Sugarcoating the Eighth Amendment: Gross Disproportionality Review is Simply the Fourteenth Amendment Rational-Basis Test

Christopher J DeClue
Dear Editors,

The accompanying Article provides a comprehensive analysis of the “gross disproportionality test” that is applied to Eighth Amendment challenges to the length of prison sentences. This subject is a matter of intense discussion, as courts and commentators struggle to create consistent, workable guidelines to determine when the length of a sentence constitutes cruel and unusual punishment. It is intended to be a useful immediate contribution to the academic and policy discussion.

This Article was created under the advice and guidance of Professor J. Kelly Strader, a well-known scholar in the field of Criminal Law, White Collar Crime, and Criminal Punishment. I have researched for Professor Strader since 2007. Recently, Professor Strader acknowledged me in the new addition of his casebook. See J. KELLY STRADER & SANDRA D. JORDAN, WHITE COLLAR CRIME: CASES, MATERIALS AND PROBLEMS vii (2d ed. LexisNexis, 2009).

My academic success makes me qualified to provide this contribution. I received the CALI Excellence for the Future Award in Criminal Law and the WITKIN Award for Academic Excellence in Constitutional Law, the two fields of law pertinent to this Article. Additionally, this Article received both the CALI Excellence for the Future Award and the WITKIN Award for Academic Excellence in my law school’s Criminal Law Theory Seminar.

I have prepared this Article to be the most thorough and realistic appraisal of the court’s application of the “gross disproportionality test” for a wide audience of courts, scholars, practitioners and policy makers within the US and abroad.

Additional summary information appears in an abstract included with this submission. I hope you will accept the piece for publication.

Christopher J. DeClue
SUGARCOATING THE EIGHTH AMENDMENT: GROSS DISPROPORTIONALITY REVIEW IS SIMPLY THE FOURTEENTH AMENDMENT RATIONAL-BASIS TEST

Student Article

Christopher J. DeClue

“Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower courts no matter how misleading the judges of those courts may think it to be.”

INTRODUCTION

In 2003, a California jury convicted Cecilio Gonzalez for failing to update his annual sex offender registration. The court imposed a twenty-eight year-to-life sentence. Seeking habeas corpus relief, Gonzales argued the sentence was cruel and unusual punishment under well established principles of federal law. The Ninth Circuit agreed, explaining the sentence was grossly disproportionate to the offense and therefore violated the Eighth Amendment.

Notwithstanding Gonzalez’s fortune, it is extremely difficult for a defendant to successfully challenge the length of a sentence under the Eighth Amendment’s prohibition of cruel and unusual punishment. To succeed in such a challenge, a

1A B.A. 2006, University of California, San Diego; J.D. Candidate 2011, Southwestern Law School; President, Student Bar Association. I would like to thank my mentor, Professor J. Kelly Strader for his remarkable insight and advice throughout the development of this Article. I would also like to thank my fellow students who commented on previous drafts of this Article, especially Ashley Decker, Danielle Foster, Eric Anthony, Justin Rogal, Matthew Cohen, and Shaili Pezeshki. Finally, I would like to thank my family for their unconditional love and support.


2 Gonzalez v. Duncan, 551 F.3d 875, 889 (9th Cir. 2008).

3 See Rummel v. Estelle, 445 U.S. 263, 272 (1980) (plurality opinion). See also United States v. Angelos, 433 F.3d 738, 750 (10th Cir. 2006) (recognizing that the Supreme Court has only invalidated two sentences
defendant must establish that his sentence is grossly disproportionate to the offense\(^4\) which, according to the Supreme Court, is “exceedingly rare.”\(^5\) However, the Court has neither clearly defined what constitutes a grossly disproportionate sentence nor offered consistent, workable guidelines to determine whether a sentence is grossly disproportionate.\(^6\) As a result, this lack of clarity has caused inconsistent results from the lower courts,\(^7\) which continue to face a pervasive question: how does a court actually determine when a sentence is grossly disproportionate to the offense?\(^8\)

---

4 See, e.g., United States v. MacEwan, 445 F.3d 237 (3d Cir. 2006) (explaining a sentence that violates the Eighth Amendment requires a showing of gross disproportionality); United States v. Vega-Mejia, 611 F.2d 751, 753 (9th Cir. 1979) (“[A] sentence . . . may not be overturned on appeal as cruel and unusual punishment unless the sentence is . . . grossly out of proportion to the severity of the crime.”).

5 \textit{Rummel}, 445 U.S. at 272. See also United States v. Johnson, 451 F.3d 1239, 1242 (11th Cir. 2006) (“Outside the context of capital punishment, there are few successful challenges to the proportionality of sentences.”).


7 Compare, e.g., United States v. Rios, 390 F.3d 1082, 1086 (9th Cir. 2004), \textit{cert. denied}, 126 S. Ct. 37 (2005) (affirming a third strike life sentence for petty theft after considering the defendant’s “lengthy criminal history”) \textit{with} Ramirez v. Castro, 365 F.3d 755, 768 (9th Cir. 2004) (holding a third strike life sentence for petty theft \textit{was} grossly disproportionate, considering the defendant’s lengthy criminal history was nonviolent).

This Article demonstrates that gross disproportionality review is simply a rational-basis test, one which is virtually identical to the rational-basis test traditionally applied to Fourteenth Amendment equal protection challenges. In this respect, the Eighth Amendment, like the Fourteenth Amendment, is merely a safeguard against arbitrary or irrational sentencing. Under the Fourteenth Amendment rational-basis test, a law is upheld so long as it furthers a conceivable government purpose. Case law illustrates that a very similar test is applied in Eighth Amendment challenges to the length of prison sentences. Specifically, a sentence for a term of years is upheld so long as the sentence furthers a conceivable penological purpose. Conversely, a sentence violates the Eighth Amendment only if the court finds the sentence furthers no conceivable penological theory - i.e. the sentence is arbitrary or irrational.

Unfortunately, gross disproportionality review has never been articulated in such a precise manner, especially with respect to rational-basis language traditionally

---

"Cruel And Unusual" when Imposed on Mentally Retarded Offenders, 34 N. M. L. Rev. 35, 36 (2004) ("Eighth Amendment case law addressing non-capital sentences is much less developed.").

9 See infra, Part IV.

10 This Article focuses on Eighth Amendment “gross disproportionality” review - i.e. the standard a court applies when confronted with a challenge to the length of a sentence. Unless otherwise indicated, reference to Eighth Amendment review implicates gross disproportionality review and not, for example, Eighth Amendment review in the capital punishment context.

11 This Article focuses only on utilitarian principles of punishment, not retribution. Clearly, retribution will always be furthered, at least minutely, by any punishment. However, retribution is not a penological theory within the scope of this Article. For an overview of the complexity of proportional retribution, see ANDREW VON HIRSCH, CENSURE AND SANCTIONS 6-13 (1993).

12 See Doyle Horn, Lockyer v. Andrade: California Three Strikes Law Survives Challenge Based on Federal Law that is Anything but “Clearly Established”, 94 J. CRIM. L. & CRIMINOLOGY 687, 712 (2004). However, a number of commentary suggests that proportionality review entails a type of rationality analysis. One scholar suggested that a sentence could violate the Eighth Amendment if a sentence is a needless imposition of pain and suffering, therefore having no rational basis or if a sentence is grossly out of proportion to the severity of the crime. Marc G. Wilhelm, Recidivist Statutes-Application of Proportionality and Overbreadth Doctrines to Repeat Offenders – Wanstreet v. Bordenkircher, 276 S.E.2d 205 (W.Va. 1981), 57 W.A. L. Rev. 573, 586-87 (1982). See also Adil Admad Haque, Lawrence v. Texas
applied to the Fourteenth Amendment. However, this Article shows that the standards set by the Supreme Court, and the lower courts’ application of those standards, creates a rational-basis test, although courts maintain they are applying “gross disproportionality review.” The purpose of this Article is only to identify how a court actually reviews a sentence in the face of an Eighth Amendment challenge, not to promote or oppose the principles applied. Only upon recognition that gross disproportionality review is merely a safeguard against arbitrariness can courts and scholars address whether such a standard does, in fact, properly align itself with the Eighth Amendment’s prohibition of cruel and unusual punishment.

Part I consists of a brief background of the Eighth Amendment and an examination the leading Supreme Court cases regarding gross disproportionality review. Part II recognizes that lowers courts use of legislative deference to create a rebuttable presumption that a sentence is constitutional. Part III offers a brief summary of the current rational-basis test applied under Fourteenth Amendment equal protection challenges. Finally, Part IV establishes that gross disproportionality review allows a court to uphold a sentence so long as the court determines the sentence furthers a conceivable penological theory, a standard that is virtually identical to the Fourteenth Amendment rational-basis test.

I. THE EIGHTH AMENDMENT

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\(^{13}\) Determining what constitutes “cruel and unusual” has haunted the Supreme Court since the nineteenth century\(^{14}\) and has yielded inconsistent results.\(^{15}\) Despite the continuing ambiguity, the Court has never clearly defined the phrase “cruel and unusual punishment.”\(^{16}\)

\section*{A. GENERAL OVERVIEW}

The roots of the Cruel and Unusual Punishment Clause can be traced back to the English Declaration of Rights of 1689 and the Magna Carta.\(^{17}\) The Supreme Court explained that the Framers “included in the Bill of Rights a prohibition upon ‘cruel and unusual punishments’ precisely because the legislatures would otherwise have had

\begin{itemize}
  \item \(^{13}\) U.S. CONST. amend. VIII. The Supreme Court held that the Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. See Robinson v. California, 370 U.S. 660 (1962).
  \item \(^{14}\) See Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) (“Difficulty would attend the effort to define with exactness the extent of what is cruel and unusual.”).
  \item \(^{15}\) See, e.g., Hope v. Pelzer, 536 U.S. 730, 737 (2002) (restraining a prison inmate to a pole for longer than was necessary to restore order was cruel and unusual punishment); Robinson, 370 U.S. at 667 (holding that any sentence would be excessive for the crime of narcotics addiction); Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that revoking the defendant’s citizenship was cruel and unusual); Weems v. United States, 217 U.S. 349, 382 (1910) (holding that a fifteen year punishment of hard labor in shackles for fraud is cruel and unusual punishment).
  \item \(^{16}\) See Brian Gallini, Equal Sentences for Unequal Participation: Should the Eighth Amendment Allow All Juvenile Murder Accomplices to Receive Life Without Parole?, 87 OR. L. REV. 29, 35 (2008); Richard Frase, Excessive Prison Sentences, Punishment, Goals, and the Eighth Amendment: “Proportionality” Relative to What?, 89 MINN. L. REV. 571, 588 (2005) (“The Supreme Court has never made clear what it means by proportionality in the context of prison sentences.”); Pillai, supra note 8 at 718 (describing the proportionality standard as “inherently amorphous and undefinable”). See, e.g., Trop, 356 U.S. at 100 n.32 (“Whether the word ‘unusual’ has any qualitative meaning different from ‘cruel’ is not clear.”).
  \item \(^{17}\) See Harmelin v. Michigan, 501 U.S. 957, 966 (1991). See also State v. Wheeler, 175 P.3d 438 (Or. 2007) (en banc) (“Concerns about both proportionality and severity in criminal sentencing in English law may be found as early as Magna Carta of 1215 and in the English Bill of Rights of 1689.”).
\end{itemize}
unfettered power to prescribe punishments for crimes.”\textsuperscript{18} The Court also recognized that the framers “had a particular concern with the establishment of a safeguard against arbitrary punishments.”\textsuperscript{19} In this respect, the Clause acts as a constitutional check that ensures legislation defining crimes and proscribing punishment is subject to judicial scrutiny.\textsuperscript{20} However, the fact that America is still the world’s leader in per capita imprisonment\textsuperscript{21} suggests that the Eighth Amendment’s safeguard mechanism is relatively weak.

Inherent in the principles of justice and fairness is the notion that the punishment fit the crime,\textsuperscript{22} a concept that has emanated from Eighth Amendment case law throughout the past century. As a result, certain patterns evolved as to what aspects of crime and punishment fall under the shadow of the Cruel and Unusual Punishment Clause. First,

\textsuperscript{18} Furman v. Georgia, 408 U.S. 238, 263 (1972) (Brennan, J., concurring).

\textsuperscript{19} \textit{Id.} at 274. \textit{See also} Capuchino v. Estelle, 506 F.2d 440, 442 (5th Cir. 1975) (quoting Rogers v. United States, 304 F.2d 520, 521 (5th Cir. 1962)) (”[T]he test for cruel and unusual punishment is whether the punishment ‘is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice.’”); Lambeth v. State, 354 S.E. 2d 144, 145 (Ga. 1987) (”[The cruel and unusual] concept embraces not only the prohibition of torture and other barbarous punishments, but also arbitrary and disproportionate sentences.”); 2 J. ELLIOT’S DEBATES 111 (2d ed. 1876) (illuminating Holmes’ concern that Congress has the power to define laws and determine punishments but there was nothing provided that restrained Congress from “inventing the most cruel and unheard-of punishment.”). \textit{But see} Chris Baniszewski, \textit{Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment’s Proportionality Principle}, 25 ARIZ. ST. L. J. 929, 936-38 (1993) (arguing that the Framers may have misinterpreted the English Declaration of Rights).

