence of violence, the "small amount of money taken," and the harshness of Texas's recidivist statute in his argument, the Court

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62. U.S. CONST. amend. VIII.

63. *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910) (reasoning that punishment of *cadena temporal*, which entailed 15 years of hard labor with chains fastened to the prisoner's wrists and ankles at all times, constituted cruel and usual punishment); Graham v. West Virginia, 224 U.S. 616 (1912) (rejecting a claim that life imprisonment for horse theft was "cruel and unusual"); Robinson v. California, 370 U.S. 660 (1962) (finding a 90-day sentence excessive for the crime of being "addicted to narcotics"); Coker v. Georgia, 433 U.S. 584, 592 (1977) (suggesting that only "unique" forms of punishment can violate the Eighth Amendment, and holding that imposing capital punishment for rape of an adult woman was disproportionate).

64. Gregg v. Florida, 428 U.S. 153, 173 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

65. *See* Rummel v. Estelle, 445 U.S. 263, 272 (1980); *see also* Enmund v. Florida, 458 U.S. 782 (1982) (holding the death penalty is excessive for felony murder when the defendant did not take a life, attempt to take a life, or intend that a life be taken).

66. 445 U.S. 263 (1980).

67. 454 U.S. 370 (1982) (per curiam).

68. 463 U.S. 277 (1983).

69. 501 U.S. 957 (1991).

70. 445 U.S. 263 (1980).

71. *Rummel*, 445 U.S. 263.

72. *Id.* at 274.

73. *Id.* at 265-66. His two prior felonies included fraudulent use of a credit card to obtain $80.00 and passing a forged check in the amount of $28.36. *Id.*

found his pleas unpersuasive.[74] The Court reasoned that "successful challenges to the proportionality of [non-capital sentences] have been exceedingly rare,"[75] and reserved only for extraordinary circumstances.[76]

The *Rummel* Court further analyzed the constitutionality of Rummel's sentence by comparing the stringency of Texas's recidivist statute to other states' habitual offender provisions.[77] Ultimately, the Court concluded that, "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."[78] Thus, Texas's comparatively harsh sentencing scheme did not render Rummel's conviction unconstitutional.[79] Rather, the Court concluded that "Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by . . . the State."[80] Therefore, by deferring the proportionality question to the legislature and noting the "rarity" of challenges to prison terms, the opinion did little to answer the question of whether the proportionality principle applies to non-capital cases.

2. *Hutto v. Davis*[81]

Two years later, the Court in *Hutto v. Davis*[82] continued to evade the proportionality question and, instead, reiterated *Rummel*'s holding that courts are "reluctan[t] to review legislatively mandated terms of imprisonment."[83] In its *per curiam* opinion, the Court rejected defendant Davis's Eighth Amendment challenge to a forty-year sentence and fine of $20,000 for the possession and distribution of about nine ounces of marijuana.[84] In fact, the Court chastised the Fourth Circuit for finding Davis's sentence unconstitutional and ignoring the Court's decision in *Rummel*.[85] The Court emphasized that "the basic line-drawing process [regarding the proportionality of sentences] is 'properly within the province of legislatures, not courts.'"[86] Moreover, the Court once again

74. *Id.* at 275-76.
75. *Id.* at 272.
76. *Id.* at 274 n.11 (noting that Justice Powell's extreme example in the dissent of receiving a mandatory life sentence for overtime parking constitutes addressing proportionality).
77. *Id.* at 279–82.
78. *Id.* at 282.
79. *See id.* at 281.
80. *Id.* at 284.
81. 454 U.S. 370 (1982) (per curiam).
82. *Hutto*, 454 U.S. 370.
83. *Id.* at 374 (quoting *Rummel*, 445 U.S. at 274).
84. *Id.* at 375.
85. *Id.* at 374-75. The Court noted that the "Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress." *Id.*
86. *Id.* at 374 (quoting *Rummel*, 445 U.S. at 275-76).

stressed that "'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'"[87]

3. *Solem v. Helm*[88]

While *Rummel* and *Hutto* deferred the proportionality question to the legislature, the Court in *Solem v. Helm*[89] finally suggested that "all sentences of imprisonment are subject to appellate scrutiny to ensure that they are 'proportional' . . . ."[90] In affirming the reversal of Helm's life sentence without parole for uttering a no account check for $100,[91] the Court reasoned that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[92] In response, Chief Justice Burger, in his dissent, accused the majority of "distort[ing] the concept of proportionality of punishment by tearing it from its moorings in capital cases."[93] Yet, the majority bolstered its decision by applying a broad interpretation of *Rummel*.[94] The Court recognized "that some sentences of imprisonment are so disproportionate that they violate the Eighth Amendment,"[95] and, therefore, *Rummel* "should not be read to foreclose proportionality review of sentences of imprisonment."[96]

The Court in *Solem* also delineated three objective factors to aid courts in analyzing a proportionality challenge: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[97] Although *Rummel* implied that courts were incapable of impartially judging the gravity of an offense and severity of a sentence, the *Solem* Court suggested that courts are in fact competent to make these subjective judgments in an objective manner.[98] Accordingly, courts are justified in punishing a recidivist more severely.[99] However, the level of harm caused to society is also weighed in determining the constitutionally permissible

87. *Id.* (quoting *Rummel*, 445 U.S. at 272).
88. 463 U.S. 277 (1983).
89. *Solem*, 463 U.S. 277
90. *Id.* at 305. The Court noted that it "do[es] not adopt or imply approval of a general rule of appellate review of sentences. . . . [R]ather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits." *Id.* at 290 n.16.
91. *Id.* at 281.
92. *Id.* at 284.
93. *Id.* at 304 (Burger, C.J., dissenting). Justices White, Rehnquist and O'Connor joined the Chief Justice in his dissent. *Id.* Ultimately, the dissent accused the majority of ignoring the standard adopted in both *Rummel* and *Hutto*. *Id.*
94. *See id.* at 303 n.32. The Court stressed that its decision in *Solem* was "not inconsistent with *Rummel v. Estelle*." *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 292. These are the same factors proposed by Justice Powell in the *Rummel* dissent. *Rummel*, 445 U.S. at 295 (Powell, J., dissenting).
98. *Id.* at 292.
99. *Id.* at 296.

degree of harshness in a sentence.[100] Therefore, the Court found that because Helm's prior convictions were minor and nonviolent, his sentence was disproportionate to the harm and, thus, unconstitutional.[101] By applying the proportionality principle to non-capital sentences, the *Solem* Court recognized that lengthy prison sentences could indeed constitute cruel and unusual punishment under the Eighth Amendment. However, despite the *Solem* Court's interpretation of the Eighth Amendment, discordance eventually reemerged in the proportionality debate and resulted in even more confusion.[102]

4. *Harmelin v. Michigan*[103]

