Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Punishments/Proportionality

---

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

Gary Ewing stole three golf clubs worth $399 each while on parole from a nine-year sentence for robbery and burglary. Ewing had previously been convicted of theft, petty theft, battery, burglary, possessing drug paraphernalia, appropriating lost property, unlawfully possessing a firearm, and trespassing. For stealing the golf clubs, Ewing was convicted of felony grand theft. Under the California "three strikes and you're out" law," Ewing was then sentenced to twenty-five years to life because he had previously committed two or more serious or violent felonies. The California Court of Appeals denied Ewing's claim that this sentence was cruel and unusual punishment under the Eighth and Fourteenth Amendments, and the Supreme Court of California refused his petition for review. Ewing appealed to the Supreme Court of California.

The Supreme Court by a 5–4 vote ruled that Ewing was constitutionally sentenced. Justice O'Connor's plurality opinion maintained that the state interest in incarcerating repeat criminals justified the California "three strikes and you're out" law. Justice O'Connor and Justice Breyer, in dissent, discussed at length such precedents from previous decades as Rummel v. Estelle *(1980) (life sentence constitutional for repeat non-violent felonies),* Solem v. Helm *(1983) (life sentence without parole unconstitutional for repeated non-violent felonies), and* Harmelin v. Michigan *(1991) (life sentence for a single drug offense). How well did the various opinions synthesize these precedents? Can these precedents be synthesized? To what extent are the decisions best explained by the changing (and more conservative) complexion of the Supreme Court?*

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE KENNEDY join.

. . .

The Eighth Amendment, which forbids cruel and unusual punishments, contains a "narrow proportionality principle" that "applies to noncapital sentences." . . . In *Rummel v. Estelle* (1980), we held that it did not violate the Eighth Amendment for a State to sentence a three-time offender to life in prison with the possibility of parole. Like Ewing, Rummel was sentenced to a lengthy prison term under a recidivism statute. . . . This Court ruled that "[h]aving twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." The recidivism statute "is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole." . . . Although we stated that the proportionality principle "would . . . come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment," we held that "the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments."

. . .

Three years after *Rummel,* in *Solem v. Helm* (1983), we held that the Eighth Amendment prohibited "a life sentence without possibility of parole for a seventh nonviolent felony." . . . The *Solem* Court then explained that three factors may be relevant to a determination of whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of the offense and the harshness

Copyright OUP 2013

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."

. . .

Eight years after *Solem,* we grappled with the proportionality issue again in *Harmelin v. Michigan* (1991). . . . . Justice KENNEDY, joined by two other Members of the Court, concurred in part and concurred in the judgment. Justice KENNEDY specifically recognized that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences." He then identified four principles of proportionality review—"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors"—that "inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Justice KENNEDY's concurrence also stated that *Solem* "did not mandate" comparative analysis "within and between jurisdictions."

The proportionality principles in our cases distilled in Justice KENNEDY's concurrence guide our application of the Eighth Amendment in the new context that we are called upon to consider.

. . .

Throughout the States, legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety. Though three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding.

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. . . .

When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice. To the contrary, our cases establish that "States have a valid interest in deterring and segregating habitual criminals." . . .

. . .

Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record. Ewing has been convicted of numerous misdemeanor and felony offenses, served nine separate terms of incarceration, and committed most of his crimes while on probation or parole. His prior "strikes" were serious felonies including robbery and three residential burglaries. To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.

. . .

JUSTICE SCALIA, concurring in the judgment.

. . .

Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution. "[I]t becomes difficult even to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight," not to mention giving weight to the purpose of California's three strikes law: incapacitation. In the present case, the game is up once the plurality has acknowledged that "the Constitution does not mandate adoption of any one penological theory," and that a "sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation." That acknowledgment having been made, it no longer suffices merely to assess "the gravity of the offense compared to the harshness of the penalty," th[e] classic

Copyright OUP 2013

description of the proportionality principle (alone and in itself quite resistant to policy-free, legal analysis). . . .

. . . Perhaps the plurality should revise its terminology, so that what it reads into the Eighth Amendment is not the unstated proposition that all punishment should be reasonably proportionate to the gravity of the offense, but rather the unstated proposition that all punishment should reasonably pursue the multiple purposes of the criminal law. That formulation would make it clearer than ever, of course, that the plurality is not applying law but evaluating policy.

JUSTICE THOMAS, concurring in the judgment.

. . . In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

. . .

"The Eighth Amendment succinctly prohibits 'excessive' sanctions." Faithful to the Amendment's text, this Court has held that the Constitution directs judges to apply their best judgment in determining the proportionality of fines, see *United States v. Bajakajian* (1998), bail, see *Stack v. Boyle* (1951), and other forms of punishment, including the imposition of a death sentence. . . . [B]y broadly prohibiting excessive sanctions, the Eighth Amendment directs judges to exercise their wise judgment in assessing the proportionality of all forms of punishment.