\textsuperscript{20} \textit{See} Gregg v. Georgia, 428 U.S. 153, 174 (1976) (plurality opinion) (“[T]he Eighth Amendment is a restraint upon the exercise of legislative power.”); \textit{Furman}, 408 U.S. at 261 (“[The Framers] called for a ‘constitutional check’ that would ensure that ‘when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.’”); Trops, 356 U.S. at 100 (“While the state has the power to punish, the [clause] stands to assure that this power be exercised within the limits of civilized standards.”). \textit{But see} Roper v. Simmons, 543 U.S. 551, 615 (2005) (Scalia, J., dissenting) (arguing that the unconstitutionality of capital punishment applied to a minor undermined the legislatures role by inserting the “Court’s own judgment”).


the Eighth Amendment prohibits criminalization and punishment of status, where the
defendant is nearly void of culpability - for example, the act of being a drug addict.23
Second, the Eighth Amendment forbids certain kinds of punishment, either altogether or
applied to particular crimes.24 For example, it is well established that the Eighth
Amendment prohibits torture25 and limits the imposition of capital punishment to
aggravated murder.26 Finally, the Eighth Amendment prohibits sentencing for a term of
years that is grossly disproportionate to the offense.27 Although there is some debate as
to whether the Eighth Amendment was intended to prohibit disproportionate
punishment,28 the Supreme Court has nonetheless established that the Eighth Amendment
prohibits sentences that are grossly disproportionate to the offense.29 However, the Court
has had difficulty clarifying a standard to apply when deciding whether a sentence is
grossly disproportionate and, therefore, violates the Eighth Amendment.

23 See Robinson v. California, 370 U.S. 660, 667 (1962) (holding that it is unconstitutional to punish
someone for their status). See also Furman, 408 U.S. at 273.

24 See, e.g., Hutto v. Finney, 437 U.S. 678, 685 (1978) (recognizing that certain conditions of solitary
confinements might violate the Eighth Amendment); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968)
(holding that the use of “strap” in prison constituted cruel and unusual punishment).

25 See, e.g., In re Kemmler, 136 U.S. 436, 447 (1890) (recognizing the Eighth Amendment prohibits
inhumane and barbarous punishments); Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (recognizing the
Eighth Amendment forbids punishment of “torture” and “unnecessary cruelty”).

26 See, e.g., Coker v. Georgia, 433 U.S. 584 (1977) (holding that the crime of rape is not grounds for capital
punishment). Additionally, the Eighth Amendment forbids imposing of capital punishment upon certain
types of individuals. See, e.g., Roper v. Simmons, 543 U.S. 551, 578 (2005) (juveniles); Atkins v. Virginia,

27 See Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (plurality opinion) (Kennedy, J., concurring in part,
joined by O’Conner and Souter, JJ.) (explaining that stare decisis requires the Court to recognize a
proportionality principle).

28 See Ewing v. California, 538 U.S. 11, 52 (2003) (Scalia, J., dissenting) (arguing that the court should not
review sentences because it confuses legislators and courts); Stephen T. Parr, Symmetric Proportionality: A
New Perspective on the Cruel and Unusual Punishment Clause, 68 TENN. L. REV. 41, 70 (2000) (arguing
that the Framers did not intend to include a proportionality requirement in the Eighth Amendment).

The Supreme Court has only addressed the Eighth Amendment gross disproportionality principle in a handful of decisions and, even in this limited field, the decisions have been highly inconsistent. Nevertheless, certain characteristics and principles can be identified that consistently flow from these few opinions and lower courts’ application of the Supreme Court’s precedent.

First, a court will grant substantial deference to the legislature in determining what conduct to criminalize and the appropriate sentence to impose upon violators. Second, in the face of an Eighth Amendment challenge to the length of a sentence, a court will not invalidate the sentence so long as it determines the sentence furthers a conceivable penological theory. In order to identify these characteristics and principles, it is important to briefly summarize the primary Supreme Court cases addressing gross disproportionality review.

**B. SUPREME COURT CASE STUDIES**

The Court first considered the proportionality principle in *O’Neil v. Vermont*. In *O’Neil*, the defendant challenged a sentence of nearly 20,000 days of hard labor for 307 counts of selling liquor without a license. Although the majority did not address

---

30 Compare, e.g., *Solem*, 463 U.S. at 303 (invalidating a life sentence imposed on a habitual offender where the underlying crime was uttering a no account check for $100) with *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (plurality opinion) (validating a life sentence imposed on a habitual offender where the underlying crime was forging a check in the amount of $28. 36). For a detailed discussion regarding the Supreme Court’s application of Eighth Amendment gross disproportionality review in the aforementioned cases, see Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L. J. 107 (1995-96).

31 See infra, III.A.

32 See infra, III.B.

33 144 U.S. 323 (1892).

34 Id. at 326-27.
the Eighth Amendment argument, Justice Field raised the issue in his dissent. According to Justice Field, the Cruel and Unusual Punishment Clause applies to “all punishments which by their excessive length or severity are greatly disproportioned.”

Nearly two decades later, the Court reconsidered the issue in *Weems v. United States*. In *Weems*, the Court held that a sentence of hard physical labor and carrying an ankle chain was disproportionate the crime of falsifying documents. For the first time, the Court acknowledged that the Eighth Amendment contained a proportionality principle, explaining that the Cruel and Unusual Punishment Clause contained a “precept of justice that punishment for crime should be graduated and proportioned to offense.” The underlying rationale of these early cases seemed to focus on human dignity. However, recent Supreme Court opinions indicate that the focus on human dignity plays only a minor role in gross disproportionality review.

The modern test for gross disproportionality began to take shape seventy years after *Weems*, in a series of cases starting with *Rummel v. Estelle*. In *Rummel*, the defendant was sentenced, under a Texas recidivist statute, to life in prison for passing a

---

35 *Id.* at 339-40 (Field, J., dissenting).

36 217 U.S. 349 (1910).


39 *See infra*, III.B.

forged check in the amount of $28.36.\textsuperscript{41} A closely divided Supreme Court held that the sentence did not violate the Eighth Amendment.

Essentially, the Court punted, explaining that “the length of the sentence actually imposed is purely a matter of legislative prerogative.”\textsuperscript{42} Moreover, the Court recognized that society had an interest in incapacitating repeat offenders who were incapable of ceasing their criminal behavior.\textsuperscript{43} Although the Court admitted that the sentence was a serious penalty, it granted substantial deference to the legislature.\textsuperscript{44} By doing so, the Court punted, essentially leaving two questions unanswered: (1) does the Eighth Amendment actually contain a viable proportionality principle for noncapital sentences;\textsuperscript{45} and (2) if so, what is the standard for applying such a principle?\textsuperscript{46}

\begin{flushright}
\textsuperscript{41} Id. at 265.
\textsuperscript{42} Id. at 274.
\textsuperscript{43} The Court explained that the statute was “nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State’s judgment as to whether to grant parole.” Id. at 278. The Court illuminated the state’s roles in criminal sentencing, recognizing that “Texas was entitled to place upon [the defendant] the onus of one who is simply prescribed by the criminal law of the state” and Texas had a “valid interest” in severely punishing habitual offenders who seemingly are “incapable of conforming to the norms of society as established by its criminal law.” Id. at 276, 284.
\textsuperscript{44} Id. at 284. The Court also relied on the fact that the defendant would be eligible for parole within twelve years. See id. at 280.
\textsuperscript{45} The Court suggested that a proportionality principle might apply in the extreme case of a statute that made overnight parking a felony punishable by life imprisonment. Id. at 274 n.11. Accordingly, such a statement implies the proportionality principle applies the non-capital punishment, but the Court was not entirely clear on the issue.
\end{flushright}
Several years later, in *Solem v. Helm*, the Supreme Court invalidated a life sentence. This landmark decision was the first and only decision to date where the Supreme Court held that the length of a sentence violated the Eighth Amendment. In *Solem*, the defendant received a life sentence *without* the possibility of parole for “uttering a no account check for $100.” Although the Court granted substantial deference to the legislature and recognized that the defendant was a repeat offender, the Court held that the sentence constituted cruel and unusual punishment. Most notably, the Court explained that the Eighth Amendment “prohibits . . . sentences that are disproportionate to the crime committed.” The Court’s opinion thus ushered in a proportionally principle of the Eighth Amendment that is still recognized today.

Additionally, the Court listed three factors that are relevant in determining whether a sentence violates the Eighth Amendment:

(i) The gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the commission of the same crime in other jurisdictions.

---


48 *Id.* at 281.

49 *Id.* at 279 n.1 (recognizing the defendant was previously convicted three times of third degree burglary, in addition to money laundering, grand larceny, and driving while intoxicated).

50 *Id.* at 284. Specifically, the Court determined the Cruel and Unusual Punishment Clause was not limited to barbaric type punishments. *See id.*

51 *See, e.g.*, Nunes v. Ramirez-Palmer, 485 F.3d 432, 438 (9th Cir. 2007); United States v. Marks, 209 F.3d 577, 583 (6th Cir. 2000); United States v. Gonzales, 121 F.3d 928, 942 (5th Cir. 1997); Banyard v. Duncan, 342 F. Supp. 2d 865, 870-71 (C.D. Cal. 2004); Pinkston v. Lamarque, 247 F. Supp. 2d 1145, 1148 (N.D. Cal. 2003); State v. Davis, 79 P.3d 64, 72 (Ariz. 2003) (en banc).

Applying these factors, the Court explained that the gravity of the offense was relatively minor, and the severity of the sentence excessively harsh. Hence, the sentence was grossly disproportionate and therefore unconstitutional.

Eight years after *Solem*, the Supreme Court again considered the proportionality issue in *Harmelin v. Michigan*. In *Harmelin*, the Court upheld a mandatory life sentence imposed on a first time offender convicted of possessing more than 650 grams of cocaine. Justice Kennedy, in his concurring opinion, recognized the *Solem* test but restricted its application. He opined that a court should only consider the second and third factors of the *Solem* test if “a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” Kennedy explained that certain principles embedded in proportionality review suggest “[t]he

---

53 *Solem*, 463 U.S. at 296-97. The Court considered several factors, including: (1) the felony was extremely passive; (2) society did not view the crime as severe enough to justify utilitarian principles of punishment; (3) the triggering offense and entire criminal history were neither violent nor crimes against people.

54 The Court considered the fact that the sentence was the most severe sentence the state could have imposed on any criminal for any crime. *Id.* at 297. Next the Court considered the crimes that were punished by life without the possibility of parole and concluded such crimes were “more deserving punishment” than the defendant in *Solem*. *Id.* at 299. Finally, the Court explained that only one other state would subject Helm to such a punishment. *Id.*

55 *Id.* at 303.


57 Justice Kennedy’s concurrence is currently the test followed and applied by the courts. See, e.g., *Ewing v. California*, 538 U.S. 11 (2003); *United States v. Snape*, 441 F.3d 119, 152 (2d Cir. 2006); *United States v. Chauncey*, 420 F.3d 864, 877 (8th Cir. 2005); *United States v. Frisby*, 258 F.3d 46 (1st Cir. 2001).


59 *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (plurality opinion) (Kennedy, J., concurring in part and concurring in judgment) (emphasis added). Kennedy further explained that the “comparative analysis between jurisdictions is not always relevant” and will be “rare.” *Id.*

60 *Id.* at 1001 (considering “the primacy of the legislature, the variety of legitimate penological schemes, the nature of the federal system, and the requirement that proportionality review be guided by objective factors”).

13
Eighth Amendment does not require strict proportionality between the crime and the sentence” and only forbids “extreme sentences that are grossly disproportionate to the crime.”

Justice Kennedy concluded that Harmelin’s sentence did not lead to an inference of gross disproportionality. First, Kennedy granted substantial deference to the Michigan legislature. He explained that “[t]he efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system [and] the responsibility for making these fundamental choices and implementing them lies with the legislature.” Second, Kennedy identified a penological theory furthered by the sentence. According to Kennedy, there was a “rational basis” to conclude that the threat to society for possession of large quantities of drugs “is momentous enough to warrant the deterrence and retribution of a life sentence without parole.” In sum, Kennedy upheld the sentence because he (1) recognized that it is within the province of

---

61 Id. A number of lower courts considering Eighth Amendment challenges to harsh sentences imposed on drug offenders simply rely on Harmelin to justify upholding the sentence. See, e.g., United States v. Odeneal, 517 F.3d 406, 414 (6th Cir. 2008) (upholding a life sentence for conspiracy to distribute fifty grams of cocaine “[i]n light of Harmelin”); United States v. Whiting, 528 F.3d 595, 596-97 (8th Cir. 2008) (per curiam) (relying on Harmelin to uphold a life sentence imposed on a defendant convicted of conspiracy to possess and distribute fifty grams or more of cocaine); United States v. Looney, 533 F.3d 392 (5th Cir. 2008) (per curiam) (upholding a 548-month sentence for conspiracy to possess and distribute methamphetamine); United States v. Johnson, 528 F.3d 1318, 1322 (11th Cir. 2008), cert. granted, 129 S.Ct. 1315 (Feb. 23, 2009) (relying on Harmelin to affirm a 185-month sentence for possession of ammunition and the defendant had prior felony convictions).

62 Harmelin, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in judgment).

63 Id. at 1003 (recognizing the sentence served deterrent and retributive purposes).

64 Id. Perhaps Justice Kennedy used to phrase “rational basis” for a reason, as one scholar recognized. See Carol S. Steiker & Jordan M. Steiker, Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly, 11 U. PA. J. CONST. L. 155, 187 (2009) (“The use of the phrase “rational basis” is particularly telling here, because it echoes the Court’s lowest tier of scrutiny for equal protection challenges to legislative classifications-- challenges that almost never succeed.”).
the legislature to severely punish what it considers a serious crime; and (2) determined that the legislature’s chosen sentence conceivably furthered a penological theory.