Because of the conflicting standards in *Rummel* and *Solem*, the Court's recognition of a proportionality principle in the Eighth Amendment remained unclear. Almost ten years later, the Court in *Harmelin v. Michigan* attempted to resolve the conflict. The *Harmelin* Court concluded that its decision in *Solem* "was simply wrong; the Eighth Amendment contains no proportionality guarantee."[104] Yet, the Court differed on why Harmelin's proportionality claim failed.[105] Justice Scalia, joined by Chief Justice Rehnquist, affirmed first-time offender Harmelin's life sentence without parole for possessing 652 grams of cocaine.[106] Unlike *Solem*, the Court instead concluded that the three-part test outlined in *Solem* mistakenly invited judicial subjectivism and, therefore, failed to create a workable objective test.[107] Furthermore, after careful examination of the historical pretexts of the Cruel and Unusual Punishments Clause, Justice Scalia reasoned that the Eighth Amendment should be directed at prohibiting the "*methods* of punishment," rather than length of sentences.[108] Simply put, Justice Scalia drew a bright line at capital punishment, and refused to extend proportionality review to non-capital sentences.[109]

Unlike Justice Scalia, Justice Kennedy, joined by Justices O'Connor and Souter, invoked a "narrow proportionality principle" in his concurrence in *Harmelin*.[110] In contrast to Justice Scalia's "no proportionality guarantee" for non-capital cases, Justice Kennedy reasoned that the pro-

100. *Id.* at 292-95.
101. *Id.* at 303.
102. *Ewing*, 538 U.S. at 23.
103. 501 U.S. 957 (1991).
104. *Harmelin*, 501 U.S. at 965.
105. *Compare id.* at 994, *with id.* at 997 (Kennedy, J., concurring in part and concurring in judgment).
106. *Id.* at 996.
107. *Id.* at 986.
108. *Id.* at 979.
109. *See id.* at 996.
110. *Id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment).

portionality principle does apply to non-capital sentences.[111] In trying to make sense of the Court's contradictory standards for reviewing proportionality claims, Justice Kennedy extracted four common principles that emerged over the years—"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors," such as those delineated in *Solem*.[112] However, Justice Kennedy emphasized that in applying *Solem*'s objective three-factor test, "intrajurisdictional and interjurisdictional 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."[113] Overall, Justice Kennedy reasoned that the Eighth Amendment does not mandate strict proportionality in criminal sentencing, but rather, "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[114]

In short, Justice Scalia once again maintained that an objective analysis of non-capital sentences is impossible and, therefore, proportionality reviews should remain with death penalty cases. In contrast, Justice Kennedy's concurrence, successfully illustrated that an objective analysis is achievable under his modified version of *Solem*'s objective test. Following Justice Kennedy's lead, the *Ewing* Court applied a similar test to evaluate the propriety of Ewing's sentence under California's three strikes law.

Notwithstanding this precedent acknowledging a proportionality review of non-capital sentences, the definition of what constitutes an "extreme sentence that is 'grossly disproportionate' to the crime," has remained ambiguous. Within this backdrop, the Supreme Court in *Ewing* once again addressed the proportionality principle, but this time shrouded in the controversy of California's three strikes law.

III. *EWING V. CALIFORNIA*[115]

Following the Court's previous holdings that proportionality reviews of non-capital cases are "rare," the plurality in *Ewing* adopted an exceedingly narrow proportionality standard to apply to recidivists' sentences.[116] Specifically, the plurality extended the initial threshold inquiry

111. *Id.*; *see also Hutto*, 454 U.S. at 374 n.3 (recognizing the possibility of a proportionality review); *Solem*, 463 U.S. 277 (holding life sentence for habitual offender with nonviolent felonies as unconstitutional and grossly disproportionate).

112. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

113. *Id.* at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

114. *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem*, 463 U.S. at 288). The *Harmelin* dissent is beyond the scope of this Comment because the *Ewing* Court focused on Justice Kennedy's concurrence.

115. 538 U.S. 11 (2003).

116. *See Ewing*, 538 U.S. at 20.

to include a repeat offender's entire criminal history[117] and, thus, made "gross proportionality" challenges to non-capital cases practically impossible.[118] Accordingly, the plurality upheld the constitutionality of Ewing's sentence.[119] Justices Scalia and Thomas, went one step further and reserved proportionality review to only capital cases.[120] Finally, while Justice Stevens, in his dissent, suggested adopting a broad proportionality principle,[121] Justice Breyer applied a thorough comparative analysis in his dissent to Ewing's case and concluded that under the circumstances, Ewing's sentence was grossly disproportionate and, therefore, unconstitutional.[122]

A. The Plurality Opinion: Reforming Harmelin*'s Narrow Proportionality Principle to Apply to Non-Capital Cases*

In *Ewing*, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, affirmed a 25-year-to-life sentence for three-time offender Ewing.[123] In reaching its decision, the Court relied on the proportionality principles set forth in Justice Kennedy's concurrence in *Harmelin*.[124] Specifically, Justice O'Connor maintained that the "Eighth Amendment . . . contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'"[125] The Court recognized the same four basic guidelines of proportionality review set out by Justice Kennedy in *Harmelin*—"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors," similar to those outlined in *Solem*.[126] Accordingly, like Justice Kennedy in *Harmelin*, Justice O'Connor reasoned that the Eighth Amendment proscribed only "extreme sentences that are 'grossly disproportionate' to the crime."[127]

In applying a "narrow proportionality principle" to Ewing's sentence, Justice O'Connor first addressed the legitimacy of California's three strikes law. The Court noted that "[t]hough three strikes laws may

117. *See id.* (noting that the trial court considered Ewing's entire criminal history during sentencing).

118. *See id.* at 42-43 (Breyer, J., dissenting) (noting the severity of the plurality's threshold inquiry).

119. *Id.* at 30-31.

120. *Id.* at 31 (Scalia, J., concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment).

121. *Id.* at 32-35 (Stevens, J., dissenting).

122. *Id.* at 42 (Breyer, J., dissenting).

123. *Id.* at 30-31.

124. *Id.* at 30.

125. *Id.* at 20 (quoting Harmelin v. Michigan, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

126. *Id.* at 23 (quoting *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgment)).

