

Comparing the Strike Zones of “Three Strikes and You’re Out” Laws for California and Georgia, the Nation’s Two Heaviest Hitters

“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”¹

“As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”²

I. INTRODUCTION

On November 4, 1995, Leandro Andrade was arrested for the benign offense of shoplifting \$84.70 worth of children’s movies from a K-Mart store located in Ontario, California.³ Just fourteen days later, Andrade was again arrested for stealing \$68.84 of children’s movies in Montclair, California.⁴ A life of crime was nothing new to Andrade.⁵ In fact, Andrade had been in and out of prison since 1982 for a host of offenses, including petty theft, first-degree residential burglary, and transporting marijuana.⁶

In 1994, California adopted a “Three Strikes and You’re Out” law (three strikes law), which is an antirecidivist law that mandates a sentence of twenty-

1. Weems v. United States, 217 U.S. 349, 367 (1910).

2. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

3. Lockyer v. Andrade, 538 U.S. 63, 66 (2003) (discussing facts of case).

4. *Id.*

5. *Id.* at 66-67 (discussing Andrade’s criminal history). Andrade had a criminal history spanning roughly thirteen years. *Id.* (noting Andrade had served time in both state and federal prison). In January 1982, Andrade was arrested and convicted for misdemeanor theft. *Id.* That same year, Andrade was arrested for multiple counts of first-degree residential burglary, for which he was sentenced to serve 120 months in prison. *Id.* In 1988, Andrade was convicted for transporting marijuana and was ordered to serve eight years in federal prison. *Id.* In 1990, Andrade was again convicted for both misdemeanor theft and transporting marijuana. *Id.* (noting Andrade received federal prison sentence of 2191 days for transporting marijuana conviction). Finally, in 1991, Andrade was “arrested for a state parole violation-escape from federal prison.” *Id.* Andrade was eventually paroled from the state penitentiary system in 1993. *Id.*

6. *Id.*

five years to life in prison upon a criminal's third felony conviction if the criminal has two prior serious or violent felony convictions.⁷ The State charged and convicted Andrade of two counts of petty theft with a prior conviction for shoplifting children's videotapes—a felony in California.⁸ Tragically, because Andrade had two prior violent or serious felony convictions, a judge sentenced Andrade to serve two consecutive terms of twenty-five years to life in prison.⁹ Leandro Andrade will not be eligible for parole until 2046, at which time he will be eighty-seven years old.¹⁰

If California's three strikes law is considered overly broad, at the opposite end of the spectrum is Georgia's version, which only applies to seven specific offenses.¹¹ Colloquially known as Georgia's "Seven Deadly Sins Law" (two strikes law), Georgia's two strikes law is considered the nation's harshest because it only takes two strikes—as opposed to three—for a criminal to be "out."¹² A criminal who is convicted for committing a second serious violent felony is sentenced to life in prison without the possibility of parole or any other sentence-reducing measures.¹³ In *Ortiz v. State*,¹⁴ Robert Ortiz was charged and convicted of rape, aggravated sodomy, and burglary in Georgia.¹⁵ Because the crimes of rape and aggravated sodomy are categorized as serious violent felonies, Ortiz will spend the rest of his life behind bars without any hope for parole.¹⁶

Here are two versions of a three strikes law, two repeat offenders with differing criminal histories, two very different triggering offenses, and yet, both

7. See CAL. PENAL CODE ANN. § 667(d), (e)(2)(A) (2012) (requiring at least two predicate serious or violent felonies for statute to apply). Under California's three strikes law, the third felony need not be violent or serious to trigger the statute's application. See CAL. PENAL CODE ANN. § 667(e)(2)(A) (2012); see also *Andrade*, 538 U.S. at 66-68 (outlining California's three strikes law and sentencing procedure of Andrade); Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1, 2-3 (2003) (criticizing California's recidivist statute as overly broad in scope).

8. *Andrade*, 538 U.S. at 68.

9. Lockyer v. Andrade, 538 U.S. 63, 68 (2003); Chemerinsky, *supra* note 7, at 2-3 (discussing terms of Andrade's sentence).

10. Chemerinsky, *supra* note 7, at 3.

11. See GA. CODE ANN. § 17-10-6.1(a), 7(b) (2012) (enumerating seven crimes deemed serious violent felonies).

12. See TIMOTHY S. CARR, GA. DEP'T OF CORR., "TRUTH IN SENTENCING" IN GEORGIA 2 (2008), available at http://www.dcor.state.ga.us/Research/Standing/Truth_in_sentencing.pdf (calling Georgia's "Seven Deadly Sins" law "toughest" in nation); see also *Ortiz v. State*, 470 S.E.2d 874, 876 (Ga. 1996) (holding Georgia's two strikes law does not violate state and federal constitutions).

13. GA. CODE ANN. § 17-10-7(b) (2012) (mandating life in prison without possibility of parole for second serious violent felony conviction); see also *Ortiz*, 470 S.E.2d at 875 (discussing terms of Georgia's two strikes law).

14. 470 S.E.2d 874 (Ga. 1996).

15. See *Ortiz*, 470 S.E.2d at 875 (recounting facts of case).

16. *Id.* (receiving life sentence without parole pursuant to § 17-10-7(b) plus twenty-year consecutive sentence). But see William W. Berry III, *More Different Than Life, Less Different Than Death*, 71 OHIO ST. L.J. 1109, 1112 (2010) (arguing prison sentence of life without parole deserves own heightened standard of Eighth Amendment review).

Leandro Andrade and Robert Ortiz will spend the rest of their lives behind bars.¹⁷ The message both California and Georgia are trying to send to recidivists, although not equally clear in California's case, is that if you continually commit a certain class of felonies, you are going to prison for life.¹⁸ Yet, when juxtaposed, these specific outcomes inevitably beg the question: Does incarcerating a repeat offender for life—in Andrade's case, for petty theft—violate the Eighth Amendment's proscription against cruel and unusual punishment?¹⁹ Moreover, do the social and financial costs saved from prevented crimes warrant the frequent use of three strikes laws in California and Georgia?²⁰ Or rather, are these laws needlessly filling prisons with life-long prisoners who, as they age, will only cost states more to incarcerate?²¹

17. See *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (reversing Ninth Circuit decision overturning California Court of Appeal). The California Court of Appeal affirmed Andrade's sentence of two consecutive life sentences. *Id.* at 69. After the California Supreme Court denied discretionary review of the California Court of Appeal decision, Andrade filed a petition for a writ of habeas corpus in federal district court, which was ultimately denied. *Id.* The Ninth Circuit reversed the lower court's decision, holding that Andrade's prison sentence violated the Eighth Amendment. *Id.* (holding California Court of Appeal's decision to affirm Andrade's sentence clear error). *But see Ortiz*, 470 S.E.2d at 876 (holding life sentence without possibility of parole does not violate Eighth Amendment).

18. See *Ewing v. California*, 538 U.S. 11, 24 (2003) (noting three strikes laws, specifically California's, aimed to deter "career criminals"). The Supreme Court admonished courts for substituting their own penological theory in place of a state legislature's. *Id.* at 25. Consequently, deference should be afforded to a state's decision to enact penal laws that incarcerate a serious or violent recidivist for an extended period of time in order to effectuate that particular state's policy objectives of incapacitation and deterrence. *See id.* at 24-25.

19. See *Graham v. Florida*, 130 S. Ct. 2011, 2021-22 (2010), *modified*, (July 6, 2010) (describing differing proportionality standards under Eighth Amendment). The Eighth Amendment contains a narrow proportionality requirement for noncapital sentences. *Id.* at 2021; *see also Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy J., concurring in part) (stating Supreme Court has yet to clearly define proportionality principle for noncapital offenses). "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001.

20. See James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 31-34 (2000) (arguing violent crime and overall crime have declined because of three strikes law). In the few years prior to the enactment of California's three strikes law, the overall crime rate decreased by 2.4%, whereas the violent crime rate increased by 7.3%. *Id.* at 32 (discussing crime rate in California between 1990-1993). Over the next five or six years after the enactment of the three strikes law, however, the crime rate decreased significantly. *Id.* (contributing decline of crime rate to law). During the five-year period between 1994 and 1999, the general crime rate dropped an aggregate of 44%. *Id.* More noteworthy, however, was the reduction in serious or violent crime during this same period, with the homicide rate dropping 48.7%, and the crime of rape dropping 16.8%. *Id.* "Put in stark terms, 5,587 fewer murders were committed in California from 1993 to 1998 than would have occurred if the 1993 rate had continued." *Id.* (citing additional statistic of 7063 fewer rape victims over same period). Using the cost factors calculated by the National Institute of Justice for a single murder, the overall cost of 5587 murders that would have occurred if 1993 homicide levels had continued is \$5,864,820,000. *Id.* at 33 (factoring in tangible costs). In addition to plain numbers, intangible costs like "misery, emotional distress, and fear" should be emphasized. *Id.* Compared with the cost of \$2,376,360,000 to incarcerate the 5658 third-strike felons for twenty years who have been convicted since the law's enactment, the law is well worth the burdens it places on state prisons. *Id.* (stating law has allowed for overall savings of \$3,488,460,000 from preventing murders alone).

21. See David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557, 582 (2000)

This Note compares California's and Georgia's versions of a three strikes law.²² Part II of this Note briefly discusses the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause as interpreted by the United States Supreme Court.²³ Additionally, Part II explains the respective mechanics and effects of both California's and Georgia's versions.²⁴ Finally, Part III of this article seeks to substantiate several claims: first, the United States Supreme Court has significantly diverged from its prior decisions interpreting the Eighth Amendment's Cruel and Unusual Punishment Clause regarding noncapital punishments; second, Georgia's version of a three strikes law warrants greater judicial deference than California's; and third, although both California's and Georgia's versions of a three strikes law contribute to prison overcrowding and increased costs in their respective states, California's version causes a greater burden.²⁵

II. HISTORY

News of the brutal slayings of Kimber Reynolds and Polly Klaas, each committed by a paroled violent offender, swept the nation in late 1992 and 1993.²⁶ Mike Reynolds, Kimber's father, demanded swift action be taken to

(concluding California's three strikes law has led to no determinable social savings); Ilene M. Shinbein, Note, "Three-Strikes and You're Out": A Good Political Slogan to Reduce Crime, But a Failure in Its Application, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175, 198-202 (1996) (discussing costs and consequences of three strikes laws on prisons, public, and criminals).

22. See *infra* Part II.E (discussing California's and Georgia's versions of three strikes law); *infra* Part III.A (analyzing California's three strikes law); *infra* Part III.B (analyzing Georgia's version of three strikes law).

23. See *infra* Part II.A-C (discussing history of Cruel and Unusual Punishment Clause of Eighth Amendment).

24. See *infra* Part II.E (discussing effects and burdens of three strikes laws on states).

25. See *infra* Part III (asserting states' penal policies insulated from judicial review); *infra* Part III.A-B (arguing Georgia's three strikes law worthy of greater judicial deference than California's).

26. George Skelton, *A Father's Crusade Born from Pain*, L.A. TIMES, Dec. 9, 1993, http://articles.latimes.com/1993-12-09/news/mn-65402_1_mike-reynolds (recounting facts of crime). In June 1992, eighteen-year-old Kimber met a friend for dinner in her hometown of Fresno, California. *Id.* After dinner ended, Kimber was returning to her car when two men on a motorcycle suddenly pulled alongside her and attempted to steal her purse. *Id.* As told by Mike Reynolds, Kimber's father, "[s]he resisted, but not that much. It wasn't a big struggle. He pulled a .357 magnum out of his waistband, stuck it in her ear and pulled the trigger . . . There must have been 24 witnesses . . . They didn't even take her purse." *Id.* In October 1993, Richard Allan Davis, a twice-convicted violent offender who had recently been paroled, entered a home in Petaluma, California and kidnapped twelve-year-old Polly Klaas from a slumber party. See FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 5 (2001) (discussing circumstances surrounding Polly's abduction); Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 CALIF. L. REV. 257, 260 & n.21 (2002) (reviewing FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001)) (remarking on impossibility of Davis abducting Polly had he served entire prison sentence). As the search for Polly approached its third month, Davis eventually revealed to the police where he had dumped her body. See ZIMRING ET AL., *supra*, at 5; Vitiello, *supra*, at 260 & n.21.

prevent repeat offenders from ever committing such heinous crimes again.²⁷ The American public, by an overwhelming margin, echoed his sentiment.²⁸ More than twenty states and Congress responded to Reynolds's plea by enacting legislation commonly called "Three Strikes and You're Out," or three strikes laws.²⁹ The State of Washington was the first to pass a three strikes law in 1993; other states, including California and Georgia, soon followed.³⁰ Ironically, however, these laws were enacted at a time when crime rates were actually stagnating, or even declining.³¹

Prisoners decry these laws as imposing disproportionate prison sentences that violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.³² Opponents of three strikes laws fear that the population of life-long prisoners will drastically swell in size, and correspondingly, so will total incarceration costs.³³ Moreover, these monetary costs promise only to increase because aging prisoners require costly medical services that the state is obligated to provide.³⁴ Yet, despite these attacks, the United States Supreme

27. See ZIMRING ET AL., *supra* note 26, at 4 (discussing ballot initiative proposed by Mike Reynolds calling for enhanced punishments for recidivists). California's legislature proposed five different versions of a "Three Strikes and You're Out Law" to then-California Governor Pete Wilson. *Id.* at 6 (remarking California Democrats wanted to pressure Governor Wilson to choose "softer" three-strikes bill). Of these five proposed bills, the broadest mirrored the proposed three-strikes initiative spearheaded by Mike Reynolds to appear on the ballot of the upcoming 1994 state election. *Id.* at 6-7 (noting Governor Wilson chose Reynolds's bill over narrower bill proposed by California's District Attorneys Association).

