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A CRUEL AND UNUSUAL APPLICATION OF THE
PROPORTIONALITY PRINCIPLE IN EIGHTH
AMENDMENT ANALYSIS

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

*Blake J. Delaney**

Petitioner, Gary Ewing, while on parole, stole three golf clubs valued at approximately \$1200 from a pro shop.¹ Respondent, the State of California, charged Petitioner with felony grand theft of personal property.² The Los Angeles County Superior Court convicted Petitioner of the charged offense, triggering Respondent's "three strikes law."³ The recidivist statute required the trial judge to impose a prison term of twenty-five years to life because Petitioner had been convicted of four previous felonies.⁴ Petitioner appealed, arguing that the sentence violated his

* To my wife Jen, for whose encouragement and love I will always be grateful.

1. *Ewing v. California*, 538 U.S. 11, 17-19 (2003) (plurality opinion). Petitioner was on parole after having been incarcerated for five and a half years for committing three residential burglaries and a robbery at an apartment complex over a five-week period in 1993. *Id.* at 18-19 (plurality opinion). Petitioner's early release came four years before his prison sentence was originally scheduled to end. *Id.* at 19 (plurality opinion).

2. *Id.* (plurality opinion). As is common with property-related offenses, the crime of grand theft in California is a misdemeanor unless the value of the goods at issue exceeds the specified statutory amount. 50 AM. JUR. 2D *Larceny* § 49 (2003). In California, that threshold value is \$400. CAL. PENAL CODE § 487 (West 2003).

3. *Ewing*, 538 U.S. at 19-20 (plurality opinion). California's "three strikes law" is a recidivist statute: it penalizes previously convicted felons more severely than first-time offenders precisely because the felon has shown an inability to conform his conduct to the requirements of the State's criminal law system. § 667(b); *Ewing*, 538 U.S. at 16-17 (plurality opinion).

The crime of felony grand theft is known in California as a "wobbler" because the trial judge has discretion to reduce the crime to a misdemeanor. *Ewing*, 538 U.S. at 16-17 (plurality opinion). If the trial judge had decided to reduce Petitioner's felony to a misdemeanor, Respondent's recidivist statute would not have applied. *Id.* (plurality opinion).

4. *Id.* at 19-20 (plurality opinion). Respondent's recidivist statute requires enhanced prison terms for defendants who have previously committed one or more serious or violent felonies. If a defendant has one prior felony conviction on his or her record, the sentence for his or her current conviction must be twice the term that normally would be imposed. § 667(e)(1). If a defendant has two or more prior felony convictions, the defendant must receive an indeterminate term of life imprisonment, with parole not available until after the "minimum term." *Id.* § 667(e)(2)(A). The minimum term is calculated by the greater of: three times the prison term that normally would be imposed; twenty-five years; or a term otherwise determined by the court. *Id.*

In the instant case, Petitioner had four "strikes" on his record prior to his current conviction for felony grand theft. *See supra* note 1. Therefore, Respondent's recidivist statute required the sentencing judge to impose an indeterminate term of life imprisonment. *See* § 667(e)(2). As for

constitutional right to be protected from cruel and unusual punishment.⁵ However, the California Second District Court of Appeal affirmed the sentence.⁶ The United States Supreme Court granted certiorari⁷ and, in affirming the appellate court's decision, HELD that Respondent's three strikes law did not constitute cruel and unusual punishment with respect to Petitioner's sentence.⁸

In the criminal law system, states have a generally recognized right to legislate their own punishments.⁹ Nevertheless, the Eighth Amendment allows for some judicial intervention by proscribing the infliction of "cruel and unusual punishments."¹⁰ How courts should evaluate whether a punishment is cruel and unusual, however, has been a source of controversy for nearly 100 years. Some argue that the Eighth Amendment is applicable only to cruel and unusual *modes* of punishment,¹¹ while others maintain that the Eighth Amendment requires, regardless of the form of punishment, proportionality between the harshness of the penalty and the gravity of the offense.¹²

Petitioner's parole eligibility date, the sentencing judge was required to impose a minimum term of twenty-five years because three times the prison term for felony grand theft would be less than twenty-five years. *See id.*; *Ewing*, 538 U.S. at 16-20 (plurality opinion).