127. *Id.* (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)).

be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding."[128] The Court reasoned that because "[r]ecidivism has long been recognized as a legitimate basis for increased punishment,"[129] California was justified in "'deterring and segregating habitual [offenders].'"[130] In fact, the Court acknowledged that the State's interest in protecting the public's safety added to the law's validity. To rationalize its reasoning, the Court pointed to the decrease in California's crime rate, as well as evidence indicating that more parolees have left California since the inception of the three strikes law.[131] The Court reiterated that any criticism of three strikes should be directed at the legislature, and emphasized that "[the Supreme Court] do[es] not sit as a 'superlegislature' to second-guess [the State's] policy choices."[132]

In addressing Ewing's constitutional challenge, the Court first conducted a threshold analysis of "the gravity of the offense compared to the harshness of the penalty," as summarized in Justice Kennedy's concurrence in *Harmelin*.[133] The Court noted the Supreme Court of California's recognition of the "'seriousness' of grand theft in the context of proportionality review."[134] Accordingly, the Court opined that "[e]ven standing alone, Ewing's theft should not be taken lightly."[135]

Notwithstanding the "seriousness" of Ewing's triggering offense, the Court also considered Ewing's prior crimes when balancing the gravity of the offense against the harshness of the penalty.[136] Unlike *Solem* and *Harmelin*, where the Court only measured the proportionality of the offender's current crime,[137] Justice O'Connor stated that "[i]n weighing the gravity of Ewing's offense, we [also] must place on the scales . . . his long history of felony recidivism."[138] This expanded approach, the Court reasoned, is the only way "[t]o give full effect to the State's choice of this legitimate penological goal [of deterring and incapacitating habitual offenders] . . . ."[139] In weighing Ewing's prior offenses against the State's

128. *Id.* at 24-25 (citing Weems v. United States, 217 U.S. 349, 379 (1910); Gore v. United States, 357 U.S. 386, 393 (1958); Payne v. Tennessee, 501 U.S. 808, 824 (1991); Rummel v. Estelle, 445 U.S. 263, 274 (1980); Solem v. Helm, 463 U.S. 277, 290 (1983); *Harmelin*, 501 U.S. at 998).

129. *Id.* at 25.

130. *Id.* (quoting Parke v. Raley, 506 U.S. 20, 27 (1992)).

131. *Id.* at 26.

132. *Id.* at 28.

133. *Id.* This is the first prong of the *Solem* three-part test. *Solem*, 463 U.S. at 292. Although the plurality and Justice Breyer's concurrence follow the objective test in Justice Kennedy's concurrence in *Harmelin*, the objective factors employed in this analysis are identical to the three-prong test in *Solem*. For purposes of this Comment, the author will refer to the framework as the *Harmelin* framework.

134. *Ewing*, 538 U.S. at 28.

135. *Id.*

136. *Id.* at 29.

137. *See Solem*, 463 U.S. at 290; *Harmelin*, 501 U.S. at 1003-04 (Kennedy, J., concurring in part and concurring in the judgment).

138. *Ewing*, 538 U.S. at 29.

139. *Id.*

public safety interests, the Court concluded that Ewing's sentence was not a "rare case" that was grossly disproportionate to the crime.[140] Thus, because Ewing's sentence failed to reach the initial threshold, the Court stopped short of conducting an intrajurisdictional and interjurisdictional comparison of three strikes.

Finally, the Court respected the trial judge's decision to not extend misdemeanant privileges to Ewing under California's "wobbler" provision.[141] Justice O'Connor reasoned that one of the purposes behind the law's allowance of judicial discretion to reduce certain felonies to misdemeanors was to avoid imposing harsh penalties on rehabilitated defendants.[142] Justice O'Connor rationalized, however, that given Ewing's long criminal history, the trial judge properly declined to reduce Ewing's triggering offense to a misdemeanor and, was justified in concluding that Ewing did not deserve "lenient treatment."[143] By affirming the trial judge's ruling on Ewing's "wobbler" argument, Justice O'Connor acknowledged the legitimacy of using a "wobbler" as a triggering offense under three strikes.

To summarize, in its plurality opinion, the Court justified Ewing's sentence in light of the State's primary goal of ensuring public safety. Instead of following both *Solem* and Justice Kennedy's concurrence in *Harmelin* and comparing only the gravity of the *triggering* offense to the harshness of the penalty, the plurality expanded the threshold test to include placing Ewing's *entire* criminal history on the proportionality scales. Consequently, given Ewing's habitual criminal behavior, the Court affirmed the California courts' finding that Ewing's sentence did not violate the Eighth Amendment, and was not "grossly disproportionate" considering his long criminal history.[144] While the Court recognized that, in theory, the Eighth Amendment includes a proportionality principle for non-capital cases,[145] in practice, the narrow scope of the plurality's balancing test does little to advance the reality of proportionality concerns in non-capital sentences like Ewing's.

B. Justice Scalia's and Justice Thomas's Concurring Opinions: The Eighth Amendment Does Not Include a Proportionality Principle for Non-Capital Cases

Although the plurality followed a "narrow proportionality" standard, both Justice Scalia and Justice Thomas, in their separate concurring opinions, maintained that the Eighth Amendment proportionality analysis

140. *Id.* at 30.
141. *See id.* at 28-29.
142. *See id.* at 29.
143. *Id.*
144. *Id.* at 30-31.
145. *Id.* at 20.

is reserved solely for capital punishment.[146] The Justices contended that the Eighth Amendment applies only to modes of punishment, and not to the length of a sentence.[147]

Specifically, Justice Scalia referred to his concurring opinion in *Harmelin*,[148] that the "Eighth Amendment's prohibition of 'cruel and unusual punishments' . . . was not a 'guarantee against disproportionate sentences.'"[149] While recognizing the importance of *stare decisis*, Justice Scalia stated that he would accept a "narrow proportionality principle" if he "could intelligently apply it."[150] Justice Scalia acknowledged the difficulty in applying the proportionality principle when courts must "giv[e] weight to the purpose of California's three strikes law: incapacitation."[151] In fact, Justice Scalia suggested that in order to make clear that the Court is "evaluating policy," the plurality opinion should "read[] into the Eighth Amendment . . . the unstated proposition that all punishment should reasonably pursue the multiple purposes of the criminal law."[152]

Justice Thomas, in his brief concurrence, agreed with Justice Scalia's contention that *Solem*'s proportionality test is "incapable of judicial application."[153] In keeping with the notion that *Solem* was "simply wrong,"[154] Justice Thomas stated that "[e]ven were *Solem*'s [objective factors] test perfectly clear, [he] would not feel compelled by *stare decisis* to apply it."[155] Justice Thomas further declared that "the Eighth Amendment contains no proportionality principle."[156]

Thus, although both Justice Scalia and Justice Thomas concurred in the plurality's result, they both denied the necessity of even applying a proportionality principle to Ewing's non-capital sentence.

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146. *See id.* at 31 (Scalia, J., concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment).

147. *See id.* at 31 (Scalia, J., concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment).

148. *Id.* at 31 (Scalia, J., concurring in the judgment). Justice Scalia announced the judgment of the Court in *Harmelin* and delivered the opinion with respect to Part IV, in which Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy and Justice Souter joined. In addition, Justice Scalia offered an opinion with respect to Parts I, II and III of the *Harmelin* decision, in which Chief Justice Rehnquist joined. Accordingly, Parts I, II and III of Justice Scalia's *Harmelin* opinion are referred to as "concurring" opinions. *See Harmelin*, 501 U.S. at 961.