28. See Schultz, *supra* note 21, at 558 (noting in 1994 seventy-four percent of American public supported passage of three strikes legislation).

29. *Id.* (stating twenty-two states and Congress passed three strikes legislation in two-year period).

30. See *id.* at 568; see also CAL. PENAL CODE § 667(e)(2)(A) (2012) (outlining California's three strikes legislation); GA. CODE ANN. § 17-10-7 (2012) (providing Georgia's two strikes legislation).

31. See Ardaiz, *supra* note 20, at 32 (conceding California's crime rate declined prior to enactment of three strikes law); cf. Schultz, *supra* note 21, at 557-58 (describing public concern over crime rates during early 1990s).

32. U.S. CONST. amend. VIII; see, e.g., *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003) (weighing challenge of prison sentence totaling fifty years as grossly disproportionate to crime); *Ewing v. California*, 538 U.S. 11, 19-20 (2003) (O'Connor, J., plurality opinion) (considering constitutionality of twenty-five years to life for stealing golf clubs); *Ortiz v. State*, 470 S.E.2d 874, 875 (Ga. 1996) (considering argument that statute imposing life in prison without possibility of parole unconstitutional).

33. See Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 483 (2010) (noting average annual cost of incarceration for state prisoner approximately \$25,900). Stricter sentencing laws increased both the elderly prison population and incarceration expenses because prison costs increase as the prisoners age. *Id.* Compare NAT'L ASS'N OF STATE BUDGET OFFICERS, 1993 STATE EXPENDITURE REPORT 49 (1994), available at http://www.nasbo.org/sites/default/files/ER_1993.pdf (marking total state expenditures on corrections for 1993 as \$20.5 billion), with NAT'L ASS'N OF STATE BUDGET OFFICERS, FISCAL YEAR 2009 STATE EXPENDITURE REPORT 54 (2010) [hereinafter 2009 STATE EXPENDITURE REPORT], available at <http://www.nasbo.org/sites/default/files/2009-State-Expenditure-Report.pdf> (noting total state expenditures on corrections for 2009 fiscal year reached \$52.3 billion).

34. See *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (remarking human dignity requires prisons to provide basic sustenance, including adequate medical care); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (holding government obliged to provide medical treatment to prisoners). "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met [and] . . . may

Court has held three strikes laws constitutional, and thus, these laws remain viable tools for states to deter crime.³⁵

A. *The Dynamic Meaning of “Cruel and Unusual”*

The Eighth Amendment prohibits the federal government from inflicting cruel and unusual punishments.³⁶ In *Robinson v. California*,³⁷ the United States Supreme Court held that this prohibition applies to the states through the Due Process Clause of the Fourteenth Amendment.³⁸ The exact meaning of the Cruel and Unusual Punishment Clause, although vague, has been interpreted by the Supreme Court to contain a narrow proportionality requirement regarding noncapital punishments.³⁹

1. *Origins of “Cruel and Unusual”*

The familiar legal axiom that the punishment must fit the crime existed well before the Framers of the Constitution incorporated the phrase “cruel and unusual punishments” into the Eighth Amendment.⁴⁰ One of the earliest examples limiting the type of punishment inflicted for a particular wrong comes from the Book of Exodus, which directs that the punishment for a particular wrong be retributive only—specifically, “eye for eye, tooth for tooth.”⁴¹ In seventeenth-century England, as judges increasingly relied upon

actually produce physical ‘torture or a lingering death.’” *Gamble*, 429 U.S. at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)). Moreover, the denial of medical care furthers no penological purpose, but instead, inflicts unnecessary and wanton physical pain, which the Eighth Amendment prohibits. *Id.*; see also Timothy Curtin, Note, *The Continuing Problem of America’s Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473, 479 (2007) (costing states \$69,000 to incarcerate elderly prisoners each year).

35. See, e.g., *Ewing*, 538 U.S. at 30 (O’Connor, J., plurality opinion) (holding California’s three strikes law mandating prison sentence of twenty-five years to life constitutional); *Andrade*, 538 U.S. at 77 (upholding two-time application of California’s three strikes law against defendant); *Ortiz*, 470 S.E.2d at 876 (determining Georgia’s two strikes law violates neither federal nor state constitutions).

36. See U.S. CONST. amend. VIII. The Eighth Amendment states in full, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.*

37. 370 U.S. 660 (1962).

38. *Id.* at 666-67 (holding ninety-day prison sentence imposed upon addict cruel and unusual).

39. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (maintaining sentence for term of years must not be grossly disproportionate to offense).

40. See *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958) (explaining American adoption of phrase “cruel and unusual”). Although conceding that this particular phrase lacks a definite meaning, the Supreme Court in *Trop* explained that the basic legal tenet for which the phrase stands is well-established in American jurisprudence. *Id.* Speaking for the Court, Chief Justice Warren stated that the phrase “cruel and unusual” was “taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta” of 1215. *Id.*

41. *Exodus* 21:24. The phrase “eye for eye” implicitly contains the Latin principle of *lex talionis* or the law of retaliation. See HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE 53-54 (1952) (pointing to *lex talionis* as “first sign of equitable punishment for crime in social life”). The Jewish jurists, known as the Oral Tradition, interpreted the *lex talionis* to be figurative in its meaning and application. *Id.* at 54 (interpreting “eye for eye” principle to provide monetary relief analogous to tort theory of law).

prison sentences as a form of punishment against the wrongdoer, the common law required that the punishment be in proportion to the offense.⁴² The proportionality principle was expressly adopted in the English Declaration of Rights of 1688, which declared, "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."⁴³ Less than a hundred years later, the English jurist William Blackstone defined "cruel" to mean punishment that is severe and excessive to the charged act.⁴⁴ The drafters of the United States Constitution directly imposed this language, and arguably by extension, its substantive meaning into the Eighth Amendment.⁴⁵

2. *The Eighth Amendment Contains a Narrow Proportionality Requirement for NonCapital Sentences*

a. *The Punishment Must Be Proportional to the Offense*

Over a century ago, in *Weems v. United States*,⁴⁶ the Supreme Court—reviewing a case from the United States-occupied Philippines—evaluated whether a law allowing for a prison sentence ranging from twelve to twenty years, hard and painful labor, and fines as punishment for the crime of falsification of public documents constituted cruel and unusual punishment.⁴⁷ A Philippine court convicted Weems of falsifying public documents when he falsely recorded the payment of wages to two employees as paid.⁴⁸ The Philippine court sentenced Weems to fifteen years in prison, hard and painful labor, and a fine of four thousand pesetas.⁴⁹ After an exhaustive discussion

42. *Solem v. Helm*, 463 U.S. 277, 285 (1983) (citing *Hodges v. Humkin*, (1615) 80 Eng. Rep. 1015 (K.B.) 1016) (explaining principle of proportionality deeply rooted in common law); *see also* Chemerinsky, *supra* note 7, at 10-12 (discussing common law precursors to Eighth Amendment). *But see* *Weems v. United States*, 217 U.S. 349, 393 (1910) (White, J., dissenting) (arguing Eighth Amendment does not originate from theory of proportionality). Justice White asserted that the first crimes act passed by the United States Congress made no reference to any "assumed rule of proportion." *Id.* at 398-99 (noting act prescribed death for murder and forgery of public securities); Raoul Berger, *The Cruel and Unusual Punishments Clause, in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 303, 305 (Eugene W. Hickok, Jr. ed., 1991) (defying proportionality principle as "ahistorical").

43. *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (quoting English Declaration of Rights).

44. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES, *10, *16-19 (1769).

45. *See Trop*, 356 U.S. at 100. *Compare Solem*, 463 U.S. at 285-86 (explaining Eighth Amendment preserved English principle of proportionality), *and* Chemerinsky, *supra* note 7, at 10-12 (discussing pervasive acceptance of common law roots of proportionate punishment), *with Weems*, 217 U.S. at 393 (White, J., dissenting) (criticizing majority's characterization of history of proportionality theory as unfounded).

46. 217 U.S. 349 (1910).

47. *Id.* at 357-59, 360-61, 365-66 (noting Philippines under U.S. control at time of case). Although *Weems* arose under Philippine law, the provision contained in the Philippine Bill of Rights prohibiting the infliction of cruel and unusual punishment was taken directly from the U.S. Constitution. *Id.* at 367 (arguing substantive meaning of Philippine provision must be identical to that of Eighth Amendment).

48. *Id.* at 363 (outlining facts surrounding defendant's conviction).

49. *Id.* at 366 (asserting prison sentence and monetary fine far exceeded prescribed statutory minimums).

concerning the undefined yet dynamic meaning of the Cruel and Unusual Punishment Clause, the Supreme Court ultimately held that the Philippine law imposed cruel and unusual punishment, and therefore, contravened the Philippine Bill of Rights.⁵⁰ Most importantly, the *Weems* Court held that the backbone of the Cruel and Unusual Punishment Clause stands for the principle that the punishment must be proportional to the committed offense.⁵¹

b. Courts Will Rarely, If Ever, Invalidate a Prison Sentence

In *Solem v. Helm*,⁵² the Supreme Court gave flesh to the proportionality analysis by providing a precise framework for lower courts to apply in cases involving noncapital sentences.⁵³ Specifically, courts are to compare: “(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.”⁵⁴ Applying this analysis, the Court rejected South Dakota’s argument that the proportionality principle is inapplicable to felony prison sentences and held that the criminal sentence must be proportional to the presently charged crime.⁵⁵

Just eight years later, however, in *Harmelin v. Michigan*,⁵⁶ Justice Scalia concluded, with only Chief Justice Rehnquist joining, that the Cruel and Unusual Punishment Clause does not contain an implied proportionality guarantee.⁵⁷ The Cruel and Unusual Punishment Clause does not prohibit punishments that are disproportional, but rather, only those modes of punishment that do not occur in ordinary practice.⁵⁸ The difference in the

50. See *Weems*, 217 U.S. at 382 (holding Philippine law, as written, unconstitutional). The *Weems* Court discussed the dynamic meaning of the phrase “cruel and unusual” in the Constitution, specifically stating that the constitutional provision was “enacted . . . from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. . . . [A] principle, to be vital, must be capable of wider application than the mischief which gave it birth.” *Id.* at 373.

51. *Id.* at 367 (stating proportionate punishment fundamental aspect of justice).

52. 463 U.S. 277 (1983).

53. *Id.* at 289-92 (outlining factors to use in evaluating challenges to noncapital sentences on Eighth Amendment grounds). In *Solem*, the defendant, a six-time nonviolent recidivist offender, was sentenced to life in prison without the possibility of parole for issuing a “no account” check for \$100. *Id.* at 277. Life imprisonment without possibility of parole is the most severe prison sentence South Dakota could have imposed against the defendant. *Id.* at 297 (explaining capital punishment not authorized in South Dakota). The Supreme Court held that life imprisonment was severely disproportionate to the crime of issuing a “no account” check for \$100, and therefore, violated the Constitution. *Id.* at 296-98, 303 (remarking on nonviolent nature of defendant’s present crime and six prior felonies).

54. *Id.* at 292 (listing objective criteria for courts to consider).

55. *Id.* at 288-90 (conceding substantial deference to legislatures’ determination of punishments for crimes). No penalty, however, is per se constitutional. *Id.* at 290.

56. 501 U.S. 957 (1991).