In 2003, the Court again considered gross disproportionality review, specifically in the context of recidivist statutes. In *Ewing v. California*, the state convicted the defendant of grand theft for stealing golf clubs and sentenced him to twenty-five-years-to-life because it was his third offense. The Court held that the sentence did not violate the Eighth Amendment and rested its decision on two fundamental principles: (1) deference the legislature and (2) identification of a penological purpose furthered by the sentence.

Justice O’Connor’s plurality opinion recognized it is primarily the role of the legislature to determine which conduct society condemns and the appropriate punishment for such conduct. O’Conner explained that the Court was not a “superlegislature” and cautioned that the Court should be reluctant to second guess the policy decisions of

---


66 *See id.* at 1001 (furthering the penological theory of deterrence and retribution).

67 *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion); *Lockyer v. Andrade*, 538 U.S. 63 (2003). These two cases are the most recent Supreme Court decisions addressing Eighth Amendment review of the length of a sentence.


69 *Id.*

70 *Id.* at 24 (recognizing the Court’s tradition of “deferring to state legislatures in making and implementing such important policy decisions is longstanding”).

71 *Id.* at 28. Additionally, the plurality explained that “federal courts should be reluctant to review legislatively mandated terms of imprisonment.” *Id.* at 22. Such language suggests a mandated sentence might be presumed constitutional.
Following such principles, the Court had little difficulty upholding the sentence, reasoning that it was enough that California had “a reasonable basis” for believing that severe sentences imposed on career criminals substantially advances the goals of its justice system. In this respect, the Court was very lenient in indentifying conceivable penological theories which might be advanced by the sentencing scheme. The Court recognized that “[r]ecidivism has long been . . . a legitimate basis for increased punishment.” The Court further explained that punishing repeat offenders more severely furthers the legitimate penological theories of deterrence and incapacitation. Though the Court identified two particular penological justifications for this particular sentencing scheme, it also recognized the variety of penological theories and the wide array in which those theories might be used to justify a sentence.

The Court further identified penological justifications for the defendant’s sentence, focusing primarily on the defendant’s criminal history. The Court explained, “[i]n weighing the gravity of [a defendant’s] offense, we must place on the scales not only his current felony, but also the long history of recidivism.” Subsequently, the

---

72 Id.
73 Ewing, 538 U.S. at 28.
74 Id. at 25.
75 Id. 25-27.
76 See id. at 25 (“A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation [and] [s]ome or all of these justifications may play a role in a State’s sentencing scheme.”).
77 Id. at 29. Additionally, the Court explained that considering the criminal history was necessary to “accord proper deference to the policy judgments” of the legislature. Id. at 29. However, some commentators suggest that considering criminal history clouds accurate proportionality review. See, e.g., Richard H. Andrus, Which Crime is it? The Role of Proportionality in Recidivist Sentencing After Ewing v. California, 19 B.Y.U J. PUB. L. 279, 294 (2004) (“It is difficult to determine the proportionality of recidivist sentences due to the weight of criminal history as an aggravating factor.”).
defendant’s punishment was not merely for the crime of stealing golf clubs but rather, “felony grand theft for stealing nearly $1,200 worth of merchandise after previously having been convicted of at least two violent or serious felonies.” The Court recognized that the sentence was a “long one,” but, however, it was rationally “justified [by] the State’s public safety interest in incapacitating and deterring recidivist felons.” In essence, the Court indicated that court may use its imaginative powers in search of a penological theory to justify a sentence.

The second 2003 Supreme Court decision addressing gross disproportionality review was *Lockyer v. Andrade*. In *Andrade*, the Court upheld two consecutive twenty-five-year-to-life sentences imposed on a defendant convicted of stealing $150 worth of video tapes from two different stores. The defendant sought habeas relief. The Court held the sentence did not violate the Eighth Amendment, and the lower courts correctly relied on *Rummel*. The Court explained that the defendant’s situation rested somewhere between *Solem* and *Rummel*, but is “not materially indistinguishable from either;”

---


79 *Id.* at 29-30. *See also id.* at 31-32 (Scalia, J., concurring) (agreeing with the plurality that the state’s interest in public safety justified the harsh sentence). *But see United States v. Jackson*, 835 F.2d 1195, 1198-1200 (7th Cir. 1987) (Posner, J., concurring) (arguing a life sentence is not justified on either deterrence or retributive grounds against a defendant convicted of armed robbery, even though such a crime is would be considered more serious that those presented to the Court in *Ewing*).

80 *See infra*, IV.A.


82 *Id.* at 77.

83 In order to prevail, the defendant was required to show that the lower courts incorrectly applied “clearly established federal law.” *See Weeks v. Angelone*, 528 U.S. 225, 237 (2000).

84 *Andrade*, 538 U.S. at 73-74.

85 *Id.* at 74.
therefore relying on either holding was reasonable. Though the opinion was relatively short, the Court did express its insecurities regarding Eighth Amendment gross disproportionality review, explaining “we have not established a clear or consistent path for the courts to follow”\footnote{Id.} and “precedents in this area have not been a model of clarity.”\footnote{Id. at 72.}

*Ewing* and *Andrade* are the two most recent Supreme Court cases addressing gross disproportionality review. However, not only did these two decisions cease to articulate standards for applying gross disproportionality review, but the decisions significantly reduced the Court’s role in determining Eighth Amendment violations. Essentially, the Supreme Court gave reviewing courts a channel to avoid gross disproportionality review altogether.\footnote{See James J. Brennan, *The Supreme Court’s Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551, 574 (2004).} As a result, lower courts consistently struggle when reviewing sentences challenged under the Eighth Amendment.

As this Article illustrates below, the Supreme Court’s precedent, and the lower courts’ application of that precedent, indicate that gross disproportionality review is a rational-basis test. Under this rational-basis test, a court will uphold a sentence so long as the court determines the sentence furthers a conceivable penological theory. However, such a standard of review can only be applied if the court actually addresses an Eighth Amendment challenge to the length of a sentence. As the next section indicates, courts afford substantial deference to the legislature and, some courts afford so much deference that it precludes reviewing sentences under the Eighth Amendment altogether.
II. LEGISLATIVE DEFERENCE

The Supreme Court cases summarized above offer little guidance for lower courts to follow when confronted with an Eighth Amendment challenge to the length of a prison sentence. Nonetheless, there is one principle that the Court consistently emphasized and lower courts unanimously recognize: legislative deference.\footnote{See, e.g., Ewing v. California, 538 U.S. 11, 24 (2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 998 (1991); Solem v. Helm, 463 U.S. 277, 290 n.1 (1983); Rummel v. Estelle, 445 U.S. 263, 274 (1980) (plurality opinion); United States v. Polk, 546 F.3d 74, 76 (1st Cir. 2008); United States v. MacEwan, 445 F.3d 237, 247-48 (3d Cir. 2006); Alford v. Rolfs, 867 F.2d 1216, 1222 (9th Cir. 1989); Adaway v. State, 902 So. 2d 746, 50 (Fla. 2005); State v. Harris, 844 S.W. 2d 601, 602 (Tenn. 1992); Johnson v. Morgenthau, 505 N.E. 2d 240, 243 (N.Y. 1987).}

Generally, under gross disproportionality review, a court will defer to the legislature’s authority to proscribe certain conduct and determine the appropriate sentence to impose against violators. However, only under extremely rare circumstances, where the court is confronted with a grossly disproportionate sentence, will a court disregard such legislative deference.\footnote{See infra, IV.B.} In this respect, a court will grant extensive deference to legislative determinations regarding (1) what conduct to proscribe and (2) the appropriate sentence to impose upon individuals who commit such proscribed conduct. As this section indicates, such deference under the current gross disproportionality test forms significant obstacles for defendants challenging the length of their sentence under the Eighth Amendment to overcome.\footnote{Carol S. Steiker & Jordan M. Steiker, Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly, 11 U.PA.J.CONST. L. 155, 186 (2009). See also Eva S. Nilsen, Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse, 41 U.C. DAVIS L. REV. 111, 147 (2007) (“[T]he Supreme Court has forsaken this basic requirement of the Eighth Amendment by placing impossible burdens on the defendant.”); Stephanie E. Carlson, Note, State v. Pack: Proportionality of Sentences -- Should it be a Necessary Factor in Determining Whether a Sentence “Shocks the Conscience of the Court?” 40 S.D. L. REV. 130, 149 (1995) (“The grossly disproportionate standard is difficult to meet.”).}
The Supreme Court explained that courts have a limited role in applying Eighth Amendment requirements as a restraint on legislative power and, reviewing courts should grant substantial deference to the legislature’s penological determinations. However, courts’ application of this “limited role” appears to be more like complete abstinence. A central argument behind the “hands-off” approach is that judicial proportionality determinations require subjective comparisons and arbitrary line drawing to distinguish between sentences that do and do not violate the Eighth Amendment and, this form of inquiry constitutes judicial activism that is beyond the scope of the court’s traditional role. The Supreme Court recognized this potential for judicial activism, which may well be the driving force behind the Court’s unwillingness to invalidate


93 Solem v. Helm, 463 U.S. 277, 290 (1983) (“Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crime…”).


legislatively prescribed sentences.\(^{97}\) As a result, courts grant substantial deference to the penological determinations of the legislature.\(^{98}\)

It is well established that each state and the federal government has the sovereign authority to make and enforce its own criminal laws,\(^{99}\) and such laws are the clearest evidence of contemporary values.\(^{100}\) In others words, penal systems accurately reflect the level of severity that particular states place on certain criminal conduct. Moreover, the legislature is best equipped to determine the severity of particular crimes and the appropriate sentence to further a penological purpose,\(^{101}\) a principle that dates


\(^{98}\) See Solem v. Helm, 463 U.S. 277, 290 n.16 (1983) (explaining that substantial deference given to the legislature “retrains [the court] from an extended analysis proportionality save in rare cases”). But see Brennan, \(supra\) note 79, at 578 (“[The Court] gives too much deference to legislative bodies to determine whether a sentence falls within the bounds of the Constitution.”).

\(^{99}\) See Solem, 463 U.S. at 303 (Powell, J., dissenting). See also Furman v. Georgia, 408 U.S. 238, 259 (1972) (Brennan, J., concurring) (recognizing that “legislatures have the power to prescribe punishments for crimes”); Taylor v. Lewis, 460 F.3d 1093, 1099 (9th Cir. 2006) (recognizing that the California legislature was entitled to weigh the severity of the crime and determine the appropriate sentence). See, e.g., United States v. Angelos, 433 F.3d 738 751 (10th Cir. 2006) (affirming a fifty-five year sentence for possession of a firearm during a drug transaction, explaining that “it was entirely rational for Congress to penalize the mere presence of a firearm”).

\(^{100}\) See Penry v. Lynaugh, 492 U.S. 301, 330 (1989) (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”).

\(^{101}\) See Ewing v. California, 538 U.S. 11, 24-26 (2003) (plurality opinion); McClesky v. Zant, 499 U.S. 467, 491 (1991); Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (plurality opinion); \(Solem\), 463 U.S. at 290; Hutto, 454 U.S. at 372; Rummel, 445 U.S. at 278. See also United States v. Polk, 546 F.3d 74, 76 (1st Cir. 2008) (“When Congress has identified a particular scourge and, using reasoned judgment, articulated a response, courts must step softly and cede a wide berth to the Legislative Branch’s authority to match the type of punishment with the type of crime.”); State v. Harris, 844 S.W.2d 601, 602 (Tenn. 1992) (“At the outset . . . reviewing courts should grant substantial deference to the broad authority legislatures possess in determining punishments for particular crimes.”); Alexander A. Reinhart, \(Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?\), 36 FORDHAM L. J. 53, 71 (2009) (“[L]egislatures should be given as much leeway to punish particular crimes as they are given to define them.”).

Although deference to the legislature in making penological determinations is generally accepted, one strategy to insure the effectiveness of strict sentencing guidelines is allow sentencing guidelines to expire unless re-affirmed by the legislature. See M\(ICHAEL TONRY, SENTENCING MATTERS\) 134, 162 (1995). According to one scholar, “[s]uch a policy would enable legislative review of the impact of these laws after
back to English common law.\footnote{In the 18th century, Sir William Blackstone explained that “the quantity of punishment . . . must be left to the arbitration of the legislature to inflict such penalties as are warranted by the nature of law and society.” 4 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 12 (1769). But see Marc Mauer, Why are Tough on Crime Policies so Popular?, 11 STAN. L. POL’Y REV. 9, 16 (1999).} According to Justice Kennedy, “[d]eterminations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order.”\footnote{Harmelin, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in judgment).} According to this rationale, the complexity inherently involved in measuring such social concepts should be left to the branch of government best equipped to reflect society’s interests.