149. *Ewing*, 538 U.S. at 31 (Scalia, J., concurring in the judgment) (quoting *Harmelin*, 501 U.S. at 984-85).

150. *Id.*

151. *Id.*

152. *Id.* at 32 (Scalia, J., concurring in the judgment).

153. *Id.* (Thomas, J., concurring in the judgment).

154. *Harmelin*, 501 U.S. at 965.

155. *Ewing*, 538 U.S. at 32 (Thomas, J., concurring in the judgment).

156. *Id.*

C. Justice Stevens's and Justice Breyer's Dissents: The Eighth Amendment Prohibits Excessive Punishments

1. Justice Stevens's Dissent

Unlike the concurring Justices' opinions that proportionality review is incapable of judicial application to non-capital sentences, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, reasoned that the Eighth Amendment "directs judges to exercise their wise judgment in assessing the proportionality of *all* forms of punishment."[157] While courts are often called upon to "'draw . . . lines in a variety of contexts,'"[158] the Court has acknowledged the complexity in objectively analyzing the proportionality of sentences.[159] However, contrary to the plurality's adoption of a "narrow proportionality principle," Justice Stevens invoked a "broad proportionality principle."[160] Accordingly, under Justice Stevens's reasoning, judges should take into account "all of the justifications for punishment—namely, deterrence, incapacitation, retribution and rehabilitation," when conducting a proportionality review.[161]

2. Justice Breyer's Dissent

Similar to Justice Stevens, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, concluded that *Ewing* fell within the "rare cases" that warranted a proportionality review.[162] Applying the *Harmelin* framework, Justice Breyer initially conducted "a threshold comparison of the crime committed and the sentence imposed."[163] To analyze the harshness of Ewing's sentence, Justice Breyer initiated a comparative analysis between Ewing's case and *Rummel* and *Solem*.[164] Justice Breyer defined three "sentence-related characteristics" to apply in his comparative analysis: (1) "the length of the prison term in real time;"[165] (2) "the sentence-triggering criminal conduct;" and (3) "the offender's criminal

157. *Id.* at 33 (Stevens, J., dissenting) (emphasis added). Justice Stevens notes that the *Solem* three-factor test is more on point than *Harmelin*, since the *Solem* Court addressed a recidivist sentencing. *Id.* at 32 n.1 (Stevens, J., dissenting).

158. *Id.* at 33 (Stevens, J., dissenting) (quoting *Solem*, 463 U.S. at 294). Justice Stevens gives the examples of "line drawing" in cases involving the Due Process Clause, in which judges are called upon to assess the constitutionality of punitive damages. *Id.* Similarly, courts exercise discretion to determine if a delay is unconstitutional, in relation to the Sixth Amendment guarantee of a speedy trial. *Id.* at 34 (Stevens, J., dissenting).

159. *See Harmelin*, 501 U.S. at 988-89 (recognizing that it is difficult to objectively define gravity).

160. *Ewing*, 538 U.S. at 35 (Stevens, J., dissenting).

161. *Id.*

162. *Id.* at 36-37 (Breyer, J., dissenting).

163. *Id.* at 37 (Breyer, J., dissenting) (internal quotations omitted).

164. *Id.* Justice Breyer explained that *Rummel* and *Solem* were the precedent "most directly in point," because these cases addressed the "constitutionality of recidivist sentencing." *Id.*

165. Real time is the time "that the offender is likely actually to spend in prison . . . ." *Id.*

history."[166] Under his analysis, Justice Breyer determined that Ewing's claim fell "within the twilight zone between *Solem* and *Rummel* . . . ."[167]

First, in comparing the "offender characteristics" of the three cases, Justice Breyer concluded that Ewing's four prior convictions did not differ significantly from Helm's six prior offenses in *Solem*.[168] Conversely, Ewing's four "priors" considerably differed in degree from Rummel's two prior felony convictions, which involved small amounts of money.[169] Next, in evaluating the differences in the "offense behavior" between the three cases, Justice Breyer reasoned that the disparity in the value of the goods stolen, when examined in relation to inflation, was marginal at best.[170] Ultimately, for Justice Breyer, the key distinction between each case rested in the length of real prison time.[171]

Justice Breyer reasoned that "Ewing's sentence on its face impos[ed] one of the most severe punishments available upon a recidivist who subsequently engaged in one of the less serious forms of criminal conduct."[172] In comparison, although Helm faced life in prison without parole,[173] Justice Breyer reasoned that Ewing's 25-year-to-life sentence "is long enough to consume the productive remainder of almost any offender's life."[174] In other words, Ewing's sentence was equally as harsh as Helm's. Moreover, in *Rummel*, the Court upheld the sentence, but the state's recidivist statute allowed parole after ten to twelve years.[175] By comparing Ewing's circumstances to the factors in *Rummel* and *Solem*, Justice Breyer concluded that Ewing's sentence was severe and, thus, unconstitutional.[176]

Beyond the comparative analysis, Justice Breyer also considered several other factors in making his threshold determination. First, in looking at the harm caused to the victim or society, the "'magnitude of the crime,'" and Ewing's "'culpability,'" Justice Breyer reasoned that Ewing's triggering offense "rank[ed] well toward the bottom of the criminal conduct scale."[177] Second, at the recommendation of the Solicitor General, Justice Breyer applied three additional criteria: (1) the fre-

166. *Id.*
167. *Id.* at 40 (Breyer, J., dissenting).
168. *Id.* at 38-39 (Breyer, J., dissenting). Justice Breyer noted, however, that one of Ewing's prior offenses did involve the use of a knife, whereas, Helm's priors were all unarmed offenses. *Solem*, 463 U.S. at 279-80.
169. *Ewing*, 538 U.S. at 38-39 (Breyer, J., dissenting); *Rummel*, 445 U.S. at 266.
170. *Ewing*, 538 U.S. at 39 (Breyer, J., dissenting). Justice Breyer compared the inflation-adjusted price of the golf clubs to *Solem* and *Rummel:* $505 compared to $100 in *Solem*, or $309 compared to $120.75 in *Rummel*. *Id.*
171. *Id.* at 39-40 (Breyer, J., dissenting).
172. *Id.* at 40 (Breyer, J., dissenting).
173. *Solem*, 463 U.S. at 282.
174. *Ewing*, 538 U.S. at 39 (Breyer, J., dissenting).
175. *Rummel*, 445 U.S. at 267.
176. *Ewing*, 538 U.S. at 40 (Breyer, J., dissenting).
177. *Id.* (quoting *Solem*, 463 U.S. 292-93).