57. See *id.* at 965 (concluding Eighth Amendment history outlined in *Solem* historically incorrect).

58. *Id.* at 973 (defining unusual to mean illegal). Punishments were considered illegal or unusual if they were the kinds of punishments that fell outside the judge’s authority. *Id.* at 973-74. Only under statutory authority could a judge administer punishments outside the bounds of the common law. *Id.* at 974. Under a

Solem and *Harmelin* interpretations is hardly meaningless: A lengthy prison term for the petty crime of shoplifting, although cruel and disproportional, is not "unusual" because imprisonment, especially for noncapital offenses, has been a commonly administered mode of punishment.⁵⁹

Writing separately in *Harmelin*, Justice Kennedy argued that strict proportionality between crime and punishment is not required; however, extreme sentences that are "grossly" disproportionate to the crime will not pass constitutional muster.⁶⁰ Justice Kennedy further pointed to the material differences between the facts in *Solem* and *Harmelin*.⁶¹ In stark contrast to the defendant's crime in *Solem*, the defendant in *Harmelin*—a first offender—was arrested with over 650 grams of cocaine, an amount capable of administering up to 65,000 potentially lethal doses.⁶² Life in prison without parole for the possession of 650 grams of cocaine was wholly justified by Michigan's goal of keeping serious drugs off its streets and clearly falls within developed constitutional boundaries.⁶³ Consequently, applying an extended proportionality analysis as enunciated in *Solem* was unnecessary in this case

modern interpretation then, the Eighth Amendment proscription against cruel and unusual punishments prohibits legislatures from "authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.* at 976.

59. *See id.* at 976; *see also* *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (remarking capital punishment differs in kind from imprisonment). *But see* *Riggs v. California*, 525 U.S. 1114, 1114 (1999), *denying cert. to* *People v. Riggs*, No. E019488, 1997 WL 1168650 (Cal. Ct. App. Dec. 17, 1997) (respecting denial of petition for writ of certiorari). In his opinion, Justice Stevens questioned the legality of California's three strikes law because California was the only state where life imprisonment for the misdemeanor of petty theft was allowed. *Id.* In Louisiana, a defendant can also receive life imprisonment for committing a misdemeanor; however, that defendant would have a strong case for relief under the state constitution. *Chemerinsky, supra* note 7, at 16.

60. *See Harmelin v. Michigan*, 501 U.S. at 1000-01 (Kennedy, J., concurring in part) (listing objective factors for courts to weigh when conducting proportionality analysis). Nevertheless, the factors listed in *Solem* do not constitute a rigid three-part test for courts to employ. *Id.* Indeed, fulfillment of one factor is not determinative that a punishment violates the Eighth Amendment, although there may be instances when this is true. *Id.* at 1004. In addition, a proportionality review is guided by five principles: "the primacy of the legislature, the variety of legitimate penological schemes, the nature of [the] federal system, . . . the requirement that proportionality review be guided by [*Solem's*] objective factors" and finally, that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence." *Id.* at 1001.

61. *Id.* at 1002 (asserting issuance of "no account" check materially different from possession of drugs). Unlike the triggering offense in *Solem*, which was passive in nature, drug possession, use, and distribution affect the well-being of the entire society. *Id.* In addition to affecting the individual who consumes them, drugs relate to other crimes because a drug user may commit crime due to the physiological effects of drugs, may engage in criminal activity in order to obtain money to buy drugs, or may join the drug culture only later to engage in violent crime. *Id.*

62. *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part).

63. *Id.* at 1004 (comparing gravity of life imprisonment with severity of cocaine possession). The Michigan legislature determined that possession of a certain amount of cocaine warrants a prison sentence of extended incapacitation. *See id.* at 998-99 (listing principles for courts to consider when conducting proportionality analysis). "[T]he fixing of prison terms for specific crimes involves a substantial penological judgment . . . [and] the Eighth Amendment does not mandate adoption of any one penological theory." *Id.* (noting substantial deference should be afforded to legislatures' determination of penological theory and prison sentences).

because a sentence of life in prison without parole “does not give rise to an inference of gross disproportionality” to the crime of possession of such a large amount of cocaine.⁶⁴ If any doubts of the legitimacy of the narrow-proportionality principle existed after *Harmelin*, the Court put such doubts to rest in *Ewing v. California*.⁶⁵ Speaking for the court, Justice O’Connor held that the proportionality principle applied narrowly to noncapital punishments to the extent that the punishment may not be grossly disproportionate to the crime.⁶⁶

B. Primacy of the Legislature and Judicial Deference

“[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is ‘properly within the province of legislatures, not courts.’”⁶⁷ Recidivist statutes, although cruel, are one legitimate method legislatures employ to discourage criminal behavior.⁶⁸ Courts rarely consider the length of a prison sentence when conducting a proportionality analysis under the Eighth Amendment.⁶⁹ Doing so would force courts to engage in subjective line drawing and thus risk usurping legislative power.⁷⁰ Consequently, successful challenges to prison sentences prescribed by statute under the narrow proportionality test are extremely rare.⁷¹

64. *Id.* at 1005 (explaining full *Solem* test only necessary when inference of gross disproportionality exists). Justice Kennedy argued that prior Eighth Amendment jurisprudence indicated that an interjurisdictional and intrajurisdictional review of the sentence imposed is only necessary when there is a preliminary inference that the prescribed punishment is grossly disproportionate to the committed offense. *Id.* Moreover, contrary to Justice Scalia’s opinion, the holding in *Harmelin* does not overrule or abandon the proportionality test established in *Solem*. *Id.*

65. 538 U.S. 11, 20 (2003). *Ewing* directly considered whether the Eighth Amendment prohibits California from imposing a life sentence against a repeat offender under its three strikes law. *Id.* at 14.

66. *Id.* at 23-24 (following Justice Kennedy’s concurring opinion in *Harmelin*).

67. See *Harmelin*, 501 U.S. at 998 (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)) (crafting sentencing statutes within purview of state legislatures).

68. *Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991) (holding statutes imposing severe mandatory penalties for certain criminal conduct cruel, but not unusual).

69. See *Rummel*, 445 U.S. at 275 (noting length of prison term imposed legislature’s prerogative). The Court in *Rummel* asserted that states are best equipped to deal with recidivist criminal behavior and may do so as they see fit, so long as the punishment is not grossly disproportionate to the crime. *Id.* at 270-72; see also *Harmelin*, 501 U.S. at 995 (refusing to extend individualized sentencing to noncapital cases).

70. *Rummel*, 445 U.S. at 275-76.

71. See *Ewing v. California*, 538 U.S. 11, 21 (2003) (noting successful challenges to sentences under proportionality principle exceedingly rare); see also *Ortiz v. State*, 470 S.E.2d 874, 875 (Ga. 1996) (holding state sentencing scheme determined by legislature insulated from judicial review). In *Ortiz*, a defendant convicted of rape, aggravated sodomy, and burglary challenged his sentence of life in prison without the possibility of parole and a consecutive sentence of twenty years as violating the federal and state constitutions’ prohibition against cruel and unusual punishments. 470 S.E.2d at 875. In upholding Georgia’s recidivist statute, the Georgia Supreme Court held that the judicial branch may not review a prison sentence determined by the legislature unless the punishment is devoid of rationality or grossly disproportionate to the crime’s severity. *Id.* at 875-76. Only upon this showing will a sentence for a term of years be invalidated as cruel and unusual punishment. *Id.*

C. The Constitutionality of Recidivist Laws

Recidivist laws, which punish repeat offenders more harshly than first-time offenders, have existed in America since the nineteenth century.⁷² Recidivist laws do not punish repeat offenders for prior offenses, but rather, for a repetition of unlawful conduct, for which society demands an overall sentence enhancement.⁷³ Society considers a repeat offender, who is aware of the law and yet voluntarily breaks it again, to possess a greater degree of moral depravity than a person who breaks the law for the first time, and therefore, to deserve greater punishment.⁷⁴ Three strikes laws are one acceptable form of recidivist laws.⁷⁵ Additionally, society has long viewed recidivism as a public safety concern.⁷⁶ States have enacted these laws in order to deter repeat offenders and, if necessary, incapacitate those offenders who are unable to conform their conduct with the law.⁷⁷

Recidivist laws, including three strikes laws, have been upheld by the United States Supreme Court as a legitimate approach for states to combat crime.⁷⁸

72. See, e.g., *People v. Stanley*, 47 Cal. 113, 116 (1873) (upholding statute imposing greater prison sentence against repeat offender); *Commonwealth v. Richardson*, 55 N.E. 988, 990 (Mass. 1900) (validating Massachusetts statute imposing twenty-five-year sentence for three-time convicted habitual criminal); *King v. Lynn*, 18 S.E. 439, 440 (Va. 1897) (deciding statute providing for increased punishment against defendant for another conviction constitutional); *Rand v. Commonwealth*, 50 Va. 738, 740-41 (9 Gratt. 1852) (noting recidivist laws have existed since birth of American penitentiary system).

73. *Graham v. West Virginia*, 224 U.S. 616, 623 (1912) (rationalizing need for recidivist laws). States may rightly impose harsher sentences against repeat offenders because "repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted." *Id.*

74. Compare *Ewing*, 538 U.S. at 29 (asserting requirement of weighing defendant's prior criminal history in sentence), with *Solem v. Helm*, 463 U.S. 277, 290 (1983) (holding proportionality to convicted crime required in criminal sentence). In *Solem*, the Supreme Court decreed, "[A]s a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted." 463 U.S. at 290. The Court in *Ewing*, however, held: "In weighing the gravity of [a defendant's] offense, [a court] must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." 538 U.S. at 29; see also Chemerinsky, *supra* note 7, at 21 (illuminating discrepancy between Supreme Court's proportionality weighing in *Solem* and *Ewing*). The significant effect of the Court's language in *Ewing* is that successful challenges to prison sentences as grossly excessive are extremely difficult if a court may give as much consideration to the defendant's entire criminal record as the presently charged crime. Chemerinsky, *supra* note 7, at 21.

75. See *Ewing*, 538 U.S. at 26-27.

76. *Id.* at 26.

77. *Ewing v. California*, 538 U.S. 11, 26-27 (2003).

78. See *id.* at 25 (noting constitutionality of recidivist laws no longer contentious issue). The Supreme Court noted that roughly sixty-seven percent of released felons committed a serious felony within three years after being released from prison. *Id.* at 26. Recidivist laws seek to correct this serious public-safety concern by increasing punishment for reoccurring criminal conduct. See *id.* The Supreme Court first squarely addressed the constitutionality of recidivist laws in *Graham v. West Virginia*. See 224 U.S. 616, 623-31 (1912). The law at issue in *Graham*—a progenitor to modern three strikes laws—prescribed a five-year addition to a prison-sentence term if the offender had previously served time, or a life sentence if the offender already had two convictions. *Id.* at 622. Convicted for grand larceny, the defendant in *Graham* received a life sentence because he had two prior similar convictions—grand larceny in 1898 and burglary in 1901. *Id.* at 620-21 (discussing prior convictions). Challenging the constitutionality of the law, the defendant argued that the law subjected

Although “no penalty is per se constitutional,” states may sentence offenders who repeatedly have been convicted of serious or violent felonies to life imprisonment.⁷⁹ When reviewing a prison sentence, courts must compare the gravity of the offense against the severity of the punishment.⁸⁰ “In weighing the gravity of [the] offense, [courts] must place on the scales not only [the offender’s] current felony, but also his long history of felony recidivism.”⁸¹

D. Financial and Structural Burdens on State Prisons Resulting from Three Strikes Laws

1. Prison Overcrowding and Costs Generally

“[M]ore than one in every 100 adults” in the United States is behind bars.⁸² The swelling number of prisoners is not the result of a corresponding increase in crime or overall population; instead, it is a direct consequence of penal

him to double jeopardy, and that his life sentence violated the Cruel and Unusual Punishment Clause. *Id.* at 623-31 (addressing defendant’s arguments challenging recidivist law). In upholding the law, and consequently, the defendant’s life sentence, the Court explained that the law did not penalize the defendant again for his prior bad acts, but that instead, his prior two convictions “aggravate[d his] guilt and justify[d] heavier penalties.” *Id.* at 623. Despite the Supreme Court’s constitutional blessing of West Virginia’s recidivist law in *Graham*, it would still be roughly eighty years until many other state legislatures began to enact similar legislation in earnest. *See* Schultz, *supra* note 21, at 561 (discussing effect of *Graham* decision on states regarding enactment of recidivist laws). In 1935, eleven states had recidivist laws similar to the law in *Graham*. *Id.* By 1980, only three states—West Virginia, Texas, and Washington—had these kinds of laws still in force. *Id.*

79. *See Solem*, 463 U.S. at 290, 296-97 (holding life imprisonment for nonviolent offenses grossly disproportionate to crime). The Supreme Court, in *Solem*, held that while a state is justified in severely punishing repeat offenders, the repeat offender’s criminal status must be considered, including the character of his criminal history, which, in this case, was nonviolent. *Id.*; *see also Ewing*, 538 U.S. at 30 (upholding life sentence for repeat offender with serious or violent criminal history). In *Solem*, in addition to highlighting the gross disproportionality, the Court was also motivated to strike down the life sentence as cruel and unusual because the defendant was ineligible for parole. *See* 463 U.S. at 297 (noting defendant received harshest sentence possible in state). Conversely, under California’s three strikes law, the repeat offender would become eligible for parole after a “minimum term.” *See Ewing*, 538 U.S. at 16 (defining “minimum term” as three times term for offense, twenty-five years, or court-determined term); *see also Chemerinsky*, *supra* note 7, at 23-24 (arguing states can insulate recidivist prison sentences from judicial review by simply allowing for parole).