5. *Ewing*, 538 U.S. at 20 (plurality opinion).

6. *Id.* (plurality opinion).

7. *Id.* (plurality opinion). The Supreme Court of California had denied *Ewing*'s petition for review. *Id.* (plurality opinion).

8. *Id.* at 30-31 (plurality opinion).

9. *See Harmelin v. Michigan*, 501 U.S. 957, 1016 (1991) (White, J., dissenting); GRAEME R. NEWMAN, *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS* 114-26 (2d ed. 1995). For a discussion of how the *Ewing* decision was grounded in federalist principles, see *infra* note 52.

10. U.S. CONST. amend. VIII. The Eighth Amendment to the United States Constitution reads, in full: "Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments* inflicted." *Id.* (emphasis added). Originally, the Supreme Court held that the rights guaranteed in the first eight amendments to the United States Constitution did not apply to the States. *See Barron v. Mayor of Baltimore*, 32 U.S. 243, 247 (1833). However, the Court has since held otherwise by expressly making the Eighth Amendment applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962).

11. *See, e.g.*, Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted." *The Original Meaning*, 57 CAL. L. REV. 839, 841-44 (1969); Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 378-82 (1980).

12. *See, e.g.*, Peter Mathis Spett, *Confounding the Gradations of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in Harmelin v. Michigan*, 24 COLUM. HUM. RTS. L. REV. 203, 204-05 (1992/1993); G. David Hackney, *Recent Development, A Trunk Full of Trouble: Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), 27 HARV. C.R.-C.L. L. REV. 262, 279 (1992); Lisa Ann Tatulli, Casenote, *Eighth Amendment—Cruel and Unusual Punishment—Sentence of Life Imprisonment Without Parole for the Crime of Possessing More Than 650 Grams of Cocaine is Not Cruel and Unusual in Violation of the Eighth Amendment—Harmelin v. Michigan*, 111 S. Ct. 2680

This debate is due largely to the Supreme Court's decision in *Weems v. United States*,¹³ in which the Court espoused a proportionality principle¹⁴ in the context of corporal punishment.¹⁵ In *Weems*, the defendant, while in the Philippines, falsified official records of the United States Coast Guard, resulting in the defrauding of the United States government of 612 pesos.¹⁶ Upon conviction, the defendant was sentenced to fifteen years of *cadena temporal*, a form of punishment unique to the Philippines that required the defendant to carry out hard and painful labor for the benefit of the state while being chained by the wrists and ankles.¹⁷ In addition, the defendant lost all political rights during imprisonment, was subject to permanent surveillance after his release, and was fined 4,000 pesetas.¹⁸ In finding the punishment unconstitutional, the Court adopted as a "precept of justice" the principle that "punishment for [a] crime should be graduated and proportioned to [the] offense."¹⁹ Because the punishment, including the accompanying fine and "accessories," was excessive in penalty and unfamiliar in character, the Court found it both cruel and unusual.²⁰

After the *Weems* Court interpreted the Cruel and Unusual Clause to include a proportionality principle, courts disagreed about whether all criminal punishments should be subject to the principle.²¹ In *Rummel v.*

(1991), 2 SETON HALL CONST. L.J. 409, 443-44 (1991).

13. 217 U.S. 349 (1910).

14. *Id.* at 367.

15. *Id.* at 364.

16. *Id.* at 357-58.

17. *Id.* at 363-64. There are actually two degrees of punishment that are even more serious than *cadena temporal*: death and *cadena perpetua*. *Id.*

18. *Id.* at 364-66.

19. *Id.* at 367.

20. *Id.* at 377, 380-81.