quency of shoplifting; (2) the simplicity or difficulty of detecting the crime; and (3) deterrence of the crime by varying degrees of punishment.[178] Justice Breyer argued that shoplifting is easy to detect because of surveillance cameras, as well as the presence of witnesses, such as the store's employees and customers.[179] Justice Breyer also remained skeptical as to whether enhanced sentences deterred shoplifting.[180] Finally, although shoplifting occurs frequently, Justice Breyer stressed that "'frequency,' standing alone, cannot make a critical difference."[181] Based on a comparative analysis and these additional factors, Justice Breyer concluded that Ewing's claim fell within the "rare" occurrences that surpass the initial "'threshold' test."[182] Although Justice Breyer applied the plurality's narrow proportionality test and examined Ewing's criminal history when balancing the gravity of the offense against the harshness of the penalty, generally Justice Breyer's analysis focused on Ewing's triggering offense[183] and his lengthy sentence.[184]

Because Ewing's "grossly disproportionate" sentence crossed the initial threshold, Justice Breyer turned to the next prong of the *Harmelin* framework—a comparison of Ewing's sentence to California's sentencing scheme before the adoption of the three strikes law, and to other jurisdictions.[185] Before the enactment of three strikes, Ewing would have served a maximum of approximately ten years.[186] Recidivists, claimed Justice Breyer, would have served only a "small fraction of Ewing's real-time sentence," before the implementation of three strikes.[187] To illustrate the harshness of Ewing's sentence, Justice Breyer indicated that California reserved 25-year-to-life sentences for "nonrecidivist, first-degree murderers."[188] In comparing Ewing's sentence to other jurisdictions, Justice Breyer found that in thirty-three jurisdictions and the federal courts, "the law would make it legally impossible for a Ewing-type offender to serve more than 10 years in prison . . . ."[189] In the end, Justice

178. *Id.* (quoting Brief for the United States as Amicus Curiae at 24-25, Ewing v. California, 123 S. Ct. 1179 (2003) (No. 01-6978)).

179. *Id.*

180. *See id.*

181. *Id.* at 40-41(Breyer, J., dissenting).

182. *Id.* at 37 (Breyer, J., dissenting). Justice Breyer also presented statistics from the United States Sentencing Commission, which did not include shoplifting as a trigger crime. *Id.* at 41-42 (Breyer, J., dissenting).

183. *See id.* at 35, 40 (Breyer, J., dissenting).

184. *See id.* at 39-40 (Breyer, J., dissenting).

185. *Id.* at 42-43 (Breyer, J., dissenting). The plurality did not undertake an intrajurisdictional and interjurisdictional comparison because it concluded that Ewing's sentence did not pass the threshold requirement. *Id.* at 30. Although the plurality and Justice Breyer follow the objective test from Justice Kennedy's concurrence in *Harmelin*, the objective factors employed in this analysis are identical to the three-prong test in *Solem*. *See id.* at 37 (Breyer, J., dissenting).

186. *Id.* at 43 (Breyer, J., dissenting).

187. *Id.* at 44 (Breyer, J., dissenting). "On average, recidivists served three to four additional . . . years in prison, with 90 percent serving less than an additional real seven to eight years." *Id.*

188. *Id.* (citing CAL. PENAL CODE ANN. § 190(a) (2003)).

189. *Id.* at 45 (Breyer, J., dissenting).

Breyer reasoned that "[o]utside the California three strikes context, Ewing's . . . sentence is virtually unique in its harshness . . . by a considerable degree."[190]

After finding Ewing's sentence extreme under the *Harmelin* framework, Justice Breyer subsequently considered whether the legislative intent behind three strikes reasonably justified Ewing's punishment.[191] Although the plurality reasoned that three strikes meets California's purported goals of deterring repeat offenders and preserving public safety,[192] Justice Breyer found no criminal justice rationalization for Ewing's sentence.[193] Instead, he suggested that "California's three strikes statute is a series of anomalies."[194] For instance, the variance in the seriousness of the triggering offenses, the random application of three strikes punishments, and the statute's absence of enumerated applicable triggering offenses, resulted in unacceptable administrative justifications for Ewing's sentence.[195] Justice Breyer further contended that because the law aims to reduce serious and violent crime, Ewing's 25-year-to-life sentence for shoplifting is "overkill."[196] Therefore, "the State cannot find in its three strikes law a special criminal justice need sufficient to rescue a sentence that other relevant considerations indicate is unconstitutional."[197]

Justice Breyer emphasized the importance of applying an analytical framework on a case by case basis to determine whether a sentence is proportional to the crime.[198] Unlike Justice Scalia's and Justice Thomas's concurring opinions, Justice Breyer reasoned that "a bright-line rule would give legislators and sentencing judges more guidance."[199] With such a rule, courts may more readily recognize that 25-year-to-life sentences like Ewing's are grossly disproportionate to a triggering offense of stealing three golf clubs.[200]

In short, although the plurality conducted a proportionality analysis of Ewing's sentence, the narrow principle applied does little to remedy the gross disparity of sentences prevalent in non-capital, recidivists' cases. By reiterating the principle that proportionality reviews of non-capital cases are "exceedingly rare,"[201] the plurality implied that proportionality principles adhere better to death penalty cases. In fact, both Justice Scalia and Justice Thomas sustained in their concurring opinions that

190. *Id.* at 47 (Breyer, J., dissenting).
191. *See id.*
192. *Id.* at 24-27.
193. *Id.* at 48 (Breyer, J., dissenting).
194. *Id.* at 49 (Breyer, J., dissenting).
195. *See id.* at 48-50 (Breyer, J., dissenting).
196. *Id.* at 52 (Breyer, J., dissenting).
197. *Id.*
198. *See id.* at 52-53 (Breyer, J., dissenting).
199. *Id.* at 52 (Breyer, J., dissenting).
200. *See id.* at 52-53 (Breyer, J., dissenting).
201. *Id.* at 21 (citing *Rummel*, 445 U.S. at 272).

proportionality principles should only apply to "*modes* of punishment," rather than length of sentences.[202] Justice Breyer, on the other hand, suggested in his dissent that courts are capable of applying objective factors and conducting a comparative analysis to determine the proportionality of non-capital sentences.[203] However, given the extremely restrictive nature of the plurality's balancing test, few cases will ever get past the initial threshold to warrant an application of Justice Breyer's comparative analysis. As a result, by affirming the constitutionality of Ewing's sentence, any future successful challenges to three strikes are highly unlikely.

IV. ANALYSIS

In granting certiorari the *Ewing* Court had the opportunity to review the legitimacy of California's three strikes law, and to determine the constitutionality of indeterminate life sentences for recidivists convicted of non-violent and non-serious crimes. In response, the plurality not only affirmed the constitutionality of Ewing's sentence, but also upheld the longstanding view that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare."[204] This Comment argues that by adopting an exceptionally narrow balancing test, the plurality failed to address the fundamental principle of the "evolving standards of decency"[205] engrained in the Eighth Amendment. Moreover, aside from the plurality's neglect of the constitutional questions surrounding three strikes, the Court adamantly redirected any future criticism of the law to the state legislature.[206] Thus, unless California's legislature steps up and accepts an amended version of three strikes, targeting only serious and violent felonies, California's resources will continue to be pinched by the costs of this radical law. Even more troubling, other non-violent habitual offenders, like Ewing, will spend the majority of their lives behind bars because of the cruel effects of an overly-broad law originally aimed at imprisoning violent offenders.