Not only is the legislature in a better position to make these determinations, but our federal system also recognizes the “independent” power of a legislature to articulate societal views through criminal law.\footnote{McClesky, 499 U.S. at 491 (emphasis added). \textit{See also} Collins v. Johnston, 237 U.S. 502, 510 (1915) (recognizing that “the comparative gravity of the criminal offenses, and whether their consequences are more or less injurious” are left to the discretion of the legislature); United States v. Saccoccia, 58 F.3d 745, 789 (1st Cir. 1995) (recognizing that Congress, not the courts, is vested with the authority to “define, and attempt to solve . . . societal problems”); \textit{Hayes v. Bordenkircher}, 621 F.2d 846, 849 (6th Cir. 1980) (“[S]entencing falls peculiarly within the province of the legislature and a state is largely free to determine the necessary propensities and the amount of time that the recidivist will be isolated from society.”).} The Supreme Court even concedes that courts “lack clear and objective standards to distinguish between sentences for different terms of years”\footnote{Harmelin, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in judgment). See also Polk, 546 F.3d at 78 (“There is no principled way that the Eighth Amendment permits us to second-guess the legislative judgment.”). However, some commentators argue that the politicians are under pressure to be “tough on crime.” \textit{See}, e.g., Pamela S. Karlan, “Pricking the Line”: The Due Process Clause, Punitive Damages, and Criminal Punishment, 88 MN. L. REV. 880, 890 (2004) (suggesting political pressure may force legislators to exaggerate the seriousness of crimes and push for harsher sentences to avoid the reputation of being “soft on crime”); See Nancy J. King & Susan R. Klein, Essential Elements, 54 VAND. L. REV. 1467, 1488 (2001) (“The ever-present need to appear ‘tough on crime’ encourages legislators to...”)} and recognizes that determining the reasons for a particular sentence is a policy several years of implementation and would permit a more researched-based analysis of the equity and rationality of these policies.” Marc Mauer, Why are Tough on Crime Policies so Popular?, 11 STAN. L. POL’Y REV. 9, 16 (1999).
choice for the legislature. As a result, courts refrain from invaliding sentences even when the sentence is perceivably harsh or unwise.

Uniformity is not required among penal codes and, consequently, legislative penological decisions vary from state to state. Interestingly, this variance remains uncontested. Society expects legislatures to generate criminal codes that differ from each other because it reflects different societal values and, it is logical that the severity of a particular crime and its respective sentence would differ between states, especially where these differences result from rigorous and precise penological determinations by the present themselves as supporters of laws that impose swifter, more severe punishment...

Ewing, 538 U.S. at 25. See also Solem, 463 U.S. at 290 (“Reviewing courts... should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crime.”); Hutto v. Davis, 454 U.S. 370, 372 (1982) (per curiam) (“Courts should be reluctant to review legislatively mandated terms of imprisonment.”); State v. Jones, 950 F.2d 1309, 1317 (7th Cir. 1991) (explaining that determinations as to prison terms for crimes “involves consideration of factors that, as a general matter, is largely the function of the legislature, not the courts”); United States v. McDouherty, 920 F.2d 569, 576 (9th Cir. 1990) (honoring Congress’s determination that selling cocaine near a school was very serious and upholding a 262-month sentence for such an offense); State v. Harris, 844 S.W. 2d 601, 602 (Tenn. 1992) (“At the outset... reviewing courts should grant substantial deference to the broad authority legislatures possess in determining punishments for particular crimes.”).

See Rummel v. Estelle, 445 U.S. 263, 285 (1980) (Stewart, J., concurring) (“The question for the Court is not whether the Court applauds the sentence or even approves the sentence but, instead, whether the sentence falls below the minimum standards set by the Constitution.”); Gregg v. Georgia, 428 U.S. 153, 175 (1976) (plurality opinion) (explaining that the courts “may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved”); United States v. MacEwan, 445 F.3d 237, 250 (3d Cir. 2006), (deferring to Congress’ mandatory fifteen-year sentence for repeat child pornography offenders noting, however, that the sentence was “harsh”). See also Margaret Gibbs, Eighth Amendment—Narrow Proportionality Requirement Preserves Deference to Legislative Judgment, 82 J. CRIM. L. & CRIMINOLOGY 955, 972-73 (1992) (arguing that the court should refrain from questioning the penal determinations made the legislature). But see THE FEDERALIST NO. 78, at 501 (Alexander Hamilton) (Robert Scigliano ed., 2000) (recognizing that “the independence of judges may be an essential safeguard against the effects of occasional ill humors in the society”); Nilsen, supra note get note, at 175 (arguing that the Supreme Court’s standards of review have “abdicated[ed] its responsibility as a guardian of the Eighth Amendment”).

Joshua Dressler, UNDERSTANDING CRIMINAL LAW at 38 (4th ed. 2006). But see Hutto, 454 U.S. at 380 (Powell J., concurring in judgment) (arguing that sentencing disparity is “inevitable” because sentencing decisions are vested in trial courts, and not because of varying statutory limits among the states).
legislature.\textsuperscript{109} As Justice Kennedy explained, “differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes.”\textsuperscript{110} Thus, courts are extremely reluctant invalidate a sentence either on the face of the statute\textsuperscript{111} or as applied to a particular sentence\textsuperscript{112} merely under the principle that courts are not granted the authority to do so.

To illustrate the extreme deference courts grant to the legislature in deciding appropriate criminal penalties, consider the following two cases. In \textit{United States v. Angelos},\textsuperscript{113} the defendant sold bags of marijuana to government informants on several occasions. During two of these drug transactions, a gun was visible, although there is no evidence that the defendant used the gun or threatened to use it.\textsuperscript{114} Pursuant to federal law,\textsuperscript{115} the judge reluctantly imposed a fifty-five year sentence. Had the defendant been charged in state court, his sentence would likely have been four to seven years.\textsuperscript{116} The

\begin{footnotesize}
\textsuperscript{109} See, e.g., Robert Heglin, \textit{A Flurry of Recidivist Legislation Means: “Three Strikes and You’re Out,”} 20 J. LEGIS. 213, 227 (1994) (explaining that, where society fears future crimes from repeat offenders, it is reasonable for the state to punish such offenders more severely); Allison L. Cowan, \textit{Governor Vows to Push Again for “Three Strike” Law in Connecticut}, N.Y. TIMES, Feb. 7, 2008, at B4 (illustrating the legislature’s quick response to public outcry after the murder of a mother and her two daughters by career criminals by revising the state’s recidivist statute).

\textsuperscript{110} \textit{Harmelin}, 501 U.S. at 1000 (Kennedy, J., concurring in part and concurring in judgment).


\textsuperscript{112} Monge v. California, 524 U.S. 721, 734 (1998) (“[T]he Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context.”).

\textsuperscript{113} 345 F. Supp. 2d 1227 (D. Utah 2004), \textit{aff’d}, 433 F.3d 738 (10th Cir. 2006).

\textsuperscript{114} \textit{Id.} at 1231.

\textsuperscript{115} 18 U.S.C. § 924(c) (2000).

\textsuperscript{116} \textit{Angelos}, 345 F. Supp. 2d at 1242-43.
\end{footnotesize}
trail judge stated: “While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties.”

In United States v. Yirkovsky, the Eighth Circuit held that a fifteen year sentence for possession of a single bullet was not cruel and unusual punishment. The sentence was imposed pursuant to 18 U.S.C. § 922(g), which provides that it is unlawful for a person convicted of a felony to possess ammunition. In Yirkovsky, the defendant agreed to help his landlord remodel a house in exchange for exonerating his rent. While in the process of removing carpet, the defendant found a .22 caliber bullet between the carpet and the floorboards and placed the bullet in box in his bedroom. Subsequently, the defendant’s ex-girlfriend filed a complaint alleging the defendant possessed her property. When the defendant authorized the police to search his room for his ex-girlfriend’s property, the police found the .22 caliber bullet. Because he had previously been convicted of three felonies, the possession of the bullet subjected the defendant to a fifteen year mandatory sentence, which the Eighth Circuit upheld.

117 Id. at 1230. See also Terrebonne v. Butler, 848 F.2d 500, 504 (5th Cir. 1988) (en banc) (articulating a possible legislative rationale to severely punish drug convictions).

118 259 F.3d 704, 705 (8th Cir. 2001).

119 Id.

120 Id.

121 Id.

122 Yirkovsky, 259 F.3d at 705.

123 Id. at 706.
court recognized the penalty was extreme under the facts but explained its “hands [were] tied in this matter by the mandatory minimum sentence which Congress established.”

Cases such as Angelos and Yirkovsky raise a growing concern as to whether the Eighth Amendment even applies to sentences for a term of years. In fact, the substantial deference courts grant legislatures and the extreme reluctance of the courts to question the constitutionality of a sentence indicate a cohesive principle: a sentence is presumed constitutional so long as it is within the statutory boundaries prescribed by the legislature.

In Gregg v. Georgia, a capital punishment case, the Supreme Court indicated that the Court will presume a punishment selected by the legislature is valid. However, in the context of gross disproportionality review, the Supreme Court and some lower courts continue to deny this principle. In Solem, Court pronounced that “no penalty is per se constitutional . . . [and] a single day in prison may be unconstitutional in some circumstances.” However, this does not imply a sentence may not be presumed constitutional, but rather, should be presumed constitutional unless properly rebutted.

124 Id. at 710 n.4.


126 428 U.S. 153 (1972) (plurality opinion).

127 Id. at 173.

128 Solem v. Helm, 463 U.S. 277, 290 (1983) (plurality opinion) (emphasis added). See also Barber v. Gladden, 309 P.2d 192, 196 (Or. 1957) (explaining that a sentence within the statutory maximum, in and of itself, does not make the sentence constitutional).

129 See, e.g., United States v. Johnson, 451 F.3d 1239, 1243 (11th Cir. 2006); (affirming a sentence “[b]ecause the district court sentenced [the defendant] within the statutory limits” and he failed to make the
As a result, a general rule has emerged: a sentence is presumed constitutional so long as it is within the statutory limits.\textsuperscript{130}

Some courts are reluctant to even review a sentence that falls within the statutory limits due to such high deference to sentence’s validity.\textsuperscript{131} These courts conclude that the mere fact that the sentence is legislatively mandated or within the statutory limits renders the sentence valid under the Eighth Amendment.\textsuperscript{132}

\textsuperscript{130} See, e.g., United States v. Atteberry, 447 F.3d 562, 565 (8th Cir. 2006) (upholding a three-year sentence for possession of child pornography because it was under the statutory maximum); United States v. Albino, 432 F.3d 937, 938 (9th Cir. 2005) (determining a ten-year sentence for possession of marijuana plants is not cruel and unusual because it is mandatory under the statute); United States v. Moriarty, 429 F.3d 1012, 1024 (11th Cir. 2005) (explaining a sentence within the statutory limits “is neither excessive nor cruel and unusual”).

\textsuperscript{131} See, e.g., United States v. Collins, 340 F.3d 672, 679 (8th Cir. 2003) (“It is well settled that a sentence within the range provided by statute is generally not reviewable by an appellate court.”); Austin v. Jackson, 213 F.3d 298, 302 (6th Cir. 2000) (“A sentence within the maximum set by statute generally does not constitute cruel and unusual punishment.”); United States v. Saunders, 973 F.2d 1354, 1365 (7th Cir. 1992) (“[E]ighth amendment [sic] challenges to sentences that are . . . within the statutory maximums established by Congress . . . are looked at with disfavor.”). Such a high degree of deference is precisely what the dissent feared in Hutto. In that case, Justice Brennan opined that the “general principle of deference . . . cannot justify the complete abdication of [the Court’s] responsibility to enforce the Eighth Amendment.” Hutto v. Davis, 454 U.S. 370, 383 (1982) (per curiam) (Brennan, J., dissenting). Other courts have determined that the possibility of parole precludes proportionality review. See, e.g., United States v. Organek, 65 F.3d 60, 63 (6th Cir. 1995); United States v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1995).

\textsuperscript{132} See, e.g., United States v. Kiderlen, 569 F.3d 358, 369 (8th Cir. 2009) (“The Eighth Amendment does not proscribe the punishment authorized by Congress and selected by the district court.”); Johnson, 451 F.3d at 1243 (“The general rule regarding sentencing is that a sentence within the maximum statutory guidelines does not violate the Eighth Amendment prohibition against cruel and unusual punishment.”).
On the other hand, the majority of courts do not accord such extensive legislative deference, and the mere fact that a sentence is within the statutory limits does not, in and of itself, end the inquiry.\footnote{133 See, e.g., Barber v. Gladden, 309 P.2d 192, 196 (Or. 1957) (en banc) (“The bare fact that a sentence is within the maximum . . . does not prevent it from violating the constitutional provision forbidding the imposition of cruel and unusual punishment.”).} According to these courts, an additional finding is required to uphold the length of a sentence in the face of an Eighth Amendment challenge: the sentence furthers a conceivable penological theory.\footnote{134 See infra, IV.} In other words, if a court decides to review the length of a sentence, there is a rebuttable presumption that the sentence is constitutional and, this presumption can only be overcome if the court determines the sentence does not further any conceivable penological theory.\footnote{135 This concept is addressed in section IV, infra.}

Particularly, the requirement that a sentence must further a conceivable penological under the Eighth Amendment is identical to the requirement that a law must further a conceivable government interest under the Fourteenth Amendment. In order to accurately illustrate this theory, it is important to first summarize the well established principles of the Fourteenth Amendment rational-basis test. Once these principles are articulated, a comparison to the principles of Eighth Amendment gross disproportionality review will show that the two forms of review are virtually identical.