21. Compare *Carmona v. Ward*, 576 F.2d 405, 408 (2d Cir. 1978) ("[C]onstitutional prohibition is not limited to sanctions which involve torture or other barbaric modes of punishment."), and *Downey v. Perini*, 518 F.2d 1288, 1290 (6th Cir. 1975) (*vacated by* 423 U.S. 993 (1975)) ("The Court in *Weems* was primarily concerned with the kind of punishment inflicted; nevertheless, the requirement that the punishment not be disproportionate applies to the length of sentence as well."), and *Hart v. Coiner*, 483 F.2d 136, 139-40 (4th Cir. 1973) (finding that the Eighth Amendment's prohibition against cruel and unusual punishment is directed not only against torture or barbarism, but also against punishments which by their excessive length or severity are greatly disproportionate to the offense), and *People v. Broadie*, 332 N.E.2d 338, 341 (N.Y. 1975) ("Although the intent of the framers was to proscribe barbaric, torturous punishments, the clause has come to mean much more. Prohibited also are punishments grossly disproportionate to the crime."), with *Renner v. Beto*, 447 F.2d 20, 23 (5th Cir. 1971) (finding that a prison sentence is neither cruel nor unusual if it is within the statutory limits set by a legislature), and *Anthony v. United States*, 331 F.2d 687, 693 (9th Cir. 1964) ("The punishments prescribed, fine and imprisonment, are and always have been customary punishments for crime in this country, and cannot be said to be either cruel or unusual."), and *Smith v. United States*, 273 F.2d 462, 467-68

Estelle,²² the Supreme Court considered the applicability of the proportionality principle in the context of an enhanced prison sentence under a recidivist statute.²³ In *Rummel*, the defendant was convicted of felony theft for the third time in nine years.²⁴ Although in isolation the latest felony would have been punishable by a prison term of between two and ten years, the state's recidivist statute imposed upon the defendant a life sentence, with parole not available for ten to twelve years.²⁵ In upholding the sentence, the Court refused to review whether the harshness of the punishment was proportional to the gravity of the offense,²⁶ recognizing that the proportionality principle was traditionally reserved for cases involving capital punishment.²⁷ Because the defendant probably "would be eligible for parole within 12 years of his initial confinement,"²⁸ the Court found that this punishment was not one of the "exceedingly rare" non-capital punishment cases where the application of a proportionality principle would be appropriate.²⁹

(10th Cir. 1959) (finding a strong presumption of constitutionality for a punishment imposed within the statutory limit). See generally Andrew H. Mun, Note, *Mandatory Life Sentence Without Parole Found Constitutionally Permissible for Cocaine Possession—Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), 67 WASH. L. REV. 713, 716-17 (1992).

22. 445 U.S. 263 (1980).

23. *Id.* at 264.

24. *Id.* at 265-66.

25. *Id.* at 266.

26. *Id.* at 271-75.

27. *Id.* at 271-72. A proportionality principle might be applicable only in capital punishment cases "[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long." *Id.* at 272. Furthermore:

"The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

Id. (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)).

28. *Id.* at 268. Although the Court lent significance to the reality that the defendant would be released before fully serving his life sentence, the dissent criticized such reliance as misplaced. *Id.* at 293 (Powell, J., dissenting). Justice Powell argued that the defendant had no legal right to early release. *Id.* (Powell, J., dissenting). In fact, the Court had expressed a similar viewpoint just one year earlier, when it noted that there is no "constitutional or inherent right" to parole and that a state may "establish a parole system, but it has no duty to do so." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979).

29. *Rummel*, 445 U.S. at 272. The Court identified *Weems* as the most notable exception for applying the proportionality principle in a non-capital case, but de-emphasized its importance by highlighting that the context of *Weems* was of a "unique nature." *Id.* at 272-74.