A. California's Three Strikes Law is Unconstitutional

In reviewing the constitutionality of Ewing's sentence, the plurality failed to address an essential factor under the Eighth Amendment—society's "evolving standards of decency."[207] By applying an extremely "narrow proportionality principle" to non-capital sentences,[208] the Court

202. *See id.* at 31 (Scalia, J., concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment).
203. *See id.* at 52-53 (Breyer, J., dissenting).
204. Rummel v. Estelle, 445 U.S. 263, 272 (1980).
205. *Rummel*, 445 U.S. at 292 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
206. Ewing v. California, 538 U.S. 11, 28 (2003).
207. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting *Dulles*, 356 U.S. at 101).
208. *See Ewing*, 538 U.S. at 20.

significantly circumscribed any future attempts at surpassing the initial threshold and successfully challenging the constitutionality of three strikes' mandatory minimum sentences in relation to non-violent offenders.

1. The Ewing Court's Narrow Threshold Test Slams the Door on Recidivist's Proportionality Claims

To conduct a pertinent objective analysis of excessive sentences, Justice Breyer maintained that "[a] threshold test must permit *arguably* unconstitutional sentences, not only *actually* unconstitutional sentences, to pass the threshold . . . ."[209] However, the plurality's narrow balancing test, which requires courts to consider an offender's prior offenses in weighing the gravity of the current offense against the harshness of the penalty, produces an insurmountable legal hurdle for recidivists wanting to bring a constitutional claim.[210] In fact, the plurality's balancing test goes beyond being a simple threshold inquiry and, instead, creates a determinative standard.[211] By building a barrier out of a habitual offender's criminal history and placing it in front of the threshold, the plurality makes fighting an excessive punishment utterly impossible for recidivists.[212] The most unreasonable effect of the Court's conclusive balancing test is that it precludes taking into account the "evolving standards of decency," which is fundamental to any Eighth Amendment objective analysis.

2. The Plurality Disregarded Any Notion of Human Decency in *Ewing*

The Eighth Amendment embodies the idea that maintaining human dignity is essential to a mature and civilized society.[213] In fact, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[214] In order to evaluate the "'clearest and most reliable objective evidence of contemporary values,'" courts must be able to take the next step in a proportionality analysis and compare similar legislative enactments throughout the country.[215]

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209. *Id.* at 42 (Breyer, J., dissenting).

210. *See id.* (reasoning that any "test that blocked every ultimately invalid constitutional claim . . . would not be a threshold test but a determinative test" (emphasis excluded)).

211. *See id.*

212. *See* Erwin Chemerinsky, *Is Any Sentence Cruel and Unusual Punishment?*, TRIAL, May 2003, 78, 78.

213. *See* Blake v. Hall, 668 F.2d 52, 55 (1st Cir. 1981).

214. *Dulles*, 356 U.S. at 100.

215. Brief of Amicus Curiae California Public Defenders Association at 9, Lockyer v. Andrade, 123 S. Ct. 1166 (2003) (No. 01-1127) (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989))) [hereinafter CPDA Brief].

Recently the Court confirmed that "[a] claim that punishment is excessive is judged . . . by [standards] that currently prevail," in today's society.[216] Accordingly, if the plurality had conducted the pertinent intra-jurisdictional and interjurisdictional comparative analysis outlined in *Solem*'s three-prong test,[217] the results would have indicated that no other state would have given Ewing as harsh a punishment as he received from California.[218] Although the plurality noted the seriousness of Ewing's grand theft[219] when reaching its decision,[220] a serious sentence for shoplifting three golf clubs still does not warrant 25-years-to-life. In fact, even in California, the punishment for the non-violent crime of stealing approximately $1,200 in merchandise is typically one year in a county jail for first time offenders, [221] and no more than ten years under thirty-three other recidivist statutes.[222] The plurality further justified its decision by pointing to California's public safety concerns.[223] Yet, considering that Ewing's prior crimes were primarily non-violent property offenses,[224] Ewing does not fall into the category of the threatening, violent offenders Californians intended to reach when they voted for three strikes.[225] Consequently, the plurality's restrictive balancing approach impedes any chance of defining society's contemporary values and, therefore, is not in accordance with an individual's fundamental rights under the Eighth Amendment.

Notwithstanding the plurality's failure to address significant constitutional concerns in its *Ewing* decision, in the end, the Court upheld the constitutionality of three strikes, and the law's effects of sending non-violent offenders to prison for life. In fact, the Court all but foreclosed any future judicial challenges to three strikes and left any revision of the statute to "the legislatures, not . . . the federal courts."[226] Therefore, any hope of mitigating the harshness of the controversial recidivist statute now rests with California's legislative process.

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216. *Atkins*, 536 U.S. at 311 (reasoning that determining the excessiveness of a crime should not be judged by the standards that "prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted").

217. Solem v. Helm, 463 U.S. 277, 292 (1983).

218. CPDA Brief, *supra* note 215, at 9.

219. Shoplifting nearly $1,200 worth of merchandise is considered felony grand theft and is a "wobbler." CAL. PENAL CODE ANN. § 487(a) (West 2003).

220. *See Ewing*, 538 U.S. at 28.

221. CAL. PENAL CODE ANN. § 489 (West 2003).

222. *Ewing*, 538 U.S. at 45 (Breyer, J., dissenting).

223. *Id.* at 24-26.

224. *Id.* at 19. However, one of Ewing's prior offenses involved a knife. *Id.*

225. *See generally* Amend 3 Strikes, *Understand the Problem and the Solution*, *at* http://amend3strikes.com/problemsolution.htm (last visited Oct. 31, 2003) [hereinafter Problem and Solution]; *see also generally* CAL. BALLOT PAMPHLET, GEN. ELECTION 5 (Nov. 8, 1994), *available at* http://holmes.uchastings.edu/ballot_pdf/1994g.pdf (last visited April 21, 2004)).

226. *Rummel*, 445 U.S. at 284.

