EXTENDING *GORE* AND *STATE FARM*'S PROMISE OF FAIRNESS IN PUNISHMENT TO A CRIMINAL CONTEXT

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I. INTRODUCTION

In 2003, the Supreme Court upheld a sentence of life imprisonment for a recidivist found guilty of theft after stealing three golf clubs under California's notorious Three Strikes Law.[1] Meanwhile, a large insurance company found liable for fraud and intentional infliction of emotional distress causing $2.6 million of damage faced a staggering $145 million punitive damages award.[2] The grossly divergent results of the two subsequent opinions by the Supreme Court, handed down just one month apart, serve as an indictment of the Court's proportionality jurisprudence.

This Note's initial goal is to highlight the inconsistency between the rigorous protection afforded to civil defendants and the absence of meaningful safeguards for criminal offenders convicted under habitual offender statutes.[3] This Note then proposes that the Court's approach to punitive damages, and particularly the use of a ratio, be adopted when reviewing the proportionality of criminal sentences. The main support for affording criminal and civil defendants similar constitutional protection is the rationale underlying limits on punitive damages in civil cases. This underlying rationale relies heavily upon principles at the core of American legal values—principles that are necessarily inherent in the criminal context. It is inexcusable that despite this similar foundation, the Court remains remiss to impose real limits on excessive criminal sentences.

This Note does not challenge the constitutionality of habitual offender statutes as a whole in light of the fact that countless constitutional challenges on various grounds, such as double jeopardy,[4] equal protection,[5]

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

2. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

3. Many scholars and commentators have viewed the Court's treatment in these areas as inconsistent, at best. *See, e.g.*, Michael P. O'Shea, *Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences*, 72 TENN. L. REV. 1041, 1104 (2005) ("Academic condemnation of the Court's handling of the twin lines of cases has been practically universal.").

4. Nichols v. United States, 511 U.S. 738, 747 (1994) ("Enhancement statutes . . . do not change the penalty imposed for the earlier conviction."); Moore v. Missouri, 159 U.S. 673, 677 (1895) (rejecting a double jeopardy challenge, stating that "the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself" (internal quotation marks omitted)).

5. Oyler v. Boles, 368 U.S. 448, 454–56 (1962) (denying habitual offender's contention that prosecution of only select habitual offenders constituted discrimination and denied him equal protection, stating that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation").

cruel and unusual punishment,[6] due process,[7] and the ex post facto clause,[8] have all fallen short of their goal from a very early point. Nor does it suggest that habitual offenders are not, overall, more deserving of harsher punishment than first-time offenders.[9] Finally, despite statistical evidence,[10] scholarly conjecture, and judicial speculation that habitual offender statutes have the paradoxical effect of increasing crime and wasting revenue,[11] this Note does not argue that habitual offender statutes

6. Howard v. Fleming, 191 U.S. 126, 135–36 (1903) (noting the gravity of the defendant's offense and, in rejecting his claim that his sentence was "cruel," stating that "[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one").

7. Graham v. West Virginia, 224 U.S. 616, 625 (1912) ("It cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately.").

8. Gryger v. Burke, 334 U.S. 728, 732 (1948) ("Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive . . . ."); McDonald v. Massachusetts, 180 U.S. 311, 312 (1901) (rejecting a challenge to a conviction under a habitual criminal offender statute as a violation of the Ex Post Facto Clause, reasoning that "[t]he punishment is for the new crime only, but is the heavier if he is an habitual criminal").

9. *See* Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 896 (2004) ("Suppose, as seems entirely plausible, there is a widely shared consensus that people who have demonstrated a propensity to commit offenses are more blameworthy than first-time offenders.").

10. Linda S. Beres & Thomas D. Griffith, *Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 LOY. L.A. L. REV. 101, 102 (1998) (discussing measurements of California's crime rate, and concluding "there is no evidence that Three Strikes played an important role in the drop in [California's] crime rate"); John J. Sloan III, *Habitual Offender Laws Often Fail*, BIRMINGHAM NEWS, Apr. 2, 2006, *available at* http://www.sentencing.nj.gov/downloads/pdf/articles/2006/0426_17_birminghamnews.pdf (evaluating statistical findings and hypothesizing that violent crime has actually increased as a result of habitual offender statutes because "repeat offenders realize that because their sentence for the substantive offense . . . will be dramatically enhanced because they have prior felony convictions, it becomes imperative not to be caught").

11. *See, e.g.*, Ramirez v. Castro, 365 F.3d 755, 776 (9th Cir. 2004) (Kleinfeld, J., dissenting) (noting the increased risks "of obstruction of justice and even murder of witnesses in cases where such things would otherwise be inconceivable" and stating no "reasonable person [would] favor spending hundreds of thousands of dollars to incarcerate [someone in order] to protect stores from the occasional $200 shoplifting"); Lisa E. Cowart, *Legislative Prerogative vs. Judicial Discretion: California's Three Strikes Law Takes a Hit*, 47 DEPAUL L. REV. 615, 633 (1998) (stating that because habitual offenders face such serious penalties if apprehended, "such felons will do whatever it takes to resist arrest"); Mike Males & Dan Macallair, *Striking Out: The*

should be discarded due to their ineffectiveness.[12]

A middle path is instead proposed. This Note argues that while habitual offender statutes may be constitutional in general, the proportionality principle inherent in the Eighth Amendment[13] and the Due Process Clause of the Fourteenth Amendment[14] should bar certain excessive punishments imposed on habitual offenders to the same extent excessive punitive damages awards against tortfeasors are barred. Specifically, just as the ratio of punitive damages to compensatory damages generally cannot exceed ten-to-one in a civil case, the duration of a habitual offender's enhanced sentence should not exceed the duration of the original sentence by a ratio of more than ten-to-one.[15] The basis for the crossover of civil features into the criminal context arises from the premise that both punitive damages and habitual offender enhancements are aimed at tailoring a defendant's punishment to serve retributive, deterrent, and other penological functions. In other words, punitive damages and habitual offender enhancements are cut from the same cloth and should be treated as such.

The organization of this Note begins with Part II, which discusses jurisprudence in the modern era involving the duration of prison sentences that have been challenged as disproportionate. This overview summarizes recent cases and the legal reasoning behind the Supreme Court's decisions. It also assesses the current standard used by the Court to review criminal

Failure of California's "Three Strikes and You're Out" Law, 11 STAN. L. & POL'Y REV. 65, 67 (1999) ("[C]ounties that vigorously and strictly enforce the Three Strikes law did not experience a decline in any crime category relative to more lenient counties."); Joy M. Donham, Note, *Third Strike or Merely a Foul Tip?: The Gross Disproportionality of* Lockyer v. Andrade, 38 AKRON L. REV. 369, 409 (2005) ("Offenders facing Three Strikes sentencing tend to be more violent than they normally would be.") (citation omitted).

12. This Note concedes this point because it is generally agreed that it is properly the province of legislatures to choose their own method, however ineffective or unwise, for confronting a problem—as long as their method is within constitutional bounds. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (citing Semler v. Dental Exam'rs, 294 U.S. 608 (1935)) (discussing the legislature's ability to pass legislation that attacks an evil in a piecemeal manner and stating that "[t]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind").

13. U.S. CONST. amend. VIII.

14. *Id.* amend. XIV.

15. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("Single digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution . . . .").

sentences challenged as disproportionate under the Eighth Amendment. A particular emphasis is placed on case law involving some of the most common habitual offender statutes—the well-known "three strikes" laws—because such laws frequently result in lengthy sentences most likely to raise an inference of disproportionality.

Part III describes the rise and development of due process limitations on punitive damages awards. The current constitutional standard adopted by the Court is also set forth.

Part IV analyzes the similarities between punishments that are tailored to defendants in the civil and criminal spheres. It begins by discussing the justifications for enhanced sentences for repeat offenders. This is followed by a comparison to the justifications behind imposing punitive damages on civil defendants. Finally, Part IV presents evidence supporting the assertion that the basic justifications and values underlying both punitive damages and habitual offender statutes are essentially identical.

Part V discusses possible reasons for the apparent disconnect in the Court's jurisprudence and evaluates the Court's stated justifications for its divergent treatment of civil and criminal defendants.

Part VI proposes that the civil framework be applied in criminal sentencing. In particular, Part VI advocates for the application of proportionality review to habitual offender sentences. An analysis of the practical effect of adoption of the ratio in the criminal context, along with the likelihood of a change in the Court's approach to proportionality, concludes Part VI.

II. PROPORTIONALITY JURISPRUDENCE INVOLVING PRISON SENTENCES

A. *Early Injustice:* Rummel v. Estelle

The first notable case regarding the constitutionality of habitual offender sentences in the modern era was *Rummel v. Estelle*.[16] William James Rummel was convicted of obtaining $120.75 by false pretenses.[17] Because Rummel was a recidivist with two prior strikes, he was sentenced to life imprisonment for his third offense, which triggered the application of the state's three strikes law.[18] This sentence was the result of Texas's

16. *See* Rummel v. Estelle, 445 U.S. 263 (1980).

17. *Id.* at 266.

18. *Id.* Rummel's two prior strikes were for fraudulent use of a credit card

recidivist statute, which mandated a life sentence upon a defendant's conviction of a third felony if the defendant was imprisoned following the first two convictions.[19] Amazingly, life imprisonment for petty crimes like Rummel's is not an uncommon result under many state habitual offender statutes.[20]

Rummel argued that his sentence was unconstitutional, relying on precedent that established that prison sentences disproportionate to the severity of the crime violated the Eighth Amendment.[21] The Court rejected his argument and affirmed his life sentence, distinguishing punishments of a "unique nature," which Rummel had cited for his proposition that precedent had established a proportionality principle, and merely "lengthy" sentences that are "purely a matter of legislative prerogative."[22] Despite this seemingly unyielding statement implying that the proportionality of criminal sentences could never be reviewed by the judiciary, the Court wavered slightly: "This is not to say that a proportionality principle would not come into play . . . if [for example] a legislature made overtime parking a felony punishable by life imprisonment."[23] The Court did not shut the door on a finding of disproportionality in all instances—but the door was left open just a crack.