Although the *Rummel* Court did not provide a test for when a case is "exceedingly rare," Justice Powell offered a hypothetical case in his dissenting opinion. Criticizing the majority's

Only three years later, however, in *Solem v. Helm*,³⁰ the Supreme Court significantly expanded the applicability of the proportionality principle in the context of a recidivist statute.³¹ In *Solem*, the defendant, convicted of six prior felonies, pleaded guilty to felonious “uttering of a ‘no account’ check.”³² Because of the defendant’s criminal record, the state’s recidivist statute mandated a life sentence with no opportunity for parole.³³ The Court, however, held the statute to be unconstitutional as applied to the defendant.³⁴ Following the principle that the Eighth Amendment prohibits “sentences that are disproportionate to the crime committed,”³⁵ the Court found that the proportionality principle should apply equally to both capital punishments and felony prison sentences.³⁶ The Court further outlined three objective factors that should be reviewed when testing the proportionality of a punishment: the gravity of the offense, as weighed against the harshness of the penalty;³⁷ a comparison of sentences imposed

unwillingness to read a proportionality principle into the Eighth Amendment in non-capital cases, he sarcastically suggested that a mandatory life sentence for overtime parking would surely “offend our felt sense of justice,” even if the majority would not feel compelled to review its constitutionality. *Id.* at 288 (Powell, J., dissenting). Justice Rehnquist, writing for the majority, responded with what is perhaps now the most famous footnote in Eighth Amendment jurisprudence: “This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, if a legislature made overtime parking a felony punishable by life imprisonment.” *Id.* at 274 n.11 (citation omitted). Although the exchange was somewhat tongue-in-cheek, Justice Rehnquist’s footnote is now frequently cited to stand for the proposition that a proportionality principle may be applicable in non-capital cases. *See, e.g.*, *United States v. Gonzalez*, 922 F.2d 1044, 1052-53 (2d Cir. 1991); *Duran v. Castro*, 227 F. Supp. 2d 1121, 1130 (E.D. Cal. 2002); *State v. Scott*, 961 P.2d 667, 672 (Kan. 1998); *Jackson v. State*, 740 So. 2d 832, 835 (Miss. 1999).

30. 463 U.S. 277 (1983).

31. *See id.* at 290.

32. *Id.* at 279-81.

33. *Id.* at 281-82.

34. *Id.* at 284.

35. *Id.*

36. *Id.* at 288-90. In reaching this interpretation of the Eighth Amendment, the Court examined the history of the Cruel and Unusual Clause. *Id.* at 284-88. The Framers of the Eighth Amendment adopted almost verbatim the language of the English Bill of Rights: “excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.” *Id.* at 285 (quoting Bill of Rights, 1688, 1 W. & M., c. 2 (Eng.)). That language, as applied within the English legal system, most certainly included a proportionality principle, even in the context of non-capital cases. *Id.* at 285-86. For example, in *Earl of Devonshire’s Case*, 11 State Trials 1353, 1354 (H.L. 1687), the King’s Bench had imposed a fine of 30,000 pounds upon a defendant as punishment for committing an assault and battery. Reversing the decision of the King’s Bench, the House of Lords characterized the fine as “excessive and exorbitant” and therefore violative of the English Bill of Rights. *Id.* at 1372. Therefore, when “the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality.” *Solem*, 463 U.S. at 285-86.

37. *Solem*, 463 U.S. at 290-91. The Court outlined several sub-factors to guide the analysis

for other crimes in the same jurisdiction;³⁸ and a comparison of sentences imposed for the same crime in other jurisdictions.³⁹

The instant Court inherited this uncertainty regarding the applicability of a proportionality principle in the context of a recidivist statute.⁴⁰ Although the Court, by a five-to-four margin, upheld Petitioner's prison sentence of twenty-five years to life,⁴¹ it could not reach a majority opinion as to *why* the punishment was constitutional. The five Justices constituting the majority espoused two distinct justifications for Respondent's three strikes law.

Justice O'Connor, delivering the plurality opinion in which Chief Justice Rehnquist and Justice Kennedy joined, found that the prison sentence did not violate the narrow proportionality principle⁴² established in *Solem*.⁴³ Whereas in *Solem* the Court outlined three factors to consider in determining the proportionality of a penalty,⁴⁴ the O'Connor plurality employed a modified test which converted the first consideration—the gravity of the offense and the harshness of the penalty—into a threshold issue.⁴⁵ Only if the penalty is found “grossly disproportionate”⁴⁶ to the offense should the Court then consider the penalties for other crimes within the same jurisdiction and the penalties for the same crime within other jurisdictions.⁴⁷ The plurality concluded that Petitioner's punishment

of this first factor: the harm caused or threatened to the victim or society; the magnitude of the crime; the presence or absence of violence; and the lack of intent or presence of a motive. *Id.* at 292-94.