The absence of a black-letter rule does not disable judges from exercising their discretion in construing the outer limits on sentencing authority that the Eighth Amendment imposes. After all, judges are "constantly called upon to draw . . . lines in a variety of contexts" and to exercise their judgment to give meaning to the Constitution's broadly phrased protections. For example, the Due Process Clause directs judges to employ proportionality review in assessing the constitutionality of punitive damages awards on a case-by-case basis. Also, although the Sixth Amendment guarantees criminal defendants the right to a speedy trial, the courts often are asked to determine on a case-by-case basis whether a particular delay is constitutionally permissible or not.

. . .

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

This Court's precedent sets forth a framework for analyzing Ewing's Eighth Amendment claim. The Eighth Amendment forbids, as "cruel and unusual punishments," prison terms (including terms of years) that are "grossly disproportionate." In applying the "gross disproportionality" principle, courts must keep in mind that "legislative policy" will primarily determine the appropriateness of a punishment's "severity," and hence defer to such legislative policy judgments. If courts properly respect those judgments, they will find that the sentence fails the test only in *rare* instances.

The plurality applies Justice KENNEDY's analytical framework in *Harmelin v. Michigan* (1991). And, for present purposes, I will consider Ewing's Eighth Amendment claim on those terms. To implement this approach, courts faced with a "gross disproportionality" claim must first make "a threshold comparison of the crime committed and the sentence imposed." If a claim crosses that threshold—itself a *rare* occurrence—then the court should compare the sentence at issue to other sentences "imposed on other criminals" in the same, or in other, jurisdictions. The comparative analysis will "validate" or invalidate "an initial judgment that a sentence is grossly disproportionate to a crime."

. . .

Ewing's claim crosses the gross disproportionality "threshold." First, precedent makes clear that Ewing's sentence raises a serious disproportionality question. Ewing is a recidivist. Hence the two cases

Copyright OUP 2013

most directly in point are those in which the Court considered the constitutionality of recidivist sentencing: *Rummel v. Estelle* (1980) and *Solem v. Helm* (1983). . . . Three kinds of sentence-related characteristics define the relevant comparative spectrum: (a) the length of the prison term in real time, *i.e.,* the time that the offender is likely actually to spend in prison; (b) the sentence-triggering criminal conduct, *i.e.*, the offender's actual behavior or other offense-related circumstances; and (c) the offender's criminal history. In *Rummel,* the Court held constitutional (a) a sentence of life imprisonment *with parole available within 10 to 12 years,* (b) for the offense of obtaining $120 by false pretenses, (c) committed by an offender with two prior felony convictions (involving small amounts of money). In *Solem,* the Court held unconstitutional (a) a sentence of life imprisonment *without parole,* (b) for the crime of writing a $100 check on a nonexistent bank account, (c) committed by an offender with six prior felony convictions (including three for burglary). . . .

. . .

. . . Ewing's sentence here amounts, in real terms, to at least 25 years without parole or good-time credits. That sentence is considerably shorter than Helm's sentence in *Solem,* which amounted, in real terms, to life in prison. Nonetheless Ewing's real prison term is more than twice as long as the term at issue in *Rummel,* which amounted, in real terms, to at least 10 or 12 years. And, Ewing's sentence, unlike Rummel's (but like Helm's sentence in *Solem*), is long enough to consume the productive remainder of almost any offender's life. (It means that Ewing himself, seriously ill when sentenced at age 38, will likely die in prison.)

The upshot is that the length of the real prison term—the factor that explains the *Solem*/*Rummel* difference in outcome—places Ewing closer to *Solem* than to *Rummel,* though the greater value of the golf clubs that Ewing stole moves Ewing's case back slightly in *Rummel's* direction. Overall, the comparison places Ewing's sentence well within the twilight zone between *Solem* and *Rummel*—a zone where the argument for unconstitutionality is substantial, where the cases themselves cannot determine the constitutional outcome.

Ewing's sentence on its face imposes one of the most severe punishments available upon a recidivist who subsequently engaged in one of the less serious forms of criminal conduct. I do not deny the seriousness of shoplifting, which an *amicus curiae* tells us costs retailers in the range of $30 billion annually. But consider that conduct in terms of the factors that this Court mentioned in *Solem*—the "harm caused or threatened to the victim or society," the "absolute magnitude of the crime," and the offender's "culpability." In respect to all three criteria, the sentence-triggering behavior here ranks well toward the bottom of the criminal conduct scale.

. . .