Justice Powell, writing for four dissenting Justices, strongly believed that the "penalty for a noncapital offense may be unconstitutionally

and passing a forged check, totaling a property loss of just $108.36. *Id.* at 265.

19. *Id.* at 278.

20. *See* FACTS: Purpose of Families to Amend California's Three Strikes Laws, http://www.facts1.com/About/Purpose/ (last visited Apr. 21, 2010) (stating that nearly 50% of third strikes in California are for non-violent felonies); *see also, e.g.*, Riggs v. California, 525 U.S. 1114, 1114–15 (1999) (sentencing defendant to twenty-five years to life imprisonment for shoplifting a bottle of vitamins, despite the fact that without the enhancement, this crime carried a six-month sentence); People v. Romero, 122 Cal. Rptr. 2d 399, 403–04 (Ct. App. 2002) (sentencing defendant to twenty-five years to life imprisonment for shoplifting a magazine).

21. *Rummel*, 445 U.S. at 271–72. Rummel relied primarily on *Weems v. United States*, 217 U.S. 349 (1910), a case in which a Coast Guard clerk was convicted of falsifying an entry in a government ledger. Weems was sentenced to fifteen years in *cadena temporal*, a penalty originating under Spanish law which entailed shackled manual labor. *Id.* at 363–64. The Supreme Court reversed the sentence, but as one commentator has indicated, determining whether Weems's sentence was overturned strictly on grounds of proportionality or cruel and unusual punishment is a difficult task. *See* O'Shea, *supra* note 3, at 1055–56.

22. *Rummel*, 445 U.S. at 274–75.

23. *Id.* at 274 n.11.

disproportionate."[24] Justice Powell's reasoning was multifaceted. He believed that the Magna Carta of 1215 required that an offense should be fined according to the gravity of the crime and that by the year 1400, the common law had established "that punishment should not be excessive either in severity or length."[25] According to Justice Powell, "the 'cruel and unusual punishments' clause of the English Bill of Rights of 1689 . . . [was] a 'reiteration of the English policy against disproportionate penalties.'"[26] Because Article 1, Section 9 of the Virginia Declaration of Rights took the words "cruel and unusual punishment" directly from the English Bill of Rights, when that provision of the Virginia Declaration of Rights was incorporated into the United States Constitution's Eighth Amendment, it included a proportionality principle.[27]

B. *The Old Standard:* Solem v. Helm

The only Supreme Court case in the modern era to invalidate a prison sentence under the Eighth Amendment's proportionality principle was *Solem v. Helm*.[28] Jerry Helm was convicted and sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute for "uttering a 'no account' check" worth $100.[29] Helm qualified under the statute because he had six prior felonies, although each was nonviolent.[30] Justice Powell, who wrote for the dissent in *Rummel*, now wrote for the majority. Again looking to the history and the language of

24. *Id.* at 286 (Powell, J., dissenting). It is of some value to note here that unlike noncapital offenses, the review of capital offenses is quite extensive. Of course, the issue of capital punishment deserves concerted attention outside the scope of this Note, but for an example of the Court's rationale behind protecting capital offenders extensively, see *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), in which the Court held that "the imposition of death by public authority is so profoundly different from all other penalties." For a leading case discussing proportionality in capital sentencing, see *Coker v. Georgia*, 433 U.S. 584, 592 (1977), stating that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." The Court has also been willing to overturn fines under the Eighth Amendment's excessive fines clause. *See* United States v. Bajakajian, 524 U.S. 321 (1998).

25. *Rummel*, 445 U.S. at 288–89 (Powell, J., dissenting) (citing R. PERRY, SOURCES OF OUR LIBERTIES 236 (1959)).

26. *Id.* at 289 (citing Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 860 (1969)).

27. *Id.* at 287–89.

28. *See* Solem v. Helm, 463 U.S. 277 (1983).

29. *Id.* at 281–82.

30. *Id.* at 279–80.

the Eighth Amendment, he found that extensive review of life and property deprivations was inconsistent with the Court's tendency to shy away from meaningful review of liberty deprivations.[31] Not unlike subsequent commentators, Justice Powell emphasized what logic dictated: "It would be anomalous indeed if the lesser punishments of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not."[32]

Justice Powell then outlined three factors to guide proportionality review of noncapital sentences: (1) a comparison of the gravity of the offense with the harshness of the penalty; (2) a comparison with the sentences imposed on other criminals in the same jurisdiction for more serious and less serious crimes; and (3) a comparison with the sentences imposed for commission of the same crime in other jurisdictions.[33] These three factors became known as the *Solem* test.[34]

Beginning with the first inquiry of its newly fashioned test, the Court noted that Helm's mandatory sentence was the harshest in South Dakota, his conviction was for "'one of the most passive felonies a person could commit,'" and his prior offenses were all minor and nonviolent.[35] With respect to the second factor, the Court found that Helm was punished more severely than many South Dakotans who committed much more serious crimes, such as manslaughter, first-degree arson, and kidnapping.[36] In evaluating the third factor, the Court determined that no other state mandated such a harsh penalty for a similar minor offense.[37] Based on its evaluation of these factors, the Court concluded that Helm's "sentence is significantly disproportionate to his crime, and is therefore prohibited by

31. *Id.* at 289–90.

32. *Id.*; *see also* Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1288–89 (2000) (arguing that the values of "life, liberty, and property" are ordered by importance, and therefore liberty deprivations should be addressed by more rigorous review than property deprivations).

33. *Solem*, 463 U.S. at 290–92.

34. One commentator has dubbed the Court's review of sentences under the *Solem* test "substantive scrutiny." *See* O'Shea, *supra* note 3, at 1064–66 ("[T]he majority opinion sought to reconceptualize Eighth Amendment sentencing review as a form of substantive scrutiny that focused closely on retributive proportionality.").

35. *Solem*, 463 U.S. at 295–97 (quoting State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting)) (internal quotation marks omitted).

36. *Id.* at 298.

37. *Id.* at 299–300.

the Eighth Amendment."[38] In striking down Helm's sentence, the Court adhered to the age-old retributivist maxim that the punishment should fit the crime.[39] As we shall see, however, the *Solem* test was short-lived.

C. *The Current Standard:* Harmelin*'s Threshold Test*

Eight years later, in *Harmelin v. Michigan*, the Supreme Court scrapped the *Solem* test in favor of a "threshold test," which has proven to be much less likely to overturn disproportionate sentences.[40] Ronald Harmelin was convicted of possessing 672 grams of cocaine and was sentenced to a mandatory life imprisonment without parole, although it was his first offense.[41] Harmelin challenged this sentence on the grounds that it was cruel, unusual, and disproportionate.[42]

Justice Scalia, writing for the majority, declined to find a proportionality principle in the Eighth Amendment with regard to prison sentences, and upheld Harmelin's sentence.[43] In reaching this conclusion, he looked to the original meaning and circumstances surrounding the English Declaration of Rights of 1689, the precursor to the United States Constitution.[44] Unlike Justice Powell in *Rummel*, Justice Scalia's examination of history led him to conclude that "it [is] most unlikely that the English Cruell and Unusuall Punishments Clause was meant to forbid 'disproportionate' punishments."[45] His main argument supporting this finding was that the precursor to the Eighth Amendment was motivated by the abuses of Lord Jeffreys.[46] In addition to presiding over the execution of hundreds of insurgents in a 1685 rebellion, Lord Jeffreys was notorious for creating his own signature penalties that were not prescribed by statute.[47] According to Justice Scalia, the original cruel and unusual clause

38. *Id.* at 303.

39. *Id.* at 296 n.21 ("[We] must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses.").

40. *See* Harmelin v. Michigan, 501 U.S. 957 (1991).

41. *Id.* at 961, 1021.

42. *Id.* at 961.

43. *Id.* at 965 ("*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.").

44. *Id.* at 966. For a well-articulated critique of Justice Scalia's historical analysis in *Harmelin*, see Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments"*, 122 HARV. L. REV. 960 (2009).

45. *Harmelin*, 501 U.S. at 974.

46. *Id.* at 967–74.

47. *Id.* at 968–70 (noting that Lord Jeffreys apparently sentenced a cleric to

was a response to Lord Jeffreys's barbaric practices and was "directed . . . at illegality, rather than disproportionality, of punishment in general."[48]

Justice Scalia also made a constitutional interpretation argument frequently used to disprove the existence of an inferred provision in statutes and the Constitution: the framers knew how to write a provision explicitly requiring proportionality, and, in fact, several state constitutions had explicitly included such provisions.[49] Therefore, because they did not write it as such, the framers must have intended not to include one.[50]

Finally, Justice Scalia found no discrepancy in the Court's treatment of excessive fines and sentences. For Justice Scalia, substantial review of excessive fines is justifiable because the State stands to benefit from an excessive fine, but substantial review of prison sentences is unnecessary because the State has no incentive to imprison criminals excessively, since the State does not generally derive any revenue or other gains from its prisons.[51]

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life imprisonment, a heavy fine, and whipping "'from Aldgate to Newgate' and 'Newgate to Tyburn'").