38. *Id.* at 291.

39. *Id.*

40. After deciding *Solem* in 1983, the Supreme Court heard *Harmelin v. Michigan*, 501 U.S. 957, 961-62 (1991) (plurality opinion), where a first-time drug offender brought suit challenging the constitutionality of a mandatory term of life in prison without the possibility of parole. Because the case did not involve an enhanced punishment for a repeat offender, however, the *Harmelin* decision did little to resolve the turmoil regarding the constitutionality of recidivist statutes. Nevertheless, *Harmelin* was an important precursor to the instant case. For a specific analysis of the evolution of the Court's analysis of the Cruel and Unusual Clause from *Harmelin* to *Ewing*, see *infra* note 54.

41. *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (plurality opinion).

42. *Id.* at 20 (plurality opinion).

43. 463 U.S. 277, 290-92 (1983).

44. *Id.*

45. See *Ewing*, 538 U.S. at 23-28 (plurality opinion).

46. *Id.* at 23-28 (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)).

47. See *id.* at 22-28 (plurality opinion). Although the plurality did not expressly announce that it was using a modified version of the *Solem* test, the plurality opinion makes this fact eminently clear. The plurality wrote that the “first” and “threshold” inquiry is to weigh the gravity of the offense against the harshness of the penalty. *Id.* at 28 (plurality opinion). As for the second and third steps, the plurality wrote that “*Solem* ‘did not mandate’ comparative analysis ‘within and between jurisdictions.’” *Id.* at 23 (plurality opinion) (quoting *Harmelin*, 501 U.S. at 1004-05

was constitutional because the harshness of Respondent's sentence was not grossly disproportionate to the gravity of Petitioner's offense.⁴⁸ Because the threshold issue of gross disproportionality was not met, the plurality did not need to evaluate the last two steps of the test.⁴⁹

Although Justice Scalia and Justice Thomas concurred separately that Respondent's punishment was constitutional, they grounded their opinions in reasoning different than that of the plurality.⁵⁰ However, they outlined two reasons why a proportionality principle, whether narrow or broad, should *never* be used to analyze the constitutionality of a term-of-years sentence. First, Justice Scalia noted that a test of proportionality cannot be judicially applied because the harshness of the penalty cannot be weighed against the gravity of the offense without considering the penological goals and policy choices "inherently . . . tied" to both the punishment and the crime.⁵¹ Second, Petitioner's sentence should not be evaluated with a proportionality principle because the Cruel and Unusual Clause only proscribes cruel and unusual *modes* of punishment, which, by definition, incarceration is not.⁵²

(Kennedy, J., concurring in part and concurring in judgment)). Thus, only if a "threshold" determination of gross disproportionality is made should the analysis continue by comparing sentences imposed for crimes in the same jurisdiction and comparing sentences for the same crime in other jurisdictions. Because the first factor of the *Solem* test has consequently become more significant in Eighth Amendment jurisprudence, some argue that objective analysis of challenges under the Cruel and Unusual Clause has been rendered futile. *See, e.g., Spett, supra* note 13, at 233-34; Aubrey L. Brown, Jr., Case Comment, *Constitutional Law—Harmelin v. Michigan: The Continuing Saga of Proportionality Review Under the Eighth Amendment*, 22 MEM. ST. U. L. REV. 373, 386-88 (1992); 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, 421 (1999).

48. *Ewing*, 538 U.S. at 30-31 (plurality opinion).

49. *See id.* (plurality opinion). However, the dissent contended that by rendering the first, and most subjective, factor of the *Solem* test (gross disproportionality) a threshold issue, the plurality inappropriately created a "determinative test" that fails to consider the two objective parts of the *Solem* test: the second and third factors. *Id.* at 42 (Breyer, J., dissenting). Therefore, the dissent maintained that the first factor of the *Solem* test should be applied using the *broad* proportionality principle embodied in the Eighth Amendment. *Id.* at 36 (Stevens, J., dissenting).