80. *See Solem v. Helm*, 463 U.S. 277, 290-91 (1983) (providing examples of Court’s prior decisions in which nature of crime evaluated).

81. *See Ewing*, 538 U.S. at 29 (instructing courts to weigh repeat offender’s entire criminal history); *cf. Solem*, 463 U.S. at 296-97 & n.21 (explaining defendant’s criminal history “relevant”). *Compare Ewing*, 538 U.S. at 29 (weighing current offense and defendant’s criminal history), *with Solem*, 463 U.S. at 297 n.21 (focusing on principal felony because defendant has already paid penalty for prior offenses), *and Chemerinsky*, *supra* note 7, at 21-22 (criticizing Court’s reasoning in *Ewing*). Consideration of the defendant’s entire criminal history significantly diminishes the defendant’s chance of overturning a life sentence based on an argument that the punishment is grossly disproportionate to the present crime. *See Chemerinsky*, *supra* note 7, at 21-23.

82. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008, at 3 (2008) [hereinafter ONE IN 100], available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf (highlighting higher incarceration rate for certain groups).

policies that states have chosen to implement.⁸³ Among the varied approaches, three strikes laws have contributed greatly to the increased population of imprisoned adults.⁸⁴ In 2009, total state expenditures on corrections exceeded \$52 billion.⁸⁵ On a per-prisoner basis, the average annual cost is \$25,900.⁸⁶

2. Unique Issues Facing Elderly Life-Long Prisoners

The average cost to incarcerate an elderly prisoner is approximately \$69,000 annually.⁸⁷ Although the term "elderly" has not been strictly defined in the prison context, many state correctional agencies use a threshold age of fifty-five-years old.⁸⁸ The age threshold for elderly is set ten years lower than the U.S. Census Bureau's definition for the general population because prison life deteriorates the prisoner's mental and physical health at a faster rate than similarly aged persons who are not in prison.⁸⁹ Elderly prisoners may experience "[h]earing and visual impairments, incontinence, dietary intolerance, depression and the early onset of chronic diseases"⁹⁰ Moreover, for several reasons—including the state's ability to care for the unique problems facing elderly prisoners—separate housing may also be

83. See *id.* at 3 (discussing consequences and imprisonment sentencing enhancements designed to prolong imprisonment). *But see* Ardaiz, *supra* note 20, at 21-22 (arguing three strikes law has not heavily contributed to prison population despite expectations). In the five years prior to California's three strikes law, the prison population grew by fifty percent. *Id.* at 22. Alternatively, the prison population only grew by thirty percent five years after the law's enactment. *Id.* (denying responsibility of three strikes law for unjustifiable rise in prison costs and population).

84. See ONE IN 100, *supra* note 82, at 3 (noting three strikes laws keep prisoners behind bars for longer periods).

85. See 2009 STATE EXPENDITURE REPORT, *supra* note 33, at 54.

86. See Klingele, *supra* note 33, at 483 (recognizing annual cost to house state prisoner roughly commensurate with federal cost).

87. See Curtin, *supra* note 34, at 479; see also ONE IN 100, *supra* note 82, at 13 (establishing annual cost to incarcerate elderly prisoner around \$70,000).

88. See B. JAYE ANNO ET AL., NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, CORRECTIONAL HEALTHCARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 8-9 (2004), available at <http://static.nicic.gov/Library/018735.pdf> (noting lack of national consensus defining elderly while explaining common use of fifty-five). At least twenty-seven states have attempted to define "elderly" in the prison context. See TINA CHIU, VERA INST. OF JUSTICE, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 4 (2010), available at <http://www.vera.org/download?file=2973/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf>. Fifteen states establish that fifty years or older is considered "elderly," five states consider fifty-five years old as the threshold age, and four states defined elderly as sixty years or older. *Id.* Only three states define elderly as sixty-five years or older. See *id.*

89. See ANNO ET AL., *supra* note 88, at 8-9 (noting stress driving force behind greater rate of mental and physical deterioration). The causes of prisoners' stress include: attempts to avoid conflicts with other inmates and correctional staff; concern over the finances associated with their legal costs and the burden this places on their families; withdrawal from chronic substance abuse; and lack of adequate healthcare. *Id.* at 8-9. "[Elderly prisoners] have five times as many visits to health facilities per year than similarly aged people who are not incarcerated" CHIU, *supra* note 88, at 5.

90. See ONE IN 100, *supra* note 82, at 12-13 (listing conditions unique to elderly prisoners).

required.⁹¹

Critics argue that keeping prisoners behind bars until they are well past their criminal “prime” is an unnecessary and significant drain on limited prison funds.⁹² When balancing the annual cost to house the prisoner against the inmate’s present criminal tendencies, compelling evidence exists to show that the drain on society’s resources is greater than the threat of potential recidivism.⁹³

E. California’s and Georgia’s Three Strikes Laws and Their Effects

1. California

a. The Passage of California’s Three Strikes Law

California’s legislature overwhelmingly passed its version of a three strikes law in March 1994, as a direct response to the murder of Polly Klaas.⁹⁴ The law was eventually codified in California Penal Code sections 667(b)-(i).⁹⁵ In November 1994, seventy-two percent of California residents voted to pass Proposition 184, an initiative nearly identical to its legislative counterpart.⁹⁶ Proposition 184 can only be amended or repealed by a two-thirds vote by

91. See CHIU, *supra* note 88, at 5 (“In 2008 at least 13 states had dedicated units for older inmates, six had dedicated prisons, nine had dedicated secure medical facilities, five had dedicated secure nursing-home facilities, and eight had dedicated hospice facilities.”). Because of elderly prisoners’ special needs, state-run prisons spend almost three times more to imprison geriatric inmates than their younger, healthier counterparts. *Id.*

92. See *id.* (comparing recidivism rates of elderly and adolescent offenders). The criminal’s age “is one of the most significant predictors of criminality, with criminal or delinquent activity peaking in late adolescence or early adulthood and decreasing as a person ages.” *Id.* Indeed, statistical evidence indicates that older parolees are the least likely group to find themselves back behind bars. *Id.* But see Curtin, *supra* note 34, at 480 (arguing against release of elderly prisoners). Inmates who entered prisons at an advanced age were more likely to be in prison for committing violent offenses. *Id.*

93. See CHIU, *supra* note 88, at 5 (arguing recidivism rates lower for elderly inmates); see also PRISON POLICY INITIATIVE, “THREE STRIKES” LAWS: FIVE YEARS LATER 13 [hereinafter FIVE YEARS LATER], available at <http://www.prisonpolicy.org/scans/sp/3strikes.pdf> (last visited Oct. 8, 2012) (asserting no crime-reduction benefit in extended incarceration for third-striker felons in California). Many three-strikers sentenced to life imprisonment in California were approaching the end of their criminal careers, such that extended incarceration resulted in no crime-reduction benefit or cost savings to the state. *Id.* But see Ardaiz, *supra* note 20, at 28 (addressing criticism that three strikes laws incarcerate old, criminally impotent persons). As of 1999, almost seventy percent of three-strike felons in California were under the age of forty. *Id.* (concluding criminals under forty not past criminal “prime”). Judge Ardaiz, however, failed to adequately address the legitimate concern that second-strike felons—in 1999, numbering more than 34,000—would commit a third nonviolent offense after the age of forty and receive a life sentence. See *id.*

94. See *Ewing v. California*, 538 U.S. 11, 15 (2003) (characterizing California’s three strikes initiative as one of fastest qualifying initiatives in its state’s history).

95. See CAL. PENAL CODE § 667 (2012).

96. See Naomi Harlin Goodno, *Career Criminals Targeted: The Verdict Is In, California’s Three Strikes Law Proves Effective*, 37 GOLDEN GATE U. L. REV. 461, 464-65 (2007) (discussing passage of three strikes law in California).

California's legislature or by a new ballot measure.⁹⁷ The purpose of California's three strikes law is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."⁹⁸

b. The Mechanics of California's Three Strikes Law

To trigger California's three strikes law, a criminal must presently be convicted of a felony and also must have been convicted previously of at least two prior serious or violent felonies.⁹⁹ Upon this showing, California's three strikes law directs the sentencing judge to impose an indeterminate sentence of twenty-five years to life.¹⁰⁰ The California Penal Code defines serious or violent felonies to include murder, rape, arson, robbery, first-degree burglary,

97. See 1994 Cal. Legis. Serv. Prop. 184 (West) (proposed) [hereinafter Proposition 184]; Goodno, *supra* note 96, at 465 (outlining amendment and appeal process). Prior to the election, the voters were given a ballot pamphlet that provided arguments in support and opposition of the passage of Proposition 184. See GEN. ELECTION 1994, CALIFORNIA BALLOT PAMPHLET, PROPOSITION 184, at 36 [hereinafter CALIFORNIA BALLOT PAMPHLET], available at http://library.uchastings.edu/ballot_pdf/1994g.pdf (last visited Oct. 8, 2012) (noting arguments not checked for accuracy). The argument in favor of passing the proposition fervently told voters that passing the law would keep "career criminals, who rape women, molest innocent children and commit murder, behind bars where they belong." *Id.* The party against passage had no equally impassioned argument for its position and could only muster a response arguing that passing Proposition 184 could cost taxpayers billions annually and would indiscriminately group nonviolent criminals with violent criminals. *Id.*

98. CAL. PENAL CODE § 667(b) (2012); see also Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1066 (2004) (acknowledging Supreme Court's reliance on California's penological goal of incarceration to uphold three strikes law). One principle the courts are to consider is the penological goal of the state. Vitiello, *supra*, at 1066. It would seem highly arbitrary if the Supreme Court struck down as excessive a lengthy prison sentence in a state whose penological judgment is rehabilitation, but upheld the same sentence for the same crime in a state whose goal is incapacitation. *Id.* (remarking Supreme Court has impliedly declined to uphold this outcome); cf. ZIMRING ET AL., *supra* note 26, at 109-12 (discussing evolution of California's criminal sentencing scheme's focus from rehabilitation to incapacitation). Heavily influenced by a rehabilitative philosophy, prior to 1976, California had in place an indeterminate sentencing scheme that divided the formal sentencing authority between two entities: the superior court judges and the California Adult Authority. ZIMRING ET AL., *supra* note 26, at 109-10. Unless otherwise mandated by law, the judge would determine whether the offender would be sentenced to imprisonment or receive a punishment less than imprisonment. *Id.* In cases where the judge chose imprisonment, the judge would also determine the minimum term, and the law would provide the maximum. *Id.* at 110. The Adult Authority would then decide the actual prison term the offender would serve. *Id.* By the mid-1970s, because of numerous complaints regarding the efficacy of the system in achieving its purpose of rehabilitation, the legislature ultimately amended this approach in order to achieve greater sentencing uniformity. *Id.* at 110-12 (summarizing complaints about wide discretion by Adult Authority leading to arbitrary prison sentences). Most significantly, California shifted the purpose of its sentencing scheme from that of rehabilitation to incapacitation. *Id.* at 112.

99. See CAL. PENAL CODE § 667 (2012). In addition to a three strikes provision, California's recidivist statute also contains a two strikes provision that requires the sentencing judge to impose a five-year enhancement, in addition to the sentence for the present conviction, for a serious felony, if the defendant has a predicate serious felony. *Id.* § 667(a)(1); see also ZIMRING ET AL., *supra* note 26, at 7-9 (interpreting California's two strikes provision as doubling prescribed prison term for second conviction).