B. Leave the Reform of Three Strikes to the Legislature

Even though opponents of three strikes are still feeling the sting from the Court's decision, they have not stopped fighting.[227] In response to the Court's ruling, activists in the three-strikes reform movement have refocused and placed modification of the three strikes law back in the hands of California's legislature.[228]

1. Is Legislative Reform Possible?

Courts generally defer statutory reform to state legislatures, but California's government seems reluctant to make changes to the three strikes law. According to the statute's provisions, the law can only be amended by a supermajority.[229] However, in January 2003 State Assemblywoman Jackie Goldberg introduced Assembly Bill 112, which proposed to put a modified version of three strikes before voters in 2004, and would only need a majority to pass in the legislature.[230] Specifically, the amendment would limit the law's application to repeat violent and serious felons.[231] Additionally, the bill would give already convicted third-strike felons the opportunity to have their sentences reviewed and possibly reduced.[232] Although two-thirds of Californians say they would support the initiative,[233] negative sentiment against the proposed modification is equally evident.[234]

In response to the proposed bill, proponents of three strikes contend that an amendment of the law is "part of liberal Democrats' 'criminal-friendly agenda' that 'could threaten public safety by releasing dangerous criminals back into society.'"[235] Three strikes supporters further argue that adopting Goldberg's bill would give California an unwanted "soft-on-crime" image.[236] In fact, newly-elected Governor Arnold Schwarzenegger, adamantly opposes any modification to the three strikes law, and probably will veto Assembly Bill 112 if it passes a legislative

227. *See generally* Dana Parsons, *3 Strikes Opponent Still in the Game*, L.A. TIMES, Mar. 7, 2003, at B3 (recognizing the optimism of three strikes opponents, despite the Courts recent ruling).

228. *Id.*

229. CAL. PENAL CODE ANN. § 667(j) (West 2003).

230. *See* Assembly Bill 112, 2003-04 Leg., Reg. Sess. (Cal. 2003), *available at* http://www.cdaa.org/ab112introduced.pdf (last visited May. 17, 2004) [hereinafter Assembly Bill 112].

231. *Id.* Currently, every other state that has three strike laws requires that the triggering offense be a serious or violent crime. *See* Erwin Chemerinsky, *3 Strikes: Cruel, Unusual and Unfair*, AMEND THREE STRIKES NOW, Mar. 10, 2003, *at* http://www.amend3strikes.com/_supreme_court/sc006.htm (lastvisited Nov. 2, 2003).

232. *See* Parsons, *supra* note 227, at B3.

233. *Id.*

234. *Voters Should Get to Pass Judgment on Three-Strikes Law*, SAN JOSE MERCURY NEWS, Mar. 17, 2003, at 6B, *available at* http://amend3strikes.com/_news/031703.htm (last visited Nov. 3, 2003) [hereinafter *Pass Judgment*].

235. *Id.* (quoting Republican Assembly Leader Dave Cox).

236. *Id.*

vote.[237] Hence, any legislative efforts at revising three strikes likely will face considerable resistance.[238] Yet, in analyzing some of the social and economic weaknesses of three strikes, the need for reform of the law becomes even more evident.

2. The Misleading Social Ramifications of the Three Strikes Law

The minor results seen from the three strikes law thus far support the notion that the law is doing everything but cracking down on violent crime and, therefore, it must be changed. In *Ewing*, the plurality attempted to validate the three strikes law by relying on the 1998 Attorney General's study, which credited the law with significantly reducing California's crime.[239] However, comparable studies show that three strikes was not the only catalyst to the State's reduction in crime.[240]

According to studies performed after the enactment of three strikes, the overly-broad statute has barely put a dent in California's violent crime rate.[241] First, scholars suggest that California's prosperous labor market positively impacted the crime rate.[242] Specifically, both the unemployment rate and crime rate moved in the same direction during the first six years after the adoption of three strikes pointing to alternative reasons for the State's reduction in crime.[243] Second, studies indicate that crime rates dropped faster in the California counties that only applied three strikes law to serious and violent offenses than in counties where prosecutors broadly applied the law to any felony.[244] In particular, crime decreased "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."[245]

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237. *See* Join Arnold!, *Arnold's Views on Crime*, *at* http://www.joinarnold.com/en/agenda/arnoldsviews.php (last visited May 17, 2004).

238. *See Pass Judgment*, *supra* note 234, at 6B. Assembly Bill 112 was in an inactive file in Sacramento at the time of writing this paper. E-mail from Jim Benson, Vice Chairman, Citizens Against Violent Crime, to Sara J. Lewis (Oct. 11, 2003, 13:33:29 EDT) (on file with author). Assemblywoman Goldberg can put the bill up for a vote at any time during this session, which ends later in 2004. *Id.* However, supporters of the amended law are skeptical that the bill will pass and subsequently receive Governor Schwarzenegger's signature. *Id.*

239. *Ewing*, 538 U.S. at 27 (citing Office of the Atty. Gen., Cal. Dep't. of J., *Three Strikes and You're Out: Its Impact on the California Criminal Justice System After Four Years*, 10 (1998)).

240. *See* Beres & Griffith, *supra* note 41, at 108.

241. Findings from the California Department of Justice's Criminal Justice Statistics Center could not verify any "valid evaluations" of the State's "get tough" laws that conclude three strikes has a direct effect on crime rates. Ryan S. King & Marc Mauer, The Sentencing Project, *Aging Behind Bars: "Three Strikes" Seven Years Later* 7 (2001), *at* http://www.sentencingproject.org/pdfs/9087.pdf (last visited May 17, 2004).

242. *See* Beres & Griffith, *supra* note 41, at 108.

243. *Id.*

244. Mike Males et al., *Striking Out: The Failure of California's "Three Strikes and You're Out Law,"* JUSTICE POLICY INSTITUTE, Mar. 16, 1999, *available at* http://www.justicepolicy.org/article.php?id=260 (last visited May 17, 2004).

245. Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 CAL. L. REV. 257, 270 (2002) (citing Jon Hill, *Crime Stats Capture Both Arguments*, CONTRA COSTA TIMES, Feb. 3, 2000, at A1).

Probably the best evidence showing that three strikes has not significantly contributed to the drop in California's crime rate comes from an analysis conducted by The Sentencing Project in 2000.[246] This study of states' crime rates concluded that "substantial increases in incarceration did not necessarily translate into significant declines in [California's] crime."[247] To illustrate the discrepancy, although crime rates decreased by thirty-six percent in California from 1991-1998 as incarceration increased by fifty-two percent, in the previous period, 1984-1991, crime rates increased by five percent despite a ninety-six percent increase in imprisonment.[248] Thus, this study demonstrates that three strikes, designed to imprison more habitual offenders as a means to deter crime, exhibited no independent effect on California's crime rate.

Finally, in measuring the incapacitating effect of three strikes, opponents emphasize that any positive impact on the crime rate will not be known until the offenders begin serving the increased portion of their sentences.[249] As a result, current California crime rates are misleading, and should not be used by three strikes supporters as evidence for the law's success. In addition to the ambiguous social ramifications of three strikes, the clearest projected consequence of the law is the pressure it will place on California's economy.

3. The Long-Term Economic Effects of Three Strikes

By passing reform of three strikes to the legislature, California must continue to address the noticeable financial strains resulting from flooding California's prisons with non-violent repeat offenders.[250] Assemblywoman Goldberg estimates that it costs $27,000 a year to house each inmate.[251] Undoubtedly, after the Court's adoption of a restrictive proportionality standard, repeat non-violent offenders will continue to face long-term sentences and further crowd the State's prisons.[252]

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246. *See generally* Jenni Gainsborough & Marc Mauer, The Sentencing Project, *Diminishing Returns: Crime and Incarceration in the 1990s* (2000), *at* http://www.sentencingproject.org/pdfs/9039.pdf (last visited May 17, 2004).