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

51. *Id.* at 31 (Scalia, J., concurring in judgment). Specifically, Justice Scalia recognized that it is unclear how such goals as incapacitation, retribution, deterrence, and rehabilitation should be considered while at the same time weighing the harshness of the penalty and the gravity of the offense. *Id.* (Scalia, J., concurring in judgment).

52. *Id.* (Scalia, J., concurring in judgment). The full explanation of this second reason is found in Justice Scalia's plurality opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Harmelin*, he wrote that the Eighth Amendment originally prohibited only punishments that were cruel and unusual, not simply disproportionate or excessive. *Id.* at 967 (plurality opinion). The terms "cruel" and "unusual" should be tested independently because the two words are not simply synonyms. *Id.* (plurality opinion). Because incarceration has long been employed in various forms

Because seven Justices (the plurality and the dissent) found that the Eighth Amendment requires some level of proportionality between the harshness of a penalty and the gravity of an offense in the context of a recidivist statute,⁵³ the Court's guidance as to how to apply the proportionality principle is significant for the future of constitutional law.⁵⁴

throughout American history, a long mandatory prison sentence may be cruel, but could never be unusual in the constitutional sense. *Id.* at 994-95 (plurality opinion). Thus, the only punishments that can be held unconstitutional for being disproportionate are cruel and unusual *modes* of punishment, such as the *cadena temporal* employed in *Weems*. *See id.* at 990-95 (plurality opinion); *supra* notes 17-18 and accompanying text.

Although the five-member majority in *Ewing* was divided as to why Petitioner's sentence was constitutional, their three separate opinions breathed life into the notion of federalism. They were all similar in recognizing a need to defer to states in formulating systems of criminal punishment. The opinions of Justice Thomas and Justice Scalia, that Respondent's sentence should not be evaluated with a proportionality principle, are clearly grounded in federalism. They contended that states fulfill legitimate goals of deterrence and rehabilitation through their criminal punishments. *See Ewing*, 538 U.S. at 31 (Scalia, J., concurring in judgment); *id.* at 32 (Thomas, J., concurring in judgment). Therefore, judicial review of any criminal sentence must include an analysis showing that the punishment furthers the "State's public-safety interest in incapacitating and deterring recidivist felons." *Id.* (Scalia, J., concurring in judgment). Consequently, it would be impossible to evaluate whether a criminal sentence was "proportional" to these goals. *Id.* (Scalia, J., concurring in judgment).

Justice O'Connor's plurality opinion is also supportive of federalism. Although the plurality recognized that the Eighth Amendment contains a proportionality principle, its characterization of the principle was so narrow that successful challenges to non-capital punishments as disproportionate should be "rare." *Id.* at 30 (plurality opinion) (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment)). Because criminal sentencing schemes rest on difficult policy choices, the Court should not be viewed as a "superlegislature," charged with second-guessing State legislatures. *Id.* at 28 (plurality opinion). Therefore, the plurality maintained that for a criminal punishment to pass constitutional muster, it is enough for the State to have a "reasonable basis" for believing that its punishment scheme "advance[s] the goals of [its] criminal justice system in any substantial way." *Id.* (plurality opinion) (alteration in original) (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)). Ultimately, then, although the five Justices comprising the majority in *Ewing* differed as to when, if ever, a proportionality principle should apply in an Eighth Amendment challenge, all of the opinions nevertheless were rooted in a concern for federalism.

53. The plurality interpreted the Eighth Amendment to include a narrow proportionality principle, while the dissent maintained that the Eighth Amendment should be evaluated using a broad proportionality principle. *See supra* notes 43-49 and accompanying text.