100. See CAL. PENAL CODE § 667(e)(2)(A) (2012).

kidnapping, and carjacking.¹⁰¹ Felony convictions from other states count as strikes, if the prior convictions are functionally equivalent to a serious or violent felony in California.¹⁰² The time between the predicate felonies and the currently charged felony is irrelevant for sentencing purposes.¹⁰³

The third triggering felony need not be serious or violent, but only capable of classification as a felony.¹⁰⁴ These types of crimes—which can be classified as a felony or misdemeanor—are known as “wobblers” and are presumptively felonies unless the prosecutor decides to classify the “wobbler” as a misdemeanor.¹⁰⁵ If prosecuted and convicted as a felony, the prisoner must serve a minimum of twenty-five years in prison before he or she becomes eligible for parole.¹⁰⁶

c. The Frequency with Which California’s Three Strikes Law Is Applied

According to California’s Department of Corrections and Rehabilitation, as of September 2011, 8813 third-strikers have been convicted and sentenced to twenty-five years to life in prison since the law’s inception in 1994.¹⁰⁷ For less

101. See *id.* § 667.5(c) (defining violent felony); *id.* § 1192.7(c) (defining serious felony).

102. See *id.* § 667(d)(2).

103. See *id.* § 667(e)(3).

104. See *Ewing v. California*, 538 U.S. 11, 15-16 (2003) (explaining three strikes law’s application to nonviolent felonies); see also *Lockyer v. Andrade*, 538 U.S. 63, 67 (2003) (noting defendant charged with two counts of petty theft with prior conviction). In *Andrade*, the defendant had previously been convicted of misdemeanor petty theft in 1990. 538 U.S. at 67. In 1995, when the prosecutor charged the defendant with two counts of petty theft for shoplifting movies, the defendant’s prior misdemeanor enhanced his current shoplifting offenses from misdemeanors to “wobblers.” *Id.* (stating petty theft with prior punishable as felony or misdemeanor). The prosecutor decided to charge the defendant with two counts of felony petty theft with a prior. See *id.*; cf. *Chemerinsky*, *supra* note 7, at 17-18 (explaining current offenses unfairly double-counted in three strike calculus in California). In *Andrade*, the defendant’s two present convictions of petty theft with a prior were each converted from a misdemeanor to a “wobbler,” a presumptive felony, because of the defendant’s prior misdemeanor offense. *Chemerinsky*, *supra* note 7, at 17-18. The two “wobbler” offenses were then used to trigger their own application of the three strikes law. *Id.* “In other words, the prior offenses [were] used twice: first to convert a misdemeanor into a felony, and then to impose a life sentence based on it being a felony.” *Id.* at 18.

105. See *Ewing*, 538 U.S. at 16-17. If a prosecutor charges a “wobbler” as a felony, California trial courts can still avoid application of the three strikes law. *Id.* at 17. First, California trial courts have discretion to reduce a “wobbler” charged as a felony to a misdemeanor, in order to circumvent application of the three strikes law. *Id.* Second, a trial judge may vacate a defendant’s prior serious or violent felonies, if application of the three strikes law would be contrary to its purpose of discouraging serious or violent crime. *Id.* (instructing courts to consider recidivist’s current and past offenses, character, and ability to reform).

106. *Id.* at 16 (elaborating on how minimum prison sentence calculated); see also NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, “THREE STRIKES AND YOU’RE OUT”: A REVIEW OF STATE LEGISLATION 8 (1997), available at <http://www.ncjrs.gov/pdffiles/165369.pdf> (requiring minimum of twenty-five years served under California’s law).

107. See CAL. DEP’T OF CORR. AND REHAB., SECOND AND THIRD STRIKER FELONS IN THE ADULT INSTITUTION POPULATION tbl.1 (2011) [hereinafter SECOND AND THIRD STRIKER FELONS], available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Quarterly/Strike1/STRIKE1d0909.pdf. At the end of September 2011, over 99% of the 8813 third-strike felons who had been sentenced under California’s law were men. See *id.* at tbl.3 (noting men comprising 8726 of total). Table 3 further separates the total number of third-strike felons into racial or ethnic groups. *Id.* Including both males and

than half of these felons, the third triggering offense was for crimes against the person.¹⁰⁸ Felons who committed property crimes comprised 2518 of the total, and for 335 of these third-strikers, petty theft with a prior acted as the triggering offense.¹⁰⁹ Finally, more than 2000 felons were convicted for triggering offenses categorized as drug or "other" crimes.¹¹⁰ These harsh results have led to thirteen failed attempts by various Californian groups to amend California's three strikes law.¹¹¹

d. Two Effects from the Application of California's Three Strikes Law

i. California's Three Strikes Law Only Punishes a Certain Sequence of Crimes, Not a Certain Type of Offender

California's three strikes law severely punishes a repeat offender who commits a certain sequence of crimes.¹¹² It is hard to argue that two criminals with the same overall criminal record are not deserving of a similar, if not the same, prison sentence.¹¹³ Yet, under California's three strikes law, the length of the prison sentence very much depends on the sequence of the felony convictions.¹¹⁴

Despite California's goal of achieving uniform sentencing with its three strikes law, two criminals, with the same offenses overall, may nonetheless

females, African Americans account for roughly 45% of the third-strikers, Hispanics account for 24.5%, and whites only account for 24.6%. *Id.* Thus, minorities represent roughly 70% of the felons convicted under California's three strikes law, whereas whites only account for 24.6% or 2171 felons. *See id.* (providing "other" category representing 371 persons or roughly 4% of total). Moreover, 1964 of the third-strikers are fifty-five or older. *See id.* at tbl.6. Third-strike felons that are between the ages of forty and fifty-four serving a life sentence total 5788 individuals. *See id.*

108. *See id.* at tbl.1 (listing those crimes categorized as "crimes against persons"). Crimes against the person comprised only 4101 of the total and range in severity from second-degree murder and sodomy to simple assault and battery. *Id.*

109. *Id.* (listing property crimes). California's three strikes law has been applied to petty theft with a prior when committed as the third triggering offense more than second-degree murder, manslaughter, and rape combined (totaling just 277 applications). *See id.*

110. *Id.* Drug crimes include marijuana sales and "other marijuana offenses." *Id.* "Other crimes" include, among others, escape, driving under the influence, and arson. *Id.*

111. *See* Dan Bluemel, *Three Strikes Law Still a Hot Topic of Conversation for Affected Families*, L.A. ACTIVIST (June 30, 2010), <http://www.laactivist.com/2010/06/30/three-strikes-law-still-a-hot-topic-of-conversation-for-affected-families/> (recounting latest failed attempt in 2008 to amend California's three strikes law).

112. *See* ZIMRING ET AL., *supra* note 26, at 9-11 & tbl.1.2 (explaining differing sentences depending on sequence of offenses, despite intention of consistency). California's three strikes law has hardly resulted in consistent and uniform prison sentences for recidivists with similar criminal histories. *Id.* *But see* Ardaiz, *supra* note 20, at 30-31 (asserting California's three strikes law has resulted in uniform sentencing). Judge Ardaiz contends that California's three strikes law is principally aimed at a specific kind of offender—one who repeatedly commits serious or violent offenses—rather than aimed at the committed offense. *Id.* at 13, 15 (insisting purpose of recidivist law to deter repeat offenders).

113. *But see* Ardaiz, *supra* note 20, at 30-31 (stating three strikes law has achieved consistent sentencing).

114. *See* ZIMRING ET AL., *supra* note 26, at 9-10 (explaining three strikes law's differing outcomes).

receive substantially different prison sentences.¹¹⁵ A recidivist who has committed two prior serious or violent felonies followed by any third felony will receive a mandatory prison sentence of twenty-five years to life.¹¹⁶ Alternatively, a recidivist with a criminal history of two felonies, of which only one is considered serious or violent, who then commits a third serious or violent felony, falls outside the ambit of California's three strikes law.¹¹⁷ This outcome results notwithstanding the fact that, in the aggregate, both offenders have identical criminal histories overall.¹¹⁸

ii. Prison Sentences Are Inversely Proportionate to the Third Triggering Felony

Because the triggering offense need only be a relatively innocuous "wobbler," the statute actually metes out inversely proportionate prison sentences to criminals who commit a third nonviolent felony as compared to criminals who commit a third serious or violent felony.¹¹⁹ In *Ewing*, the defendant was charged and convicted for felony grand theft, a "wobbler," for shoplifting three golf clubs.¹²⁰ If this had been the defendant's first offense, he could have been punished for a middle term of two years in prison.¹²¹ Instead, because the defendant had two prior strikes, he was sentenced to twenty-five years to life in prison—a sentence more than twelve times greater than the middle prison term for felony grand theft.¹²²

As disproportionate as this seems, the disparity is even greater when considering the defendant's circumstances in *Andrade*, whose third, triggering offense was petty theft.¹²³ In California, petty theft with a prior is punishable

115. *Id.* at 9-10 & tbl.1.2 (comparing recidivists with same overall criminal record).

116. *Id.*

117. *Id.* (noting condition of having two prior serious or violent felonies not met).

118. *See* ZIMRING ET AL., *supra* note 26, at 10 tbl.1.2 (displaying sentencing discrepancy despite identical criminal records).

119. *See id.* at 120 & tbl.7.2 (displaying terms for three-strike minimum sentence and nonthree-strike sentence for same crime). California's three strikes law is based on the concept that the law is triggered for any third offense, regardless of its severity. *See id.* at 120. If California's three strikes law was truly focused on severely punishing repeat violent or serious offenders, then the law would apply only to those offenders who commit a third serious or violent offense. *See id.*; *see also* FIVE YEARS LATER, *supra* note 93, at 13 (stating law's drafting has led to incarceration of "different group of offenders" than originally intended). By March 1996, more people had been sentenced under the law for committing a third nonviolent felony than people committing a serious or violent felony. FIVE YEARS LATER, *supra* note 93, at 13 (noting drug crimes constituted third strike more than rape or murder). *But see* Ardaiz, *supra* note 20, at 15 (dismissing disproportionate sentencing argument). Focusing on the perceived disproportionate sentence for the third triggering offense fails to consider the law's purpose of catching certain kinds of repeat offenders. *Id.*

120. *See* *Ewing v. California*, 538 U.S. 11, 16, 18 (2003) (noting grand theft under California law considered "wobbler").

121. *See* ZIMRING ET AL., *supra* note 26, at 120 & tbl.7.2 (stating middle prison term sentence for grand theft two years).

122. *Id.* (stating would-be middle term prison sentence).

123. *See supra* notes 3-4, 9-10 and accompanying text (discussing facts and sentencing of defendant in

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by three years in prison.¹²⁴ A defendant convicted of two counts of petty theft with a prior, like Andrade, can receive a maximum prison term of three years and eight months.¹²⁵ Andrade's two prior strikes caused each conviction for petty theft to trigger its own application of the three strikes law, resulting in Andrade receiving two concurrent twenty-five years to life prison sentences.¹²⁶ A combined sentence of fifty years is more than thirteen times greater than what Andrade would have received if his only two prior convictions were for petty theft.¹²⁷

In California, the crime of rape is considered a violent felony, and is punishable by a middle term of six years in prison.¹²⁸ If rape is the third triggering offense, the prison sentence increases from six years to a minimum term of twenty-five years.¹²⁹ Under California's three strikes law, a convicted rapist who has previously committed two serious or violent felonies receives a prison sentence just over four times greater than the middle term for a first-time rape conviction.¹³⁰

e. California's Prison Conditions

In 2009, California spent a staggering \$10.3 billion of its general fund on its corrections system.¹³¹ It costs California \$48,536 to house a single prisoner for one year.¹³² In 2001, California spent a paltry \$676 million on inmate healthcare services.¹³³ In 2007, healthcare costs ballooned to \$2.1 billion, an amount that easily dwarfs the roughly \$54 million Georgia spent on its entire corrections system for that same year.¹³⁴

The declining conditions of California's prisons made headline news when the Supreme Court heard arguments as to whether a three-judge court could

Andrade).

124. See Chemerinsky, *supra* note 7, at 2 (providing prison sentence prescribed for petty theft with prior under California law).

125. *Id.* (noting maximum prison sentence for two counts of petty theft with prior).

126. See *supra* text accompanying notes 9-10 (discussing punishment imposed on defendant in *Andrade*).

127. Cf. Chemerinsky, *supra* note 7, at 2-3 (comparing prison sentence received as third strike and would-be prison sentence for nonthird-strike).

128. See ZIMRING ET AL., *supra* note 26, at 120 tbl.7.2 (comparing middle-term sentence and three-strike sentence).

129. *Id.* (asserting three strikes law metes out inversely proportionate sentences as severity of triggering offense increases).