III.
THE FOURTEENTH AMENDMENT RATIONAL-BASIS TEST

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall “deny any person . . . the equal protection of the law.”\footnote{136 U.S. CONST. amend. XIV.} The Supreme Court
explained that the Fourteenth Amendment was intended to prevent the state and federal
government “from abusing [its] power, or employing it as a means of oppression.”
Government conduct may violate the Fourteenth Amendment if it infringes on a
fundamental liberty interest or discriminates against a suspect class. However, when a
law does not fall into one of these categories, the law is reviewed under a lenient and very
d deferential rational-basis test.

Under the Fourteenth Amendment rational-basis test, a law is upheld if it
rationally relates to any conceivable government interest. Furthermore, a law rarely
fails such a deferential standard. Generally, a law only fails the Fourteenth Amendment
rational-basis test if the court concludes the law is not related to any conceivable
government interest and, therefore, can only be described as “irrational” or arbitrary.

Such a conclusion is exceedingly rare.

137 Daniels v. Williams, 474 U.S. 327, 348 (1986). See also DeShaney v. Winnebago County Dep’t of Soc.
Servs., 489 U.S. 189, 196 (1989) (explaining that the purpose of the Fourteenth Amendment is to protect
the people from the State).


(explaining that the court “must not question the will of Congress, no matter how unsound or questionable
the law is” as long as a law does not conflict with fundamental principles of the Fourteenth Amendment).

Gas Co., 220 U.S. 61, 78-79 (1911) (explaining that a court will uphold the law “if any state of facts
reasonably can be conceived that would sustain [the law]”) (emphasis added).

141 See Vance v. Bradley, 440 U.S. 93, 99 (1979) (explaining that a law must be so unrelated to any
governmental interest that it can only be described as “irrational”).

142 See Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959) (explaining a law will be upheld if
it is neither “capricious” nor “arbitrary”).

143 See, e.g., Romer, 517 U.S. at 633 (holding that a Colorado law was irrational because its only
conceivable purpose was “disadvantaging the group burdened by the law”); Zobel v. Williams, 457 U.S.
55, 60-61 (1982) (holding a law unconstitutional because it lacked a rational basis for discriminating on the
basis of residency duration).
A.
THE LENIENCE OF THE RATIONAL BASIS TEST

Under the rational-basis test, courts grant extensive deference to the legislature. Ideally, courts refrain from imputing their subjective contentions regarding the reasonableness or rationale of the law.\textsuperscript{144} The Supreme Court explained that reviewing laws under the rational-basis test does not authorize the court to “sit as a superlegislature to judge the wisdom or desirability of the legislative policy determinations . . . .”\textsuperscript{145} Such judicial restraint embodies the notion that legislation is presumed constitutional.\textsuperscript{146}

The language used when reviewing a law under the rational-basis test is relatively straightforward and rudimentary. In general, a law is upheld so long as the court determines that the law furthers a conceivable government purpose.\textsuperscript{147} Even if the legislature does not clarify the government interest furthered by the law, the court will still uphold to law if it can conceive of a possible government interests furthered by the law.\textsuperscript{148} As a result, a plaintiff challenging a law bears the heavy burden to negate every

\begin{footnotesize}
\begin{enumerate}
\item See FCC v. Beach Commun’ns, Inc., 508 U.S. 307, 313 (1993) (explaining that rational-basis review “is not a license for the courts to judge the wisdom, fairness, or logic of legislative choices”).
\item City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).
\item See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964) (explaining that laws challenged under the rational-basis test are “subject only to one caveat – that the means chosen by it must be reasonably adapted to the end permitted”). However, courts have articulated the rational-basis standard differently. \textit{Compare}, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) \textit{with} United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174-77 (1980).
\item See Beach, 508 U.S. at 313 (explaining that a court should not invalidate a law “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”).
\end{enumerate}
\end{footnotesize}
conceivable basis which might support the legislation and, the government has no obligation to justify the law and may rely entirely on speculation.

According to the Supreme Court, the legislature should be given a large degree of latitude to pass laws it deems reasonable and the court is required to “accept a legislature’s generalizations even when there is an imperfect fit between means and ends.” A law does not have to be the most suitable means to achieve the desired result, but need only be related to achieving the desired result. Such a deferential standard prevents the court from imputing its own judgment regarding proper public policy and makes it exceedingly rare for a law to fail the rational-basis test.

---


150 Hadix, 230 F.3d at 843. See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (“States are not required to convince the courts of the correctness of their legislative judgments.”).

151 Lehnhausen, 410 U.S. at 359 (“[S]tates have large leeway in making classifications and drawing lines which in their judgment [are] reasonable.”).

152 City of Chicago v. Shalala, 189 F.3d 598, 606 (7th Cir. 1999). See also Romer v. Evans, 517 U.S. 620, 632 (1996) (explaining that a law can be upheld “even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it appears tenuous”). The general rationale behind this policy is that “improvident decisions will eventually be rectified by the democratic process . . . .” Vance v. Bradley, 440 U.S. 93, 97 (1979). See Beach, 508 U.S. at 113 (“[T]he legislature must be allowed leeway to approach a perceived problem incrementally.”); Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1545 (11th Cir. 1994) (“[L]egislatures are not required to address all aspects of a particular problem in one fell swoop.”).

153 See Clements v. Flashing, 457 U.S. 957, 969 (1982) (“[A] classification is not deficient simply because the State could have selected another means of achieving the desired ends.”).


155 See Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001) (“Only in the exceptional circumstances will a statute not be rationally related to a legitimate government interest and be found unconstitutional under
The touchstone case illustrating the degree of deference that courts afford the legislature under the rational-basis test is *Williamson v. Lee Optical*.¹⁵⁶ In that case, the plaintiff challenged an Oklahoma law that regulated the eye care industry. The law required that opticians have a prescription in order to fit or duplicate eyeglasses.¹⁵⁷ However, other eye care specialists, such as optometrists and sellers of ready-to-wear glasses, were not subject to the same requirement.¹⁵⁸ The Court rejected the plaintiff’s equal protection argument that the law was blatantly discriminatory, explaining that it is the legislature’s role to balance the advantages and disadvantages of the law’s requirements, not the court’s role.¹⁵⁹ The Court reasoned that “reform takes one step at a time,” and even though a law may be unwise or unfair, a court should not invalidate it so long as it is rationally related to some government purpose.¹⁶⁰

Moreover, the Court speculated as to what government purpose might have been related to Oklahoma’s law, noting that “the legislature may have concluded that eye examinations were so critical . . . that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert.”¹⁶¹ Further, the


¹⁵⁷ *Id.* at 485.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 487.

¹⁶⁰ *Id.* Additionally, the Court recognized, but disregarded, the fact that the law “may exact a needless wasteful requirement in many cases.” *Id.*

¹⁶¹ *Id.* The Court also speculated that “in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition.” *Lee Optical*, 348 U.S. at 487.
Court explained that “[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”

The Court’s decision in *Lee Optical* illustrated what is now a well established principle under the rational-basis test: a law will be upheld so long as the law relates to a *conceivable* government interest. In a later decision, the Supreme Court broadened this standard, explaining that the government purpose ascertained by the court does not even have to be the actual purpose intended by the legislature. The Court has even gone as far as to uphold a law because the issue as to whether there was a rational relationship between the law and the government interest was “at least debatable.”

The Court’s discretion and willingness to speculate as to the rational relationship between a law and the legitimate government interest that the law conceivably furthers suggests the rationality requirement has been drained of any meaningful content. However, on several occasions, as explained below, the Supreme Court has invalidated legislation under the rational-basis test. In these cases, as the following section indicates,

---

162 *Id.* at 488.

163 *See* Butler v. Apfel, 144 F.3d 622, 625 (9th Cir. 1998) (per curiam) (citations omitted) (“All that is required is that there be a rational basis for the legislation, hypothetical or actual” and “any number of rationales could be put forth.”).

164 *See* Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528-29 (1959). *See also* Panama City Medical Diagnostic Ltd v. Williams, 13 F.3d 1541, 1546 (11th Cir. 1994) (“[I]t is entirely permissible to rely on rationales that were not contemplated by the legislature at the time of the statute’s passage.”).


the Fourteenth Amendment is triggered as a protection against arbitrary legislation where the Court tends to conclude that the legislation furthers no conceivable state interest.

B. THOSE RARE CASES THAT FAIL THE RATIONAL BASIS TEST

While the rational-basis test grants substantial deference to the legislature, the Supreme Court has recognized it is not “toothless”\textsuperscript{167} and, a law that does not further any legitimate government interest will fail the rational-basis test.\textsuperscript{168} The landmark case illustrating this principle is \textit{City of Cleburne v. Cleburne Living Center}.\textsuperscript{169} In that case, the city of Cleburne denied landowners a permit to build a housing facility for the mentally retarded.\textsuperscript{170} The challengers argued that, because the city approved permits for other housing facilities,\textsuperscript{171} the city violated their rights under the Equal Protection Clause. The Court agreed, explaining that the denial of the housing permit was not supported by a rational basis.\textsuperscript{172}

Contrary to what might have been expected under the \textit{Lee Optical} rational-basis standard, the Court rejected every legitimate interest that the city argued was furthered by denying the permit. The Court concluded that the city’s actions were based on prejudice and irrational fear of the mentally retarded.\textsuperscript{173} According to the Court, such a bias or ill-

\begin{itemize}
\item \textsuperscript{167} Mathews v. Lucas, 427 U.S. 495, 510 (1976).
\item \textsuperscript{168} See Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978).
\item \textsuperscript{169} 473 U.S. 432 (1985).
\item \textsuperscript{170} \textit{Id.} at 437.
\item \textsuperscript{171} \textit{Id.} at 447.
\item \textsuperscript{172} \textit{Id.} at 450. Specifically, the Court concluded that the only reason for the city’s decision to deny the housing permit was “irrational prejudice” which is not considered to be a legitimate government interest. \textit{Id.}
\item \textsuperscript{173} \textit{Id.}
\end{itemize}
will is not a rational basis for government decisions and a “law cannot, directly or indirectly, give them effect.”

Although the city argued that its decision furthered a number of government interests, the Court determined that denying the permits was in no way rationally related to furthering any of those interests. For example, the city argued that the housing facility would be located across the street from a junior high school, where students were likely to harass the mentally retarded people. However, the Court recognized that thirty mentally retarded students attended the junior high school where they were already subject to harassment. Therefore, denying the housing permit would not eliminate the problem.

The city also argued that denying the permit would further the city’s interest in avoiding congestion of the streets and concentration of the population. However, according to the Court, “[t]hese concerns failed to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit.”

By rejecting all the conceivable government interests furthered by the city’s conduct, the Court made clear that government action fails the rational-basis test if it does not further any conceivable government interest. In *Cleburne*, the city’s decision was

---

174 *Cleburne*, 473 U.S. at 448 (relying on *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

175 *Id*. at 449.

176 The general reasoning of the Court was as follows: if the city was really concerned about the interests at stake they could have passed a better-tailored law without the arbitrary side effect of excluding the mentally disabled. *See id*. at 439.

177 *Id*. at 449.

178 *Id*. at 450. Among the other interests argued by the city but rejected by the Court were that (1) negative attitudes toward the mentally retarded by neighboring landowners, (2) the housing facility would be near a flood plain, and (3) concerns about the legal responsibility for conduct of the mentally retarded. *See id*. at 448-50.
invalidated because the Court determined that the only interest the decision furthered was not a legitimate state interest i.e. the desire to harm an unpopular group. Thus, if government conduct is founded on such a prohibited consideration, the judicial deference generally afforded to government conduct dissipates and, the court should, in the interests of justice, intervene. Generally, under these circumstances, the court will invalidate the law because it is unable to ascertain any legitimate interest other than prejudice.

Although the principles set forth in Cleburne suggest that the rational-basis test actually carries weight, the holding itself has carried little weight in subsequent cases. Indeed, if the Court had applied the deferential rational-basis test articulated in Lee Optical, the outcome would have likely been different. Regardless, the ends sought in both the Lee Optical approach and the Cleburne approach are the same: if the court

179 This concept that prejudicial motivations is not a legitimate government interest is well established. See, e.g., United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (“[The] desire to harm a politically unpopular group cannot constitute a legitimate government interest.”).

180 See Louis D. Bilionis, The New Scrutiny, 51 EMORY L. J. 481, 481 (2002) (“Judges will defer to the judgment of other governmental actors so long as the judgment might be characterized as a rational and not plainly forbidden means to pursue an objective that the Constitution does not clearly prohibit.”).

181 For example, in Romer v. Evans, the Supreme Court invalidated a state amendment that denied homosexuals the right to invoke common democratic processes to protect themselves against discrimination. 517 U.S. 620 (1996). Because the amendment was clearly based on animosity toward a particular group, the Court had little difficulty finding the amendment furthered no conceivable government interest. See id. at 635-36. The Court explained, “[w]e cannot say [the law] is directed to any identifiable legitimate purpose or discrete objective.” Id. at 635. Upon this finding, the decision of the Court was consistent with well established principles of rational-basis review. See, e.g., McDonald v. Bd. of Election Comm’rs, 394 U.S. 802, 808-09 (1961) (plurality opinion) (explaining that a law will be invalidated if based solely on reasons unrelated to any government interests that might justifying it).