54. The makeup of the Justices in *Ewing* is quite interesting, given the Court's recent history. In both *Solem* and *Rummel*, Chief Justice Rehnquist maintained that the Cruel and Unusual Clause of the Eighth Amendment included a narrow proportionality principle that applied only rarely in the context of non-capital punishments. *Solem*, 463 U.S. at 306-07 (Burger, C.J., dissenting); *Rummel v. Estelle*, 445 U.S. 263, 271-72 (1980). However, ten years later, in *Harmelin*, the Chief Justice concurred with Justice Scalia's plurality opinion that *Solem* was wrongly decided and that "the Eighth Amendment contains no proportionality guarantee." *Harmelin*, 501 U.S. at 965 (plurality opinion). Finally, in the instant case, the Chief Justice concurred with the plurality, again finding that the Eighth Amendment embodied a narrow proportionality principle. *Ewing*, 538 U.S. at 20 (plurality opinion).

While the plurality provided a detailed framework for evaluating the harshness of a penalty and the gravity of an offense,⁵⁵ its actual application of the proportionality principle is problematic. In concluding that Petitioner's punishment was constitutional, the plurality erroneously characterized both sides of the proportionality principle: the harshness of the penalty and the gravity of the offense.

First, the plurality misconstrued Respondent's recidivist statute by placing significant weight on the premise that Respondent had an interest in "incapacitating and deterring recidivist felons."⁵⁶ The plurality maintained that enhanced prison sentences are justified because repeat offenders have shown an inability to bring their conduct "within the social norms prescribed by the criminal law of the State."⁵⁷ The plurality analogized the instant case to *Rummel*,⁵⁸ where a recidivist statute was found to be constitutional, partly because the State had already imprisoned the defendant twice without success.⁵⁹ Thus, a repeat offender, in the plurality's view, could be punished more severely because he has failed to reform his conduct despite being previously incarcerated multiple times.

In the instant case, however, Petitioner's situation is not analogous to that of the defendant in *Rummel*. Petitioner's previous "strikes" all stemmed from the same series of crimes within a five-week period, during which Petitioner committed three burglaries and one robbery.⁶⁰ When he was finally arrested and convicted, Petitioner was sentenced to a prison term of nearly ten years in satisfaction of all four felonies.⁶¹ Thus, when he was paroled five and a half years into his sentence, he had only served one prior prison term despite having four "strikes" on his record.⁶² While

Justice Souter's decision in the instant case was also different from his opinion in *Harmelin*. In *Harmelin*, he concurred with Justice Kennedy and Justice O'Connor that the Eighth Amendment included a narrow proportionality principle which should be analyzed using a modified version of the *Solem* three-factor test. *Harmelin*, 501 U.S. at 996-97 (Kennedy, J., concurring in part and concurring in judgment). Although Justice Kennedy's opinion provided a natural foundation for the plurality's similar opinion in *Ewing*, Justice Souter joined the dissent in *Ewing*, finding that the Eighth Amendment embodied a *broad* proportionality principle. *Ewing*, 538 U.S. at 35-36 (Stevens, J., dissenting). Justice Kennedy and Justice O'Connor, meanwhile, maintained consistent viewpoints, finding that a narrow proportionality principle should be read into the Cruel and Unusual Clause of the Eighth Amendment. *Id.* at 20 (plurality opinion). They also reiterated in *Ewing* their belief that Eighth Amendment jurisprudence should involve a modified version of the *Solem* test. *See supra* note 47.

55. *Ewing*, 538 U.S. at 28-29 (plurality opinion).

56. *Id.* at 29-30 (plurality opinion).

57. *Id.* at 30 (plurality opinion) (quoting *Rummel*, 445 U.S. at 284).

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

59. *Id.* at 276.

60. *Ewing*, 538 U.S. at 18-19 (plurality opinion); *see also supra* note 1.

61. *Ewing*, 538 U.S. at 19 (plurality opinion); *see also supra* note 1.

62. *Ewing*, 538 U.S. at 19 (plurality opinion).

that is certainly no excuse for avoiding punishment altogether, Petitioner's situation fails to satisfy the policy reasons underlying an enhanced prison sentence under Respondent's three strikes law.