130. *Id.*

131. CAL. DEP'T OF CORR. AND REHAB., CORRECTIONS: MOVING FORWARD 2 (2009) [hereinafter MOVING FORWARD], available at http://www.cdcr.ca.gov/News/Press_Release_Archive/2009_Press_Releases/docs/CDCR_Annual_Report.pdf (quantifying significant increase in budget between 1998 and 2009).

132. *Id.* ("[A]pproximately \$16,000 per inmate goes toward medical, mental health, and dental care.").

133. See ONE IN 100, *supra* note 82, at 11 (stating healthcare costs significantly affected by judicial oversight).

134. *Id.* at 12 (marking 210% increase in healthcare costs from year 2000 levels). Georgia spent 5.4% of its general fund on corrections in fiscal year 2007, whereas California spent 8.6% of its general fund on corrections. *Id.* at 30 tbl.A-2.

direct the release of over 46,000 prisoners.¹³⁵ In 2006, California's prisons were running at almost double, and in some prisons, triple, their intended capacity.¹³⁶ The Supreme Court agreed with the three-judge court's finding that severe prison overcrowding was the primary cause for the state's failure to administer adequate healthcare—too often resulting in an average of one prisoner death per week.¹³⁷ Concluding that no other relief could alleviate the constitutional infirmities plaguing California's prisons in a reasonable amount of time, the Supreme Court affirmed the three-judge court's order directing California to release some 46,000 prisoners within two years.¹³⁸

2. Georgia

a. *Strike Two and You're Out?*

Under Georgia's general recidivist statute, a criminal who commits a second felony receives the maximum sentence allowed for the subsequent crime.¹³⁹ A four-time recidivist receives the maximum sentence prescribed by law, and is ineligible for parole.¹⁴⁰ Removed from this general class of felonies, however, are seven specific crimes—fittingly known as the seven deadly sins—that the Georgia legislature felt necessary to treat wholly different.¹⁴¹ Defined by the

135. See *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (noting at time of trial, California's prisons held over 156,000 prisoners, nearly double intended capacity); Joan Biskupic, *Supreme Court Stands Firm on Prison Crowding*, USA TODAY, May 24, 2011, http://usatoday.com/news/washington/judicial/2011-05-24-Supreme-court-prisons_n.htm (reviewing Supreme Court decision and emphasizing appalling prison conditions). The present case arose when two Californian prisoners, Ralph Coleman and Marciano Plata, filed separate suits alleging that California's prison system provided constitutionally inadequate medical and mental healthcare that was principally caused by severe prison overcrowding. *Brown*, 131 S. Ct. at 1926-27.

136. *Brown*, 131 S. Ct. at 1923-24 (exposing dangerous conditions resulting from severe prison overcrowding). "Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets." *Id.* at 1924. In one instance, a prisoner, who had been held in such a cage for nearly 24 hours, was found "standing in a pool of his own urine, unresponsive and nearly catatonic." *Id.* Indeed, because of the "conditions of extreme peril to the safety of persons . . . due to severe overcrowding," Governor Schwarzenegger declared that a state of emergency existed within California's prison system. See Proclamation No. 4278, Office of the Governor 8 (Oct. 4, 2006) (demanding swift action to remedy prison crisis).

137. See *Brown*, 131 S. Ct. at 1926-28, 1934 (asserting prison overcrowding primary cause of healthcare violations).

138. *Id.* at 1923, 1945, 1947 (ordering California to implement prison reduction "without further delay"). The reduction of 46,000 prisoners would decrease California's prison capacity to 137.5%—the court-determined capacity that would allow the state to provide constitutionally adequate healthcare. *Id.* at 1945 (noting three-judge panel considered expert testimony before concluding 137.5% limit acceptable for adequate healthcare).

139. See GA. CODE ANN. § 17-10-7(a) (2012). This provision maintains that felonies committed outside of Georgia count, so long as those felonies, if committed in Georgia, would also be considered felonies. See *id.* (noting prisoner must have served time).

140. *Id.* § 17-10-7(c); *Bharadia v. State*, 639 S.E.2d 545, 548-99 (Ga. 2006) (upholding life sentence without parole for four-time convicted felon).

141. See GA. CODE ANN. § 17-10-7(a)-(b) (2012) (providing for different treatment of act classified as "serious violent felony"); *id.* § 17-10-6.1(a) (defining "serious violent felony" by listing seven specific crimes).

legislature as "serious violent felonies," specifically, these crimes are: murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, and aggravated sexual battery.¹⁴² A felon convicted a second time for committing one of these seven "sins"—unless sentenced to death—faces a prison sentence of life without parole and without the possibility of receiving any sentence-reducing measures.¹⁴³ In terms of the number of crimes, Georgia's two strikes law is the harshest version of a three strikes law to emerge out of the 1990s because it only takes two strikes, rather than three, to strike out.¹⁴⁴

b. Conditions of Georgia's Prisons

At the end of 2007, one in seventy adults in Georgia was behind bars.¹⁴⁵ Indeed, Georgia's prison population exceeded 49,000 individuals.¹⁴⁶ By January 1, 2010, the number of individuals in Georgia's state prisons increased to 53,562.¹⁴⁷ Further, in 2008, Georgia spent \$1.1 billion administering its entire correctional system.¹⁴⁸

Notably, if any of these seven enumerated crimes were committed in California, they would be categorized as crimes against the person. See SECOND AND THIRD STRIKER FELONS, *supra* note 107, at tbl.1 (categorizing third-strike felonies in California).

142. See GA. CODE ANN. §§ 17-10-6.1(a), 17-10-7(b)(1) (2012) (enumerating seven crimes deemed serious and violent). The crime of murder also includes felony murder. See *id.* § 17-10-6.1(a)(1).

143. See *id.* § 17-10-7(b)(2) (outlining punishment). The life sentence cannot be reduced, suspended, deferred, or withheld. *Id.* § 17-10-7(b)(2). Moreover, a person convicted under this statute is ineligible for any kind of sentence-reducing measures including a pardon, parole, or early release. See *id.* § 17-10-7(b)(2); see also *Ortiz v. State*, 470 S.E.2d 874, 876 (Ga. 1996) (holding Georgia's two strikes law constitutionally sound). In *Ortiz*, the defendant was charged and convicted for rape, aggravated sodomy, and burglary. 470 S.E.2d at 875. Sentenced under Georgia's two strikes law, the defendant received life in prison without the possibility of parole and twenty years in prison, to be served consecutively. *Id.* The defendant challenged Georgia's two strikes law on the grounds that it violated the federal and state constitutions' proscription against cruel and unusual punishment, and his due process and equal protection rights. *Id.* Upholding Georgia's two strikes law, the Georgia Supreme Court held that the statute was rationally related to deterring criminals from repeatedly committing serious violent felonies, and was thus constitutional, even if the statute mandated a certain prison sentence. *Id.* at 875-76 (removing judicial discretion from sentencing procedure).

144. See CARR, *supra* note 12, at 2 (acknowledging Georgia's three strikes law most severe in country).

145. See PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 42-43 (2009) [hereinafter ONE IN 31], available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf (ranking Georgia first for adults under correctional control and fourth for its incarceration rate). In 1982, the incarceration rate was one in 169 adults. *Id.* at 43. In 2007, only the District of Columbia, Louisiana, and Mississippi ranked higher than Georgia for incarceration rates. *Id.*

146. *Id.* at 42 (stating precise prison population of 49,337 at end of 2007).

147. See PEW CTR. ON THE STATES, PRISON COUNT 2010, at 7 (2010) [hereinafter PRISON COUNT 2010], available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Pew_Prison_Count_2010.pdf (documenting prison population as of January 1, 2010). At the end of 2008, Georgia reported having 52,719 prisoners. *Id.* The difference amounts to a 1.6% increase in prisoners during 2009. *Id.* Viewed independently, this marginal increase seems insubstantial; however, after considering that for the first time in almost forty years the overall number of individuals in state prisons declined nationally (0.3% fewer), this increase is more concerning. See *id.* at 1, 5.

148. See ONE IN 31, *supra* note 145, at 41 (outlining state correctional spending).

The number of elderly and geriatric prisoners in Georgia's prisons continues to rise.¹⁴⁹ In 2000, 3.5% of Georgia's prison population was aged fifty-five years or older.¹⁵⁰ Ten years later, that percentage doubled to 7%.¹⁵¹ Overall, Georgia has almost 250 prisoners behind bars who are seventy or older.¹⁵² While this number may seem insignificant now, it will only increase because many prisoners are just now reaching middle age who were sentenced as young adults under Georgia's two strikes law.¹⁵³ Under the Georgia Constitution, the Board of Pardons and Paroles has the power to release any prisoner older than sixty-two, or younger if the prisoner is deemed to be entirely incapacitated.¹⁵⁴

c. Has Georgia's Two Strikes Law Affected Prison Overcrowding and Cost?

Prisoners sentenced under Georgia's two strikes law have not significantly impacted Georgia's overall prison population.¹⁵⁵ This determination is largely because, unlike California's three strikes law, which even covers wobblers, Georgia's law casts a narrow net.¹⁵⁶ Moreover, as only serious violent offenses count as a strike, criminals convicted under Georgia's two strikes law would have received a significant prison sentence regardless of the existence of Georgia's two strikes law or whether it was the criminal's first or second conviction.¹⁵⁷

Despite the aforementioned, Georgia's prison system is already overcrowded and financially overburdened.¹⁵⁸ Prisoners sentenced under Georgia's two strikes law are ineligible for parole and thus, remain in prison longer—although not substantially longer—than they otherwise would if the law had not been

149. Walter C. Jones, *Aging Inmates Burden Budget in Georgia*, THE AUGUSTA CHRONICLE, July 31, 2010, <http://chronical.augusta.com/news/health/2010-07-31/aging-inmates-burden-budget-georgia> (discussing alternatives available to Georgia prisons concerning elderly prisoners).

150. *Id.*

151. *Id.*

152. *See id.* (determining twenty-seven of prisoners in eighties).

153. *See* Jones, *supra* note 149 (describing age of Georgia's prison population).

154. GA. CONST. art. IV, § 11(e); *see* Jones, *supra* note 149 (noting definition of incapacitation could be interpreted in varying ways). At one time, proposed legislation that ultimately failed, defined incapacitation to mean a prison inmate who needed help with any two daily-life activities such as "eating, breathing, using the toilet, walking or bathing." *Id.*

155. *See* FIVE YEARS LATER, *supra* note 93, at 5 (noting, regardless of two strikes, single conviction for seven enumerated crimes results in extended incarceration). In 1998, only 5% of Georgia's 42,000 prisoners were serving life sentences under Georgia's two strikes law. *Id.*

156. *Compare* CAL. PENAL CODE § 667(e)(2) (2012) (mandating twenty-five years to life prison sentence for any third felony conviction), *with* GA. CODE ANN. § 17-10-7(b)(2) (2012) (limiting triggering offense to only serious violent felonies). *But see* Vincent Schiraldi et al., JUSTICE POLICY INST., THREE STRIKES AND YOU'RE OUT: AN EXAMINATION OF THE IMPACT OF STRIKES LAWS 10 YEARS AFTER THEIR ENACTMENT 9 (2004), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/04-09_rep_threestrikes_natl_ac.pdf (stating Georgia's violent crime rate declined less than Alabama, which had no three strikes law).

157. *See* FIVE YEARS LATER, *supra* note 93, at 5.

158. *Id.*

enacted.¹⁵⁹ Consequently, prison beds, which would eventually become available for new prisoners, remain occupied.¹⁶⁰ And, even though Georgia's two strikes law has not greatly impacted the prison system, it has contributed to Georgia's need to allocate increasingly scarce taxpayer money to build more prison beds.¹⁶¹

III. COMPARISON

In *Ewing*, the Supreme Court substantially diverged from its prior Eighth Amendment proportionality jurisprudence when it held that courts should weigh the offender's entire criminal history along with the current felony when comparing the gravity of the crime against the harshness of the punishment.¹⁶² Previously, in *Solem*, the Court specifically maintained "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."¹⁶³ The first of three factors for courts to consider when conducting a proportionality analysis is to compare the gravity of the offense with the harshness of the punishment.¹⁶⁴ The gravity of the offense can be determined by considering "the harm caused or threatened to the victim or society, and the culpability of the offender," while keeping in mind that more serious offenses deserve more serious punishments.¹⁶⁵

Criminal deterrence and incapacitation are legitimate policy objectives for state legislatures.¹⁶⁶ A recidivist statute that punishes a repeat offender more

159. See *id.* (noting average prison time for first striker sixteen years); see also GA. CODE ANN. § 16-5-40 (2012) (declaring minimum prison term for kidnapping between ten and twenty years); *id.* § 16-8-41 (noting same for armed robbery).