48. *Id.* at 971. Many Supreme Court Justices disagree with Justice Scalia on this point. *See id.* at 1011–12 n.1 (White, J., dissenting) ("[T]here are scholars who disagree and have the view that the declaration forbade both illegal and disproportionate punishments. One such scholar . . . concluded that '[t]he English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was . . . a reiteration of the English policy against disproportionate penalties.'" (quoting Granucci, *supra* note 26, at 860) (citation omitted)). Scholars and commentators have also reached the conclusion that, in fact, there is a proportionality principle in the Eighth Amendment based on an examination of history. *See, e.g.*, Aisha Ginwalla, *Proportionality and the Eighth Amendment: And Their Object Not "Sublime, to Make the Punishment Fit the Crime"*, 57 MO. L. REV. 607, 610 (1992) (noting that given the framers' interest in Enlightenment thinking, some commentators believe it is likely that they intended to adopt a proportionality principle); Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 552 (2005) ("By effectively restricting proportionality to the death penalty context, the Court has defied notions of just punishment shared by the founding and modern worlds alike.").

49. *Harmelin*, 501 U.S. at 977.

50. *Id.* Justice White chided Justice Scalia for this argument, and cited a laundry list of Supreme Court decisions finding a concept of proportionality in other contexts. *Id.* at 1013–14 (White, J., dissenting).

51. *Id.* at 978 n.9 (majority opinion). Justice Scalia's argument is of course suspect in light of today's political climate, when state officials clearly stand to benefit in the next election cycle by "getting tough on crime." *See* Payne v. Tennessee, 501 U.S. 808, 867 (1991) (Stevens, J., dissenting) (noting "the political appeal of arguments that assume that increasing the severity of sentences is the best cure for the cancer of crime, and the political strength of the 'victims' rights' movement"); Gershowitz, *supra*

While Justice Scalia was able to collect enough votes to affirm Harmelin's sentence, only Justice Rehnquist joined his opinion rejecting a proportionality principle.[52] The other seven justices believed that the Eighth Amendment provides at least a "narrow proportionality principle," although they disagreed over its application to Harmelin and the proper test to determine proportionality.[53] Because the Court was so divided over the issue, Justice Kennedy's concurrence, which sets forth a narrow proportionality principle, garnered a plurality.[54]

Justice Kennedy identified four general principles that led him to narrow the *Solem* test and conclude that the Eighth Amendment does not require precise or discerning proportionality, but rather prohibits only grossly disproportionate sentences.[55] First, he found that the predominance of the legislature suggests that "[d]eterminations about the nature and purposes of punishment for criminal acts . . . [are] fundamental choices and implementing them lies with the legislature."[56] Second, he noted that the Eighth Amendment does not require adherence to any specific principle of punishment, be it retribution, deterrence, incapacitation, or rehabilitation.[57] This gave the indication that Justice Kennedy believed that Justice Powell's adherence to a primarily retributive view in *Solem* was misguided.[58] Third, he suggested that the United States's federalist system dictates that the states should decide criminal penalties on their own terms, free from uniformity imposed by the federal government.[59] Finally, Justice Kennedy stated that an absence of "clear objective standards to distinguish between sentences for different terms of years" hindered the ability to form proportionality review around objective factors, as other cases indicate is required.[60]

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note 32, at 1297–1301 (describing the rhetoric many politicians employ during campaigns).

52. *Harmelin*, 501 U.S. at 960.

53. *Id.* at 996–97 (Kennedy, J., concurring in part and concurring in the judgment).

54. *Id.* at 996–1005.

55. *Id.* at 1001.

56. *Id.* at 998–99.

57. *Id.* at 999.

58. *See supra* Part II.B.

59. *Harmelin*, 501 U.S. at 999–1000 (Kennedy, J., concurring in part and concurring in the judgment).

60. *Id.* at 1000–01 (citing Solem v. Helm, 463 U.S. 277, 289–90 (1983); Rummel v. Estelle, 445 U.S. 263, 274–75 (1980)). Justice Kennedy indicated that the length of a sentence is difficult to evaluate objectively, because while "[i]t is clear that a

Justice Kennedy then proceeded to fashion a proportionality test that incorporated a threshold as its key component: "one factor may be sufficient to determine the constitutionality of a particular sentence. . . . [I]ntrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[61] Under this threshold test, the gravity of Harmelin's offense compared to his sentence apparently did not give rise to an inference of gross disproportionality requiring comparative analysis.[62] It was clear that the Court was intent on giving substantial deference to state legislatures, and accordingly fashioned a threshold test that "sets an almost impossible standard" for defendants challenging their sentences as disproportionate.[63] Proportionality review had once again been chipped down to the narrowest conception imaginable.

D. *Proportionality and California's Three Strikes Law:* Ewing v. California

The most notorious result under a habitual offender statute was that in *Ewing v. California*.[64] While there was a strong argument that the defendant in *Harmelin* had indeed committed a rather serious offense, and thus deserved life imprisonment, Gary Ewing's third strike sentence of twenty-five years to life imprisonment for stealing three golf clubs reeked of disproportionality.[65]

But despite the appearance of excessiveness, the Court determined

25-year sentence generally is more severe than a 15-year sentence," it is more problematic "to decide that the former violates the Eighth Amendment while the latter does not." *Id.* at 1001 (quoting *Solem*, 463 U.S. at 294).

61. *Id.* at 1004–05.

62. *Id.* at 1005, 1008–09 ("The dangers flowing from drug offenses and the circumstances of the crime committed here demonstrate that the Michigan penalty scheme does not surpass constitutional bounds.").

63. Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 142 (2008); *see also Harmelin*, 501 U.S. at 1018–20 (White, J., dissenting) ("While Justice Scalia seeks to deliver a swift death sentence to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell. . . . Justice Kennedy's abandonment of the second and third factors set forth in *Solem* makes any attempt at an objective proportionality analysis futile.").

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

65. *Id.* at 18–19. Ewing did, however, have a substantial criminal record with multiple prior felonies, unlike the defendant in *Harmelin*. *Id.*

that Ewing's sentence should be affirmed.[66] Explaining the Court's extreme deference to the California legislature, Justice O'Connor, writing for a five-justice majority, reiterated Justice Kennedy's federalism concerns from *Harmelin*.[67] Justice O'Connor then analyzed Ewing's sentence under the *Harmelin* threshold test and found that the threshold was not met because, in her view, the gravity of Ewing's offense and the length of his sentence were not grossly disproportionate.[68] Rejecting retributive principles that emphasize punishment based on the instant criminal act rather than criminal history, Justice O'Connor stated that "[i]n weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism."[69]

The four dissenting Justices were not pleased with the result, and both Justice Stevens and Justice Breyer wrote very critical dissenting opinions.[70] Commentators have also cited *Ewing* as perhaps the most appalling example of the startling results possible under the Court's current proportionality standard.[71]

66. *Id.* at 31.

67. *Id.* at 28 ("We do not sit as a 'superlegislature' to second-guess these policy choices.").

68. *Id.* at 29–30 (Kennedy, J., concurring in part and concurring in the judgment) ("Ewing's [case] is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'" (quoting *Harmelin*, 501 U.S. at 1005)).

69. *Compare id.* at 29, *with* Solem v. Helm, 463 U.S. 277, 296 n.21 (1983) ("We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses.").

70. Justice Stevens's dissent argued primarily that federal judges properly have wide discretion to review sentencing. *See Ewing*, 538 U.S. at 34–35 (Stevens, J., dissenting). Justice Breyer's dissent found that even under the *Harmelin* threshold test, the Court "can say with reasonable confidence that [Ewing's] punishment is 'grossly disproportionate' to the crime." *Id*. at 35–37 (Breyer, J., dissenting).

71. *See, e.g.*, Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 530 (2008) (stating that "the principle of legislative primacy has been too easily interpreted as absolute deference to legislatively imposed sentencing protocols . . . result[ing] in an abdication of judicial responsibility to review noncapital criminal sentences and uphold Eighth Amendment proportionality standards"); James J. Brennan, Note, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551, 552 (2004) (criticizing the Court's determination in *Ewing* and calling on the Court to "assert a more active role").

E. *Settling for Injustice:* Lockyer v. Andrade

Another disturbing result under California's Three Strikes Law arose in *Lockyer v. Andrade*.[72] The defendant, Andrade, received a fifty-year minimum sentence for petty theft after shoplifting nine videotapes worth a total of $153.74.[73] There was thus a strong argument that his sentence crossed the *Harmelin* threshold—the gravity of his offense was even less than Ewing's, while the sentence imposed was double Ewing's.[74] Most commentators agree that Andrade had a much better argument than Ewing that his sentence was disproportionate.[75] But many, including Erwin Chemerinsky, who successfully represented Andrade on his habeas corpus appeal to the Ninth Circuit, were shocked and disappointed when the Supreme Court reversed the Ninth Circuit.[76]

Lockyer was complicated by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[77] AEDPA limited the ability of federal courts to grant habeas corpus relief to state prisoners to circumstances in which the state court decision is "contrary to" or an "unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[78] Applying AEDPA, the Court held that the California district court's fifty-year minimum sentence was neither contrary to federal law nor an unreasonable application of federal law.[79] Therefore, the Ninth Circuit had erred in granting habeas corpus relief because, at least according to the Court, Andrade's sentence under the California state court system was not so erroneous as to meet AEDPA's "unreasonableness" standard.[80]

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

73. *Id.* at 66–68.

74. *See supra* Part II.D.

75. *E.g.*, Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 587 (2005).

76. *See* Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1, 24 (2003) ("I still feel quite devastated by the Supreme Court's decision . . . . Had one Justice decided differently, Andrade would be a free man today . . . . Now he must wait forty-three years before he is even eligible for parole.").

77. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

78. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (2006).

79. Lockyer v. Andrade, 538 U.S. 63, 73–74 (2003).

80. *Id.* at 77.

Justice O'Connor, again writing for a five-justice majority, made clear that Andrade's fifty-year minimum sentence was not upheld because it was proper under the Eighth Amendment, but rather because the facts of the case did not meet the AEDPA standard required to grant habeas relief.[81] Yet as Chemerinsky pointed out, "[t]he Court's conclusion that there was no clearly established law is surprising because it did not explain why the three-part test from *Solem* and *Harmelin* does not meet this requirement. On many occasions, the Supreme Court has approvingly cited to this test."[82] The remainder of this Note shows that *Lockyer* is merely the tip of the hulking iceberg of the Court's inconsistent proportionality jurisprudence.