The plurality also misconstrued Respondent's punishment when it emphasized that the prison sentence allowed for parole after twenty-five years.⁶³ The plurality recognized that one reason the sentence in *Solem* was held to be unconstitutional was the absence of parole eligibility,⁶⁴ whereas one reason the sentence in *Rummel* was held constitutional was because parole was available within ten to twelve years.⁶⁵ Using this as a factor in the instant case, then, Petitioner's eligibility for parole in twenty-five years indicated a less harsh penalty.⁶⁶

However, using the existence of parole as a bright-line test for determining the harshness of a punishment is problematic. Indeed, the mere possibility of parole is not a guarantee of release from prison and thus should not be equated to a shorter prison term.⁶⁷ Further, Petitioner is not eligible for parole for twenty-five years,⁶⁸ more than twice the period in *Rummel*.⁶⁹ Although both the defendant in *Rummel* and Petitioner were sentenced to terms that included parole eligibility, it is not necessarily true that the sentences should be viewed as equally lenient. If this were the case, then a life sentence, with the possibility of parole in seventy-five years, might not be viewed as a harsh sentence because there exists the possibility of early release.

The third problem with the plurality's opinion is its characterization of the other side of the proportionality principle: the gravity of Petitioner's offense. Specifically, the plurality contended that an "offense" must be defined as the triggering felony in addition to any previous strikes.⁷⁰ If only the current felony were weighed, the proportionality test would fail to accord proper deference to the State's interest in dealing with repeat offenders in a harsher manner.⁷¹

Thus, in the instant case, Petitioner's "offense" should have included felony grand theft as well as three burglaries and a robbery.⁷² However, when the plurality weighed Petitioner's "offense" in its proportionality analysis, it looked at Petitioner's *entire* criminal history, not just the

63. *Id.* at 22, 30-31 (plurality opinion).

64. *Id.* at 22 (plurality opinion); *Solem v. Helm*, 463 U.S. 277, 301-02 (1983).

65. *Ewing*, 538 U.S. at 22 (plurality opinion); *Rummel v. Estelle*, 445 U.S. 263, 280-81 (1980).

66. *See Ewing*, 538 U.S. at 29-31 (plurality opinion).

67. *Rummel*, 445 U.S. at 293-94 (Powell, J., dissenting).

68. *Ewing*, 538 U.S. at 20 (plurality opinion).

69. *Rummel*, 445 U.S. at 267.

70. *Ewing*, 538 U.S. at 29 (plurality opinion).

71. *Id.* (plurality opinion).

72. *Id.* at 19 (plurality opinion).

triggering offense and the four prior strikes.⁷³ Specifically, the plurality referred to Petitioner's "long, serious criminal record," including "numerous *misdemeanor* and felony offenses" and "nine separate terms of incarceration."⁷⁴ The end result, then, is that Petitioner's offense was characterized as much more serious than it should have been.

Although far from clear, it appears the current Court espouses the application of a proportionality principle in cases challenging recidivist statutes under the Cruel and Unusual Clause of the Eighth Amendment. Even so, the process of weighing the harshness of a State's punishment against the gravity of a defendant's offense is cumbersome. Unless the Court clarifies, in detail, how to weigh the harshness of a recidivist statute against the gravity of an offense, application of the proportionality principle itself will surely be heralded as cruel and unusual.

73. *Id.* at 29 (plurality opinion).

74. *Id.* at 29-30 (plurality opinion) (emphasis added). The long criminal history the Court referred to included charges of: theft (twice); petty theft; battery; misdemeanor burglary; possessing drug paraphernalia; appropriating lost property; unlawfully possessing a firearm; trespassing; and felony grand theft auto (ultimately dismissed). *Id.* at 18 (plurality opinion). Petitioner established this criminal history during the nine years prior to the series of three burglaries and one robbery comprising Petitioner's four "strikes." *Id.* (plurality opinion). Despite the numerous charges, though, Petitioner had not previously been subject to Respondent's recidivist statute. Nine of the ten charges were misdemeanors and, consequently, did not qualify as serious and/or violent felonies. *Id.* (plurality opinion). The tenth charge (felony grand theft auto) would have counted as a "strike" for Petitioner except that the sentencing court ultimately dismissed the case after Petitioner completed probation. *Id.* (plurality opinion).