160. See FIVE YEARS LATER, *supra* note 93, at 5.

161. See *id.* (estimating additional financial burden for prison beds).

162. See Chemerinsky, *supra* note 7, at 21 (arguing *Ewing* Court made challenging prison sentence as grossly excessive more difficult). Compare *Ewing v. California*, 538 U.S. 11, 29 (1983) (weighing felony history of defendant), with *Solem v. Helm*, 463 U.S. 277, 290 (1983) (stating punishment requires proportionality to presently convicted crime), and *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding punishment proportionate to offense as fundamental precept). Weighing the recidivist's entire criminal record when comparing the gravity of the offense against the punishment ignores the Court's prior three-part framework for weighing the constitutionality of a given punishment established in *Solem*, and furthermore, practically insulates the state's penological judgment from judicial review. *Id.* at 21-24; see *supra* notes 78-81 and accompanying text (comparing *Ewing*'s weighing of current crime and criminal history with *Solem*'s focus on current crime).

163. See *Solem*, 463 U.S. at 290; see *supra* text accompanying note 55 (requiring punishment proportionate to crime in noncapital sentences).

164. See *supra* note 64 and accompanying text (noting full *Solem* test unnecessary unless inference of gross disproportionality exists).

165. See *Solem*, 463 U.S. at 292-93 (arguing harsher crimes deserve harsher punishments); *supra* note 53 (discussing overturned life sentence in *Solem* imposed against six-time nonviolent recidivist). But see *supra* notes 62-64 and accompanying text (discussing upheld life sentence for defendant in *Harmelin* for possession of cocaine).

166. See *Ewing*, 538 U.S. at 24-25 (2003) (relying on longstanding principle of deferring to legislature regarding criminal punishments); *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy J., concurring in part) (asserting proportionality analysis must take into account state legislature's penological judgment).

harshly than first-time offenders is rationally related to these policy objectives and deserves judicial deference.¹⁶⁷ Thus, when determining whether criminal punishments prescribed by a recidivist statute comport with the Eighth Amendment's Cruel and Unusual Punishment Clause, courts should consider the state legislature's policy objectives, including that of discouraging recidivist conduct.¹⁶⁸ The offender's criminal record, however, should not be weighed collectively with the current offense when comparing the gravity of the crime against the harshness of the punishment, because doing so artificially inflates the gravity of the presently charged offense.¹⁶⁹ In *Ewing*, the Court reasoned that failing to weigh the recidivist's past crimes along with the current offense when determining whether the punishment is grossly disproportionate to the crime would ignore California's legislative policy of deterring repeat offenders from committing crimes again.¹⁷⁰ In subtle language, the Court in *Ewing* significantly diverged from its Eighth Amendment jurisprudence, thus making "successful challenges to the proportionality of particular [prison] sentences . . . exceedingly rare."¹⁷¹

Writing for the majority in *Ewing*, Justice O'Connor brazenly explained just how unwilling the Court is to evaluate a state's determination to enact a three strikes law:

Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution "does not mandate adoption of any one penological theory." A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.

Ewing, 538 U.S. at 24-25 (internal citations omitted). The *Ewing* Court then held that nothing in the Eighth Amendment prohibits California's legislature from deciding to enact a three strikes law that severely punishes repeat violent offenders. *Id.* at 25 (stating California legislature felt three strikes law necessary to protect public). *But see* Vitiello, *supra* note 98, at 1066 (questioning reasoning of overturning prison sentence if punishment does not match penological goal).

167. *See Harmelin*, 501 U.S. at 994-95 (holding recidivist statutes imposing severe sentences cruel, but not unusual). "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Id.*; *see supra* note 72 and accompanying text (discussing various states' early use of recidivist laws).

168. *See Ewing v. California*, 538 U.S. 11, 26 (1983) (stating high percentage of prisoners commit violent felony within three years of prison release).

169. *See Solem v. Helm*, 463 U.S. 277, 299 (1983) (explaining, as matter of principle, proportionality of punishment must relate to presently charged crime); *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding proportionality between crime and punishment precept of justice).

170. *See Chemerinsky*, *supra* note 7, at 21 (emphasizing deference to state legislatures for determining punishments for recidivists).

171. *Ewing*, 538 U.S. at 21 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)). *Compare* Chemerinsky, *supra* note 7, at 21 (explaining difficulty to challenging punishments as grossly excessive and how *Ewing* Court upheld sentence), *with Solem*, 463 U.S. at 289-90 (acknowledging rarity of successful proportionality challenge, yet holding Solem's sentence violated Eighth Amendment because disproportionate). The Court in *Solem* determined that, although successful challenges to noncapital punishments should be rare, the facts in *Solem* warrant a finding that the recidivist's criminal punishment violated the Eighth Amendment's proportionality requirement. *Solem*, 463 U.S. at 289-91. The Court determined that the defendant in *Solem* committed a passive, nonviolent felony but "received the penultimate sentence" allowed under the law. *Id.* at

A. California

1. The Application of California's Three Strikes Law Contravenes Its Intended Purpose

California voters intended to pass a measure designed to severely punish only the most violent criminals; what they received, however, was a "penal practice without a theory."¹⁷² The campaign literature that supported the passage of Proposition 184 stated that the three strikes law would target repeat violent offenders such as murderers, rapists, and child molesters.¹⁷³ Singling out this specific group of offenders implies that the gravity of the triggering offense should correspond to the severity of the prescribed sentence of twenty-five years to life.¹⁷⁴ In other words, the triggering offense should be a serious or violent felony as opposed to any third felony, because the penalty imposed is serious.¹⁷⁵ In its application, however, the law actually undermines its original goal because the third, triggering offense may be for any third felony, including trivial "wobblers," like petty theft with a prior conviction.¹⁷⁶

2. California's Three Strikes Law Focuses on the Offense Rather Than the Offender

Despite what its proponents claim, California's three strikes law is offense-focused rather than offender-focused.¹⁷⁷ First, California's three strikes law

296, 303 (determining punishment grossly exceeded crime in this case); *see also Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring in part) (comparing crime at issue in *Solem* with crime at issue in *Harmelin*). Unlike the offender in *Solem*, the offender in *Harmelin* was convicted of possession of more than 650 grams of cocaine, which is a crime that "falls in a different category from the relatively minor, nonviolent crime at issue in *Solem*." *Harmelin*, 501 U.S. at 1002. The possession and use of drugs is one of the most dangerous and widespread problems facing the United States today. *Id.* (rejecting recidivist's characterization of cocaine possession as "nonviolent and victimless").

172. *See* ZIMRING ET AL., *supra* note 26, at 7; *see also* CALIFORNIA BALLOT PAMPHLET, *supra* note 97 (discussing arguments surrounding Proposition 184).

173. *See* CALIFORNIA BALLOT PAMPHLET, *supra* note 97 (arguing law's intent to prevent violent crime and incarcerate violent career criminals).

174. *See* CAL. PENAL CODE § 667(b) (2012) (stating purpose of California's three strikes law). "It is the intent of the Legislature . . . to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." *Id.*

175. *But see* SECOND AND THIRD STRIKER FELONS, *supra* note 107, at tbl.1 (categorizing triggering, third-strike felonies as not solely violent crimes against persons).

176. *See* CAL. PENAL CODE § 667(b) (2012) (stating law designed to incapacitate serious or violent repeat offenders); *see also* Lockyer v. Andrade, 538 U.S. 63, 67-68 (2003) (triggering three-strikes for petty theft); *Ewing v. California*, 538 U.S. 11, 16 (2003) (noting serious or violent felony unnecessary to trigger law); *supra* notes 104-05 and accompanying text (discussing "wobblers" as third triggering felony).

177. *See* ZIMRING ET AL., *supra* note 26, at 9-10 (highlighting how California has not achieved intended goal of uniform sentencing of serious/violent offenders); FIVE YEARS LATER, *supra* note 93, at 13 (arguing three strikes law has imprisoned "different group of offenders" despite targeting dangerous recidivists); *see also supra* Part II.E.1.d (discussing effects resulting from application of California's three strikes law). *But see* Ardaiz, *supra* note 20, at 30-31 (asserting three strikes law has achieved uniform policy for sentencing similar recidivist offenders).

only punishes serious or violent offenders that commit their crimes in a certain sequence.¹⁷⁸ If the law was truly focused on punishing the offender and not the offense, then every repeat offender who committed three felonies—two of which were serious or violent—would be sentenced under the law’s terms, irrespective of the sequence in which committed.¹⁷⁹ In reality, however, only those criminals who have previously committed two serious or violent felonies and then commit any third felony are given an extended prison sentence.¹⁸⁰ In contrast, felons who have a criminal record in the sequence of one violent felony, a nonviolent felony, and a violent felony will avoid the three strikes law.¹⁸¹ This result is even more perplexing in light of *Ewing*, in which the Supreme Court stated: “In weighing the gravity of [the recidivist’s] offense, [courts] must place on the scales not only his current felony, but also his long history of felony recidivism.”¹⁸² In California, the bottom line is that two recidivists with identical criminal histories overall can receive vastly different prison sentences.¹⁸³

Second, every offender sentenced under California’s three strikes law is sentenced to twenty-five years to life in prison, regardless of whether the triggering offense is rape or shoplifting.¹⁸⁴ Consequently, because the imposed sentence is uniform—twenty-five years to life—it cannot be said that California’s three strikes law is primarily focused on severely punishing serious or violent offenders.¹⁸⁵ If it were, California’s three strikes law would more severely punish offenders who committed a third serious or violent offense than

178. See ZIMRING ET AL., *supra* note 26, at 9-10 (establishing sequence of crimes significantly affects whether offender sentenced under statute). *But see* CAL. PENAL CODE § 667(b) (2012) (outlining statute’s purpose of punishing offenders who commit serious or violent crimes); Ardaiz, *supra* note 20, at 30-31 (arguing three strikes law reduced disparities in sentencing).

179. See ZIMRING ET AL., *supra* note 26, at 9-10 (indicating order of offenses matter). Despite *Ewing*-like weighing of a recidivist’s entire criminal history, under California’s three strikes law, offenders that have identical criminal records can still receive vastly different sentences. *Id.* (asserting, as unintended consequence, sequence of crimes matters greatly under California’s three strikes law); see *supra* text accompanying notes 116-18 (elucidating serious flaw in statute’s language and application).

180. See ZIMRING ET AL., *supra* note 26, at 9-10 (describing law’s application against offenders who commit two serious/violent felonies, and subsequently, any third felony); see also *supra* text accompanying note 116.

181. See ZIMRING ET AL., *supra* note 26, at 9-10 & tbl.1.2 (describing offender with same overall criminal history who will avoid law’s application); see also *supra* text accompanying note 117.

182. See *Ewing v. California*, 538 U.S. 11, 29 (2003) (instructing courts to weigh offender’s entire criminal history along with current offense).

183. See ZIMRING ET AL., *supra* note 26, at 10 (pointing out differing prison sentences for defendants with identical criminal records).

184. See *Ewing*, 538 U.S. at 16 (noting sentence in case where triggering misdemeanor treated presumptively as felony due to prior record); see also ZIMRING ET AL., *supra* note 26, at 9-10 (asserting offenders receive same sentence regardless of severity of triggering crime).

185. See ZIMRING ET AL., *supra* note 26, at 120 (arguing law escalates punishment for various crimes uniformly to twenty-five years to life). California’s three strikes law is not concerned with incarcerating a certain type of offender because it punishes third-strike felons equally, regardless of the gravity of the third triggering offense. *Id.*

nonviolent third-strikers.¹⁸⁶ Instead, the same sentence is imposed regardless of the triggering crime.¹⁸⁷ Seemingly, the result is that California's three strikes law actually metes out inversely proportionate sentences as the seriousness of the third triggering offense increases.¹⁸⁸ In short, California's three strikes law hardly seems like the penological judgment Justice Kennedy had in mind in *Harmelin v. Michigan*¹⁸⁹ that warrants substantial judicial deference.¹⁹⁰

B. Georgia

At the outset, it is important to recognize that in Georgia, a person convicted of two serious violent felonies is sentenced to prison for life without parole; yet in California, that same individual would only have two strikes, and, at least in theory, have one more chance to avoid life in prison.¹⁹¹ This is why Georgia's version of a three strikes law, although not casting as wide a net as California's, has been described as the most draconian.¹⁹² Despite this label, the law's scope is exceptionally narrow, applying only to seven specific offenses that the Georgia legislature has deemed serious and violent.¹⁹³ Georgia's rendition of a three strikes law avoids the two harsher effects that result under California's three strikes law.¹⁹⁴ Accordingly, Georgia's version is more deserving of judicial deference.¹⁹⁵

186. See *Ewing*, 538 U.S. at 15-16 (2003) (explaining how third-strikers serve twenty-five years to life regardless of triggering offense); see also Chemerinsky, *supra* note 7, at 5-6 (noting third strike for "wobblers," such as shoplifting, results in life sentence).