III. JURISPRUDENCE INVOLVING LIMITS ON PUNITIVE DAMAGE AWARDS

A. *Early Discontent with Punitive Damages:* Haslip

Examination of the Court's most influential decisions regarding punitive damages begins with *Pacific Mutual Life Insurance Co. v. Haslip*, in which the Court acknowledged, for the first time, that the Due Process Clause of the Fourteenth Amendment could impose limits on the amount of punitive damages awarded.[83] Under the common law approach utilized by courts prior to *Haslip*, a punitive damages award was only reviewed on appeal to determine whether it was "reasonable."[84]

Haslip involved a fraud claim against an insurance provider after one of its agents misappropriated funds intended to be paid towards Haslip's policy.[85] As a result of the fraud, when Haslip was hospitalized the hospital could not confirm health coverage, and it required her to make payment upon discharge.[86] After she was unable to make further payments to the hospital, the delinquent account was referred to a collection agency, which obtained a judgment against Haslip, thereby adversely affecting her

81. *See id.* at 73–77.

82. Chemerinsky, *supra* note 76, at 22 (citations omitted). Justice Souter was equally surprised by the Court's decision: "If Andrade's sentence is not grossly disproportionate, the principle has no meaning." *Lockyer*, 538 U.S. at 83 (Souter, J., dissenting).

83. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

84. *Id.* at 15.

85. *Id.* at 6.

86. *Id.* at 5.

credit.[87] At trial, the jury found for Haslip and awarded her $200,000 in compensatory damages and about $1 million in punitive damages.[88]

Pacific Mutual challenged the award as violative of its due process rights.[89] On review, the Supreme Court noted that there was some concern over the dramatically increasing size of punitive damages awards.[90] Although it was willing to recognize for the first time that "general concerns of reasonableness and adequate guidance . . . enter into the constitutional calculus," the Court declined to find Haslip's award excessive under the Due Process Clause.[91]

Justice O'Connor wrote a dissenting opinion laying out her principal argument for the imposition of limits on punitive damages awards, which would eventually become the majority view.[92] Justice O'Connor was critical of many aspects of punitive damages awards. She most took issue with the lack of direction given to juries, the possibility of an arbitrary and prejudiced verdict, and the unpredictability of the amount of a jury's punitive damages award.[93] The manner in which Justice O'Connor described punitive damages is of most import for this Note's purposes: "Here . . . the civil/criminal distinction is blurry . . . . [P]unitive damages are, by definition, punishment."[94] While this mention of the common nature of criminal and civil punishments is not particularly alarming, it is surprising that Justice O'Connor was willing to fully utilize proportionality arguments usually used by criminal defendants:

> [P]unitive damages are *quasi-criminal punishment*. . . . [P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was

87. *Id.*

88. *Id.* at 7 n.2.

89. *Id.* at 7.

90. *Id.* at 10 (quoting Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part)) ("Awards of punitive damages are skyrocketing.").

91. *Id.* at 19.

92. *See infra* Part III.C.

93. *Haslip*, 499 U.S. at 43–45 (O'Connor, J., dissenting). Justice O'Connor went on to say, "[T]he instruction suggests that the jury may do whatever it 'feels' like. It thus invites individual jurors to rely on emotion, bias, and personal predilections of every sort. . . . Our cases attest to the wildly unpredictable results and glaring unfairness that characterize common-law punitive damages procedures." *Id.* at 44–45, 49.

94. *Id.* at 47.

> especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards.[95]

Justice O'Connor therefore contended that because punitive damages are like criminal punishments, they demand additional judicial scrutiny. Paradoxically, just three months after arguing that civil defendants should be afforded more protection because punitive damages are "quasi-criminal" and carry a stigma that requires stricter judicial oversight, Justice O'Connor concurred in the judgment in *Harmelin*, narrowing the Court's proportionality principle in criminal sentencing to its current hollow condition.[96]

B. *Justice O'Connor Fully Embraces Proportionality . . . for Civil Defendants:* TXO

In *TXO Production Corp. v. Alliance Resources Corp.*, Justice O'Connor wrote another blistering dissent, criticizing the majority's failure to provide a framework for lower courts to review punitive damages awards.[97] The majority had upheld a punitive damages award of $10 million for a plaintiff who had received just $19,000 in compensatory damages in a slander of title action.[98]

Interestingly, Justice O'Connor used proportionality as a key component of her argument that limits on punitive damages awards were necessary:

> Judicial intervention in cases of excessive awards also has the critical function of ensuring that another ancient and fundamental principle of justice is observed—that the punishment be proportionate to the offense. As we have observed, the requirement of *proportionality* is "deeply rooted and frequently repeated in common-law jurisprudence."[99]

95. *Id.* at 54 (emphasis added).

96. *See supra* Part II.C.

97. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 472–501 (1993) (O'Connor, J., dissenting).

98. *Id.* at 446, 466 (majority opinion).

99. *Id.* at 478 (O'Connor, J., dissenting) (quoting Solem v. Helm, 463 U.S. 277, 284–85 (1983)) (emphasis added).

Perhaps sensing that by relying so heavily on proportionality she was reopening the Eighth Amendment to a broader application that might then spread back into the criminal sentencing context, Justice O'Connor attributed her discussion of proportionality to the Court's "recogni[tion] that the requirement of proportionality is implicit in the notion of due process."[100] But merely asserting that she was relying on due process—and thus not on the Eighth Amendment—cannot hide the fact that, in order to show that proportionality is "deeply rooted" in American jurisprudence, Justice O'Connor quoted a familiar case—*Solem*—which most certainly was decided on Eighth Amendment grounds.[101]

C. *The Supreme Court Tosses a Lifeline to Civil Defendants:* Gore

In *BMW of North America, Inc. v. Gore*, the Supreme Court heard a challenge to a punitive damages award arising out of an action for fraud.[102] BMW had adopted a nationwide policy of reselling damaged vehicles as new, without disclosing the damage to the retailer, if the damage to a vehicle amounted to less than three percent of the car's retail price.[103] Gore bought one of these damaged vehicles, and he brought suit when he later discovered that the vehicle he purchased had been repainted and sold as new by BMW after it was damaged.[104] The jury found BMW's nondisclosure to be a "'gross, oppressive or malicious' fraud," and awarded Dr. Gore $4,000 in compensatory damages and a whopping $4 million in punitive damages.[105]

In its bombshell opinion, the Court announced that three guideposts would be used to review punitive damages awards.[106] *Gore* calls for a three-pronged analysis to determine whether the Fourteenth Amendment's Due Process Clause prohibition against "'grossly excessive' punishment on a tortfeasor"[107] was violated: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between punitive damages and compensatory damages; and (3) the difference between punitive damages

100. *Id.* at 478–79.
101. *Id.* at 478 (quoting *Solem*, 463 U.S. at 284–85); *see also supra* Part II.B.
102. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 565 (1996).
103. *Id.* at 563–64.
104. *Id.* at 563.
105. *Id.* at 565 (quoting ALA. CODE §§ 6-11-20, 6-11-21 (1993)).
106. *Id.* at 574–75.
107. *Id.* at 562 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993)).

and civil and criminal penalties for similar misconduct.[108] In abandoning the deference to punitive damages awarded by juries that prevailed prior to that point, the Court ruled that a punitive damages award that was over 500 times greater than the compensatory damages award[109] was a "grossly excessive award [that] transcends the constitutional limit."[110] The Court noted that BMW was not a recidivist, a fact which it stated would have factored into the degree of reprehensibility of the defendant's conduct.[111] Also of importance was the Court's willingness to again cite *Solem*, the case which had provided for the most meaningful review of criminal sentences in Supreme Court history.[112]

D. *Refining* Gore*'s Ratio:* State Farm

The Court refined "*Gore*'s Guideposts" in *State Farm Automobile Insurance Co. v. Campbell*.[113] *State Farm* involved claims of fraud, bad faith refusal to settle within insurance policy limits, and intentional infliction of emotional distress.[114] The jury awarded the plaintiffs $2.6 million in compensatory damages and $145 million in punitive damages.[115] Applying the *Gore* standard, the Court voiced serious concerns about the arbitrary deprivation of life, liberty, and property.[116] The Court also reiterated that "compensatory and punitive damages . . . serve different purposes. . . . [P]unitive damages . . . are aimed at deterrence and retribution."[117] Another major concern was the risk that the jury was prejudiced after learning of the defendant's wealth.[118] This concern led the Court to reaffirm that a defendant's wealth cannot justify what amounted to an otherwise unconstitutional award.[119] Most importantly, the Court explained that with regard to *Gore*'s ratio prong, "[s]ingle-digit multipliers

108. *Id.* at 574–75.
109. *Id.* at 582.
110. *Id.* at 585–86.
111. *See id.* at 577 ("Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.").
112. *Id.* at 575–77.
113. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).
114. *See id.* at 412–15.
115. *Id.* at 415.
116. *Id.* at 416–17.
117. *Id.* at 416 (citing Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001)).
118. *Id.* at 427 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996)).
119. *Id.* at 427–28 (citing *Gore*, 517 U.S. at 585).

are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution . . . ."[120] Although the Court parsed this statement and declined to impose a "bright-line ratio,"[121] the Court stated that courts reviewing punitive damages awards "must ensure that the measure of punishment is both reasonable and *proportionate* . . . ."[122]

IV. JUSTIFICATIONS AND VALUES UNDERPINNING HABITUAL OFFENDER STATUTES AND PUNITIVE DAMAGES

A. *Habitual Offender Statutes*

Habitual offender statutes are primarily aimed at tailoring the punishment imposed upon a criminal defendant. Proponents of these enhancement schemes believe that increased penalties are necessary because "'the punishment should fit the offender and not merely the crime.'"[123] Habitual offender statutes therefore seek to mold a sentence to a given offender based on his criminal history.[124] This measuring facilitates the goals of general and specific deterrence, which in turn reduce crime and curb recidivism. There is also a general belief that a court should factor an individual's criminal record into calculation of a sentence because repeat offenders are less likely to successfully be rehabilitated and are therefore more deserving of extended punishment.[125] Finally, habitual offenders are, by and large, more dangerous and more likely to commit crimes, so there is a heightened need to protect society from any future crimes the offender would commit if released.[126] Therefore, in order to effectively incapacitate a deviant, criminal propensity is considered during sentencing.[127]

120. *Id.* at 425 (citing *Gore*, 517 U.S. at 582).