182 See, e.g., Powers v. Harris, 379 F.3d 1208, 1223-24 (10th Cir. 2004).

183 See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 456 (1985) (Marshall, J., concurring and dissenting in part) (recognizing that the “ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation” i.e. the Lee Optical rational-basis test). Professor Strasser contends that there are two tiers of the rational-basis test applied to Equal Protection challenges, one very deferential under the Lee Optical standard and another less deferential under the Cleburne standard. See Mark Strasser, Interpretations of Loving in Lawrence, Baker, and Goodridge: Equal Protection and the Tiers of Scrutiny, 13 WIDENER L. J. 859, 862 (2004).
concludes a law does not further a conceivable legitimate government purpose, therefore making it arbitrary, the law will fail the rational-basis test.\footnote{See Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause.").}

C. \textbf{SUMMARY: \textsc{FOURTEENTH AMENDMENT RATIONAL-BASIS TEST}}

As indicated above, there are several well established principles under the Fourteenth Amendment rational-basis test. First, due to substantial deference to legislative determinations, a law is presumed constitutional. Second, in the face of a Fourteenth Amendment challenge to a law, a court will uphold the law so long as it determines the law furthers any conceivable legitimate state interest. Finally, a court will only invalidate a law if the court determines the law furthers no conceivable government interest. In other words, the court must conclude that the law is arbitrary or irrational. As the next section indicates, courts apply virtually the same rational-basis test when reviewing the length of a sentence in the face of an Eighth Amendment challenge.

IV. \textbf{THE EIGHTH AMENDMENT RATIONAL-BASIS TEST}

This section establishes that a court will uphold the length of a sentence in the face of an Eighth Amendment challenge so long as the court determines the sentence furthers some conceivable penological theory. This standard is virtually identical to the Fourteenth Amendment rational-basis test under which a law is upheld so long as the law furthers a conceivable government interest.\footnote{See supra, III.} However, even if this Eighth Amendment rational-basis test is recognized, a question remains: does such a deferential and lenient standard properly align itself with the principles of the Eighth Amendment? In other
words, is the Eighth Amendment merely a safeguard against arbitrary punishment, or was it intended to carry more weight?

A.

It is well established that punishment must serve some penological purpose. However, case law suggests that the court’s role is merely to ensure that a punishment furthers a penological purpose; it should not to impute its own judgment as to whether the punishment is the most suitable means to further that penological purpose. The Supreme Court explained that it “cannot ‘invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology,’ [however,] the sanction imposed cannot be totally without penological justification.” This language reflects the notion that a sentence cannot be arbitrarily imposed.

Nonetheless, this language also poses a critical question: must the penological justification for a punishment be objectively visible or may a reviewing court insert its subjective contentions as to the penological justifications for a sentence? Generally, a reviewing court will uphold a sentence so long as it furthers any penological theory.

186 See Gregg v. Georgia, 428 U.S. 153, 182-83 (1976) (plurality opinion). This Article does not take into account retributive principles of punishment. Retribution clearly furthers a penological purpose because it implies that a punishment is imposed solely for what the defendant has done. For a more in-depth discussion on retribution, see HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 11 (1968).

187 Gregg, 428 U.S. at 182-83 (quoting Furman v. Georgia, 408 U.S. 238, 251 (1972)). However, Justice Scalia contends that the Court’s decisions illustrate that the Court is actually inserting its own judgment. See, e.g., Roper v. Simmons, 534 U.S. 551, 615 (2005) (Scalia, J., dissenting) (opining that the force driving the Court’s decision “is not the actions of four state legislatures, but the Court’s own judgment”).

188 Courts and commentators seem to advocate the notion that punishment must serve some penological purpose but remain silent as to whether the court should dig to find it. See, e.g., United States v. Olson, 450 F.3d 655, 686 (7th Cir. 2006) (explaining that the Eighth Amendment prohibits punishment that is “totally without penological justification.”); Louis D. Bilionis, The New Scrutiny, 51 EMORY L. J. 481, 535 (2002) (“[D]isproportionality must be gross, as established by . . . the fact that the penalty makes no measurable contribution to any legitimate penological purpose.”).

189 See Wilhelm, supra note 10, at 578 (recognizing a legislative purpose test, under which a court will “examine the legislative, or penal, purpose of [a] statute.”). (Correct Supra Note)
If the legislature specifies which penological theory a sentence furthers, the court will grant deference to the legislature. Moreover, if the legislature is silent as to what penological theory is furthered by the sentence, the court will nonetheless uphold the sentence so long as the court finds the sentence furthers a *conceivable* penological theory.

In *Harmelin*, Justice Kennedy explained that the threshold requirement for Eighth Amendment review of sentences is “an inference of gross disproportionality,” which requires the court to consider the “gravity of the offense and the harshness of the penalty.” Applying this test, Justice Kennedy determined that the defendant’s crime of possessing cocaine was a particularly serious one, not only because of the direct dangers posed to the individuals who ingest the drugs, but “because drugs create a threat to public safety.” Consequently, the defendant’s life sentence served legitimate deterrent, rehabilitative, and incapacitating purpose. Kennedy concluded that the sentence did not create an inference of gross disproportionality because there were conceivable penological interests furthered by the sentence.

Similarly, in *Rummel*, the Court recognized that the primary goals of the Texas’s recidivist statute were to (1) deter repeat offenders and (2) incapacitate those who are

---


191 The defendant, a first time offender, was charged and convicted of possession of 650 grams of cocaine.

192 *Id.* Specifically, Kennedy explained that “the Michigan legislature could with reason conclude that the threat posed to the individual and society by possession of [a] large amount of cocaine [justifies] a life sentence without parole.” *Id.*

193 *Id.*

194 *Id.* Even Justice Stevens, in his dissenting opinion, focused on the penological justifications for the sentence. Justice Stevens would have held that the sentence violated the Eighth Amendment, but this conclusion stemmed from his arguments that the sentence was “irrational” and failed to “even purport to serve a rehabilitative function.” *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting).
incapable of ceasing their criminal behavior. The language and the reasoning of these cases suggest a central principle: a court can uphold a sentence by imputing its own judgment when identifying a conceivable penological theory that a sentence furthers.

The “inference of gross disproportionality” requirement articulated by Justice Kennedy in *Harmelin* currently governs Eighth Amendment review of sentences. As Kennedy explained, sentencing schemes require “agreement on the purposes and objectives of the penal system” and it is the legislature’s responsibility for deciding and implementing a sentencing scheme that best furthers these penological objectives. This language suggests that a court need only identify a conceivable penological objective furthered by a sentence to justify validating the sentence.

Nonetheless, such a lenient requirement allows courts to easily sidestep rigorous proportionality review because a court may employ all of its imaginative powers to conceive of possible penological theories to justify a sentence. The common

---


196 *See, e.g.*, United States v. Nagel, 559 F.3d 756, 764 (7th Cir. 2009) (upholding a mandatory sentence for the attempted sexual enticement of a minor because the legislative history indicated Congress’s belief that the offense “is a serious offense even where a law enforcement agent poses as a minor victim”); United States v. Whitehead, 487 F.3d 1068, 1070-71 (8th Cir. 2007) (upholding a life sentence for possession of drugs with intent to distribute, reasoning that defendant “had been convicted of five prior felony drug offenses . . . and because [drug] distribution represents a grave threat to society”) (citation omitted); United States v. Walker, 473 F.3d 71, 83 (3d Cir. 2007) (recognizing that Congress could conclude the threat posed to citizens and society by the crime is large enough to justifying deterrent and rehabilitative goals); United States v. Couch, 291 F.3d 251, 255 (3d Cir. 2002) (“It is likely that Congress meant . . . to protect our communities from violent criminals who repeatedly demonstrate a willingness to employ deadly weapons by punishing them more harshly.”); State v. Berger, 134 P.3d 378, 382 (Ariz. 2006) (en banc) (“Criminalizing the possession of child pornography is tied to the state efforts to deter its production and retribution.”).

197 *See, e.g.*, United States v. Bland, 961 F.2d 123, 128-29 (9th Cir. 1992) (recognizing Justice Kennedy’s concurring opinion as the “rule”).

198 *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in judgment).

penological theories identified by the courts, which are by no means exhaustive, are deterrence, incapacitation, and criminal history under recidivist statutes.\textsuperscript{200} Importantly, the court need not find any clear legislative intent to further a particular penological theory. Rather, a court only needs to conceive of a possible penological theory furthered by the sentence.\textsuperscript{201} Justice Kennedy explained that the Constitution does not mandate any particular penological theory.\textsuperscript{202} In context, this suggests that courts do not need to

---

\textsuperscript{200} See Ewing v. California, 538 U.S. 11, 25 (2003) (explaining a sentence can have a variety of justifications). See, e.g., Muscarello v. United States, 524 U.S. 125, 126 (1998) (quoting 114 CONG. REC. 22231 (1968)) (recognizing the purpose behind a federal statute governing felony possession of firearms was to “persuade the man who is tempted to commit a Federal felony to leave his gun at home”); United States v. Moriarty, 429 F.3d 1012, 1025 (11th Cir. 2005) (upholding a life sentence of supervised release imposed on a twenty-one-year-old defendant convicted of possession of child pornography because it served a rehabilitative end); United States v. Chauncey, 420 F.3d 864, 877 (8th Cir. 2005); (deferring to the legislature’s desire to incapacitate career offenders in upholding a one-hundred-month sentence for possession with intent to distribute one ounce of marijuana); Ramos v. Weber, 303 F.3d 934, 938 (8th Cir. 2002) (reasoning that the defendant’s “threatened harm to society arising from his need to control those around him” justified the life sentence and “did not constitute excessive retribution”). However, some commentators argue that utilitarian justifications for punishment do not align with the principles of proportionality. See, e.g., Joy Donham, Note, \textit{Third Strike or Merely a Foul Tip?: The Gross Disproportionality of Lockyer v. Andrade}, 38 AKRON L. REV. 369, 396 (2005) (“[U]tilitarian policies behind punishments . . . do not support a proportionality requirement.”).

\textsuperscript{201} See, e.g., United States v. Couch, 291 F.3d 251, 255 (3d Cir. 2002) (“It is likely that Congress meant . . . to protect our communities from violent criminals who repeatedly demonstrate a willingness to employ deadly weapons by punishing them more harshly.”).

\textsuperscript{202} \textit{Harmelin}, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in judgment) (recognizing that the Eighth Amendment does not mandate any one penological theory).
engage in detailed scrutiny of a sentence and, instead, only needs to identify a conceivable penological theory furthered by the sentence.\textsuperscript{203}

The requirement that a sentence must merely further a penological theory is easily satisfied,\textsuperscript{204} but it is not surprising. According to the Supreme Court, a sentence is not required to be “strictly proportionate” to the offense.\textsuperscript{205} The Eighth Amendment merely contains a “narrow proportionality” principle that applies to sentences for a term of years and forbids only “extreme sentences.”\textsuperscript{206} As a result, harsh sentences intended for severe crimes will be upheld even when the offender does not seem to be the ideal offender that the legislature targeted.

\textsuperscript{203} See, e.g., United States v. Couch, 291 F.3d 251, 255 (3d Cir. 2002) (determining that enhanced sentences for use of firearms during a crime was “likely” meant to deter repeated violence). One scholar suggests that courts should adopt an additional prong to the Harmelin test. This fourth prong would essentially require the court to “ask whether the state’s punishment is rationally related to [a] legitimate legislative purpose.” Margaret Gibbs, Eighth Amendment—Narrow Proportionality Requirement Preserves Deference to Legislative Judgment, 82 J. CRIM. L. & CRIMINOLOGY 955, 976 (1992). Some commentators agree with the notion that a sentence must further a penological purpose, but however, they argue the court needs to identify a specific penological purpose. See, e.g., Alice Ristroph, State Intentions and the Law of Punishment, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1376 (2008) (explaining Supreme Court precedent deemed it “necessary to consider what goal the sentence was intended to serve”). This Article argues that courts do not make such considerations and, instead, speculate as to conceivable penological purposes a sentence potentially serves.

\textsuperscript{204} See Alice Ristroph, State Intentions and the Law of Punishment, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1377 (2008) (arguing that relying on default penological theories “leaves the Eighth Amendment as a relatively weak restriction of legislative power, since the legislature is permitted to select the baseline against which its own acts will be judged”).

\textsuperscript{205} Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in judgment); accord United States v. Marks, 209 F.3d 577, 583 (6th Cir. 2000).

\textsuperscript{206} Harmelin, 501 U.S. at 996-97 (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy’s “narrow proportionality” concept is followed by the lower courts. See Gonzalez v. Duncan, 551 F.3d 875, 881 (9th Cir. 2008); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968). See, e.g., Allen v. Stratton, 428 F. Supp. 2d 1064, 1077 (C.D. Cal. 2006) (holding that a fifty-four-year-to-life sentence for pimping was “undeniably harsh,” but did not violate the Eighth Amendment’s narrow proportionality standard). Such a lenient standard of review is very different from the one applied to capital punishment. In the context of capital punishment, a sentence may violate the Eighth Amendment, even though the sentence serves a penological purpose. See Coker v. Georgia, 433 U.S. 584, 592 n.4 (1977).
For example, in *Young v. Miller*, the defendant was a first time offender convicted of possession of 1,300 grams of heroin and sentenced to life imprisonment without the possibility of parole. The Sixth Circuit upheld the sentence, recognizing the potential harm such a large quantity of drugs might have on society and such a punishment would sufficiently act as a deterrent. The court recognized that the defendant may not have been the exact target intended by the legislature, but nonetheless, explained that sometimes “the tiger trap may [spring] upon a sick kitten” and “it is not the court’s role to interfere with the hunters.”