187. See Chemerinsky, *supra* note 7, at 5-6, 14 (stating all qualifying offenders receive uniform sentence of life imprisonment). But see Ardaiz, *supra* note 20, at 32 (arguing three strikes law has achieved reduction in violent crime because of uniform sentencing).

188. See ZIMRING ET AL., *supra* note 26, at 120 & tbl.72 (asserting three strikes law impacts penalties less for more serious crimes like rape); see also *supra* text accompanying note 122 (noting Ewing's sentence twelve times greater than middle prison term for felony grand theft); *supra* text accompanying note 126 (noting Andrade's sentence thirteen times greater for two petty theft with prior convictions); *supra* text accompanying notes 127-29 (stating third-strike triggering offense of rape only four times greater than middle term).

189. 501 U.S. 957 (1991).

190. See *id.* at 998-1001 (Kennedy, J., concurring in part) (providing common principles as guide for lower courts regarding proportionality analysis of prison sentences). The first principle for courts to consider is that "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Id.* at 998 (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)); *supra* notes 67-71 and accompanying text (instructing courts not to supplant their own penological theory in place of legislatures').

191. Compare GA. CODE ANN. § 17-10-7(b)(2) (2012) (stating twice-convicted felon of serious violent felony receives life without parole), with CAL. PENAL CODE § 667(c)(2)(A) (2012) (noting felon must have total of three felonies to trigger three strikes law).

192. See CARR, *supra* note 12, at 2 (noting two-striker receives true life without possible parole sentence).

193. See GA. CODE ANN. §§ 17-10-6.1(a), 17-10-7(b)(1) (2012) (listing seven most egregious crimes as determined by legislature).

194. See *supra* Part III.A.2 (outlining harsh results for defendants who commit nonviolent crime as third strike).

195. See GA. CODE ANN. § 17-10-7(b)(2) (2012) (implying, by very nature of statute, sequence of convictions irrelevant).

Judges will sentence all offenders who have been convicted of a serious violent felony and subsequently commit a second serious violent felony under Georgia's two strikes law.¹⁹⁶ Georgia sends a clear message to criminals about serious violent felonies, while California, by punishing felonies that are not serious and violent under the three strikes law, sends a more muddled message.¹⁹⁷ In Georgia, only those seven felonies that have been deemed serious and violent constitute a strike.¹⁹⁸ This remains true for the second triggering offense.¹⁹⁹ Thus, unlike California's three strikes law, in which any third felony can trigger its application, in Georgia, only a second serious and violent felony can trigger the statute's application.²⁰⁰

C. Three Strikes Laws Are Financially and Structurally Burdening California's and Georgia's Prisons

1. California

Prison overcrowding in California is not caused by an increase in crime or a surge in its overall population, but from California's penal policy.²⁰¹ Although not as high as originally estimated, the three strikes law has extensively impacted prison overcrowding in California.²⁰² Prisoners sentenced under California's three strikes law must serve a minimum of twenty-five years, and thus, three-strike criminals remain behind bars for much longer than if they had committed the same crimes and the three strikes law did not exist.²⁰³ Moreover, because any third felony can trigger the law's application, some three-strike offenders may have not been imprisoned at all if not for

196. See *Ortiz v. State*, 470 S.E.2d 874, 875 (Ga. 1996) (noting offender in *Ortiz* received life sentence without parole for rape and aggravated sodomy convictions). The Georgia Supreme Court, in *Ortiz*, held that Georgia's two strikes law did not violate the Federal or State Constitutions' proscriptions against cruel and unusual punishment. *Id.* at 876.

197. Compare *id.* (holding Georgia's two strikes law's application corresponds with purpose of deterring recidivists from violent crime), with *ZIMRING ET AL.*, *supra* note 26, at 9-10 (noting California's three strikes law contravenes intended purpose).

198. See GA. CODE ANN. § 17-10-6.1(a) (2012) (listing "seven deadly sins").

199. See *id.* § 17-10-7(b) (limiting second triggering offense to serious violent felony).

200. Compare CA. PENAL. CODE § 667 (2012) (mandating life imprisonment for twice convicted serious/violent recidivist for any third felony conviction), with GA. CODE ANN. §§ 17-10-7(a), 17-10-7(b) (2012) (limiting qualifying offenses to only seven enumerated serious violent felonies).

201. See *ONE IN 100*, *supra* note 82, at 3. Generally, three strikes laws have led to overcrowding, which, in turn, has led to structural and financial burdens on state prisons. *Id.* at 11-12; see also *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (blaming prison overcrowding for state's failure to provide constitutionally adequate prisoner healthcare); *SECOND AND THIRD STRIKER FELONS*, *supra* note 107, at tbl.1 (totaling number of times three strikes law applied in California).

202. See *Ardaiz*, *supra* note 20, at 21-22 (arguing three strikes law's effects on prison overcrowding and costs overblown).

203. See *supra* text accompanying notes 120-27 (noting Andrade and Ewing received substantially longer prison terms under three strikes law); see also *Chemmerinsky*, *supra* note 7, at 3 (noting Andrade ineligible for parole until eighty-seven years old).

California's three strikes law.²⁰⁴

California's prisons are now in a state of financial crisis.²⁰⁵ Currently, the annual cost to house a prisoner for a single year is \$48,536.²⁰⁶ Since the law's inception in 1994, judges have sentenced 8813 third-strikers to twenty-five years to life in prison.²⁰⁷ Of the three-strike population, nearly 2000 are fifty-five or older, the commonly applied threshold age defined as "elderly."²⁰⁸ An obvious, but still important, point to consider is that this number will only increase as prisoners age.²⁰⁹ Older prisoners experience greater health risks than younger prisoners.²¹⁰ Consequently, the cost to imprison three-strike offenders for life will increase substantially because older prisoners increasingly need healthcare-related procedures that California is constitutionally obligated to provide.²¹¹

2. Georgia

Georgia currently spends more than \$1.1 billion annually administering its correctional system.²¹² In 2010, Georgia imprisoned 53,562 persons.²¹³ Felons sentenced under Georgia's two strikes law receive life in prison without any possibility of parole.²¹⁴ Thus, although hard numbers are not available, Georgia's two strikes law has contributed to the burdening population of Georgia's prisons, albeit insubstantially.²¹⁵ Yet, because Georgia's two strikes

204. See ZIMRING ET AL., *supra* note 26, at 120 & tbl.7.2 (determining two-year middle sentence for grand theft twenty-three years fewer than third-strike sentence). A conviction for grand theft infrequently results in imprisonment, but the three strikes law requires imprisonment for twenty-five years. *Id.*; *supra* text accompanying notes 125-27 (noting difference exceeding forty-six years between Andrade's sentence and would-be nonstrike sentence).

205. See *Brown*, 131 S. Ct. at 1923-24 (remarking prisons running at double, and sometimes triple, intended capacity); see also MOVING FORWARD, *supra* note 131, at 2 (noting California spent \$10.3 billion on corrections system in 2009); ONE IN 100, *supra* note 82, at 12, 30 tbl.A-2 (noting healthcare costs accounted for \$2.1 billion in 2007).

206. See MOVING FORWARD, *supra* note 131, at 2 (noting annual cost and healthcare-related costs to house prisoner).

207. See SECOND AND THIRD STRIKER FELONS, *supra* note 107, at tbl.1 (discussing frequency of application of California's three strikes law since enactment).

208. *Id.* at tbl.6; see also ANNO ET AL., *supra* note 88, at 8-9 (discussing definition of "elderly").

209. See *Ewing v. California*, 538 U.S. 11, 16 (2003) (stressing three-strikers must serve twenty-five-year minimum before eligible for parole); ANNO ET AL., *supra* note 88, at 8 (warning of growing elderly population).

210. See ANNO ET AL., *supra* note 88, at 8-9 (discussing unique issues facing elderly prisoners that affect prison costs); ONE IN 100, *supra* note 82, at 11-12 (asserting medical costs primary driving force for high prison costs); see also Curtin, *supra* note 34, at 481 (stating elderly prisoners have average of three chronic illnesses each).

211. See *supra* notes 135-36 (condemning California's prisons as providing healthcare well below minimal standards).

212. See ONE IN 31, *supra* note 145, at 41 tbl.A-2.

213. PRISON COUNT 2010, *supra* note 147, at 7.

214. See CARR, *supra* note 12, at 2 (noting two-striker ineligible for any sentence-reducing measure).

215. See FIVE YEARS LATER, *supra* note 93, at 5 (noting Georgia's prisons overcrowded and underfunded). If Georgia's two strikes law had not existed, however, prisoners sentenced under Georgia's two

law only applies to those criminals who commit two serious violent felonies, these individuals are precisely the types of felons that should be isolated from the community for an extended period of time.²¹⁶

There is, however, a large prison population of two-strikers that will soon reach middle age and may need additional healthcare procedures.²¹⁷ The elderly prison population doubled to seven percent from 2000 to 2010.²¹⁸ As of July 31, 2010, Georgia has twenty-seven prisoners behind bars who are eighty years old.²¹⁹ Keeping these prisoners well past their criminal prime—especially to the point of physical or mental incapacitation—unnecessarily drains financial resources.²²⁰ Even though the Georgia Constitution permits the release of prisoners older than sixty-two—or younger if entirely incapacitated—the state should strongly consider passing legislation that permits the state to release prisoners who need help with two or more daily functions because the cost to imprison these offenders is substantially greater than the economic impact that their crimes would have on society.²²¹

IV. CONCLUSION

The Supreme Court's decision in *Ewing* effectively insulates a state's penal policy from constitutional review. By weighing the recidivist's entire criminal history along with the present crime, a prescribed punishment for a term of years hardly looks grossly disproportionate, making it nearly impossible for a prisoner to challenge his prison sentence as cruel and unusual. As a result, many prisoners have been sentenced to overwhelmingly harsh prison sentences for nonviolent crimes, but are left without any judicial recourse.

California's three strikes law actually contravenes its intended purpose. Because of the statute's language, which permits any third felony to trigger the law's application, the three strikes law has the practical effect of punishing only those repeat offenders who commit a particular sequence of crimes. Therefore, California's three strikes law actually metes out inversely proportionate

strikes law would still serve lengthy prison terms because of the severity of the crimes that fall within the Georgia two strikes law. *See id.*

216. *Id.* (summarizing statute as covering only most egregious crimes).

217. *See* ANNO ET AL., *supra* note 88, at 8-9 (listing causes of stress facing elderly prisoners); ONE IN 100, *supra* note 82, at 12-13 (noting rise in need of healthcare procedures for elderly has correspondingly raised prison costs).

218. *See* Jones, *supra* note 149 (noting prison population aged fifty-five or older comprises seven percent of total population).

219. *See id.*

220. *See* ONE IN 100, *supra* note 82, at 13 (estimating annual cost to incarcerate elderly prisoner at \$70,000); Curtin, *supra* note 34, at 479 (approximating average annual cost to care for elderly prisoner at \$69,000); Shinbein, *supra* note 21, at 201 (asserting criminal propensity of recidivist declines as recidivist ages).

221. *See* Jones, *supra* note 149 (arguing rapid increase in elderly population necessitates new legislation to release incapacitated prisoners).

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sentences. Yet, despite these inexplicable results, California's three strikes law has been upheld as constitutional by the Supreme Court.

California's three strikes law is heavily contributing to prison overcrowding and resulting in significant increases in prison costs, especially costs relating to prisoner healthcare. A recidivist sentenced under California's three strikes law must serve at least twenty-five years to life in prison before he or she is eligible for parole. It costs the state, however, almost \$49,000 each year to incarcerate a prisoner. The annual cost to incarcerate an elderly prisoner is substantially higher.

Georgia's two strikes law is the strictest version of a three strikes law in the nation; yet, the law is severely restricted in its scope. Therefore, in terms of a law being more rationally related to the goals of incarcerating violent criminals and deterring future violent crime, Georgia's law is more reasonable than California's law. Moreover, it is important to note that the persons convicted under Georgia's two strikes law are the type of criminals who deserve and should be incarcerated for a long time, regardless of whether the overall cost of imprisonment is high.

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