This case, of course, involves shoplifting engaged in by a *recidivist.* One might argue that *any* crime committed by a recidivist is a serious crime potentially warranting a 25-year sentence. But this Court rejected that view in *Solem,* and in *Harmelin,* with the recognition that "no penalty is *per se* constitutional." Our cases make clear that, in cases involving recidivist offenders, we must focus upon "the [offense] that triggers the life sentence," with recidivism playing a "relevant," but not necessarily determinative, role. . . .

Some objective evidence suggests that many experienced judges would consider Ewing's sentence disproportionately harsh. The United States Sentencing Commission (having based the federal Sentencing Guidelines primarily upon its review of how judges had actually sentenced offenders) does not include shoplifting (or similar theft-related offenses) among the crimes that might trigger especially long sentences for recidivists.

Taken together, these . . . circumstances make clear that Ewing's "gross disproportionality" argument is a strong one. That being so, his claim *must* pass the "threshold" test. . . .

Believing Ewing's argument a strong one, sufficient to pass the threshold, I turn to the comparative analysis. A comparison of Ewing's sentence with other sentences requires answers to two questions. First, how would other jurisdictions (or California at other times, *i.e.,* without the three strikes penalty) punish the *same offense conduct?* Second, upon what other conduct would other jurisdictions (or California) impose the *same prison term?* Moreover, since hypothetical punishment is beside the point, the

Copyright OUP 2013

relevant prison time, for comparative purposes, is *real* prison time, *i.e.,* the time that an offender must *actually serve.*

. . .

As to California itself, we know the following: First, between the end of World War II and 1994 (when California enacted the three strikes law), no one like Ewing could have served more than *10* years in prison. . . . Second, statistics suggest that recidivists *of all sorts* convicted during that same time period in California served a small fraction of Ewing's real-time sentence. On average, recidivists served three to four additional (recidivist-related) years in prison, with 90 percent serving less than an additional real seven to eight years. Third, we know that California has reserved, and still reserves, Ewing-type prison time, *i.e.,* at least 25 real years in prison, for criminals convicted of crimes far worse than was Ewing's. Statistics for the years 1945 to 1981, for example, indicate that typical (nonrecidivist) male first-degree murderers served between 10 and 15 real years in prison, with 90 percent of all such murderers serving less than 20 real years. . . .

As to other jurisdictions, we know the following: The United States, bound by the federal Sentencing Guidelines, would impose upon a recidivist, such as Ewing, a sentence that, in any ordinary case, would not exceed 18 months in prison. With three exceptions, we do not have before us information about actual time served by Ewing-type offenders in other States. We do know, however, that the law would make it legally impossible for a Ewing-type offender to serve more than 10 years in prison in 33 jurisdictions, as well as the federal courts, more than 15 years in 4 other States, and more than 20 years in 4 additional States. In nine other States, the law *might* make it legally possible to impose a sentence of 25 years or more. . . . I say "might" because the law in five of the nine last mentioned States restricts the sentencing judge's ability to impose a term so long that, with parole, it would amount to at least 25 years of actual imprisonment.

We also know that California, the United States, and other States supporting California in this case, despite every incentive to find someone else like Ewing who will have to serve, or who has actually served, a real prison term anywhere approaching that imposed upon Ewing, have come up with precisely three examples.

. . .

The upshot is that comparison of other sentencing practices, both in other jurisdictions and in California at other times (or in respect to other crimes), validates what an initial threshold examination suggested. Given the information available, given the state and federal parties' ability to provide additional contrary data, and given their failure to do so, we can assume for constitutional purposes that the following statement is true: Outside the California three strikes context, Ewing's recidivist sentence is virtually unique in its harshness for his offense of conviction, and by a considerable degree.

. . .

I can find no such special criminal justice concerns that might justify this sentence. . . .

One might argue that those who commit several *property* crimes should receive long terms of imprisonment in order to "incapacitate" them, *i.e.,* to prevent them from committing further crimes in the future. But that is not the object of this particular three strikes statute. Rather, as the plurality says, California seeks "'to reduce *serious* and *violent* crime.' The statute's definitions of both kinds of crime include crimes against the person, crimes that create danger of physical harm, and drug crimes. They do not include even serious crimes against property, such as obtaining large amounts of money, say, through theft, embezzlement, or fraud. Given the omission of vast categories of property crimes—including grand theft (unarmed)—from the "strike" definition, one cannot argue, on *property-crime-related incapacitation grounds,* for inclusion of Ewing's crime among the triggers.

Nor do the remaining criminal law objectives seem relevant. No one argues for Ewing's inclusion within the ambit of the three strikes statute on grounds of "retribution." [I]n terms of "deterrence," Ewing's 25-year term amounts to overkill. And "rehabilitation" is obviously beside the point. The upshot is that, in my view, the State cannot find in its three strikes law a special criminal justice need sufficient to rescue a sentence that other relevant considerations indicate is unconstitutional.

. . .

Copyright OUP 2013