Such a decision highlights the threshold finding required in order to uphold a sentence: does the sentence furthers a penological theory? In *Miller*, the Sixth Circuit recognized that the sentence served a deterrent purpose. Notwithstanding, the wide range of possible penological theories courts can use to justify harsh sentences is unsettling because some penological theories can always *conceivably* further a sentence; for example, incapacitation. As a result, courts go to great lengths to uphold harsh sentences by recognizing the sentence furthers a legitimate penological theory.

---

207 883 F.2d 1276 (6th Cir. 1989).

208 Id. at 1283.

209 Id.

210 In *Ewing*, the Court declared that it was not in the position to “superlegislate.” 538 U.S. 11, 28 (2003) (plurality opinion). However, as one scholar explained, “[s]uch an argument could be employed by any court to uphold even the most cruel and unusual sentences passed by the legislature.” Richard H. Andrus, *Which Crime Is It? The Role of Proportionality in Recidivist Sentencing After Ewing v. California*, 19 BYU J. Pub. L. 279, 289 (2004).

211 See, e.g., Ramos v. Weber, 303 F.3d 934, 938 (8th Cir. 2002) (reasoning that the “threatened harm to society arising from his need to control those around him” justified the life sentence and “did not constitute excessive retribution”). Former Governor of California, Pete Wilson, referenced a Kern County District Attorney who explained: “We can debate if prisons deter people from criminal activity. We can debate whether or not we should use that opportunity to rehabilitate criminals. But we cannot debate that
One factor courts commonly consider to identify conceivable penological purposes furthered by a sentence is the defendant’s criminal history. In *Ewing*, the Court recognized that “[r]ecidivism has long been . . . a legitimate basis for increased punishment.”213 The general reasoning is that, if an offender has committed certain crimes in the past and continues to commit such crimes currently, enhanced punishment is necessary because the offender has demonstrated that he cannot control his criminal tendencies.214 In this respect, courts and commentators agree that punishing habitual offenders more severely than first-time offenders serves legitimate penological interests215 and, as a result, courts are reluctant to second-guess such legislatively

---

212 See, e.g., United States v. Nagel, 559 F.3d 756, 764 (7th Cir. 2009) (upholding a mandatory sentence for the attempted sexual enticement of a minor because the legislative history indicated Congress’s belief that the offense “is a serious offense even where a law enforcement agent poses as a minor victim”); United States v. Whitehead, 487 F.3d 1068, 1070-71 (8th Cir. 2007) (upholding a life sentence for possession of drugs with intent to distribute, reasoning that defendant “had been convicted of five prior felony drug offenses” and drug distribution “represents a grave threat to society”); State v. Berger, 134 P.3d 378, 382 (Ariz. 2006) (en banc) (“Criminalizing the possession of child pornography is tied to the state efforts to deter its production and retribution.”).

213 *Ewing*, 538 U.S. at 25.

214 See Brown v. Mayle, 283 F.3d 1019, 1026 (9th Cir. 2002), overruled on other grounds, 538 U.S. 901 (2003).

215 See, e.g., United States v. MacEwan, 445 F.3d 237, 248 (3d Cir. 2006) (suggesting that, when reviewing the sentence of a habitual offender, the court will not only consider the triggering offense, but also the defendant’s previous conduct); Carissa Bryne Hessick, *Why are only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1115 (2008) (concluding there is “a public consensus that a prior conviction ought to result in a longer sentence”); Melanie Deutsch, Comment, *Minor League Offenders Strike Out in the Major League: California’s Improper Use of Juvenile Adjudications as Strikes*, 37 SW. U. L. REV. 375, 384 (2008) (explaining that California’s “Three Strikes law seeks to deter future criminals by imposing harsh punishments on habitual offenders”). *But see* Hessik, *supra* note 130, at 1151 (“Some studies have concluded that the [habitual offender] legislation deters recidivism, while others concluded that the deterrence has been negligible.”). However, some commentators argue that recidivist statutes are hard to justify on moral grounds. See, e.g., Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 431 (1997) (arguing Three Strikes laws are hard to justify from a moral perspective).
mandated sentences.\textsuperscript{216} Even the United State Sentencing Guidelines recognize that habitual offenders are more blameworthy than first-time offenders, thus more deserving of punishment.\textsuperscript{217} As a result, a reviewing court may easily justify harsh sentences imposed on career criminals.\textsuperscript{218}

For example, in \textit{Taylor v. Lewis},\textsuperscript{219} the Ninth Circuit upheld a Three Strikes sentence for possession of 0.036 grams of cocaine. The court illuminated the defendant’s criminal history, which included burglary, vehicle theft, voluntary manslaughter, and robbery with the use of a firearm.\textsuperscript{220} The court indicated that removing an offender with such an extensive history of criminal activity was a rational basis for upholding the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{216} See, e.g., Untied States v. Walker, 473 F.3d 71, 79 (3d Cir. 2007) (“Congress had a rational basis for treating second or subsequent offenses under [the statute] more harshly than first offenses and for imposing sever mandatory punishments for such offenses.”).
\item \textsuperscript{217} See U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, intro. cmt. (“A defendant with a record of prior criminal behavior is more culpable than a first time offender and thus more deserving of greater punishment.”). \textit{But see ZIMRING et al., PUNISHMENT AND DEMOCRACY} 112-114 (2001) (arguing that, though the second strike might be consistent with proportionality, the third strike is entirely inconsistent by increasing punishment far more for less serious crimes than for more serious crimes).
\item \textsuperscript{218} See United States v. Gillespie, 452 F.3d 1183, 1191 (10th Cir. 2006) (upholding a 468-month sentence for attempting to blow up a religious temple because of the defendant’s history of violence against minorities); United States v. Huskey, 502 F.3d 1196, 1200 (10th Cir. 2007) (finding the defendant’s challenge to a life sentence for conspiring to distribute fifty grams of cocaine to be “simply untenable” in light of the defendant’s two prior drug felony convictions); United States v. Collins, 340 F.3d 672, 680 (8th Cir. 2003) (upholding a life sentence imposed on a career criminal because “the repeated nature of similar crimes . . . does not warrant a finding of disproportionality under the Eighth Amendment”). \textit{See also Horn, supra} note 7, at 539 (explaining that a reviewing court’s ability to consider past criminal conduct “produces an insurmountable legal hurdle for recidivists wanting to bring a constitutional claim”); Marc G. Wilhelm, \textit{Recidivist Statutes-Application of Proportionality and Overbreadth Doctrines to Repeat Offenders-} \textit{Wanstreet v. Bordenkircher, 276 S.E.2D 205 (W. Va. 1981), 57 WASH. L. REV.} 573, 588 (1982) (“[R]ecidivism creates culpability per se.”).
\item \textsuperscript{219} 460 F.3d 1093 (2006).
\item \textsuperscript{220} Id. at 1100-01. The court may have come to a very different conclusion had the defendant’s criminal history been relatively minor or nonexistent. \textit{Compare id.} (upholding a Three Strikes life sentence where the defendant was a repeat offender \textit{with} Henderson v. Norris, 258 F.3d 706, 714 (8th Cir. 2001) (invalidating a life sentence imposed on a first time offender convicted of delivery of 0.238 grams of cocaine).
\end{itemize}
\end{footnotesize}
sentence. If all courts applied similar reasoning, a sentence imposed on a career criminal will presumptively further the penological theory of, at least, incapacitation, and the courts that do choose to focus on criminal history will easily find reasons to justify harsh sentences.

Many courts apply reasoning similar to Taylor, but extend it by considering a defendant’s criminal history as the determinative penological justification for upholding a sentence. As the Supreme Court explained in Rummel, recidivist statutes further the legitimate penological theories of deterrence and incapacitation by imposing harsh sentences on criminals that “are simply incapable of conforming to the norms of society as established by its criminal law.” One longstanding rationale is that habitual criminals are “not punished the second time for the earlier offense, but the repetition of

---

221 Taylor, 460 F.3d at 1100-01.

222 Generally, an enhanced sentence under a habitual offender statute that furthers the penological theory of incapacitation rests on the theory that these criminal are “unamenable to rehabilitation during their ‘crime-prone years.’” Deutsch, supra note 130, at 388. See also Rummel v. Estelle, 445 U.S. 263, 284 (1980) (plurality opinion) ( “[The] primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses . . . segregate that person from the rest of society.”). However, whether or not habitual offender statutes are effective, is still a matter in debate. See, e.g., Lewis, supra note 6, at 542 (arguing that California Three Strikes law “has barely put a dent in California’s violent crime rate”).

223 For example, in Reyes v. Brown, the Ninth Circuit remanded a Three Strike sentence for an evidentiary hearing as to whether the defendant’s prior convictions involved violence. 399 F.3d 964, 969-70 (9th Cir. 2005). In an unpublished opinion, the District Court, on remand, affirmed the sentence after determining one of the defendant’s prior felonies involved a knife. See Reyes v. Calderson, No. CV 00-600, “Order, etc.” (C.D. Cal. 2006) (unpublished).

224 See, e.g., United States v. Kaluna, 192 F.3d 1188, 1199 (9th Cir. 1999) (en banc) (explaining “legislatures may punish recidivists more severely than first-time offenders”); United States v. Cardoza, 129 F.3d 6, 18 (1st Cir. 1997) (explaining a defendant “was sentenced to such a term because . . . he had previously been convicted of at least three violent felonies”); Smallwood v. Scott, 73 F.3d 1343, 1346 (5th Cir. 1996) (upholding a fifty-year sentence for petty theft because it did not create and inference of gross disproportionality in light of the defendant’s criminal history). But see Ewing v. California, 538 U.S. 11, 41 (2003) (plurality opinion) (Breyer, J., dissenting) (arguing that the recidivism should merely be a relevant, “but not necessarily determinative” when considering whether a sentence is grossly disproportionate”).

criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.\textsuperscript{226} Thus, a court reviewing a sentence that is imposed under a recidivist statute may easily avoid rigorous review by illuminating the defendant’s criminal history - i.e. the sentence furthers the penological purpose of preventing future crimes by those who continues to commit them and deters others from committing similar conduct.\textsuperscript{227}

Another approach courts use to sidestep disproportionality review and uphold a severe sentence is bootstrapping the challenged sentence to a sentence that was previously upheld. For example, the Third Circuit upheld a life sentence reasoning that the defendant’s robbery and drug charges “were at least as serious as those committed by Lockyer, Rummel, Hutto, and Ewing, whose proportionality challenges were rejected by the Supreme Court.”\textsuperscript{228} These types of cases essentially impute the penological justifications found by other courts to justify a sentence instead of identifying the particular penological theories furthered by the sentence at issue.

\textsuperscript{226}Graham v. W. Virginia, 224 U.S. 616, 623 (1912).

\textsuperscript{227}See, e.g., United States v. James, 564 F.3d 960, 964 (8th Cir. 2009) (upholding a 262-month sentence for possession of cocaine with the intent to distribute in light of the defendant’s criminal history, which included assault, burglary, and delivery of cocaine); Taylor v. Lewis, 460 F.3d 1093, 1099 (9th Cir. 2006) (upholding a life sentence where the underlying crime was possession of .036 grams of cocaine but the defendant had an impressive recidivist history); United States v. Gurule, 461 F.3d 1238, 1248 (10th Cir. 2006) (explaining that the court was “certain” a sentence was not grossly disproportionate when the defendant had twice been convicted of serious and violent felonies); United States v. Cardoza, 129 F.3d 6, 17-18 (1st Cir. 1997) (“Society has decided through the Congress that it simply will not tolerate this violence, will not tolerate people who have such a record from committing other crimes.”); Delgado v. Yates, 622 F. Supp. 2d 854, 864 (N.D. Cal. 2008) (“In light of [defendant’s] history of criminal recidivism, which includes crimes of violence, his sentence cannot be said to be grossly disproportionate.”). See also Heglin, supra note 15, at 227 (arguing lengthy incapacitation is necessary “[t]o vindicate the rule of law and protect the public from future harm”). Such an extensive number of courts that uphold extremely harsh sentences beg the question as to whether the gross disproportionality standard actually carries any weight. According to several commentators, it is hard to even imagine a set of facts that would meet the threshold finding of an inference of gross disproportionality. See, e.g., James Headley, Proportionality Between Crimes, Offenses, and Punishments, 17 St. Thomas L. Rev. 247, 255 (2004); G. David Hackney, Note, A Trunk Full of Trouble: Harmelin v. Michigan, 27 Harv. C.R.-C.L. L. Rev. 262, 262-63 (1992).

\textsuperscript{228}United States v. Walker, 473 F.3d 71, 83 (3d Cir. 2007).
Justice Powell feared such a bootstrapping approach in his dissenting opinion in *Rummel* explaining, “[t]he reach of the Eighth Amendment cannot be restricted only to those claims previously adjudicated under the Cruel and Unusual Clause.” However, Justice Powell’s concern is often ignored by courts. Some courts’ comparisons go beyond just comparing crimes. These courts will uphold a sentence if they recognize any mitigating variances or similarities between the challenged sentence and another sentence that was upheld. For example, (1) the challenged sentence is shorter than or similar to a previously upheld sentence or (2) the underlying crime’s harm to society is similar to the underlying crime’s harm in a previously upheld sentence.