121. *Id.*

122. *Id.* at 426 (emphasis added).

123. Thomas R. Goots, Comment, *"A Thug in Prison Cannot Shoot Your Sister": Ohio Appears Ready to Resurrect the Habitual Criminal Statute—Will It Withstand an Eighth Amendment Challenge?*, 28 AKRON L. REV. 253, 256 (1995) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

124. *See Williams*, 337 U.S. at 247 (stating that a sentencing judge must take into account "the defendant's life and characteristics" (citation omitted)).

125. Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 8 (1998) (discussing the rationale supporting enhancement statutes).

126. Romero, *supra* note 63, at 147 ("As long as the legislature has articulated incapacitation as a penal goal, recidivist sentencing appears to be beyond proportionality review and insulated from an excessiveness challenge.").

127. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A intro. cmt. (2008) ("To

B. *Punitive Damages*

There can be no doubt that punitive damages are imposed to simultaneously deter and punish unlawful conduct.[128] Beyond that obvious commonality with habitual offender statutes, it can be concluded that punitive damages are imposed to tailor punishment to a wrongdoer based on repeated misconduct. The most explicit affirmation of this conclusion comes from *Haslip*, in which Justice O'Connor wrote that "the State has a legitimate interest in avoiding rigid strictures so that a jury may *tailor* its award to specific facts."[129] Moreover, in *Gore*, the Court identified recidivism as a factor which weighed into its degree of reprehensibility analysis:

> Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.[130]

The only aspect of habitual offender statutes without an identical counterpart in the punitive damages context is incapacitation. Because the civil system does not impose prison sentences, incapacitation is not an easily comparable issue. Conceptually, however, it can be said that a large punitive damages award may cripple a civil defendant economically, thereby financially incapacitating a tortfeasor from repeating its conduct.

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protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered.").

128. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1051, 1079 (2004) (arguing for a "unified, coherent theory of constitutional limits on punishment" and stating, "[w]hether it is a criminal or a civil case, whether the punishment is death, imprisonment, a fine, or punitive damages, the government's goals are to deter wrongdoing and inflict retribution"); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798, 1803 (1992) (stating that "[t]he purpose of punitive civil sanctions is to punish, even though their procedural setting is civil" and describing punitive damages as "middleground" sanctions).

129. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting) (emphasis added).

130. *Gore*, 517 U.S. at 576–77 (internal citations omitted).

C. *Evidence Showing that Habitual Offender Statutes and Punitive Damages Are Built on the Same Foundation*

1. *The Court's Methodology*

The Court has long asserted that its punitive damages jurisprudence is built upon the Fourteenth Amendment's substantive due process guarantees rather than the proportionality principle of the Eighth Amendment.[131] Yet it is curious that despite the Court's insistence that it utilized due process principles, it was willing to refer to proportionality considerations in *Gore* in determining whether a punitive damages award was excessive.[132] The Court's recent punitive damages cases show remarkable reliance on proportionality values.[133] Indeed, scholars have found that "the Court has articulated an increasingly robust requirement of proportionality under the Due Process Clause in punitive damages cases."[134]

Next, in *Gore*, the Court was willing to cite to *Solem*.[135] The implications of the Court's willingness to quote *Solem* in a landmark case like *Gore*, which purported to ensure "[e]lementary notions of fairness," cannot be understated.[136] It is, at worst, outright hypocrisy—or, at best, an accident on the part of the Court, considering that in *Harmelin* and *Ewing* the Court gave every indication that it was ready to forever purge from casebooks *Solem*'s attempt at setting significant limits on excessive sentences.[137]

Another indication that certain aspects of the criminal and civil

131. *See* Browning–Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 263–64 (1989) (rejecting the argument that the Excessive Fines Clause of the Eighth Amendment applies to punitive damages awards when the government has no right to receive a share of the damage award). However, scholars have observed that there is a better argument that a proportionality principle likely comes from the Eighth rather than Fourteenth Amendment. *See* Chemerinsky, *supra* note 128, at 1063 ("Arguably, the text of the Eighth Amendment offers more basis for proportionality than the Due Process Clause; after all, a prohibition of 'excessive fines' inherently requires some way of deciding what is too much.").

132. *See Gore*, 517 U.S. at 580 n.32 (referring to five cases that stressed the importance of "proportion" between the damages inflicted and the punitive damages).

133. *See, e.g.*, *id.* at 580–81 ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree.").

134. Karlan, *supra* note 9, at 920.

135. *Gore*, 517 U.S. at 575 n.24.

136. *Id.* at 574.

137. *See supra* Part II.C–D.

systems are analogous is the Court's incorporation of *Gore*'s third guidepost, which compares the civil punitive damage award to similar criminal penalties.[138] According to the Court, this comparison is useful in determining whether a punitive damages award is excessive.[139] This guidepost directly supports the general proposal of this Note for two reasons: First, it shows that civil and criminal sanctions are properly juxtaposed; and second, it shows more generally that neither domain need be treated in a vacuum; the practices and characteristics of one realm can give valuable insight to the other.

2. *Justice O'Connor's Influence*

Justice O'Connor's willingness to lean on sentencing proportionality jurisprudence to advocate for a reformed civil framework also supports the proposition that punitive damages and habitual offender statutes are built upon the same foundation. Justice O'Connor's opinions go beyond merely providing background case law that mentions proportionality in passing—in fact, a heavy reliance on the principle of proportionality pervades her opinions. As with the majority, Justice O'Connor was also willing to quote *Solem* as support for her belief that "[j]udicial intervention in cases of excessive awards also has the critical function of ensuring that another ancient and fundamental principle of justice is observed—that the punishment be proportionate to the offense. As we have observed, the requirement of proportionality is 'deeply rooted and frequently repeated in common-law jurisprudence.'"[140] Again, this level of reliance on *Solem* is remarkable considering the broad notion of proportionality that *Solem* conceived.

There is additional evidence that the newly forged punitive damages doctrine is inescapably intertwined with criminal sentence proportionality. Justice O'Connor mentions the word "proportionality," or some variation of the word, *twenty-one times* in her dissenting opinion in *TXO*, in which she voiced strong concerns about the lack of judicial review of punitive damages.[141] It is clear that it was Justice O'Connor who was instrumental in bringing the punitive damages issue to the forefront in several blistering dissents before she finally prevailed in *Gore*.[142] Considering Justice

138. *Gore*, 517 U.S. at 583–85.

139. *Id.*

140. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 478 (1993) (O'Connor, J., dissenting) (quoting Solem v. Helm, 463 U.S. 277, 284–85 (1983)).

141. *Id.* at 473–98.

142. *See supra* Part III.

O'Connor's influential role on the Rehnquist Court, it is very likely that her notion of proportionality was a heavy factor in the Court's decision to impose a cap on punitive damages.[143] The penultimate evidence is that before the Court set forth *Gore*'s guideposts, Justice O'Connor advocated for the use of a *Solem*-like framework to review punitive damages: "I would adapt the *Solem* framework to punitive damages."[144] Based on the preceding, it would be difficult for a reasonable mind to find that punitive damages and habitual offender statutes do not stand on the same footing.

V. REASONS FOR THE DISCONNECT IN THE COURT'S JURISPRUDENCE

A. *The Court's Reasons*

Having established the strikingly similar underpinnings of habitual offender statutes and punitive damages, even a cursory reading of the Supreme Court's proportionality jurisprudence reveals an anomalous occurrence: "the Court seems to be much more protective of civil defendants' bank accounts than it has been of criminal defendants' liberty."[145]

143. *See* NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT ix (1996) (arguing that Justice O'Connor's was not simply a "famous first" but rather a "sophisticated and influential judicial actor" on the Rehnquist Court); NANCY MAVEETY, QUEEN'S COURT: JUDICIAL POWER IN THE REHNQUIST ERA 3, 109 (2008) (describing Justice O'Connor as having played a "critical role as a decisional pivot" and stating that Justice O'Connor "contributed more to the Court's identity than its chief justice did"); JEFFREY TOOBIN, THE NINE 57–58, 70 (Anchor Books 2008) (stating that "[a]ll of the other justices . . . went to O'Connor. The way to win a majority in the Rehnquist Court was to earn O'Connor's support, so her colleagues invariably came to her as supplicants" and declaring, "[i]t was O'Connor's Court").

144. *See* Browning–Ferris Indus. v. Kelco Disposal Inc., 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part). Before the Court set limits on punitive damages awards in *Gore*, commentators also suggested limits on punitive damages adhering to the Eighth Amendment and *Solem*. Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761, 794 (1995) ("An alternative to using a ratio rule to define excessiveness would be for courts to adopt some form of the proportionality analysis the Supreme Court endorsed in *Solem v. Helm* for use in cases arising under the Eighth Amendment's Cruel and Unusual Punishments Clause.") (citations omitted).