247. King & Mauer, *supra* note 241, at 8 (citing Gainsborough & Mauer, *supra* note 246).

248. *See* Gainsborough & Mauer, *supra* note 246, at 10, 14.

249. *See* Vitiello, *supra* note 245, at 268.

250. Approximately 7,000 convicted habitual offenders have been sentenced to at least 25 years to life under California's three strikes law, and more than half of those received their sentence for a non-violent crime. Kristina Horton-Flaherty, *Court Rulings, Public Opinion Chip Away at 'Three Strikes,'* CAL. B.J., Mar. 2002, *available at* http://www.calbar.ca.gov/calbar/2cbj/02mar/page1-1.htm (last visited May 17, 2004).

251. Parsons, *supra* note 227, at B3.

252. As mentioned, by requiring courts to weigh an offender's entire criminal history in the proportionality balancing test, the Court basically makes proportionality challenges against three strikes sentences virtually impossible. *See supra* Part IV.A and accompanying text. In essence, the standard produces a chain reaction. By upholding the constitutionality of Ewing's sentence under the plurality's restrictive test, other non-violent third-strike offenders will likely forego challenging the proportionality of their sentences and, therefore, wind up in California's prisons serving their mandatory term of at least 25 years. At $27,000 a year per inmate, not including inflation or costs related

Although proponents of the law claim the penal system can handle the increased number of inmates, the estimated costs of three strikes on California's prison system are staggering.[253] Critics of three strikes, claim the effect on the prison system is "a crisis deferred, one for which Californians will pay dearly . . . on the installment plan."[254] In fact, "160,000 inmates are crowded into prisons designed for 80,000."[255] Even more troubling is the additional cost to taxpayers. When Californians cast their votes in favor of three strikes, they implicitly approved using more of their tax dollars to deter violent crimes.[256] Yet what Californians got in return was a law that costs taxpayers "more than $500 million per year," to house non-violent recidivists.[257] An estimate by The Sentencing Project puts the bill for accommodating three strikes inmates at $750 million annually by 2026.[258] Therefore, while the California legislature should consider the social propriety of three strikes, the legislature must also undoubtedly seriously consider the fiscal impact of the statute, and recognize that reformation of the law is economically inevitable.

CONCLUSION

In 1994, in the heat of the distressing murder of twelve-year-old Polly Klaas, California's legislature sold three strikes to voters as a law that would lock up repeat violent criminals and put an end to these heinous crimes.[259] Instead, when Californian's went to the ballot box that November they chose a law made up of extreme variables and a "one-size-fits-all mandatory minimum sentencing scheme [for] minor crimes."[260] The foreseeable depletion of California's resources resulting from this deluded legislation calls for the immediate reform of three strikes law. Accordingly, change must begin by returning to the voters' original intentions—to deter violent crime.

Given the strong policy arguments for revising the law, legislators, the governor, and California's voters should amend three strikes to only apply to violent and serious felonies.[261] First, by adopting a narrower

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to medical needs of older prisoners, a third strike offender will cost the prison system at least $675,000 by the end of serving the minimum 25-year sentence. *See* Parsons, *supra* note 227, at B3.

253. Vitiello, *supra* note 245, at 279-80.

254. *Id.* (internal quotations omitted).

255. *See* Problem and Solution, *supra* note 225.

256. *See* King & Mauer, *supra* note 241, at 3. Some of the laws "staunchest supporters" asserted that the law was designed to isolate and punish the most serious, habitual offenders. *Id.*

257. *See* Problem and Solution, *supra* note 225.

258. *See* King & Mauer, *supra* note 241, at 5.

259. *See* Parsons, *supra* note 227, at B3.

260. Brief of Amicus Curiae Families Against Mandatory Minimums at 3, Ewing v. California, 123 S. Ct. 1179 (2003) (No. 01-6978). To illustrate, in a sample of more than 1,300 cases, burglary or drug offenses are twice as likely to receive a mandatory 25-year-to-life sentence under three strikes than are all of the violent offenses in California's penal code combined. *See* ZIMRING ET AL., *supra* note 25, at 50.

261. This proposed amendment is similar to Assembly Bill 112 proposed by Assemblywoman Goldberg's. *See* Assembly Bill 112, *supra* note 230.

law, courts will not have to weigh down the proportionality scale with prior violent acts in order to prove that the punishment fits the crime.[262] Simply put, the gravity of a violent and serious triggering offense, will fit the harshness of the penalty, and likely will do away with proportionality concerns. Similarly, by ceasing the disproportionate punishment of non-violent offenders, courts will adhere to the "evolving standards of decency" set forth in the Eighth Amendment, and implicit in other recidivist statutes throughout the nation. Finally, as part of an amended version of the law, the highly discretionary "wobbler" offenses should not be allowed to constitute third strikes. Instead, the new law should adhere to the defined violent and serious offenses and likewise permit eligibility for three strikes only after an offender commits a third truly violent or serious crime. Ultimately, with the passage of a narrower law, the constitutionality of three strikes likely would be moot.

In addition to alleviating any constitutional concerns, California's projected economic problems and social inconsistencies resulting from three strikes will dissolve. First, as proposed by Assemblywoman Goldberg, already convicted third-strike offenders should have the opportunity to have their convictions reviewed and possibly reduced.[263] By allowing a retroactive application of the new law, the overcrowding currently present in California's prisons will eventually subside with each reduced sentence. Finally, if California's penal system moves away from incarcerating petty thieves for up to twenty-five years, the costs saved by the State will be colossal.[264]

While the problems associated with three strikes are overwhelming, the solution is simple—change the law. If California's legislature steps up and passes a revised version of three strikes targeting violent offenders, California's prisons will no longer be bursting at the seams with minor third-strikers. More importantly, California's resources can go to more important social necessities, like higher education,[265] instead of to housing the golf club thieves of today's society.

Sara J. Lewis[*]

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262. *See* ACLU of Southern California, *What's at Stake: Three Strikes Reform*, *at* http://ga1.org/campaign/ab112/explanation (last visited May 17, 2004).

263. *See* Parsons, *supra* note 227, at B3.

264. *See generally* King & Mauer, *supra* note 241 (examining the impact three strikes has on California's economy and penal system); *see also supra* Part IV.B.3 (evaluating the economic costs of three strikes).

265. *See generally*, Kathleen Connolly et al., *From Cellblocks to Classrooms – California*, JUSTICE POLICY INSTITUTE, Oct. 17, 1996, *at* http://www.justicepolicy.org/article.php?id=281 (last visited May 17, 2004) (noting that the higher proportion of tax dollars that go to the corrections system occurs at the expense of other programs, such as higher education).

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