As indicated above, courts maintain substantial discretion in the face of an Eighth Amendment challenge to the length of a sentence. As a result, the vast majority of courts can uphold a sentence by simply identifying a conceivable penological theory furthered by the sentence. In this respect, the lower courts’ application of gross disproportionality

---


230 See, e.g., United States v. Garcia-Carrasquillo, 483 F.3d 124, 135 (1st Cir. 2007) (holding a 210-month sentence for drug possession did not violate the Eighth Amendment because longer sentences had been upheld for lower quantity of drugs); United States v. Meiners, 485 F.3d 1211, 1213 (9th Cir. 2007) (per curiam) (upholding a fifteen-year sentence for advertisement and distribution of child pornography, reasoning that it was “a lesser sentence than the defendant’s in *Hutto* and *Harmelin*”); United States v. Gamble, 388 F.3d 74, 77 (2d Cir. 2004) (affirming the sentence because the defendant’s criminal history “at least rival[ed]” other harsh sentences that the court upheld); United States v. Mitchell, 932 F.2d 1027, 1029 (2d Cir. 1991) (per curiam) (upholding a fifteen-year sentence for possession of a firearm was “no more severe than that found acceptable in *Rummel*”).

231 See, e.g., Nunes v. Ramirez-Palmer, 485 F.3d 432, 439 (9th Cir. 2007) (affirming a twenty-five-year-to-life sentence where the defendant’s “career as a criminal ha[d] been longer, more prolific, and more violent that the petitioner’s in *Lockyer*”); United States v. Gross, 437 F.3d 691, 694 (7th Cir. 2006) (considering the fact that child pornography “is at least as serious as the two recidivist defendants for whom the Supreme Court has denied relief”); United States v. MacEwan, 445 F.3d 237, 249 (3d Cir. 2006) (upholding a fifteen-year sentence for receiving child pornography because the crime was “at least as serious as those committed by the appellants challenging their life sentences in *Rummel* and *Ewing*”); Coleman v. Dewitt, 282 F.3d 908, 915 (6th Cir. 2002) (“[A] jurisprudence that finds mandatory life sentences for non-violent possession of cocaine constitutionally permissible . . . would be hard-pressed to find nine years for [the defendant’s] violent act beyond constitutional pale.”).
review has created a rational-basis virtually identical to the Fourteenth Amendment rational-basis test. Specifically, under this Eighth Amendment rational-basis test, a court will uphold a sentence so long as the court determines that the sentence furthers a conceivable penological theory. However, just as the Supreme Court recognized that the Fourteenth Amendment rational-basis test is not “toothless,” some courts recognize that Eighth Amendment review, too, is not toothless. This concept is addressed in the next section.

B.

The Supreme Court explained that a punishment is unconstitutional if it “makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.” Generally, when a court declares that a sentence is grossly disproportionate, it does so under the rhetoric that it can find no conceivable penological justification for the sentence. In other words, a sentence violates the Eighth Amendment because it is arbitrary. However, in order for a court to make such a determination, the court must acknowledge two principles: (1) under certain circumstances, the court must disregard its tendencies to

---

232 See supra, III.B.


234 Some commentators suggest that the court should apply such a standard when reviewing sentences under the Eighth Amendment. See, e.g., Chris Baniszewski, Supreme Court Review of Excessive Prison Sentences: The Eighth Amendment’s Proportionality Requirement, 25 ARIZ. ST. L. J. 929, 959 (1993) (“[T]he courts should follow a rational basis test that would forbid ‘grossly disproportionate’ sentences that lack a rational basis on which the legislature could have concluded that the crime was serious enough to require the imposed punishment.”); Marc G. Wilhelm, Recidivist Statutes-Application of Proportionality and Overbreadth Doctrines to Repeat Offenders – Wanstreet v. Bordenkircher, 276 S.E.2d 205 (W.Va. 1981), 57 W.A. L. REV. 573, 586-87 (1982) (suggesting that a sentence could violate the Eighth Amendment if a sentence is a needless imposition of pain and suffering i.e. the sentence is arbitrary). However, this Article extends these implications, stressing the fact that courts actually do apply such a standard of review.
defer to the legislature and (2) under certain circumstances, a sentence will not further any penological theory.

Very few sentences violate the Eighth Amendment prohibition of cruel and unusual punishment. Indeed, *Solem* is the sole Supreme Court decision invalidating the length of a sentence under Cruel and Unusual Punishment Clause. Notwithstanding, *Solem*’s application can only be described as archaic as courts continue to grant deference to the legislatures and uphold harsh sentences in the face of Eighth Amendment challenges.

In *Lockyer v. Andrade*, the defendant was convicted of two counts of petty theft for stealing VHS tapes from two separate stores within a single night. The Supreme Court upheld the defendant’s two consecutive life sentences because each of the petty theft convictions triggered separate application of the Three Strikes law. Yet, Justice Souter’s dissenting opinion suggested that a sentence must further some penological theory in order to avoid an Eighth Amendment violation. Justice Souter explained that, even if the Court grants deference to the policy choices of the state, “that policy cannot reasonably justify the imposition of a consecutive 25-year minimum sentence for a second minor felony committed soon after the triggering offense [because the]

---

235 See Baniszewski, *supra* note 10, at 955.

236 The Supreme Court has only articulated this principle in the context of capital punishment. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 318-19 (2002) (recognizing that mentally retarded offenders are not deterred); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (recognizing that juvenile offenders under the age of sixteen are not deterred). Notwithstanding, some lower courts have recognized that the length of a sentence may violate the Eighth Amendment because it does not further any conceivable penological theory. See infra III.C.


238 See Frase, *supra* note 8, at 629 (saying that *Andrade* indicates that “a sentence only violates the Eighth Amendment if it is grossly disproportionate in relation to all traditional sentencing purposes, or at least all purposes asserted by the state”).
The defendant did not somehow become twice as dangerous to society.”

In other words, the consecutive sentence did not further any deterrent or retribution purpose and, in this respect, Justice Souter opined that the sentence violated the Eighth Amendment because the imposition of the consecutive sentences furthered no penological theory.

The exceedingly few courts that do invalidate a sentence under the Eighth Amendment generally do so under the reasoning similar to Justice Souter’s dissent in *Andrade*: the sentence violates the Eighth Amendment because it does not further any conceivable penological purpose. This notion that a sentence must merely serve a penological purpose suggests that the Cruel and Unusual Punishment Clause is merely a safeguard against arbitrary punishment.

Recently, in *Gonzalez v. Duncan*, the Ninth Circuit invalidated a Three Strikes sentence where the triggering offense was failing to update the defendant’s annual sex

---

239 *Andrade*, 538 U.S. at 82 (Souter, J., dissenting).

240 See id.

241 See, e.g., *Ramirez v. Castro*, 365 F.3d 755, 768 (9th Cir. 2004) (holding that Three Strikes twenty-five year-to-life sentence for petty theft was “grossly disproportionate,” taking into account that he surrendered without resistance and his prior strikes were non-violent robberies that did not involve weapons); *Hart v. Coiner*, 483 F.2d 136, 141 (4th Cir. 1973), cert. denied, 415 U.S. 983 (1974) (holding that a defendant whose underlying crimes were writing a check on insufficient funds for fifty dollars, transporting $140 worth of forged checks across state lines, and perjury, did not warrant a life sentence); *State v. Davis*, 79 P.3d 64, 72 (Ariz. 2003) (en banc) (holding that a fifty-two year sentence for non-coerced sex with two sixteen-year olds was grossly disproportionate considering, inter alia, the fact that the act was consensual); *Crosby v. State*, 824 A.2d 894 (Del. 2003) (holding a life sentence violated the Eighth Amendment, where the triggering offense was Class G forgery); *Faulkner v. State*, 445 P.2d 815, 818 (Ala. 1968) (holding a thirty-five year sentence for bouncing seven checks was “so disproportionate . . . as to be completely arbitrary and shocking to the sense of justice and thus amounts to cruel and unusual punishment”).

242 The concept that the Cruel and Unusual Punishment Clause is a safeguard that prohibits arbitrary punishment is nothing revolutionary. See *McCleskey v. Kemp*, 481 U.S. 279, 323 n.1 (1987) (Brennan, J., dissenting) (“Once we can identify a pattern of arbitrary sentencing outcomes, we can say that the defendant runs a risk of being sentenced arbitrarily.”).
offender registration within five working days of his birthday.\textsuperscript{243} The court invalidated the sentence even though the defendant’s criminal history involved cocaine possession, committing a lewd act on a child under the age of fourteen, attempted forcible rape, and auto theft.\textsuperscript{244}

The court explained that the triggering offense was “based on a violation of a technical regulatory requirement that resulted in no social harm and to which no moral culpability attach[ed]” and the offense did not “reveal any propensity to recidivate.”\textsuperscript{245} Most noteworthy, the Court explained it was “unable to discern any \textit{rational relationship} between [the defendant’s] failure to update his sex offender registration annually and the probability that he will recidivate as a violent criminal or sex offender.”\textsuperscript{246} This language indicates the court was unable to identify any penological theory in which the sentence may have furthered.

As indicated above, reliance on the criminal history allows many courts to uphold harsh sentences.\textsuperscript{247} However, the Ninth Circuit declined to utilize this justification under these circumstances. In fact, the court explained that the touchstone penological theory

\textsuperscript{243} 551 F.3d 875, 877 (9th Cir. 2008).

\textsuperscript{244} \textit{Id.}

\textsuperscript{245} \textit{Id.} at 887.

\textsuperscript{246} \textit{Id.} (emphasis added). Another description of what the court is looking for is arbitrary sentencing which, historically, courts have taken an active role in invalidating. For example, the Fifth Circuit explained that a sentence violates the Eighth Amendment’s prohibition of the cruel and unusual punishment if the sentence “is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice.” Rogers v. United States, 304 F.2d 520, 521 (5th Cir. 1962); \textit{accord} Capuchino v. Estelle, 506 F.2d 440 (5th Cir. 1975). \textit{See also} State v. Dauzart, 960 So.2d 1079, 1089 (La. Ct. App. 2007) (“A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than a purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime.”).

\textsuperscript{247} \textit{See supra}, Part IV.A.
common to recidivist sentences - incapacitating habitual criminals whose conduct indicate they are incapable of conforming to society’s laws - did not even justify the Three Strikes sentence. The court explained that, because there was no connection between the defendant’s criminal history, the triggering offense, and his propensity to commit future acts, it “could not conclude that [the state’s] interest in deterring and incapacitating recidivist offenders justifie[d] the . . . life sentence.”

The Ninth Circuit’s decision in Gonzalez is the closest case to apply a rational-basis type test to determine whether a sentence violates the Eighth Amendment. Arguably, the court could have upheld the sentence had it inquired into the legislative interest in surveillance of convicted sex offenders. Had the court illuminated such a state interest, it might have concluded that the severe penalty imposed on the defendant might deter others from engaging in similar conduct. Alternatively, the court could have justified the sentence on incapacitation grounds i.e. incapacitating individuals who are incapable for conforming to the requirements set forth by the legislature. However, by choosing to ignore the excessive deference commonly afforded to the legislature and declining to speculate as to vaguely conceivable penological theories the sentence might further, the Ninth Circuit’s decision may be the landmark case articulating the principles inherent in gross disproportionality review: a sentence that furthers no conceivable penological purpose violates the Eighth Amendment.

CONCLUSION

248 Gonzalez, 551 F.3d at 888.

249 Several cases following Gonzalez recognize this principle to distinguish Gonzalez. See, e.g., Calloway v. White, 649 F. Supp. 2d 1048, 1054 (N.D. Cal. 2009); People v. Nichols, 97 Cal. Rptr. 3d 702, 708 (3d Dist. 2009).
Although the Supreme Court precedent regarding Eighth Amendment gross disproportionality review seems unclear and inconsistent, lower courts have, surprisingly, established consistent principles in their application of gross disproportionality review. First, a court will grant substantial deference to the legislature to define crime and proscribe punishment.\textsuperscript{250} Second, if deference does not, in and of itself, compel a court to uphold a sentence, the court can inevitably uphold a sentence so long as the court concludes the sentence furthers a conceivable penological theory.\textsuperscript{251} Finally, a court may invalidate a sentence only in the rare situation where the court concludes that the sentence does not further any conceivable penological theory - i.e. the sentence is arbitrary or irrational.\textsuperscript{252} As section III illustrates, these characteristics are virtually identical the Fourteenth Amendment rational-basis test.

Under the Eighth Amendment rational-basis test, courts are free to insert their own judgment and uphold sentences by merely identifying a conceivable penological theories furthered by the sentence. For example, even if a court believes a sentence is excessively harsh but, in its own judgment, values extensive deference to the legislature, then the court can use all of its imaginative powers to identify a possible penological theory the sentence furthers and avoid detailed analysis inherent in disproportionality review. However, a court must go to great lengths to justify invalidating a sentence and avoid the embarrassment of having its decision overturned on appeal.

\textsuperscript{250} See supra, Part II.A.

\textsuperscript{251} See supra, Part IV.A.

\textsuperscript{252} See supra, Part IV.B.
The Court must recognize what the test applied to Eighth Amendment challenges to the length of a sentence is: *does the sentence further a conceivable penological theory?* As previously mentioned, it is not the purpose of this Article to advocate for or oppose the application of a rational-basis test to an Eighth Amendment challenge. Instead, the purpose of this Article is to identify that such a test is, in fact, applied. Only if the Court recognizes that such a test is applied and, it is merely a safeguard against arbitrary punishment, will the Court be able to decide whether such a lenient standard is consistent with the principles of the Eighth Amendment.