145. Frase, *supra* note 75, at 609; *see also* Rachel A. Van Cleave, *"Death Is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 219–20 (2003) (noting that the Supreme Court "give[s] teeth" to proportionality review of monetary deprivations, but "ironically . . . has not shown the

In order to determine the actual reasons for the differing treatment of civil and criminal defendants, the Court's purported reasons for affording criminal defendants less protection under the Eighth Amendment must first be unraveled.

One of the Court's main arguments has been that respect for the "primacy of the legislature" demands extreme deference to criminal sentences which are decided by state legislatures.[146] This is, through and through, a separation of powers argument.

But the Court's willingness to utilize a separation of powers argument raises several questions. Why is the Court absolutely determined to avoid "superlegislating" in the criminal context, and yet more than willing to actively insert itself in the review of punitive damages awards? Are not the numerous harms caused by unlimited punishment every bit as harmful in the criminal context as they are in the civil context, despite the fact the harms caused by habitual offender statutes originate in the legislative branch? And because disproportionate criminal punishments are dealt out by state legislatures, as opposed to juries comprised of private citizens, is it not actually *more* incumbent on the Court to strike down legislation that amounts to oppressive "state action"? Conversely, if juries are considered a local branch of government—and there is a strong argument that juries are local governance in its purest form[147]—then are jury decisions not every bit as deserving of the same level of deference that the Court is willing to extend to legislatures?

At least one scholar argues that any double standard is the product of the fact that with regard to punitive damages, the Court is justifiably usurping runaway juries rather than legislatures.[148] This argument is

same concern about excessiveness and disproportionality when the punishment is imprisonment").

146. *See* Ewing v. California, 538 U.S. 11, 23–26 (2003); Harmelin v. Michigan, 501 U.S. 957, 998–99, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

147. *See* Nathan Seth Chapman, Note, *Punishment by the People: Rethinking the Jury's Political Role in Assigning Punitive Damages*, 56 DUKE L.J. 1119 (2007).

148. *See* Romero, *supra* note 63, at 154–56. Professor Romero readily acknowledges that "punishment requires an upper limit," but suggests that these limits are "preferably established by a legislative body." *Id.* at 115. But this approach is woefully inadequate in the criminal sentencing context, where Professor Romero's suggestion is tantamount to the argument that the way for legislatures to stop imposing disproportional punishments is for legislatures to stop imposing disproportional punishments. First, it is wholly idealistic to believe that legislatures would be motivated to do so when they themselves enacted the disproportionate sentencing

unconvincing in light of the fact that tort reform has become a highly publicized and controversial political issue of late.[149] It follows that the decision of state legislatures not to impose limits on punitive damages is a concerted legislative policy decision deserving of separation of powers deference. In rejecting meaningful proportionality review of habitual sentences, the Court has stated that the Eighth Amendment allows subscription to any of the penological theories of punishment—be it incapacitation, rehabilitation, retribution, or deterrence.[150] Habitual offender statutes, the argument goes, are merely decisions by state legislators to adhere to a utilitarian deterrence model of punishment.

As an initial matter, the Court has not made it clear why it is acceptable for state legislatures to ignore retribution principles in the criminal context, and yet it is crucial that punitive damages awards conform to proportionality constraints—the key aspect of retributive punishment. Next, while it might be reasonable to declare that legislatures are free to favor a given penological theory, it is disingenuous to say that legislatures are free to "subscribe" to any penological theory of their liking. The problem with that language is that it sends the message that by "subscribing" to a given theory, legislatures are immunized from objective review for proportionality. Placing proportional limits on the penalties legislatures impose would not foreclose the ability of legislatures to favor a penological theory of their liking. Legislatures could still enact laws with utilitarianism as their main thrust, but would be prevented from violating other penological principles on a whim, which is inevitable when the states are informed that they can "subscribe" to any theory of punishment. It is crucial to distinguish between such language, particularly when considering that the retributive principle of proportionality is embodied within the guarantees of the Eighth Amendment.

Finally, the Court has also stressed that our federal system's nature dictates that proportionality review of noncapital offenses is properly

scheme to begin with. Second, if Professor Romero's suggestion is taken seriously, then why not do away with judicial review altogether, and leave it up to our benevolent legislatures to check all of their own constitutional abuses? Clearly judicial review of violations of the Eighth Amendment is just as important as judicial review of other constitutional violations caused by the legislative branch.

149. *See* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 4, 50–93 (2002) (surveying "the political nature and development of neo-conservative tort law").

150. *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment).

narrow.[151] The claim is that the Court is therefore merely deferring to the states' determination of their own laws, which is central to our system of vertically divided government. But this contention is also impugned by inconsistency. For a Court so preoccupied with federalism concerns, it is peculiar how actively the Court has inserted itself into tort law and punitive damages cases—the contours of which have traditionally been left to the states to define.[152] In addition, federalism concerns should not insulate the Court from criticism for a dereliction of its duty to uphold the Constitution: "[T]he suggestion that a legislatively mandated punishment is necessarily 'legal' is antithesis of the principles established in *Marbury* . . . for '[i]t is emphatically the province and duty of the judicial department to say what the law is' . . . and determine whether a legislative enactment is consistent with the Constitution."[153] Our country's history also tells us that federalism may not be worthy of such unquestioned reverence, particularly when individual liberties are at stake.[154] In sum, generic federalism arguments simply do not—and should not—gobble up the Supremacy Clause, or the Court's duty to uphold the Constitution.[155]

151. *Ewing*, 538 U.S. at 23; *Harmelin*, 501 U.S. at 999–1001 (Kennedy, J., concurring in part and concurring in the judgment).

152. *See* Silkwood v. Kerr–McGee Corp., 464 U.S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law."); *see also* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2639 (2008) (Ginsburg, J., concurring in part and dissenting in part) (naming *State Farm* and *Gore* as the Court's "recent forays into the domain of state tort law under the banner of substantive due process").

153. *Harmelin*, 501 U.S. at 1017 (White, J., dissenting) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) (second alteration in original).

154. *See* Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107, 108 n.1 (1992) (discussing the Canadian Constitution framers' rejection of a wholly federalist system and concluding that "in the aftermath of the U.S. Civil War, [Canada] sought to avoid what was perceived as the mistakes of strong states' rights and the centrifugal force that had led to the U.S. Civil War").

155. *See* U.S. CONST. art. VI. ("This Constitution . . . shall be the supreme Law of the Land . . . ."); Duncan v. Louisiana, 391 U.S. 145, 170 (1968) (Black, J., concurring) ("I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights."); Brennan, *supra* note 71, at 582 ("[T]he Court seems to be confusing legitimate deference to state legislative determinations that are constitutional and illegitimate deference to state legislative determinations that are unconstitutional.").

B. *Other Reasons*[156]

Another possible reason for the disconnect is the simplest, and perhaps the most obvious reason: a crime is most certainly not a tort. Therefore, the two should not be treated identically. And there are indeed numerous distinctions between the criminal and civil spheres. First, the tort system is more willing to attach liability to civil defendants in an effort to "make the plaintiff whole." Second, the burden of persuasion on plaintiffs in a tort action is usually a "preponderance of the evidence," compared with the "beyond a reasonable doubt" standard for the prosecution in criminal cases. Furthermore, there are generally no limits on the jury's initial determination of punitive damages liability. It might be reasonable to argue that it is because of these differences that the Court has extended more active judicial oversight in the tort context. It is also plausible that the Court is less willing to disturb the findings of juries because they have found the defendant guilty beyond a reasonable doubt three times, while civil defendants have only been found liable by a preponderance of the evidence on a single occasion.

But these differences are superficial. The underpinnings of the narrower subjects of habitual offender statutes and punitive damages discussed in Part IV readily lend themselves to uniform application of constitutional safeguards to each sphere. It is true that the differing burdens of persuasion are strong candidates for explaining what is otherwise a blatant inconsistency by the Court. After all, defendants already had their advantage in the guilt–innocence phase of their trial and, despite that advantage, they were convicted beyond a reasonable doubt. Thus, it might be contended that no further "equalizing" is appropriate by an appellate court. But conceptually, the differing burdens may in fact simultaneously mandate more stringent sentencing review. This is because the "beyond a reasonable doubt" standard is a testament to the significance our society assigns to liberty. Logically then, the differing burdens of persuasion, at their core, actually serve to reinforce the stance that the approach to reviewing liberty deprivations should be uncompromising. A tenet of our society is that liberty is of such value that it is only properly put at risk when done so by a high standard. In the end, it is this tenet that militates for stronger proportionality review of criminal sentences.

156. Special thanks to Deputy District Attorney Richard Berry, 7th Judicial District of New Mexico, for his insight on this issue.

C. *Likely Reasons*

What may be a more likely—and more troubling—reason for the disconnect in the Court's proportionality jurisprudence is the lack of political and financial power of criminal defendants compared with their civil counterparts.[157] In *Gore*, the Court did not hesitate to state there was a heightened interest in protecting BMW because it was an important economic actor.[158] Meanwhile, habitual offender sentencing has become tied to political platforms and considerable media attention. Due to this politicization, the issues surrounding habitual offender sentencing have arguably been relegated to scrutiny in the court of public opinion. The popularity of habitual offender statutes such as three strikes laws amongst the public may have led the Supreme Court to sidestep meaningful review because a decision contrary to the perceived will of the public hurts the Court's lasting institutional legitimacy. Finally, politicians stand to gain from "getting tough on crime," while it would be hard as a matter of practice to "get tough on tortfeasors" without fear of political reprisal from multimillion dollar corporate defendants who provide generous campaign contributions.[159] It may also be that the Court is mindful of the wrath of legislators who have their laws struck down by an activist Court. Others have explained the disconnect as the foreseeable result of blind decision-making based on political affiliation.[160]

Whatever the case, it might be surmised from *Ewing* that the Court realized that completely abolishing the proportionality provision still employed in the criminal context would undermine the foundation for the

157. *See* Gershowitz, *supra* note 32, at 1297 ("[C]riminal defendants lack access to the political process that metes out their disproportionate punishments.").

158. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996) ("[BMW's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.").

159. *See* Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 11 (1999) ("While crime control is clearly the professed objective of these policies, one can observe without being overly cynical that a competing objective has been political gain from proponents of such policies.").

160. Erwin Chemerinsky, *Politics, Not History, Explains the Rehnquist Court*, 13 TEMP. POL. & CIV. RTS. L. REV. 647, 658 (2004) (stating that with regard to the Court's review of three strikes laws, "[t]he Court in these decisions ruled that too many years in prison for shoplifting does not violate the Constitution, but too much money from a business in punitive damages is unconstitutional. It is hard to imagine a clearer indication of a Court animated not by history or interpretive principles, but by conservative ideology.").

limits it imposed on punitive damages.[161] This may also explain why the Court has been hostile to expansion of judicial intervention into criminal sentences, yet only narrowed the proportionality principle in criminal sentencing to the point that it "forbids only extreme sentences that are 'grossly disproportionate' to the crime, rather than abolishing it altogether."[162]

VI. IMPORTING THE CIVIL FRAMEWORK TO A CRIMINAL CONTEXT

A. *The Ratio*

The application of the ratio is simple. In civil cases, the ratio prong of *Gore*, as refined in *State Farm*, generally limits a punitive damages award to ten times the amount of compensatory damages owed a plaintiff.[163] In criminal cases, the same ratio would cap an enhanced sentence at ten times the duration of the original sentence.

Because *Gore*'s ratio prong is "the most potent ingredient in the witch's brew," it is the best candidate to curtail excessive sentences in the criminal sphere.[164] Employing a ratio in *Gore* and *State Farm* was a sound choice that provided a mechanism for upholding the constitutional guarantee of proportionality of punishment. Employing a ratio in the criminal context would be every bit as instrumental in ensuring that criminal sentences comport with the Eighth Amendment. Ratios are fast and easy to calculate for sentencing and reviewing judges alike, and they put the accused on immediate notice of the maximum amount of prison

161. There appears to be a growing awareness of the breakdown of the criminal–civil distinction. *See* Susan R. Klein, *Redrawing the Criminal–Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 685 (1999) ("[T]he Court's current approach of labeling an action entirely civil or entirely criminal for purposes of determining a defendant's procedural rights is misguided . . . . [T]he sun has set on the day when statutes possessed all of the attributes of a criminal or civil action . . . ."). Others argue that the distinction between criminal and civil law should not confine constitutional provisions to one sphere. *E.g.*, Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal–Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

162. Ewing v. California, 538 U.S. 11, 23 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

163. *See Gore*, 517 U.S. at 581; *see also* State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

164. McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003).

time he faces, amidst inherent uncertainty over which prior convictions will "count" as a prior strike. These benefits would help streamline the review process and would prevent a flood of proportionality challenges from clogging the federal courts, which some fear extensive proportionality review may cause.[165] Furthermore, because of its straightforward application, the ten-to-one ratio retains a good deal of discretion in the sentencing judge, which helps to alleviate the criticism that the proportionality principle allows for the insertion of reviewing judges' personal beliefs.[166]

The plain meaning and dictionary definition of the word "proportional" is also a useful interpretive tool. According to the word's definition, it appears that the use of a ratio is compelled by the word "proportional" itself. The words "proportional" and "proportion" are, respectfully, defined as "*Mathematics*: Having the same or a constant ratio," and "[a] statement of equality between two ratios."[167] "Ratio" is defined as "the relationship in quantity, amount, or size between two or more things: Proportion."[168] Therefore, utilizing a ratio appears to be the most common-sense manner of upholding the Eighth Amendment's proportionality principle.

Finally, it should be emphasized that conceptually, the proposed approach is not radically different from the current test the Court has set forth. The Court's current proportionality test calls for a comparison of the gravity of the offense to the harshness of the penalty.[169] The proposed approach simply adds mathematical precision to proportionality review by quantifying the gravity of the offense and the harshness of the penalty into a ratio.

165. Karlan, *supra* note 9, at 911 ("[O]ne of the disadvantages of the Eighth Amendment proportionality principle was the possibility that it could have spawned wholesale collateral litigation, clogging federal court dockets.").

166. *See Harmelin*, 501 U.S. at 986 ("The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values."); Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 76 (2007) ("When the rule of proportionality is deconstructed, it becomes apparent that proportionality is not a rule of restraint, but rather one of activism.").

167. AMERICAN HERITAGE DICTIONARY 1453 (3d ed. 1992).

168. WEBSTER'S NEW COLLEGIATE DICTIONARY 950 (1981).

169. *See supra* Part II.C.

B. *The Ratio's Practical Effect on Criminal Sentencing*

In practice, what effect would implementing a *Gore*-type ratio have on the Court's Eighth Amendment test for sentencing proportionality? Under the proposed approach, criminals convicted of moderate and serious crimes are not likely to benefit extensively from the use of the ratio. This is because these offenders' original sentences are already quite long to begin with. The ratio would not significantly scale back the length of their sentences because the sentences for some of the most heinous crimes are often capped only by the convict's life expectancy. Realistically, reducing a sentence from, say, one hundred years to ninety years by way of the ratio would not preclude a dangerous criminal from lifelong incapacitation.

On the other hand, a framework utilizing the ratio could dramatically reduce the sentences of criminals convicted of minor, nonviolent felonies, such as those in *Ewing* and *Lockyer*. These smaller, nonviolent "third strikes" would be the only instances in which the ratio would have a noticeable, but nonetheless necessary, impact on a defendant's ultimate sentence. With regard to these less serious trigger offenses, the case law set forth in this Note suggests two propositions: (1) minor crimes are the most likely to feel the full effect of habitual offender statutes, and (2) the enhanced sentences for these minor crimes are the most likely to be grossly unfair and disproportionate.[170] Recognition of these propositions is growing. California lawmakers, for example, are aware of the problems with their Three Strikes Law and have been somewhat receptive to proposed changes.[171] In addition, several jurisdictions, including federal courts, have limited the applicability of three strikes laws to defendants with a serious violent felony as their triggering offenses.[172] These limitations are some indication of growing public opinion against the

170. *See supra* Part II.

171. *See* CALIFORNIA STATEWIDE NOVEMBER 2, 2004 GENERAL ELECTION—PROPOSITIONS, Proposition 66 § 2(b), 8(a)–(h), *available at* http://vote2004.sos.ca.gov/voterguide/propositions/prop66-title.htm (follow "Text of Proposed" hyperlink) (stating that California's Three Strikes Law "did not set reasonable limits to determine what criminal acts to prosecute as a second and/or third strike" and proposing that the third criminal strike be limited to "serious and/or violent felonies"). Nevertheless, this amendment was not enacted, as 52.7% of voters rejected it, while 47.3% were in favor. League of Women Voters of California Education Fund, Proposition 66, http://www.smartvoter.org/2004/11/02/ca/state/prop/66/ (last visited Apr. 21, 2010).

172. *See, e.g.*, 18 U.S.C. § 3559(c)(1) (2006). The federal three strikes law also provides that the two prior convictions must have either been for two or more serious violent felonies or for a serious violent felony and a serious drug offense. *Id.* § 3559(c)(1)(A).

triggering of three strikes laws when the instant offense is of a minor nature. Therefore, in the public's eye, the ratio would remedy excessive sentences for those most in need, while for the most part excluding less deserving habitual offenders who committed moderate or serious crimes and whom proponents of habitual offender statutes likely had in mind when enacting and fiercely defending such statutes.[173]

Applying the ratio to two familiar cases illustrates how it would work in practice. Without the California Three Strikes Law, Ewing's crime of grand theft would have carried a maximum sentence of one year in prison.[174] Under the proposed approach, using a *State Farm*-type ratio would reduce his enhanced sentence of twenty-five years to life down to ten years—ten times the duration of his crime's original maximum sentence of one year. Even though his sentence would be reduced substantially, ten years imprisonment is hardly a light sentence for stealing three golf clubs.[175]

Similarly, without California's Three Strikes Law, the defendant in *Lockyer* would have faced maximum imprisonment of up to six months for each of his two petty thefts.[176] Using the same *State Farm*-type ratio, Andrade's fifty-year minimum sentence would be cut to a total of ten years, five years for each theft. While a swing of forty years might appear astronomical to some, the dramatic result would have remedied what was arguably the most grossly disproportionate sentence under a three strikes law.[177]

C. *Likelihood of Change*

The idea that excessive sentences can be unconstitutional has not been wholly rejected by all American courts. Despite the Supreme Court's reluctance to overturn sentences, some state and lower federal courts have

173. *See* Ramirez v. Castro, 365 F.3d 755, 769–70 (9th Cir. 2004) ("Indeed, it is doubtful that California's Three Strikes Law, passed largely in response to the infamous 1993 kidnapping and murder of 12-year-old Polly Klaas was ever intended to apply to a nonviolent, three-time shoplifter . . . .") (citation omitted); Goots, *supra* note 123, at 253–54 (arguing passionately that "[i]f California had a habitual offender statute prior to [that] year, maybe a 13-year-old girl would still be alive to enjoy another sleep over with her friends").

174. CAL. PENAL CODE § 489(b) (West 1999).

175. As one astute circuit judge stated: "Even Hammurabi limited the penalty for an eye to an eye." *Ramirez*, 365 F.3d at 776 (Kleinfield, J., dissenting).

176. CAL. PENAL CODE § 490.

177. *See generally* Chemerinsky, *supra* note 76 (discussing grossly disproportionate sentences under California's Three Strikes Law).

found prison sentences unconstitutional, even applying the Supreme Court's narrow interpretation of Eighth Amendment proportionality requirements.[178] Many of the sentences which have been overturned have been sentences for nonviolent offenses—the same sentences that are the most likely to be affected by proportionality review that incorporates the ratio as its key feature.[179] Furthermore, in *Lockyer*, the Court itself noted the uncertainty that characterizes its proportionality jurisprudence, giving the impression that the Court is willing to revisit the issue.[180] The Court has already used the principle of proportionality to set limits on the use of capital punishment,[181] fines and forfeitures,[182] and punitive damages, although the Court continues to maintain that the need for constitutional limits on punitive damages arises from substantive due process considerations.[183] Finally, a majority of Justices on the Court recognize that the Eighth Amendment prohibits certain lengthy prison sentences.[184] It should therefore not be assumed that the Court is completely opposed to adjusting its approach to proportionality in the criminal context.[185]

One final consideration that the Court must address before adopting the ratio in the criminal context is the argument that the full brunt of habitual offender statutes needs to apply to small-scale chronic offenders

178. *See* Frase, *supra* note 75, at 650 n.333.

179. *See, e.g.*, *Ramirez*, 365 F.3d at 756 (petty theft); Crosby v. State, 824 A.2d 894, 896 (Del. 2003) (second degree forgery); People v. Davis, 687 N.E.2d 24, 28–29 (Ill. 1997) (possessing a firearm without a firearm owner's card).

180. Lockyer v. Andrade, 538 U.S. 63, 72 (2003) ("Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality."); *see also* Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 172 (1995) ("Due to a series of flawed opinions by the Supreme Court regarding a proportionality principle in non-capital cases, there is considerable uncertainty and confusion over the existence, extent, and application of such a principle.").

181. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (holding the imposition of the death penalty upon minors unconstitutional).

182. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321 (1998) (striking down disproportionate forfeiture).

183. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2633 (2008) (stressing the need to prevent "unpredictable and unnecessary" punitive damages awards); Jeffrey L. Fisher, *The* Exxon Valdez *Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 2–3 (2009) (describing unpredictable punitive damages awards as "the root of the problem" the Court sought to remedy when it imposed constitutional limits on punitive damages awards).

184. Frase, *supra* note 75, at 575.

185. *See id.* at 576 (predicting a "brighter future of proportionality jurisprudence").

who, without facing sharply increasing punishments, would be undeterred from committing additional minor offenses. The argument is that "[s]ome people commit relatively small crimes, without graduating to more serious ones, but appear unable to be deterred."[186]

Strict adherence to utilitarianism, which would oblige deterrence through a harsh penalty in the case of the repeat minor offender described above, has long been debated by intellectual giants.[187] But thinkers such as Blackstone, Montesquieu, and Bacon, who undeniably had an immense impact on our framers, recognized the importance of the principle of proportionality, which would reject a harsh punishment for the minor offender described above.[188] This is because, absent a retributive counterweight, exclusive reliance on a utilitarian model of punishment inevitably leads to the enactment of ever-increasing penalties in order to better the prospects of deterring crime, thereby diminishing the likelihood of proportional punishment.[189] For a pure retributivist, a punishment

186. Ramirez v. Castro, 365 F.3d 755, 776 (9th Cir. 2004) (Kleinfield, J., dissenting).

187. *Compare* IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (William Hastie trans., The Lawbook Exchange 2002) (1887) ("For one man ought never be dealt with merely as a means subservient to the purpose of another . . . . [W]oe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it . . . ."), *with* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690), *reprinted in* CLASSICS OF MORAL AND POLITICAL THEORY 688 (Michael L. Morgan ed., 4th ed. 2005) ("[L]esser breaches . . . may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like." (emphasis omitted)).

188. FRANCIS BACON, ESSAYS 549–50 (Richard Whately ed., Lee and Shepard 1875) (1625) ("A judge ought to prepare his way to a just sentence, as God useth to prepare his way, by raising valleys and taking down hills."); 4 WILLIAM BLACKSTONE, COMMENTARIES *3 (warning against "too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some prevalent offence" and stating, "from . . . these causes it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil"); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 107 (Thomas Nugent trans., Batoche Books 2001) (1748) ("It is an essential point, that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a smaller, and that which is more pernicious to society rather than that which is less.").

189. Stacy, *supra* note 48, at 553 ("If punishments may be justified solely on the basis of the utilitarian objectives of deterrence and incapacitation, then no judicially enforceable constraints exist and even torture and the rack become legitimate punishments.").

should always "fit the crime."[190] In other words, a punishment should be proportional to the crime. Not so for a utilitarian.[191] For a pure utilitarian, a punishment need not serve anything other than society's needs, and "making an example" out of a convicted criminal often does so.[192] Sole reliance on deterrence destroys the retributivist value of set punishments with some defined relation to the reprehensibility of the offense.[193] Most agree that "[w]ithout fixing the enhancement to the crime of conviction, past misconduct becomes the determinant factor for the punishment and the punishment loses its moorings to the principles of retribution."[194]

This is not to say that retribution is necessarily the "magic bullet," or that utilitarianism is without any value. Rather, strict adherence to any model, to the exclusion of all others, is an unwise way to achieve the varied goals of punishment. Utilitarianism is not the only theory of punishment subject to criticism in this regard. Sole reliance on retributivism can be critiqued as completely failing to take into account society's general need for deterrence.[195] The point is that the principles of punishment work best in conjunction.[196] As such, the hypothetical petty criminal can in fact be punished more severely if he is a repeat offender, thereby satisfying utilitarian principles, and at the same time be free from limitless punishments, thereby respecting retributivist principles. The ratio is the

190. United States v. Blarek, 7 F. Supp. 2d 192, 202 (E.D.N.Y. 1998).

191. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 737–38 (2005) ("As is well-known, the utilitarian theory of punishment subscribes to the notion that the issue of whether someone should be punished, and in what way, should be considered in terms of the consequences that the punishment would bring for the overall good of the society. The purpose of punishment, under this view, is not to give each criminal what he or she deserves, but to deter future crimes, to incapacitate criminals by keeping them 'off the streets,' or to rehabilitate criminals so they would become better citizens.").

192. *Blarek*, 7 F. Supp. 2d at 210.

193. *See Ramirez*, 365 F.3d at 776 (Kleinfield, J., dissenting) ("The sentencing goals of incapacitation and deterrence are . . . served by [a] harsh sentence. But those are not the only goals. The goals of reaffirming societal norms and of just retribution are disserved as much by an excessively harsh sentence as by an excessively lenient one.").

194. Romero, *supra* note 63, at 147–48.

195. *See* James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 89 (2003) ("But [retributivism] does often seem weirdly blind to the nasty realities of the American world around it, with its otherworldly discussions of abstractly conceived autonomous actors.").

196. *See generally* John Rawls, *Two Concepts of Rules*, *reprinted in* PHILOSOPHY OF PUNISHMENT (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

best vehicle for striking this compromise. It respects the need for increased punishments for recidivists, yet keeps the sentences for minor crimes from shooting into the atmosphere. Although this may give the impression that the repeat minor offender described above has been given a stroke of luck by being outside the full scope of utilitarian punishment vis-à-vis a punishment scheme employing the principles of punishment in conjunction, this rare occurrence is undoubtedly preferable to the extreme results which would frequently arise from use of a punishment model utilizing only one principle. Most importantly, and as emphasized throughout this Note, the founders already decided this issue. They embraced the principle of retribution and drafted the Eighth Amendment accordingly.

VII. CONCLUSION

Without any doubt, crime could more effectively be prevented if, for example, we allowed compelled confessions or evidence obtained through unlawful searches. But it is agreed that such evidence is better excluded, lest we sacrifice the principles embodied in the Bill of Rights. The proportionality principle is a baseline right which must not be breached, regardless of any purportedly gripping reason for doing so. State interests often suggest the need for a more active and powerful state, but the central axiom of the Bill of Rights is that state power must be harmonized, and minimized to the greatest extent possible, in order to preserve individual liberties. Our founders recognized the appeal of a perfectly safe, crime-free society, but they chose liberty and rejected a paternalistic state. We must do the same.

The Supreme Court has a duty to uphold the constitutional protections afforded to all citizens in the Bill of Rights, even in the face of public opinion which might press for the dissolution of such protections. The Court's proportionality jurisprudence reveals a double standard that should be troubling to every American—not only to repeat petty criminal offenders who suffer the immediate consequences of the Court's inconsistent jurisprudence in this area.

There is *always* an evil. There is *always* a reason to curtail liberties in order to protect people from themselves. There is *always* a reason to impose draconian sentences in order to cure a perceived sickness in society. But history shows us that these cure-all approaches have a nasty tendency to backfire.[197] Habitual offender statutes had a noble goal when first

197. *See* WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER 117 (Arno Press 1972) (1883) (describing the "ulterior effects which may be

enacted—preventing crime by administering strong medicine to repeat offenders. Sadly, the prescription failed to provide a maximum dosage, thereby mutating the over-hyped cure into a pathogen that has now run roughshod over our constitutional protections once held dear. As a result, proportionality of punishment, one of the most basic principles making our justice system fair, has been gutted. If we do not unequivocally renounce legislative paternalism now, then what further "cures" must we endure before we do?

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apprehended from the remedy itself"); Donald Allen, *Paternalism vs. Democracy: A Libertarian View*, *in* IDEALS AND IDEOLOGIES 125, 126–27 (Terrence Ball & Richard Dagger eds., 6th ed. 2006) (discussing the Prohibitionists and stating that "well-meaning paternalists, in attempting to solve one 'problem,' have not only failed to solve it but have created many additional problems").

* B.A., University of New Mexico, 2007; J.D. Candidate, Drake University Law School, 2010. I dedicate this Note to my wife, Juliana. Every day, you prove the veracity of the adage: "Behind every good man is a great woman." I would also like to thank Ashley Dose for her helpful suggestions and revisions to my early drafts of this Note, and my colleagues on the *Drake Law Review* for their tireless assistance in editing this Note.